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PROTECTION APPLICATIONS IN THE CHILDREN'S COURT

Final Report 19

Contents

Preface	9	Attorney-General's Justice Statement 1 and new government roles	48
Terms of Reference	10	<i>Child Wellbeing and Safety Act 2005 (Vic)</i>	49
Glossary of Terms and Abbreviations	11	<i>The Children, Youth and Families Act 2005 (Vic)</i>	49
Executive Summary	14	Changes to the Children's Court following the Boston Consulting Group report in 2007	51
Options and Proposals	20	<i>Attorney-General's Justice Statement 2</i> and introduction of judicial resolution conferences	51
Chapter 1: Introduction	27	Recent Victorian reports	53
Introduction	28	Norgard Committee report (1976)	53
Scope of report	29	Report of the Child Welfare Practice and Legislation Review (the Carney Committee's report)	53
Concurrent and recent reviews of the child protection system	29	<i>Protective Services for Children in Victoria: Interim Report</i>	54
Children's Court Clinic review	30	<i>Protective Services for Children in Victoria: Final Report</i>	55
DHS—State Services Authority workforce review	30	Auditor-General's <i>Special Report No 43: Protecting Victoria's Children: The Role of the Department of Human Services</i>	56
DHS—KPMG review	30	Report of the Community Care Review (the Carter Report)	56
Children's Court (Family Division)—Koori Family Support Program (KFSP)	30	The Public Accounts and Estimates Committee's Review of the Auditor-General's report	57
Ombudsman out-of-home care review	31	<i>Protecting Children: The Child Protection Outcomes Project</i>	58
Australian and NSW Law Reform Commissions	31	Evaluation of pre-hearing conferences	59
Planned reviews	31	Boston Consulting Group report on the Children's Court 2007	60
Our process	31	Selected reviews in other jurisdictions	61
Information paper	31	Australian Law Reform Commission report no 18: <i>Child Welfare</i>	61
Consultations and meetings	31	Australian Law Reform Commission report no 84: <i>Seen and Heard: Priority for Children in the Legal Process</i>	62
Structure of this report	32	<i>Family Law and Child Protection Final Report</i>	63
Guiding principles	33	<i>Report of the Special Commission of Inquiry into Child Protection Services in NSW</i> (the Wood Report)	63
Background and context	34	Chapter 3: Current Law and Practice in Victoria	65
Profile of children and young people in the child protection system	34	Introduction	66
Families	34	Institutions and participants involved in child protection proceedings	66
Life chances of children in care	36	The Children's Court of Victoria	66
Addressing disadvantage	38	The Department of Human Services—Child Protection Service	68
Chapter 2: Background: Historical Overview	39	Children, parents and other parties with a direct interest in proceedings	69
Introduction	40	Victoria Legal Aid	70
Ombudsman's report	40	Children's Court Clinic	70
Report of the Child Protection Proceedings Taskforce	41		
Legislative history	43		
<i>Parens patriae</i>	43		
<i>Neglected and Criminal Children's Act 1864 (Vic)</i>	43		
<i>Children's Court Act 1906 (Vic)</i>	44		
<i>Children's Court Act 1958 (Vic)</i>	44		
Legislative developments in child protection in the 1970s	44		
Legislative developments in child protection in the 1980s	45		
Further legislative changes in child protection in the 1990s	48		
2000 to current day: creation of independent Children's Court with a judge as President	48		

Aboriginal agencies	70	Legal representation at the Children’s Court	91
Victoria Police	71	Introduction	91
The role of Child Protection in bringing protection applications to Court	71	Representation for child protection practitioners—Court Advocacy Unit (CAU)	92
Referrals and reports relating to concerns about a child	71	Lawyers for parents	92
Principles applied by Child Protection	72	Lawyers for children and types of legal representation	93
Phases of Child Protection processes	74	Protection orders (dispositions)	94
Child care agreements	76	Introduction	94
Protection (and other) applications in the Children’s Court	77	Order under section 272—‘no proof’ undertaking	94
Primary applications	77	Protection order undertaking	95
Secondary applications	78	Supervision order	95
Grounds for determining that a child is in need of protection	78	Custody to third party order	96
Two pathways to commence protection applications proceedings	79	Supervised custody order	96
Introduction	79	Custody to Secretary order	96
Process for protection applications by safe custody	80	Guardianship to Secretary order	97
Application for interim accommodation order after taking child into safe custody	82	Costs orders	99
Protection applications commenced by notice	82	Appeals	99
Protection applications commenced by safe custody	83	Full re-hearing (hearing <i>de novo</i>)	100
Interim accommodation order submissions contest	83	Appeal on a question of law	100
Interim accommodation order contest with evidence	85	Judicial review	101
Duration of an interim accommodation order made by the Court	85	Appeal to Supreme Court for interim accommodation orders	101
Practice at Children’s Courts other than Melbourne	85	Appeals in practice	101
Court reports	86	Transfer of child protection orders and proceedings	102
Introduction	86	Child Protection responsibilities after the Court makes a protection order	102
Protection reports (application reports)	86	Protection order phase—case plans, stability plans, cultural plans	102
Disposition reports	86	Case closure by Child Protection	104
Additional reports—includes clinic reports and other expert reports	87	Charter of Human Rights and Responsibilities and international rights instruments	104
Court events and progression of cases through Court	87	Introduction	104
Mentions	87	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	105
Dispute resolution conferences (DRCs)	87	International conventions	106
Directions hearings	88	Protection of families and children—a balancing exercise	107
Judicial resolution conferences (JRCs)	89	Separation of children from their families	111
Contested hearing	89	Representation and participation of children in child protection processes	112
Conduct of proceedings	90	The right to a fair hearing	115
Conducting proceedings in an informal manner, without regard to legal forms	90	Cultural rights	116
Court may inform itself in any manner it sees fit, despite rules of evidence	90	Chapter 4: Current Law and Practice in Other Australian Jurisdictions	119
The standard of proof	91	Introduction	120
		Australian Capital Territory	120
		General overview	120

Contents

The role of the Public Advocate	120	Court processes and procedure	147
Family group conferencing	121	Protection orders	148
Emergency removal powers and orders	121	Australian family law children’s disputes	149
Appraisal and assessment orders	122	Family law in the Australian Federation	149
Court processes and procedure	122	Decision-making principles for children	150
Final orders	123	ADR in family law	151
New South Wales	124	Victoria Legal Aid: Roundtable Dispute Management	154
General overview	124	Legal representation in family dispute resolution	155
Pre-court ADR, care plans and parent responsibility contracts	124	Nature of family court proceedings	157
Emergency removal powers and orders	125	The involvement of children in family law processes	164
Assessment orders	125	Representation of children in family court processes	166
Court processes and procedure	126	Legal representation in family law	168
Care orders	128	Chapter 5: Current International Law and Practice	169
Northern Territory	128	New Zealand	170
General overview	128	General	170
Pre-court ADR	129	Commencement of a care and protection matter	170
Emergency removal powers and orders	130	Family group conferencing	171
Assessment orders	131	Emergency removal powers	174
Court processes and procedure	131	Court procedure and processes	176
Protection orders	132	Final orders	178
Queensland	132	Appeals from decisions of the Family Court	180
General overview	132	Scotland	180
Pre-court ADR	133	General	180
Emergency removal powers	133	Notification and investigation of protection concerns	181
Assessment orders	133	Pre-hearing processes	182
Court processes and procedure	134	Hearing of protection matters: the children’s hearing	182
Child protection orders	135	Court and associated processes	186
South Australia	137	Reform program	189
General overview	137	England and Wales	190
Emergency removal powers	137	General	190
Investigation and assessment orders	137	Key bodies responsible for child protection	190
Family care meetings run by the Care and Protection Unit	138	Commencement of a child protection matter	191
Court processes and procedure	139	Pre-court processes	192
Care and protection orders	140	Emergency removal powers	193
Tasmania	141	Care and supervision proceedings	195
General overview	141	Appeals	201
Family group conferences	141	Chapter 6: Reform Options	203
Warrants to remove children for assessment	142	Introduction	204
Assessment orders and restraint orders	142	The relevant interests	206
Court processes and procedure	143	Administrative case management	207
Care and protection orders	144		
Western Australia	145		
General overview	145		
Pre-court ADR: the Signs of Safety pilot	146		
Emergency removal powers and orders	146		

New processes for child protection matters	209	Family group conferences and commencement of primary applications	248
An overarching objective	209	A new commencement procedure for protection applications	248
Principles that have guided the development of the options	210	The need for legislative reform	248
Options for reform	210	Legislative schemes for family group conferencing in other jurisdictions	249
How the options interact	211	Primary applications other than protection applications	250
Where the Commission's final options depart from the Information Paper	212	Attendance at family group conferences	251
Chapter 7: Option 1—A New System: Processes for achieving appropriate child-centred agreements	213	Exceptional circumstances	251
Appropriate dispute resolution and family decision making	214	Court-ordered family group conferencing following emergency intervention	253
A process continuum	214	Secondary applications and family group conferences	255
Is ADR suitable for the child protection jurisdiction?	216	Secondary applications that should go straight to court	255
Arguments against use of ADR processes	216	Possible secondary applications where a family group conference could first be held	255
Arguments for use of ADR processes	216	The proposed model of family group conferencing	256
The Commission's response and proposal	217	The independence of the family group conference convenor	256
Qualifications and training of convenors	218	Location of family group conferences	257
Accreditation	218	Practice standards for family group conferencing	258
A complaints process for family group conference and conciliation conference convenors	222	Participation of children and young people in family group conferences	259
Legal representation and advice in family decision-making processes	222	Confidentiality of family group conferencing	261
Introduction	222	Formalisation of family group conferencing agreements	262
Arguments supporting lawyers' involvement in family decision-making processes	223	Court referral to a range of family decision-making processes	266
Arguments against lawyers' involvement in family decision-making processes	225	Court-based conciliation conferences	267
Family decision-making processes in other jurisdictions	226	Conciliation	268
Representation of DHS within family decision-making processes	227	Views presented in submissions and consultations	269
Representation for child or young person in family decision-making processes	229	Dispute resolution conferences	270
Legal representation of parents in family decision making	229	The Taskforce Report and new model conferences	270
The Commission's proposal	232	The proposed model of conciliation conferences	272
Inter-professional collaboration and training	233	Conciliation conferences and their relationship to new model conferences	277
The difficulties of collaboration around family decision-making processes	233	Judicial resolution conferences	279
Why inter-professional collaboration?	234	Judicial resolution conferences and their use in Victoria	279
Family group conferences	236	Response and proposals in relation to judicial resolution conferences	280
Family group conferences and their use in child protection	236	Evaluation and review of new decision-making processes	285
Use of family group conferencing in Victoria	238		
Submissions on family group conferencing	240		
Models of family group conferencing	241		
Aboriginal children and families and Aboriginal Family Decision Making (AFDM)	244		

Contents

Chapter 8: Option 2—A New System: Enhancing court practices and processes	287		
Introduction	288	The need for all children and young people to be represented in protection proceedings	324
Commencement of proceedings	288	The need for two models of representation	325
Introduction	288	Relevant models of representation in overseas jurisdictions	327
Background	289	The Commission’s views	331
Current commencement of proceedings	289	Direct participation of children and young people in proceedings	332
Views in consultations and submissions	291	New grounds for intervention and agreement provision	333
Involuntary removal of a child in the context of the Victorian Charter	293	Introduction	333
Timeframes for judicial authorisation of involuntary removal of children in other Australian jurisdictions	294	Current grounds in Victoria	333
Emergency involuntary removal and commencement in New Zealand	296	Previous proposals for new grounds	334
Distinguishing between the decision to remove a child and the decision to file a protection application	296	Views in consultations and submissions	335
Addressing family violence prevention options before removing a child	297	No-fault grounds in other jurisdictions	336
Addressing the seriousness of removing a child suddenly	297	New no-fault grounds	337
The Commission’s views in relation to commencement	297	‘Agreement as to outcome’ provision	339
Process map for a new system	299	Findings of fact on the balance of probabilities	340
Process and disclosure following filing of protection application	300	Review of case plan decisions	342
First return date after filing protection application	301	Increasing the jurisdictional age limit of the Family Division of the Children’s Court	344
Listing the case for a contested hearing and obligations of parties to narrow issues in dispute	302	Current law	344
Emergencies requiring prompt removal of a child from care of parents	303	Historical background	344
Introduction of new case management, inquisitorial and problem-oriented processes	307	Previous recommendations and other Australian jurisdictions	345
Introduction	307	The need to cover the gap between child protection and guardianship	345
Case management and docket systems	307	International obligations	346
The introduction of problem-oriented approaches	311	Cross-jurisdictional issues	346
The introduction of more inquisitorial approaches	314	Jurisdictional overlap between family law and child protection	346
Models of representation for children	317	Jurisdiction to make family violence orders under the <i>Family Violence Protection Act 2008</i> (Vic)	351
Children and young people as parties to proceeding	317	Built environment of the Children’s Court	353
Representation of children and young people in proceedings	318	Introduction	353
Standards applicable to all representation of children and young people	322	Metropolitan Children’s Court buildings	353
		Reducing volume: decentralisation of metropolitan child protection matters	357
		Regional children’s courts	357
		Involving court users in design	358
		A new-look Children’s Court	358
		Court administration	358
		Introduction	358
		Current Court operating model	359
		Other models of administration	360
		Next steps	361
		Training	361

Chapter 9: Option 3—Office of the Children and Youth Advocate (OCYA): A new multi-disciplinary body to advance the interests of children and young people	367		
Introduction	368		
Historical influences on the unique jurisdiction of child protection	369		
Tension between the institutions of child protection	369		
Structure of OCYA	371		
OCYA organisational chart	372		
Metropolitan head office and regional operations	372		
OCYA's objectives	372		
Functions to be performed by OCYA	373		
Introduction	373		
Distinguishing OCYA from other agencies	373		
Convening family group conferences	374		
Representing children and young people	374		
Providing specialist services	379		
Independence of OCYA	382		
Chapter 10: Option 4—Representing the Department of Human Services: A Role for the VGSO in Protection Matters	385		
Introduction	386		
The Secretary's statutory functions	386		
The Department of Human Services legal services	386		
The Community Services Team	386		
The Court Advocacy Unit	386		
Operations of the Court Advocacy Unit	387		
Ombudsman's comments	388		
Views in consultations and submissions	388		
DHS staff attrition and knowledge of legal processes	389		
Legal representation	389		
Independent statutory commissioner/ Office of Public Prosecutions model	390		
Practices in other jurisdictions	391		
Australian Capital Territory	391		
South Australia	391		
New Zealand	392		
Models of legal representation	392		
Purchaser/provider model	392		
Independent statutory office: Office of Public Prosecutions	393		
The role of the Victorian Government Solicitor's Office and the Government Legal Services Panel	394		
The model litigant guidelines	395		
		The Commission's views	397
		Utilising the services of the Victorian Government Solicitor's Office	398
		Chapter 11: Option 5—Broadening the role of the Office of the Child Safety Commissioner	401
		Introduction	402
		Overarching policy framework	402
		The <i>Growing Victoria Together</i> and <i>A Fairer Victoria</i> policy agendas	402
		<i>The State of Victoria's Children: 2006 and 2008</i>	403
		The Office of the Child Safety Commissioner	403
		Functions of the Commissioner	404
		Relationship of OCSC with other children's agencies and bodies	404
		Victorian Children's Council	404
		Children's Services Coordination Board	404
		The Victorian Child and Adolescent Monitoring System	405
		Role of Victorian Ombudsman in relation to children and child protection	405
		Ombudsman's criticisms of the current OCSC model	406
		Views in consultations and submissions	406
		Previous reviews	408
		The Office of the Public Advocate	408
		Other Australian and international models	409
		Australian Capital Territory—ACT Children and Young People Commissioner	409
		New South Wales—The NSW Commission for Children and Young People	410
		The NSW Children's Guardian	410
		Northern Territory—Children's Commissioner	410
		Queensland—Commission for Children and Young People and Child Guardian	411
		South Australia—Guardian for Children and Young People	411
		Tasmania—Commissioner for Children	412
		Western Australia—Commissioner for Children and Young People	412
		New Zealand—Children's Commissioner	413
		Scotland—Commissioner for Children and Young People	414
		England—Children's Commissioner	414
		Wales—Children's Commissioner	414
		Additional functions to be performed by the Child Safety Commissioner	415
		Oversight and review of the child protection system	416

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Contents

Investigation and reporting on the <i>Children, Youth and Families Act 2005</i> (Vic)	416
Advocacy for children and young people	417
Liaison with Aboriginal communities	418
Promotion of children's and young people's rights	418
Reporting to parliament on the <i>Children, Youth and Families Act 2005</i> (Vic)	418
Consultation with children and young people	419
Strengthening the independence of the Child Safety Commissioner	420
Appointment by the Governor in Council	420
Period of appointment	420
Other terms similar to those that apply to the Public Advocate	421
Reporting to parliament on activities and financial operations	421
Attorney-General is the responsible Minister	421
Appendices	423
Appendix A: Submissions	424
Appendix B: Consultations	426
Appendix C: Chronology of Key Child Protection Legislation and Reviews	427
Appendix D: Recent Victorian Reports	429
Appendix E: Selected Reviews in Other Jurisdictions	449
Appendix F: The Department of Human Services Child Protection Regions and Offices	460
Appendix G: Child Protection Practitioner Roles, Classification and Teams	461
Appendix H: Outline of Five Primary Applications in Child Protection Proceedings	463
Appendix I: Sections 10–14 of the CYF Act 2005	466
Appendix J: Current Commencement Proceedings	470
Appendix K: The Pink Form—Conditions	471
Appendix L: DHS Statement of Grounds and Summary of Information Form	473
Appendix M: Victoria Legal Aid Grants of Aid for representation in Children's Court (Family Division) Matters	478
Appendix N: Table 1: Protection of Children in Australia Jurisdictions	482
Appendix O: Part VII, Division 12A of the Family Law Act 1975 (Cth)	492
Appendix P: Jurisdictional Tables (International)	498
Appendix Q: Convenor's Report	505
Appendix R: Constitutional Considerations of New Processes	507
Appendix S: Australian Commissioners for Children and Child Guardians	509
Bibliography	511

Preface

This report is the result of a seven-month inquiry into aspects of Victoria's child protection system.

In late November 2009, the Attorney-General asked the Commission to provide the Government with a range of options for reform of the Children's Court Family Division processes that may minimise disputation and maintain a focus on the best interests of children. The reference to the Commission followed a report to Parliament by the Victorian Ombudsman into the Department of Human Services' child protection program.

One of the Ombudsman's key recommendations was that the Commission be asked to consider new ways of dealing with child protection matters. The Ombudsman suggested that the legal framework of the child protection system in Victoria required consideration.

This report is the tenth major review of Victoria's child protection system in the past 33 years. The number of reviews demonstrates the complexity of the field and the difficulty in balancing the interests involved in child protection matters.

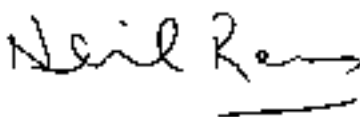
I wish to thank the many people who gave generously of their time and expertise to assist the Commission. I also acknowledge the assistance of both the Children's Court of Victoria and the Department of Human Services in providing the Commission with significant amounts of information about their operations.

The members of the Division of the Commission who worked with me on this reference—Judge Felicity Hampel, Magistrate Mandy Chambers and Hugh De Kretser—gave generously of their time and expertise. Justice Iain Ross AO was a member of this Division before resigning from the Commission in

March 2010 upon his appointment as President of the Victorian Civil and Administrative Tribunal.

This report was produced by a highly talented team of people. They were expertly led by Myra White who coordinated the entire project. Tess McCarthy assisted her in organising numerous activities as well as contributing to research and writing. Dr Becky Batagol from Monash Law School and Freia Carlton from Victoria Legal Aid joined the Commission on secondment for the reference. They provided intellectual leadership and wrote substantial portions of the report. Sarah Dillon was responsible for historical research and writing. She also assisted in writing many chapters of the report. Mia Hollick, Alexandra Krummel, Mellela Elton and Jessica Saunders all made major contributions to research and writing. Brenda Conway, Vicki Christou and Failelei Siatua provided administrative support, Carlie Jennings was responsible for editing and production, and Merrin Mason supported the reference team in many ways since joining the Commission as Chief Executive Officer. I thank them all for the commitment and energy they brought to this project.

The Commission welcomes the opportunity to contribute to the modernisation of Victoria's child protection laws by offering options for reform.



Professor Neil Rees

Chairperson

30 June 2010

Terms of Reference

To review Victoria's child protection legislative and administrative arrangements in relation to Children's Court processes, and to recommend options for procedural, administrative and legislative changes that may minimise disputation and maintain a focus on the best interests of children.

In reviewing the current Victorian arrangements, the Victorian Law Reform Commission should consider models that take a more administrative case management approach to child protection issues. In particular, the Commission should include consideration of the arrangements currently in place in other relevant Australian jurisdictions (including the Family Court) and overseas, including England and Scotland.

In addition to consulting with Victoria's Children's Court and the Victorian Departments of Human Services and Justice, the Victorian Law Reform Commission should consult with Victoria Legal Aid and other relevant stakeholders.

This reference is designed to provide the government with recommended options for Victoria's child protection legislative and administrative arrangements. In conducting the review, the Victorian Law Reform Commission should have regard to:

- the underlying aim of the child protection system to protect children in Victoria from abuse and neglect, and the objectives of the best interests principles set out in the *Children, Youth and Families Act 2005*
- the processes associated with the application for an order and the review of interim and ongoing disposition orders before the Family Division of the Children's Court
- the previous reviews of Victoria's child protection system, particularly in relation to the models for the Children's Court, and the report of the Government Taskforce that will look at measures to immediately reduce court time and bring in less adversarial processes
- the themes and principles of the Attorney-General's Justice Statement (2004) and Justice Statement 2 (2008), particularly the focus on Appropriate Dispute Resolution and measures to reduce the adversarial nature of the justice system
- the rights enshrined in Victoria's *Charter of Human Rights and Responsibilities Act 2006*.

The Commission is to report by 30 June 2010.

Glossary of Terms and Abbreviations

ABBREVIATIONS

ACG	Allen Consulting Group
ACSASS	Aboriginal Child Specialist Advice and Support Service
ADR	Appropriate or alternative dispute resolution
AFDM	Aboriginal Family Decision Making
AIFS	Australian Institute of Family Studies
AIHW	Australian Institute of Health and Welfare
AIIA	Australasian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
ATSI	Aboriginal and Torres Strait Islander
BCG	Boston Consulting Group
CAFCASS	Children and Family Court Advisory and Support Service (England and Wales)
CALD	Culturally and linguistically diverse
Carney Committee	The Child Welfare Practice and Legislation Review led by Dr Terry Carney (1982–84)
CAU	Court Advocacy Unit of the Department of Human Services
CC	Conciliation conference
The Charter	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)
Child FIRST	Child and Family Information, Referral and Support Teams
The Court	The Children’s Court of Victoria, unless otherwise stated
CPCC	Child protection case conference (Scotland)
CPS	Children’s Protection Society (Victoria)
CRC	United Nations Committee on the Rights of the Child
CROC	<i>United Nations Convention on the Rights of the Child</i>
CSV	Community Services Victoria
CWS Act 2005	<i>Child Wellbeing and Safety Act 2005</i> (Vic)
CYF	Child, Youth and Family Services (New Zealand)
CYF Act 2005	<i>Children, Youth and Families Act 2005</i> (Vic)
CYP Act 1989	<i>Children and Young Persons Act 1989</i> (Vic)
DCP	Department for Child Protection (WA)
DCSF	Department for Children, Schools and Families (England and Wales)
DHS	Department of Human Services (Victoria)
DoCS	Department of Community Services (NSW)
DPP	Director of Public Prosecutions
DRC	Dispute resolution conference
EPO	Emergency protection order (England and Wales)
FCA	Family Court of Australia

Glossary of Terms and Abbreviations

FDR	Family dispute resolution (family law)
FGC	Family group conference / conferencing
FLA 1975	<i>Family Law Act 1975</i> (Cth)
FMC	Federal Magistrates Court of Australia
FP Court	Family Proceedings Court (England and Wales)
FVP Act	<i>Family Violence Protection Act 2008</i> (Vic)
FVPLS Victoria	Aboriginal Family Violence Prevention and Legal Service Victoria
HREOC	Human Rights and Equal Opportunity Commission
IAO	Interim accommodation order under <i>the Children, Youth and Families Act 2005</i> (Vic)
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
ICL	Independent children’s lawyer
IRH	Issues resolution hearing (England and Wales)
JRC	Judicial resolution conference
KFSP	Koori Family Support Program (Children’s Court (Family Division))
LA	Local authority (England, Wales and Scotland)
LAT	Less adversarial trial
LPG	Legal Panel Gateway
LSB	Legal Services Branch of the Department of Human Services
LSCB	Local Safeguarding Children Boards (England and Wales)
MAC	Mildura Aboriginal Corporation
NADRAC	National Alternative Dispute Resolution Advisory Council
NJC	Neighbourhood Justice Centre
NMAS	National Mediation Accreditation Scheme
NMC	New Model Conference
NSPCC	National Society for the Prevention of Cruelty to Children (UK)
OPA	Office of the Public Advocate
OPP	Office of Public Prosecutions
PAEC	Public Accounts and Estimates Committee (Victoria)
PLO	Public Law Outline (UK) (equivalent to Victoria’s Practice Directions)
SIO Act	<i>Stalking Intervention Orders Act 2008</i> (Vic)
SLAB	Scottish Legal Aid Board
SOCAU	Sexual Offences and Child Abuse Unit
SOCIT	Sexual Offences and Child Abuse Investigation Team
The Taskforce	The Victorian Government Child Protection Proceedings Taskforce (26 Nov 2009 – 26 Feb 2010)

UNHRC	United Nations Human Rights Committee
VACCA	Victorian Aboriginal Child Care Agency
VALS	Victorian Aboriginal Legal Services Cooperative Ltd
VATE	Video and audio taped evidence
VGSO	Victorian Government Solicitor’s Office
VLA	Victoria Legal Aid
YACVic	Youth Affairs Council of Victoria

TERMINOLOGY

Aboriginal	In this report the word ‘Aboriginal’ is used as a generic term to refer to both Aboriginal and Torres Strait Islander people, unless otherwise specified.
Ex parte	An application heard or made with only one party present; in the absence of interested parties.
Guardian <i>ad litem</i>	A court appointed guardian who acts in litigation on behalf of someone under a disability, defined to mean a minor (under the age of 18) or a person who is incapable of handling his or her own affairs due to mental incapacity. Also known as ‘next friend’.
Parens patriae	This is a power exercised by the courts, originally delegated from the sovereign, to care for children in need as the ‘parent of the country’.
Recusal	A judicial officer voluntarily withdrawing from hearing a matter where they perceive that there may be apprehended bias if they continue to hear the matter.
Sui generis	Unique, in a class of its own.
The Department	The terms ‘Department’ and ‘DHS’ are used throughout this report to refer to the Victorian Department of Human Services. However the term ‘Department’ is also used to describe the main child welfare department in other jurisdictions.

Executive Summary

INTRODUCTION

This report is concerned with the processes followed in child protection cases in the Children's Court of Victoria.

Over the past five years, more than 3000 children have been involved in new child protection proceedings each year; approximately half of these children were under the age of seven. In addition, nearly 7000 child protection matters return to the Court each year for determination of related issues.

The Attorney-General has asked the Commission to review these processes and to identify reform options that may 'minimise disputation while maintaining a focus on the best interests of children'. The Commission was asked to consider practices followed elsewhere 'that take a more administrative case management approach to child protection issues'. The Commission has done this by analysing current law and practice in Victoria and by examining developments in other Australian jurisdictions and overseas.

The Commission has devised five options for reforming the processes used in child protection matters. Each option contains a number of detailed proposals that seek to advance the underlying aim of the child protection system to protect children in Victoria from abuse and neglect and to promote the best interests of children.

Options 1 and 2 assume that the institutions within the existing legal framework for child protection would remain unchanged. These options contain proposals for reforming the way in which cases are conducted within the existing framework. Options 3, 4 and 5 contain proposals for changing various aspects of the child protection legal framework.

BACKGROUND

In late November 2009, the Victorian Ombudsman released his *Own Motion Investigation into the Department of Human Services Child Protection Program*. This investigation was the eighth major review of the Victorian child protection system in the past three decades. The Ombudsman's report identified deficiencies in the current system, including the processes followed in the Children's Court.

The Attorney-General accepted the Ombudsman's recommendation that the Commission be asked to review Victoria's legislative and administrative arrangements in relation to Children's Court processes in child protection matters.

The terms of reference also directed the Commission to consider models that take a more administrative case management approach to child protection issues and to consult with specific organisations involved in child protection work, including the Children's Court of Victoria, the Department of Justice, the Department of Human Services and Victoria Legal Aid, as well as other relevant stakeholders.

The foundations of Victoria's child protection system may be traced to the state's first child welfare legislation, the *Neglected and Criminal Children Act 1864* (Vic), which permitted police to apprehend and charge children with being a 'neglected child'. This Act allowed courts to order that children be detained in an industrial school. While the formal processes followed in the Family Division of the Children's Court have evolved since the mid-19th century, the link with summary criminal law procedure remains strong. Current Family Division processes are similar to Magistrates' Court procedures for criminal matters.

CONSULTATIVE PROCESS

In February 2010, the Commission released an Information Paper that identified four possible areas for reform and posed a number of questions about specific topics. The Commission sought comment on the four areas and encouraged suggestions about other areas for reform within the terms of reference. The Commission consulted as broadly as possible within the limited time-frame and encouraged submissions from all Victorians with an interest in child protection legislative arrangements.

The Commission received 51 submissions from interested individuals, groups and organisations. First round consultations were conducted with 28 interested groups and individuals. A number of second round meetings with stakeholder groups were also held. The Commission met the two major institutions in child protection proceedings—the Children’s Court and the Department of Human Services—on a number of occasions. The Commission also met academic commentators on child protection and a retired judge, former Family Court justice John Fogarty, who has conducted previous reviews of the system.

The Commission engaged a number of organisations to undertake consultations with young people with experience of the child protection system, foster and kinship carers, and members of culturally and linguistically diverse communities about their experiences in the Children’s Court.

The Commission visited the Children’s Court in metropolitan and regional locations, as well as other courts that exercise jurisdiction in relation to children. Commission members and staff consulted practitioners and professionals in the field of child protection elsewhere in Australia and overseas.

The information gathered during the consultative process assisted the Commission when devising options for reform. After considering the many views advanced in submissions and during consultations, the Commission has chosen not to pursue one of the options identified in the Information Paper. A second option has been refined following further research and consultation. This report contains numerous references to the views that assisted the Commission to formulate the options and detailed proposals.

CURRENT LAW AND PRACTICE

The *Children, Youth and Families Act 2005* (Vic) governs Victorian child protection proceedings. If the Secretary of the Department of Human Services considers a child or young person to be ‘in need of protection’, a protection application may be lodged in the Family Division of the Children’s Court of Victoria. The Secretary delegates these functions to employees of the Department. The Children’s Court may make a protection order if it finds that one of the six grounds for protection exists. Protection orders range from supervision of the parents to removing a child or young person from their family and assigning parental responsibilities to the Secretary.

The general principles that underpin the legislative scheme of child protection are contained in sections 8–14 of the *Children, Youth and Families Act 2005* (Vic). Some of the most important principles when considering Children’s Court processes are:

- The best interests of a child should inform all decision making in relation to both process and outcomes.
- Children’s rights should be protected, children should be protected from harm and they should be given opportunities to develop.
- The central role of the family should be promoted and children should be removed from their family as a last resort only.
- The views of Aboriginal communities should govern decisions about Aboriginal children whenever possible.

The terms of reference directed the Commission to have regard to the *Charter of Human Rights and Responsibilities Act 2006* (Vic). A number of Charter rights—most notably those concerned with protection of families and children, cultural rights, and the right to a fair hearing—are relevant when considering protection applications in the Children’s Court.

Executive Summary

The Children's Court's Family Division exercises a unique jurisdiction, dealing with at least three different but overlapping interests, which are sometimes not easily reconciled. The Department of Human Services, as the representative of the state, is obliged to protect children from harm. Parents have an interest in protecting and preserving the family unit. Children have interests of their own which may not always be the same as those of the state or their parents, particularly when trying to balance a natural desire to remain part of a family with the need to be protected from harm.

While the *Children, Youth and Families Act 2005* (Vic) provides that 'the best interests of the child must always be paramount' and contains a number of principles to guide decision makers, it does not seek to define the various interests involved in child protection proceedings or direct how they interact. The 'best interests' principle seeks to promote discretionary decision making by identifying important values that can be used to respond to the varying needs of each child. While there appears to be widespread support for the paramountcy of the 'best interests' principle, key participants in child protection matters do not always appear to have a shared view of how the principle should be applied in individual cases.

This results in significant tension between the various participants in the system.

STRUCTURE OF THE REPORT

There are two parts to this report.

The first part provides context. Chapter 1 contains background information about concurrent reviews and a snapshot of the families, children and young people involved in the child protection system. Chapter 2 provides an historical overview of public policy and legislation in the field of child protection. Chapter 3 considers the current law and practice of child protection proceedings in Victoria. Other Australian states and territories, federal family law and international jurisdictions—including New Zealand, Scotland, England and Wales—are examined for comparative purposes in Chapters 4 and 5.

The second part of the report contains options for reform. Chapter 6 introduces the options and explains how they were developed and interact. The detailed proposals and rationales for each reform option are discussed in detail in Chapters 7 to 11.

PRINCIPLES

When developing the options the Commission was guided by principles it devised to govern the processes used when determining whether a child is in need of protection. The principles are:

- The processes should actively encourage early resolution by agreement whenever appropriate.
- The processes should be child-centred.
- The processes should actively encourage inter-professional collaboration so that decision makers have access to the best information on child development and wellbeing.
- The processes should actively promote outcomes that involve the least amount of compulsory intervention in the life of a family as required by the circumstances.
- When an agreed outcome is not possible, a court should determine whether a child is in need of protection and the intervention required in order to promote the child's wellbeing.
- The Court should be an inquisitorial and problem-oriented decision maker.

THE OPTIONS

The Commission believes that Victoria should move away from child protection procedures that closely resemble those used in summary criminal prosecutions. The processes used in child protection matters should be specially designed for this unique jurisdiction which is neither criminal nor civil in nature. Other jurisdictions, most notably New Zealand, have devised special procedures for use in child protection matters.

New procedures should reflect the fact that most child protection cases are resolved by agreement. This is clearly a desirable outcome in child protection proceedings, where parties will usually have important ongoing relationships.

At present, there is a substantial gap between the design of the Court's processes and the realities of Children's Court practice. Current procedures are based on the assumption that cases will be resolved by adjudication. The procedures do not reflect the fact that most child protection applications—approximately 97 per cent—are resolved by agreement. These agreements are often reached informally and without external assistance as part of the process of moving towards a contested hearing.

The Commission believes that it is useful to identify an overarching objective for new procedures that are specially designed for use in child protection matters. That objective is:

The processes for determining the outcome of protection applications should emphasise supported child-centred agreements and should rely upon adjudication by inquisitorial means only when proceeding by way of supported agreement is not achievable or not appropriate in the circumstances.

This objective is reflected in the five options for reform that are identified in this final report.

Although all five options could be adopted, they are not presented as a single integrated scheme. They comprise a range of possible reforms. One, some, all, or only parts of the options may be chosen to bring about a new system for dealing with child protection matters.

Options 1 and 2 involve no change to the overarching structure of the current system. They do involve significant change to the way in which protection applications are conducted in the Children's Court and to the steps that should usually occur before an application is commenced. Option 2 contains a number of separate but connected proposals for change. Options 1 and 2 overlap and would preferably be adopted together.

Option 3 involves a significant change to the overarching structure of the current system. If this option is chosen, as well as all or part of Options 1 and 2, those options would need minor consequential modifications to operate within the Option 3 framework. The new body proposed in Option 3, the Office of the Children and Youth Advocate, could perform many of the new roles and functions proposed in Options 1 and 2.

Option 4 involves change to the way in which protection applications are conducted on behalf of the Secretary of the Department of Human Services. Option 5 involves change to the functions and powers of the Child Safety Commissioner.

Executive Summary

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

The Commission proposes that the principal means of determining child protection matters should be a continuum of supported and structured agreement-making processes. The convenors and professionals involved should have appropriate qualifications and training, while parties should have access to appropriate legal assistance.

In this option, the Commission proposes that family group conferences should become the primary decision-making forum in the child protection system and that family group conferences should be conducted prior to filing a protection application. The Commission describes the components of successful family group conferences.

At the earliest possible opportunity after an application is filed, the Court should direct that the most appropriate decision-making process—a conciliation conference, a judicial resolution conference or another family group conference—take place. It should be possible to depart from this requirement in exceptional circumstances. The Commission describes the components of successful conciliation conferences and judicial resolution conferences.

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

This option comprises new processes for the manner in which protection applications are commenced and proceed through the Children's Court. It begins with a proposal that all protection applications should commence by notice. The Commission proposes that a family group conference should be conducted prior to filing a protection application, unless there are exceptional circumstances which warrant a departure from this general rule.

The Commission has devised new emergency intervention procedures. In most of these cases, judicial authorisation should be obtained prior to removing a child from the care of his or her parents. In certain limited circumstances, involving immediate risk of significant harm to a child, judicial authorisation may not be feasible. New procedures and new orders for protecting children have been developed that are separate from the filing of a protection application.

The Commission proposes that if a child is removed from his or her parents as a result of an emergency intervention, the Court should be permitted to make an interim care order for a period not exceeding 14 days if satisfied that the child is at unacceptable risk of harm. On return to court, the Court may make a short-term assessment order for up to six weeks to enable a family group conference to take place or to enable protection proceedings to commence.

The Commission proposes that every child who is the subject of a protection application should be a party to the proceedings. Every child should be separately represented in a manner which takes account of the level of maturity and understanding of that particular child.

The Commission proposes that there should be additional new 'no fault' grounds for finding that a child is in need of protection. The Commission also proposes that the Court have power to give guardianship and custody of a child to one parent to the exclusion of the other when necessary to meet the needs of the child.

Additionally, the Commission proposes that a child or a child's parent should be able to apply to the Court, as well as to the Victorian Civil and Administrative Tribunal, for review of a decision in a case plan concerning the child.

Finally, the Commission also proposes that the Court should be given a range of powers which encourage and permit it to control the conduct of proceedings by taking an inquisitorial and problem-oriented approach. The Court should have powers 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).

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

In this option, the Commission proposes that a new independent statutory commissioner be created to head the Office of the Children and Youth Advocate (OCYA), which would represent and promote the best interests of children at all stages of the child protection process. The Commission discusses the reasons for creating a new statutory body to undertake a number of key roles in the Victorian child protection system.

The purposes of OCYA should be to promote child-focused processes and outcomes, to represent children and young people in child protection matters, and to assist and encourage the parties to reach an agreement that is in the best interests of the child or young person.

The Commission proposes that OCYA should convene family group conferences, represent children and young people in all decision-making processes, and provide specialist expertise to the child protection system. In order to fulfil these functions OCYA should have a sufficient number and range of professionally qualified staff.

The independence of the Commissioner should be promoted by appropriate conditions of appointment, tenure and reporting requirements. The Attorney-General should be the Minister responsible for the new Commissioner.

OPTION 4—REPRESENTING THE DEPARTMENT OF HUMAN SERVICES: A ROLE FOR THE VICTORIAN GOVERNMENT SOLICITOR'S OFFICE IN PROTECTION MATTERS

In this option, the Commission proposes a new system for conducting cases on behalf of the protective interveners in the Children's Court. This new system makes the Victorian Government Solicitor primarily responsible for conducting proceedings on behalf of protective interveners in the Children's Court.

The Commission proposes that the Victorian Government Solicitor and the protective interveners should prepare model litigant guidelines specifically designed for protection applications, following consultation with Victoria Legal Aid and the President of the Children's Court.

OPTION 5—BROADENING THE ROLE OF THE CHILD SAFETY COMMISSIONER

The final option for reform involves giving additional functions to the Child Safety Commissioner and strengthening the Commissioner's independence.

The Commission proposes that the additional functions that should be given to the Commissioner include oversight and review of the child protection system, advocacy for children and young people, investigating and reporting on the operation of the *Children, Youth and Families Act 2005* (Vic) and promoting awareness about children's and young people's rights.

Appropriate conditions of appointment, tenure and reporting requirements should promote the independence of the Commissioner. The Attorney-General should be the Minister responsible for the Child Safety Commissioner.

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.

Options and Proposals

- 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 child is at risk of significant harm, and
 - the risk is of such magnitude that an order is necessary to protect the child, and
 - 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:
- must authorise a nominated person(s) to remove the child from his or her parents and keep that child at a nominated place, and
 - 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
 - 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:
- an order about where and with whom a child must live
 - an order requiring a parent, guardian or carer to accept supervision by the Secretary
 - 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 child is at immediate risk of significant harm, and
 - there is insufficient time to apply to the Court for an emergency removal order, and
 - 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.

Options and Proposals

- 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)

Options and Proposals

- 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.

Chapter 1

Introduction



CONTENTS

- 28 Introduction
- 29 Scope of report
- 29 Concurrent and recent reviews of the child protection system
- 31 Our process
- 32 Structure of this report
- 33 Guiding principles
- 34 Background and context

INTRODUCTION

- 1.1 This is the Victorian Law Reform Commission's final report about protection applications in the Children's Court. In December 2009, the Victorian Attorney-General asked the Commission to review Victoria's child protection legislative and administrative arrangements in relation to Children's Court processes, and to recommend options for procedural, administrative and legislative changes that may minimise disputation and maintain a focus on the best interests of children.
- 1.2 A protection application is made when the Secretary of the Department of Human Services¹ has concerns about a child's wellbeing and applies to the Children's Court for state intervention.² If the Children's Court finds that a child is in need of protection, it may make orders ranging from supervision of the parents to removing a child from a family and giving the Secretary parental responsibilities.
- 1.3 The terms of reference asked the Commission to consider models that take a more administrative case management approach to child protection issues. The Commission was also asked to consider arrangements currently in place in other relevant jurisdictions, including the Family Court of Australia (FCA), England and Scotland. In the covering letter that accompanied the terms of reference, the Attorney-General emphasised that he sought reform options rather than one set of final recommendations.³
- 1.4 In conducting the review, the Commission was asked to consider:
 - the underlying aim of the child protection system to protect children in Victoria from abuse and neglect, and the objectives of the best interests principles set out in the *Children, Youth and Families Act 2005* (Vic) (CYF Act 2005)
 - the processes associated with the application for an order and the review of interim and ongoing disposition orders before the Family Division of the Children's Court
 - the previous reviews of Victoria's child protection system, particularly in relation to the models for the Children's Court, and the Government Taskforce's investigation of measures to immediately reduce court time and introduce less adversarial processes
 - the themes and principles of the Attorney-General's Justice Statement (2004) and Justice Statement 2 (2008), particularly the focus on appropriate dispute resolution and measures to reduce the adversarial nature of the justice system
 - the rights enshrined in Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- 1.5 The Commission was directed to consult the Children's Court of Victoria, the Department of Human Services, the Department of Justice, Victoria Legal Aid and other relevant stakeholders.
- 1.6 The reference to the Commission follows the November 2009 publication of the Victorian Ombudsman's own motion investigation into Victoria's child protection program.⁴ The Ombudsman's investigation highlighted several problems with the current system and focused particularly on the legal processes through which protection applications are determined in the Children's Court. The Ombudsman concluded his examination by recommending that

*The Attorney-General provide a reference to the Victorian Law Reform Commission to examine alternative models for child protection legislative arrangements that would reduce the degree of disputation and encourage a focus on the best interests of children.*⁵

- 1.7 In February 2010, the Commission produced an Information Paper. The Commission received 51 submissions in response to the Information Paper⁶ and engaged in 28 consultations with interested groups and individuals.⁷

SCOPE OF REPORT

- 1.8 This report does not deal with the entire Victorian child protection system. The Commission was asked to examine one aspect of the system: the manner in which child protection proceedings should be conducted in the Children's Court. In undertaking this task, the Commission has not sought to make conclusive findings about the current operations of the Children's Court or about the conduct of regular participants in court proceedings as might be expected of a commission of inquiry. The primary objective has been to develop options for reform that might minimise disputation and maintain a focus on the best interests of children.
- 1.9 Practical considerations, especially time, have limited the Commission's ability to examine Children's Court processes in jurisdictions other than those regularly examined when undertaking law reform activities. Consequently, the focus of comparative work for this report has been Australian states and territories and other common law countries such as the United Kingdom and New Zealand.
- 1.10 This reference does not consider the operations of the Children's Court Clinic, as it is the subject of a separate inquiry by the Secretary of the Department of Justice. This review is discussed briefly below.
- 1.11 Finally, a recurring question raised in submissions and consultations was whether the Children's Court criminal law jurisdiction should be viewed from a child welfare perspective, as it is in Scotland and New Zealand.⁸ This important issue is outside the current terms of reference.

CONCURRENT AND RECENT REVIEWS OF THE CHILD PROTECTION SYSTEM

- 1.12 Child protection has been the subject of many recent reports by other Victorian, Australian and international bodies. The work of these bodies has informed the Commission's approach to the complex issues surrounding the child protection system and to Children's Court processes. These reports are discussed in Chapter 2.
- 1.13 Chapter 2 also examines a number of current reviews into various aspects of Victoria's child protection system. Some reviews have reported recently, such as the Child Protection Proceedings Taskforce. The brief of the Taskforce, formed on 26 November 2009, was more immediate than that of the Commission. It called for recommendations to reduce the adversarial nature of court processes, including options for appropriate dispute resolution (ADR), reduced time spent in court, and ways to better support child protection workers in court processes.
- 1.14 The Taskforce completed its report on 26 February 2010.⁹ It made a number of recommendations to change current Children's Court processes and the practices of legal practitioners and DHS in the Court.

1 Throughout this report, the Victorian Department of Human Services is referred to as 'DHS' or 'the Department' interchangeably. The terms 'the Secretary' and 'Child Protection' are used when referring to the powers of the Secretary of the Department of Human Services.

2 In practice, this power is delegated to child protection workers within the Department of Human Services: see *Children, Youth and Families Act 2005* (Vic) s 17. While the *Children, Youth and Families Act 2005* (Vic) also permits the Chief Commissioner of Police to commence proceedings as a protective intervener, this power is not exercised following a protocol between Victoria Police and the Secretary of the Department of Human Services.

3 Letter from Attorney-General Rob Hulls to Professor Neil Rees, 4 December 2009.

4 Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009).

5 Ibid 66. The Ombudsman's report is discussed in further detail in Chapter 2.

6 See Appendix A.

7 See Appendix B.

8 Consultation 1 (Children's Court of Victoria).

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

CHILDREN'S COURT CLINIC REVIEW

1.15 The Secretary of the Department of Justice is undertaking a review of the Children's Court Clinic. The scope of the review is broad and will examine organisational and management structures of the clinic as well as governance and quality assurance practices. It will look at practice in other jurisdictions and agencies to determine best-practice clinical service delivery models. The review will also investigate past and future demand for clinical services and examine service provision across the state.¹⁰ The Clinic review was expected to be completed by the end of June 2010.

DHS—STATE SERVICES AUTHORITY WORKFORCE REVIEW

1.16 The State Services Authority (SSA) is undertaking a review of the child protection workforce planning for the Secretary of the Department of Human Services. This review will look at current recruitment and retention of child protection workers across the state with a view to making recommendations that promote greater sustainability within the workforce.¹¹

DHS—KPMG REVIEW

1.17 The DHS Children, Youth and Families Division has engaged KPMG to undertake an evaluation of the Child and Family Service System Reforms. The timetable for this report is August 2008 to August 2011. The evaluation will focus on the reforms' overarching objectives, which include:

- intervening earlier through family services when families have difficulty protecting their children from harm and promoting their development
- ensuring all services focus not just on safety, but also on stability and child development
- improving the planning, coordination, targeting, delivery, quality and effectiveness of family services, child protection and out-of-home care services
- improving service responses for Aboriginal children and families and improving the cultural competence of services.¹²

CHILDREN'S COURT (FAMILY DIVISION)—Koori Family Support Program (KFSP)

1.18 For a number of years, Aboriginal Justice Forum (AJF) members have expressed concern about the high number of Koori children in the child protection system. In March 2009, the AJF commenced a project to investigate options for making the Family Division more accessible to Koori families and to improve outcomes for Koori children and families. In mid 2009, the Department of Justice (DoJ) established a project steering committee with representatives from across government, including Aboriginal agencies and organisations, the Children's Court of Victoria, the Magistrates' Court of Victoria, DoJ, and DHS. This committee is called the Koori Family Support Program (KFSP).¹³

1.19 The KFSP project is currently in its consultation phase and is considering a range of pre-court, at-court and post-court 'non-adversarial' strategies. Broadly, these include community education, improving access to Aboriginal Family Decision Making programs (AFDMs) and other pre-court case planning, improving access to legal advice and enhanced case management by the Court.¹⁴

OMBUDSMAN OUT-OF-HOME CARE REVIEW

- 1.20 Following the November 2009 investigation into the child protection system, the Ombudsman also reviewed Victoria's out-of-home care arrangements. This report was tabled in Parliament on 26 May 2010.¹⁵ DHS has accepted all but one of the Ombudsman's 21 recommendations. This report is discussed briefly later in this chapter.

AUSTRALIAN AND NSW LAW REFORM COMMISSIONS

- 1.21 In 2009, the Australian Law Reform Commission (ALRC) and the NSW Law Reform Commission (NSWLRC) received a joint reference in relation to family violence. The terms of reference

*have asked the Commissions to focus on laws and legal processes and to consider what improvements could be made to protect women and children from family violence.*¹⁶

- 1.22 The ALRC and the NSWLRC are examining the intersecting problems encountered by families in crisis and will consider

*the interrelationship in practice of at least nine sets of criminal laws, eight sets of child protection laws, eight sets of family violence laws and the Family Law Act, as well as evidence laws, sentencing laws and a range of other legal processes.*¹⁷

- 1.23 A Consultation Paper was released on 29 April 2010. The Commissions will submit their final report to the Commonwealth and NSW Attorneys-General on 10 September 2010.

PLANNED REVIEWS

- 1.24 In addition to current reviews, the Victorian Auditor-General's Office (VAGO) Annual Plan for 2010–11 indicates that 'early intervention for children at risk' is a prospective focus for a Human Services performance audit in the year 2012–13.¹⁸ The proposed audit is cited as being able to 'respond to emerging developments, enabling the audit to remain relevant and appropriate'.¹⁹ At this stage, the Commission is unaware of any further developments concerning this review.

OUR PROCESS

INFORMATION PAPER

- 1.25 In February 2010, the Commission published an Information Paper which contained a brief outline of four possible reform options and asked a number of questions about specific topics.

CONSULTATIONS AND MEETINGS

- 1.26 In addition to meetings with interested groups and individuals, the Commission employed the services of a number of organisations to undertake consultations with young people, foster and kinship carers, and parents from new and emerging communities. The reports of these consultations were published on our website.
- 1.27 The Commission intended to consult parents of children involved in protection applications, but the time required for Ethics Committee approvals made this impossible.²⁰

10 Letter from Penny Armytage, Secretary of the Department of Justice (Victoria), to Professor Neil Rees, 6 April 2010.

11 Email from Department of Human Services (Victoria), 31 May 2010.

12 Children, Youth and Families Division, Department of Human Services (Victoria), *Evaluation of Child and Family Services Reforms* (2010) <www.cyf.vic.gov.au/every-child-every-chance/evaluation-of-child-and-family-services-reforms> at 19 April 2010.

13 The steering committee membership comprises representatives of the following: Courts and Tribunals Unit, Department of Justice (Victoria); Koori Justice Unit, Department of Justice (Victoria); Children's Court of Victoria; Koori Court Unit, Magistrates' Court of Victoria; Child Protection, Department of Human Services (Victoria)—Youth Justice; Victorian Aboriginal Child Care Agency; Mildura Aboriginal Corporation; Victorian Aboriginal Community Services Association Ltd; Victorian Aboriginal Legal Service; Victorian Aboriginal Health Service; Aboriginal Family Violence Prevention and Legal Service Victoria; and Victoria Legal Aid.

14 Email from Rosemary Smith, Manager Koori Programs and Initiatives, Programs and Strategy, Courts and Tribunals Unit, Department of Justice (Victoria), 10 June 2010.

15 Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care* (2010).

16 Australian Law Reform Commission, 'ALRC/NSWLRC Release Consultation Paper on Family Violence Reform' (Media Release, 29 April 2010).

17 Ibid.

18 Victorian Auditor-General's Office, *Annual Plan 2010–11* (2010) 31.

19 Ibid 27.

20 The Commission explored the possibility of seeking permission from the Department of Justice Human Research Ethics Committee to use court premises to interview parents, but the timelines for proposals and approval did not match the delivery time given to the Commission. As such, the Commission could not follow this path of research.

- 1.28 In response to the Information Paper, the Commission received 51 written submissions from a variety of organisations and individuals, including community representatives.²¹ The Commission conducted 28 first round meetings with interested groups and individuals.²² The Commission also conducted a number of second round meetings with stakeholder groups to explore further the options proposed in the Information Paper.²³ These groups included the President and members of the Children’s Court, senior managers from DHS, lawyers from the DHS Court Advocacy Unit and Children’s Court legal practitioners.
- 1.29 In order to better understand the Children’s Court processes, the Commission visited the Court in a number of metropolitan and regional venues, and other courts that exercise jurisdiction in relation to children.²⁴

STRUCTURE OF THIS REPORT

- 1.30 This report is divided into two parts.
- 1.31 **Part 1**, which encompasses Chapters 1–5, considers the historical background to this area of law, as well as current law and practice in Victoria and other jurisdictions, both within and beyond Australia. Chapter 2 describes the background to Victoria’s child protection system including the key legislation and reviews dating back to 1864. Chapter 3 examines current law and practice in Victoria. Chapter 4 considers other Australian jurisdictions, including relevant Commonwealth laws and the interaction between state and federal law. Chapter 5 examines the relevant law in New Zealand, England and Wales, and Scotland.
- 1.32 In **Part 2**, Chapters 6–11, we identify and discuss five options for reform. Chapter 6 introduces the options and explains how they fit together. The chapter also discusses the guiding principles behind the Commission’s reform options. Chapters 7–11 contain detailed discussion of the various proposals that fall within each of the reform options. The five options presented in this report are:
- **Option 1—A New System: Processes for achieving appropriate child-centred agreements**
This option includes the development of a graduated range of supported, structured and child-centred agreement-making processes which should become the principal means of determining the outcome of child protection applications, where appropriate.
 - **Option 2—A New System: Enhanced court practices and processes**
This option includes new processes for the manner in which protection applications are commenced and proceed through the Children’s Court, including new ways of conducting contested proceedings, new emergency procedures, a new approach to the representation of children, new grounds and an ‘agreement’ provision, and new powers for the Court.
 - **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**
In this option, the Commission proposes that a new independent statutory commissioner be created to represent and promote the best interests of children and young people at all stages of the child protection process.

- **Option 4—Representing the Department of Human Services: A role for the VGSO in protection matters**

In this option, the Commission proposes a new system for conducting cases on behalf of the protective interveners in the Children’s Court.

- **Option 5—Broadening the role of the Child Safety Commissioner**

This option includes giving additional functions to the Child Safety Commissioner, and strengthening the Commissioner’s independence.

1.33 The Appendices contain detailed information about previous reports into Victoria’s child protection system and some important selected reports from other jurisdictions.

GUIDING PRINCIPLES

1.34 Sections 8–14 of the CYF Act 2005 contain the general principles that underpin the current legislative scheme. These include:

1. The best interests of a child should inform all decision making in relation to both process and outcomes.
2. Children’s rights should be protected, children should be protected from harm and they should be given opportunities to develop.
3. The central role of the family should be promoted and children should be removed from their family as a last resort only.
4. The views of Aboriginal communities should govern decisions about Aboriginal children whenever possible.

1.35 These statutory principles are sound and should continue to guide Victoria’s child protection system. The Commission believes that it is important to devise additional principles to guide the development of any new processes for dealing with child protection matters. We suggest the following principles:

1. The processes should actively encourage early resolution by agreement whenever appropriate.
2. The processes should be child-centred.
3. The processes should actively encourage inter-professional collaboration so that decision makers have access to the best information on child development and wellbeing.
4. The processes should actively promote outcomes that involve the least amount of compulsory intervention in the life of a family as required by the circumstances.
5. When an agreed outcome is not possible, a court should determine whether a child is in need of protection and the intervention required in order to promote the child’s wellbeing.
6. The Court should be an inquisitorial and problem-oriented decision maker.

These principles are discussed in Chapter 6.

21 Submissions are listed in Appendix A and are reproduced on the Victorian Law Reform Commission’s website <www.lawreform.vic.gov.au>.

22 Consultations are listed in Appendix B.

23 Stakeholders involved in these second round meetings are listed in Appendix B.

24 Staff of the Commission made visits to, and spoke with staff of, the following courts: the Neighbourhood Justice Centre, the Drug Court (Dandenong), the Family Violence list at the Melbourne Magistrates’ Court, the Federal Magistrates Court, Less Adversarial Trials and Magellan lists at the Family Court of Australia. The Commission thanks the various courts and the Department of Justice for arranging and facilitating these visits.

BACKGROUND AND CONTEXT

- 1.36 Children and young people who are involved in the child protection system are among the most vulnerable people in our community. Many are victims of neglect, abuse (physical and emotional), family breakdowns and family violence. Disadvantage and struggle is often a defining feature of their lives.
- 1.37 As the Ombudsman noted in his recent report, children who are in out-of-home care 'tend to do poorly at school, are prone to mental health disorders, have poor health and have to deal with consequences of traumatic childhood experiences'.²⁵
- 1.38 Before dealing with matters of process, it is important to provide a brief overview of child protection system clients and of the life chances of children and young people in care.

PROFILE OF CHILDREN AND YOUNG PEOPLE IN THE CHILD PROTECTION SYSTEM

- 1.39 The Australian Institute of Health and Welfare (AIHW) publishes annual reports containing comprehensive child protection data and analyses.²⁶ Commentators suggest that this child protection data does not fully capture the prevalence of child abuse, maltreatment or neglect in Victoria because it only reflects those cases that are reported to the Department.²⁷

Notifications and substantiations

- 1.40 In Victoria, the Department received 42 851 notifications of suspected child abuse to in 2008–09.²⁸ In comparison to other Australian states, the number of notifications has remained relatively stable for the last couple of years.²⁹ During the same year, there were 6344 substantiated notifications.³⁰ Emotional abuse was the most common type of substantiated abuse.³¹ Single female parent families have the highest recorded rate of substantiations in Victoria.³²

Children on care and protection orders

- 1.41 On 30 June 2009, five in every 1000 Victorian children and young people were the subject of a care and protection order.³³ Of the children who were placed on protection orders in 2008–09, the largest proportion were those aged 0–4 years.³⁴ In all jurisdictions, the rate of Aboriginal children and young people on care and protection orders is higher than that for non-Aboriginal children and young people.³⁵

Out-of-home care

- 1.42 Victoria has the lowest rate of children and young people in out-of-home care in Australia; 4.3 per 1000 children and young people were in out-of-home care on 30 June 2009.³⁶ Almost all children and young people subject to care and protection orders were in home-based care, of which over half were in foster care.³⁷ Less than 10 per cent of children were in residential care or living independently.³⁸ In line with other statistics, Aboriginal children and young people are over-represented in out-of-home care.³⁹

FAMILIES

- 1.43 The profile of families involved in the child protection system is complex. Research suggests that children and families who are involved with the child protection system possess similar social and demographic characteristics, and parents share similar risk factors.

Socio-economic disadvantage

- 1.44 There is a clear relationship between socio-economic disadvantage and contact with child protection services.⁴⁰ Low-income families are more likely to be in contact with the Department than other families. The Department has found that 71 per cent of families investigated for suspected child abuse are low-income families, of which 65 per cent receive a government pension or benefit.⁴¹
- 1.45 An audit of children in out-of-home care found that the parents of those in the sample group were primarily aged between 30 and 39 years, Anglo-Australian, sole parents and reliant upon a government benefit or pension as the primary source of income.⁴² Socio-economic disadvantage is usually concentrated in neighbourhoods or geographic areas, creating corridors of disadvantage.⁴³
- 1.46 The low socio-economic status of families involved in the child protection system is also illustrated by statistics provided by Victoria Legal Aid (VLA). During 2008–09, VLA provided 5676 grants of legal assistance to families, and duty lawyer services to another 1674 in child protection matters.⁴⁴ Eligibility for these services is means tested. These figures demonstrate that the vast majority of families involved in matters before the Family Division of the Children’s Court are supported by publicly-funded legal aid services.

Family violence

- 1.47 The connection between family violence and child abuse is strong.⁴⁵ Studies have estimated that there is a very high co-occurrence rate of adult partner violence and child abuse.⁴⁶ As highlighted in previous reports by the Commission, children and young people can be affected by violence either by experiencing abuse themselves, or by witnessing a parent being abused.⁴⁷ Data collected by the Department between 1996 and 2001 highlights family violence as the most common risk characteristic recorded in substantiated cases of child abuse.⁴⁸ In 2000–01, 52 per cent of parents in substantiated cases had experienced family violence.⁴⁹

- 25 Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection*, above n 15, 10.
- 26 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010) 4; Leah Bromfield and Mel Irenyi, National Child Protection Clearinghouse, Australian Institute of Family Studies, *Resource Sheet: Child Abuse and Neglect Statistics* (2009) No 1, 5.
- 27 Bromfield and Irenyi, above n 26, 5. See also Joe Tucci et al, *The Cost of Child Abuse in Australia* (2008) iii–iv.
- 28 Australian Institute of Health and Welfare, above n 26, table 2.3, 13.
- 29 Ibid.
- 30 Substantiation refers to the stage after the child protection worker has decided there is harm to the child’s safety, stability and development. If a matter is substantiated, the child protection worker may consider filing a protection application. If a matter is not substantiated, but there are still significant concerns for the wellbeing of a child, information, advice and referral assistance may be provided. If there are no concerns and the matter is not substantiated the case is closed. This is discussed further in Chapter 3.
- 31 Australian Institute of Health and Welfare, above n 26, figure 2.1, 15. During 2008–09 there were 2935 substantiations of emotional abuse. This was closely followed by 2438 substantiations of physical abuse, 518 substantiations of neglect and 453 substantiations of sexual abuse: table A1.1, 52.
- 32 Ibid table A1.6, 59—42.2 per cent; Boston Consulting Group, *Children’s Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007) 21.
- 33 Australian Institute of Health and Welfare, above n 26, table 3.1, 26—6100 children and young people in total.
- 34 Ibid figure 3.1, 28; table A1.7, 60.
- 35 Australian Institute of Health and Welfare, above n 26, 35.
- 36 Ibid table 4.2, 39.
- 37 Ibid table 4.5, figure 4.1, 42–3.
- 38 Ibid.
- 39 Ibid table 4.8, 46.
- 40 Bromfield and Irenyi, above n 26, 3; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 422; Community Care Division, Department of Human Services (Victoria), *An Integrated Strategy for Child Protection and Placement Services* (2002) 25.
- 41 Community Care Division, Department of Human Services (Victoria), above n 40, 25.
- 42 Service Development Unit, Child Protection and Juvenile Justice Community Care Division, Department of Human Services (Victoria), *The Audit of Children and Young People In Home Based Care Services* (2002) 6.
- 43 Council of Australian Governments, *Protecting Children is Everyone’s Business: National Framework for Protecting Australia’s Children 2009–2020* (2009) 21.
- 44 Victoria Legal Aid, *Fourteenth Statutory Annual Report 2008–09* (2009) 24.
- 45 Consultation 15 (Koori Justice Unit); submission 46 (Children’s Court of Victoria); National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009) Ch 9; Victorian Law Reform Commission, *Review of Family Violence Laws: Report*, Report No 10 (2006) 22–3.
- 46 Jeffrey Edleson, ‘The Overlap between Child Maltreatment and Woman Battering’ (1999) 5(2) *Violence Against Women* 134, cited in National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009) 20.
- 47 Victorian Law Reform Commission, above n 45, 22.
- 48 Community Care Division, Department of Human Services (Victoria), above n 40, 27 (table 2.5).
- 49 Ibid.

Homelessness

- 1.48 A significant proportion of families who are at risk of homelessness or who experience homelessness have contact with child protection services or have children who are on care and protection orders.⁵⁰ The Fitzroy Legal Service's Empowering Vulnerable Women in the City of Yarra Project examined the legal needs of homeless women who had been involved with child protection services.⁵¹ While the project found a strong link between child protection and women's homelessness, there is little statistical evidence of the connection.⁵²

Alcohol abuse and substance abuse

- 1.49 Parental alcohol abuse and substance abuse is one of the most commonly identified problems associated with families involved in child protection matters.⁵³ Substance abuse and alcohol abuse are also associated with other issues frequently experienced in families involved in child protection matters, such as psychiatric illness and family violence.⁵⁴

Aboriginal children and over-representation in the child protection system

- 1.50 Research demonstrates that Aboriginal children and young people are over-represented at each point of the child protection process. Aboriginal children and young people are 10 times more likely than non-Aboriginal children to be the subject of a substantiated notification of neglect or abuse.⁵⁵
- 1.51 On 30 June 2009, 825 Aboriginal children and young people were the subject of care and protection orders,⁵⁶ and 734 Aboriginal children and young people were in out-of-home care.⁵⁷ In accordance with the Aboriginal Child Placement Principle,⁵⁸ almost 60 per cent of Aboriginal children are placed either with relatives/kin or other Aboriginal caregivers, or by Aboriginal agencies.⁵⁹
- 1.52 Reasons for the over-representation of Aboriginal children and young people in child protection statistics are multifaceted. The 1997 *Bringing them Home Report* by the Human Rights and Equal Opportunity Commission identified some causes including:
- inter-generational effects of previous separations from family and culture
 - poor socio-economic status
 - systemic racism in the broader society
 - cultural differences in child rearing practices.⁶⁰

LIFE CHANCES OF CHILDREN IN CARE

- 1.53 Children and young people placed in out-of-home care are widely reported to experience poorer life chances and outcomes in comparison to other children.⁶¹ The Ombudsman said in his recent report:

*Young people leaving care are at risk of negative experiences in their adult lives. These include unemployment, homelessness and contact with the criminal justice system.*⁶²

- 1.54 Many factors influence the life chances of children and young people in care, including the age that children enter care, the number of care placements, the environment of the care placement and support provided by carers and social workers. Children and young people entering care are likely to have experienced severe abuse or neglect, significant life disruptions and socio-economic disadvantage.⁶³

Health and welfare

- 1.55 Research also indicates that children and young people in care are likely to experience poor physical, mental and developmental health,⁶⁴ including mental health issues, physical injury as the direct result of abuse, higher rates of teen pregnancy, increased rates of risk-taking behaviour and substance abuse, and behavioural problems.⁶⁵
- 1.56 The rate of mental health issues for young people in care was found to be marginally above the average for the general population in the same age group. Eighteen per cent of children in home-based care were diagnosed with a mental health issue in the 2001 Audit of Children and Young People in Home Based Care Services.⁶⁶ In the same sample, 14 per cent reported that they had threatened suicide.⁶⁷
- 1.57 Drug and alcohol abuse by children and young people in care and after leaving care is significant. The final report by the Australian Housing and Urban Research Institute on the housing experiences and outcomes of young people leaving care found that 53 per cent of participants reported a lifetime problem with substance abuse and had experienced or were experiencing homelessness.⁶⁸

Education and employment

- 1.58 In 2006 the CREATE Report Card on Education found that children and young people in care do not perform as well as their peers at school and are more likely to be older than their peers in class.⁶⁹ Further, changing care placements greatly affects school attendance of children and young people in care, and increases the number of schools attended during their education in comparison to their peers.⁷⁰ CREATE also found that children and young people in care are less likely to attend university or TAFE than others.⁷¹ A pilot study undertaken by the AIHW found that children on guardianship or custody orders across all year levels achieved much lower mean test scores for reading and numeracy than their peers.⁷² The length of orders was not a significant factor in academic results.⁷³ Almost a third of the young people transitioning from care who responded to the CREATE 2009 Report Card stated they were unemployed and looking for work.⁷⁴ Another third stated they were working: 15.4 per cent were working full-time and 12.6 per cent were in casual or part-time employment.⁷⁵ Only a small number were studying at TAFE (11 per cent) and university (2.8 per cent).⁷⁶

- 50 Submission 44 (CHP).
- 51 Chelsea Candy, Fitzroy Legal Service, *Final Report to the Legal Services Board: Empowering Vulnerable Women in the City of Yarra* (2009); Submission 36 (FLS).
- 52 Candy, above n 52.
- 53 Allen Consulting Group, *Protecting Children: The Child Protection Outcomes Project* (2003) 11.
- 54 Community Care Division, Department of Human Services (Victoria), above n 40, 27.
- 55 Australian Institute of Health and Welfare, above n 26, 21.
- 56 *Ibid.*
- 57 *Ibid.* 35.
- 58 *Children, Youth and Families Act 2005* (Vic) s 13.
- 59 Australian Institute of Health and Welfare, above n 26, table A1.16, 67.
- 60 Human Rights and Equal Opportunity Commission, *Bringing Them Home: The Stolen Children Report* (1997).
- 61 See generally Tucci et al, above n 27, 11–16; Service Development Unit, Child Protection and Juvenile Justice Community Care Division, Department of Human Services (Victoria), above n 42.
- 62 Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection*, above n 15, 16.
- 63 Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) together with National Framework Implementation Working Group (Australian Government), *National Standards for Out of Home Care: Consultation Paper* (2010) 9–10.
- 64 Royal Australasian College of Physicians, *Health of Children in "Out-of-Home" Care* (2006) 5; Leah Bromfield et al, National Child Protection Clearinghouse, Australian Institute of Family Studies, *Out-of-Home Care in Australia: Messages from Research* (2005) 34–7.
- 65 See, for example, Tucci et al, above n 27, 12–14; FAHCSIA together with National Framework Implementation Working Group (Australian Government), above n 63, 10.
- 66 Service Development Unit, Child Protection and Juvenile Justice Community Care Division, Department of Human Services (Victoria), above n 42, 28–9, 35.
- 67 *Ibid.* 31, 35.
- 68 Guy Johnson et al, Australian Housing and Urban Research Institute (AHURI), *Pathways from Out-of-Home Care: Final Report*, No 147 (2010) 45.
- 69 Jadyne Harvey and Paul Testro, CREATE Foundation, *Report Card on Education* (2006) 22–30.
- 70 *Ibid.*
- 71 *Ibid.* Similar statistics about attendance of university and TAFE found in Joseph McDowall, CREATE Foundation, *CREATE Report Card 2009 Transitioning from Care: Tracking Progress* (2009) 55–6; Johnson et al, above n 68, 29.
- 72 Australian Institute of Health and Welfare, *Educational Outcomes of Children on Guardianship or Custody Orders* (2007) 10–26.
- 73 *Ibid.* 15–18.
- 74 McDowall, above n 71, 55–28.5 per cent.
- 75 *Ibid.*
- 76 *Ibid.* Another four per cent of participants indicated they were thinking about undertaking a TAFE course.

Involvement with the criminal jurisdiction

1.59 Many submissions drew attention to the number of children and young people in care who were involved with the juvenile justice system, especially Aboriginal children and young people.⁷⁷ Previous reports concerning child protection⁷⁸—and recently the Drugs and Crime Prevention Committee, Parliament of Victoria—identified and considered the correlation between juvenile offending and time spent in care.⁷⁹ A number of witnesses to the Drugs and Crime Prevention Committee expressed concern about the current operation of the child protection system and the effects of revolving care placements.⁸⁰ In evidence to the Committee, Judge Bourke from the Youth Parole Board of Victoria estimated that around 20–30 per cent of young people who come into contact with the Youth Parole Board have been on child protection orders.⁸¹ The long-term consequences of involvement with the criminal jurisdiction as a juvenile can significantly influence a young person's life chances, and for many it leads to continuing involvement with the criminal justice system.⁸²

ADDRESSING DISADVANTAGE

1.60 Many factors and life circumstances cause families to encounter the child protection system. DHS is acutely aware of the complexity:

*Ongoing social, economic and demographic changes place further burdens on families, making them more vulnerable due to lack of support. Many human services are reporting an increasing complexity in clients accessing services, including individuals and families with multiple problems and needs. These families often have simultaneous contact with multiple services, which need a better integrated and coordinated service response.*⁸³

1.61 The Department's strategic framework for family services outlines how the Department, along with other key stakeholders, is trying to work in a more integrated and coordinated way to meet families' needs. This includes having a common assessment framework 'to improve identification of need and matching to appropriate service responses'.⁸⁴

77 Submissions 24 (WHCLS), 26 (FVPLS Victoria) and 38 (VALS).

78 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 40, 103–4, 457; James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, 556–7.

79 Drugs and Crime Prevention Committee, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism in Young People*, Parl Paper No 218 (2009) 116–18.

80 Ibid.

81 Evidence of Judge Michael Bourke, Chair, Youth Parole Board, Department of Human Services (Victoria), to the Drugs and Crime Prevention Committee, above n 79. Similar statistics were also stated in Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 40, 103.

82 A Queensland study found that 91 per cent of juveniles who had been subject to a care and protection order progressed to the adult system: Mark Lynch, Julianne Buckman and Leigh Krenske, 'Youth Justice: Criminal Trajectories' (2003) 265 *Trends and Issues in Crime and Criminal Justice* 1, 1.

83 Office for Children, Department of Human Services (Victoria), *A Strategic Framework for Family Services: Every Child Every Chance* (2007) 2.

84 Ibid.

Chapter 2

Background: Historical Overview

CONTENTS

- 40 Introduction
- 40 Ombudsman's report
- 41 Report of the Child Protection Proceedings Taskforce
- 43 Legislative history
- 53 Recent Victorian reports
- 61 Selected reviews in other jurisdictions

INTRODUCTION

- 2.1 The Victorian child protection jurisdiction has been reviewed many times. In this chapter, we examine many of these earlier reviews and the Victorian Ombudsman's November 2009 report to parliament.¹ This chapter also contains an historical overview of child protection legislation.
- 2.2 There have been nine major reviews of Victoria's child protection system in the past 33 years.² When implementation audits and discrete reviews of particular aspects of the system are included, the number of reviews rises to 16.³ Appendix C contains a chronology of these reviews and key legislation.
- 2.3 Reviewing the child protection system is not a modern phenomenon. In the 50 years prior to 1976 there were eight major reviews of the Victorian child welfare system.⁴ Although one former child protection system reviewer, Justice John Fogarty, suggested in 1993 that '[w]e cannot continue to have reviews in Victoria every few years',⁵ the practice continues.⁶ The prevalence of reviews demonstrates both the complexity of child protection issues and the difficulty in gaining widespread support for reform.
- 2.4 Reviewing the child protection system is not just a Victorian phenomenon. In this chapter, we also examine a number of relevant reviews in other Australian jurisdictions.

OMBUDSMAN'S REPORT

- 2.5 On 17 April 2009, after receiving complaints about deficiencies in the Department of Human Services' response to children at risk of harm, the Victorian Ombudsman commenced an investigation into the DHS Child Protection Program.
- 2.6 The Ombudsman presented his report, *Own Motion Investigation into the Department of Human Services Child Protection Program*, to parliament on 25 November 2009.⁷ The Ombudsman concluded that the best interests of children were not met in a number of cases his investigators reviewed.⁸
- 2.7 The Ombudsman particularly focused on the legal processes through which protection applications are determined in the Children's Court. The Ombudsman noted that the current process, which involves presenting two competing arguments to the Court, 'runs the risk of exacerbating a difficult situation or turning decision-making in relation to a child's "best interests" into a competition to present the best argument'.⁹ The Ombudsman further noted that 'the current legal system perversely encourages disputation rather than cooperation in the protection of children'.¹⁰
- 2.8 The Ombudsman reported that a 'substantial proportion of the department's resources' were being 'absorbed' by legal processes in the Children's Court,¹¹ as

*Approximately 50 per cent of child protection worker time is spent servicing Children's Court work and subsequent protection orders, even though only 7.3 per cent of the total number of reports made to the department result in legal intervention being initiated in the Children's Court.*¹²

The Children's Court has questioned whether there is evidence to support this estimate.¹³

2.9 The Ombudsman also made the following observations about proceedings in the Family Division of the Children’s Court:

- The issue of the appropriate amount of access between a child and a family ‘can be contentious’, and resolving such issues through the legal process is complex and time consuming.¹⁴
- Concerns have been raised about the quality of DHS’s legal representation in child protection proceedings.¹⁵
- Negative experience of the legal process is one of the most common reasons cited by child protection workers for leaving DHS.¹⁶

2.10 The Ombudsman observed that other jurisdictions, such as England and Scotland, ‘limit highly contested legal proceedings and instead operate a collaborative system with a focus on the best interests of the child’.¹⁷ He noted that those jurisdictions provide ‘intermediate level responses’ which ‘can assist in keeping children safe while “avoiding unnecessary statutory intervention and Court proceedings”’.¹⁸ The Ombudsman also noted that such intermediate level responses had been recommended for Victoria in a 2004 report, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project*,¹⁹ and described such responses as a ‘missing element’ in the Victorian child protection system.²⁰

2.11 The Ombudsman concluded his examination of the legal processes in the child protection system by recommending that the

*Attorney-General provide a reference to the Victorian Law Reform Commission to examine alternative models for child protection legislative arrangements that would reduce the degree of disputation and encourage a focus on the best interests of children.*²¹

2.12 The Attorney-General accepted this recommendation, stating:

I endorse the recommendation that a reference be provided to the Victorian Law Reform Commission (VLRC) to examine alternative models for child protection legislative arrangements that would reduce the degree of disputation and encourage a focus on the best interests of children. I will ask that the VLRC consider the Scottish model and those models interstate that take a more administrative case management approach to issues such as access.

*As a part of this reference I will ask the VLRC to review the lessons learned from previous reviews of child protection and the legal system, particularly in relation to models for the Children’s Court (this would include consideration of the BCG Report). I will include in the reference to the VLRC a request that the VLRC consider alternatives to the current model of hearings in the Children’s Court and whether there are certain types of matters that ought to be decided administratively rather than judicially.*²²

REPORT OF THE CHILD PROTECTION PROCEEDINGS TASKFORCE

2.13 Following the publication of the Ombudsman’s report in late November 2009, the Premier announced the formation of the Child Protection Proceedings Taskforce (the Taskforce).²³ The Taskforce comprised Penny Armytage, Secretary of the Department of Justice; Gill Callister, Secretary of DHS; Judge Paul Grant, President of the Children’s Court; Bevan Warner, Managing Director of Victoria Legal Aid; and Bernie Geary, Child Safety Commissioner.

1 The last two sections of this chapter contain overviews of previous child protection reviews, both in Victoria and in other Australian jurisdictions. For a fuller discussion of each of these reviews, see Appendices 4 and 5.

2 The nine reviews include: Committee of Enquiry into Child Care Services in Victoria, *Report* (1976); Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984); Justice Fogarty, *Protective Services for Children in Victoria: An Interim Report* (1989); Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993); Victorian Auditor-General’s Office, *Special Report No 42 Protecting Victoria’s Children: The Role of the Children’s Court* (1996) (unreleased); Victorian Auditor-General’s Office, *Special Report No 43 Protecting Victoria’s Children: The Role of the Department of Human Services* (1996); Jan Carter, *Report of the Community Care Review* (2000); Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009); and Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care* (2010). This means a major review every four to five years, supplemented by a smaller review approximately every second year.

3 The remaining seven reviews (to bring the total to 16 up to 2010), as well as other national reviews and legislation, are listed in Appendix C.

4 Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 2, 1.

5 Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993) 4.

6 Ibid.

7 Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009).

8 Ibid 8.

9 Ibid 12.

10 Ibid 57.

11 Ibid 47.

12 Ibid 12.

13 Submission 46 (Children’s Court of Victoria) 25.

14 Office of the Victorian Ombudsman, above n 7, 53.

15 Ibid 55–6.

16 Ibid 56–7.

17 Ibid 13.

18 Ibid 62.

19 Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004).

20 Office of the Victorian Ombudsman, above n 7, 65.

21 Ibid 66.

22 Ibid 66–7.

23 Victorian Premier John Brumby, ‘Government Takes Action on Child Protection’ (Media Release, 26 November 2009).

- 2.14 The Taskforce was asked to recommend measures:
- to reduce the adversarial nature of Children’s Court processes, including use of ADR
 - to reduce the time parties spend in the Children’s Court
 - for DHS to further support child protection workers in their preparation for, interaction with and involvement in Children’s Court processes.²⁴
- 2.15 The Taskforce completed its report on 26 February 2010. It made a number of recommendations to change processes in the Children’s Court and the practices of DHS staff and legal practitioners.
- 2.16 The Taskforce recommended the adoption of a new dispute resolution process in the Children’s Court: Child Protection Resolution Conferences (CPRCs).²⁵ In order to ‘ensure that a well-facilitated discussion of the issues will be an important first step in the Children’s Court process’, the Taskforce recommended that the CPRCs be conducted off-site, after better preparation by convenors, the Court and parties, and that more time be allowed for discussion.²⁶ The Taskforce also recommended mandatory training and accreditation of convenors to enable them to exercise authority over the parties and facilitate negotiation.²⁷
- 2.17 To improve parties’ preparation for court, the Taskforce recommended that Victoria Legal Aid (VLA) review the fee structure for private practitioners to reward early preparation and negotiation.²⁸ It also recommended that DHS and VLA work together to develop a ‘Statement of Grounds’ to facilitate ‘earlier and succinct disclosure from DHS regarding the main concerns and recommendations for the future’.²⁹
- 2.18 To encourage and facilitate collaboration between lawyers and child protection workers, the Taskforce recommended that DHS and VLA develop a Code of Conduct for all practitioners in the Children’s Court.³⁰ It also recommended joint multi-disciplinary training for lawyers and child protection workers.³¹
- 2.19 The Taskforce supported the decentralisation and regionalisation of the Children’s Court because of the difficulties with the environment at the Melbourne Children’s Court.³² It recommended the use of space at the soon to be refurbished old County Court in Melbourne.³³
- 2.20 To improve Court processes, the Taskforce recommended that the *Children, Youth and Families Act 2005* (Vic) (CYF Act 2005) be amended to remove the 21-day time limit on interim accommodation orders, and that the Court implement an electronic calendar listing system.³⁴
- 2.21 The Taskforce suggested that the Commission consider whether the CYF Act 2005 should be amended:
- to enable the Children’s Court to conduct less adversarial trials similar to those provided for in the *Family Law Act 1975* (Cth)
 - to reflect the new approach to resolution conferences
 - to extend the period within which DHS must bring an application to Court after a child’s removal from 24 to 72 hours and whether it is in the best interests of apprehended child to do so.³⁵

These matters are considered in this report.

LEGISLATIVE HISTORY

PARENS PATRIAE

- 2.22 The current jurisdiction of Victorian courts concerning children in need of care has its origins in the development of the *parens patriae*, or ‘parent of the country’, doctrine by the English Court of Chancery in the late 1600s.³⁶
- 2.23 According to John Seymour, ‘initially the Court’s involvement in wardship and guardianship matters reflected a concern for the proper administration of the property of infant heirs’.³⁷ It was not until the mid-19th century that the requirement of a question regarding property was abandoned as a jurisdictional threshold.³⁸
- 2.24 In the late 18th century, the Court determined that it had the power to intervene in the lives of children whose parents were still alive. Previously it had only taken action in cases where the parents’ deaths had compelled the state to become involved.³⁹ In Seymour’s view, the assertion of this new power ‘signalled the beginning of a change in the relationship between children, parents and the state’.⁴⁰

NEGLECTED AND CRIMINAL CHILDREN’S ACT 1864 (VIC)

- 2.25 Early Victorian laws concerning child welfare
- tended to be the product of two main considerations. Firstly, there was a genuine public desire to ‘save’ children from ‘neglect’ as defined in terms of homelessness, exposure to moral ‘contamination’ and maltreatment. Secondly, there was a strong element of social control, based on widely prevalent fears that disorderly lower social classes would proliferate unless children were removed from criminal environments.*⁴¹
- 2.26 The first Act directed to child welfare was the *Neglected and Criminal Children’s Act 1864 (Vic)* (the 1864 Act). The 1864 Act, ‘[f]ollowing overseas patterns ... legislated in respect of three classes of children who appeared likely to develop into unsatisfactory adults ... “criminal” children, “neglected” children and those children who misbehave’.⁴²
- 2.27 Under the 1864 Act, the police were to apprehend children⁴³ who fell into these categories and bring them before the courts.⁴⁴ Dr Terry Carney has stated that the 1864 Act ‘was believed to have a deterrent effect on the child rearing practices of the poor—threatening them with state intervention if they were too lax in their parental responsibilities’.⁴⁵
- 2.28 A child would be deemed to be ‘neglected’ under the 1864 Act if found in a variety of circumstances, including being found begging, wandering the streets, residing in a brothel or having committed an offence.⁴⁶ Once apprehended, the child would be charged with being a ‘neglected child’, the Court would ‘hear the matter of the said charge’,⁴⁷ and, if satisfied that the grounds had been made out, commit the child to a state institution—usually an industrial school—for a fixed period.⁴⁸
- 2.29 In 1897, the Society for the Prevention of Cruelty to Children⁴⁹ was established. The Society was a charitable organisation that investigated suspected cases of child abuse in Victoria. In conjunction with the police, the Society was responsible for investigating and taking action in relation to notifications of child abuse. This practice continued until 1985.⁵⁰

- 24 Child Protection Proceedings Taskforce, *Report of the Child Protection Proceedings Taskforce* (2010) 4.
- 25 This model of dispute resolution was based on recommendations made by the ADR working party report requested by the President of the Children’s Court in 2009: *ibid* 19.
- 26 *Ibid* 20.
- 27 *Ibid* 20.
- 28 *Ibid* 23.
- 29 *Ibid* 6, 11.
- 30 *Ibid* 26, 33.
- 31 *Ibid*.
- 32 *Ibid* 28–9.
- 33 *Ibid*.
- 34 *Ibid* 30–1.
- 35 *Ibid* 9.
- 36 See John Seymour, ‘*Parens Patriae* and Wardship Powers: Their Nature and Origins’ (1994) 14 *Oxford Journal of Legal Studies* 159.
- 37 *Ibid* 175.
- 38 *Ibid* 176.
- 39 *Ibid* 175–6.
- 40 *Ibid* 176.
- 41 Committee of Enquiry into Child Care Services in Victoria, *Report* (1976) 14 (citation omitted).
- 42 *Ibid* 15.
- 43 Defined to include ‘[e]very boy and girl under the age of fifteen’: *Neglected and Criminal Children’s Act 1864 (Vic)* s 12.
- 44 Committee of Enquiry into Child Care Services in Victoria, above n 41, 15.
- 45 Child Welfare Practice and Legislation Review, above n 4, 157.
- 46 *Neglected and Criminal Children’s Act 1864 (Vic)* s 13.
- 47 *Neglected and Criminal Children’s Act 1864 (Vic)* s 15.
- 48 Committee of Enquiry into Child Care Services in Victoria, above n 41, 15.
- 49 In 1971 the organisation was renamed the Children’s Protection Society.
- 50 Justice Fogarty, *Protective Services: A Report*, above n 5, 17.

CHILDREN'S COURT ACT 1906 (VIC)

2.30 The Children's Court was established by the *Children's Court Act 1906 (Vic)* as a court with exclusive jurisdiction to determine applications in relation to neglected children, as well as jurisdiction in relation to juvenile crime.⁵¹ Justice John Fogarty noted that, although expressed in the *Children's Court Act 1906 (Vic)* to be a separate court, 'in reality [the Children's Court] remained a division of the Magistrates' Court'.⁵² The Children's Court sat wherever a Court of Petty Sessions was established.

2.31 Justice Fogarty stated that the establishment of a Children's Court in Victoria in 1906 was

*part of an increasing recognition that the work carried out in that jurisdiction called for specialist magistrates and for procedures which were more attuned to the issues than was possible within the ordinary Court structure.*⁵³

2.32 In 1933, child welfare legislation was introduced that expanded the definition of a 'neglected child' to include a child who was 'under the guardianship of any person who in the opinion of the children's court is unfit by reason of his conduct or habits to be the guardian of the child'.⁵⁴ This was the first time that child welfare legislation in Victoria had referred to the unfitness of a child's guardian as a basis for state intervention in the child's life.

2.33 In 1954, a specific neglect and maltreatment ground was added to the Victorian child welfare legislation to protect a child who was 'not provided with sufficient or proper food nursing clothing medical aid or lodging or who [was] ill-treated or exposed'.⁵⁵ Other new grounds included children who were 'exposed to moral danger' and 'habitually' absent from school.⁵⁶ Terminology also changed: a child went from being 'charged' with neglect to being the subject of an application that they were 'in need of care and protection'.⁵⁷

CHILDREN'S COURT ACT 1958 (VIC)

2.34 The *Children's Court Act 1958 (Vic)* included innovations to the procedures by which the Court determined care and protection applications, including a provision directing the Court to 'proceed without regard to legal form and ceremonies and ... direct itself by the best evidence it can procure or that is laid before it'.⁵⁸

2.35 In terms of representation in care and protection proceedings, the *Children's Court Act 1958 (Vic)* provided that 'the parent of the child shall be entitled to be heard on the child's behalf either personally or by a barrister and solicitor'.⁵⁹ This provision left it unclear whether the legal practitioner was representing the child or the parent.⁶⁰

2.36 Also in 1958, new laws were introduced that allowed protection applications to commence by serving a notice on the parent or guardian rather than apprehending the child.⁶¹

LEGISLATIVE DEVELOPMENTS IN CHILD PROTECTION IN THE 1970S

2.37 The *Children's Court Act 1973 (Vic)* gave the Children's Court the power to make supervision orders for children found to be in need of care and protection.⁶² The child could be supervised by a probation officer for a maximum of three years, or until the child turned 18.⁶³

- 2.38 In 1976, the Committee of Enquiry into Child Care Services in Victoria (the Norgard Committee) observed that these provisions provided a 'valuable alternative to full State wardship'⁶⁴ in situations
- where it is felt families [are] 'malfunctioning' or their low standards of care warrant attention, but where the families have sufficient strengths it is possible for children to remain in the care of the family under supervision.*⁶⁵
- 2.39 Following the Norgard Committee's report in 1976,⁶⁶ which noted that the system of child welfare in place at the time was 'largely unaltered' from that established under the 1864 Act,⁶⁷ the *Community Welfare Service Act 1978* (Vic) was passed.⁶⁸
- 2.40 The *Community Welfare Services Act 1978* (Vic) provided a new definition of when a child was in need of care and protection. It shifted the focus to intervention where there was maltreatment of a child by a guardian, such as ill-treatment, abandonment, inability or unwillingness to exercise supervision, or the absence of a guardian due to death or incapacitation, and removed grounds based on the child's behaviour.⁶⁹ One of the new grounds was couched in very broad terms, providing that a child or young person would be in need of care if he or she 'has been ill-treated or is likely to be ill-treated or his physical, mental or emotional development in is jeopardy'.⁷⁰
- 2.41 The 1978 amendments also included a provision to the effect that a child could not be admitted to the care of the Department of Community Welfare Services unless the Director-General was satisfied that all reasonable steps had been taken to provide the necessary services to enable the child to stay with the family, and that admission to state care 'is in the best interests of the child in the circumstances'.⁷¹

LEGISLATIVE DEVELOPMENTS IN CHILD PROTECTION IN THE 1980S

The Carney Committee Report and state responsibility for child protection

- 2.42 From 1982 to 1984, a committee chaired by Dr Terry Carney (the Carney Committee) conducted a comprehensive review of the Victorian child welfare system. The Carney Committee noted:
- The history of child welfare in Victoria has been characterised by a demonstrably superficial system of control and oversight. This has resulted in an essentially laissez-faire system of child welfare and protection.*⁷²
- 2.43 The Carney Committee also noted that in 1984 there were 'at least ten different Acts of Parliament ... governing guardianship, custody, access, maintenance and welfare of children in Victoria'.⁷³ This included section 177 of the *Supreme Court Act 1958* (Vic), which gave 'statutory recognition to the court's inherent jurisdiction to order that a minor be made a ward of the court'.⁷⁴ This inherent jurisdiction was based on the *parens patriae* jurisdiction of English superior courts.⁷⁵
- 2.44 The Carney Committee noted that since the 1950s, there had been a shift in government views about the appropriateness of state guardianship. This was in part due to a
- growing concern that the problems of individual children need to be seen in the broader context of inadequate provision by the state for the welfare of families. More recently, research findings on the harmful effects of institutionalisation and separation of children from their families have shaped policy development. These considerations made the state again adopt the role of 'reluctant guardian'. The emphasis is now on avoiding state guardianship by providing better support and assistance to families to enable people to continue to care for their own children.*⁷⁶

- 51 *Children's Court Act 1906* (Vic) s 12.
- 52 Justice Fogarty, *Protective Services: A Report*, above n 5, 137. The members of the new Court were appointed from the Magistrates' Court for a limited period of time, and 'the ultimate power and responsibility for the administration of the Children's Court' remained with the Chief Magistrate.
- 53 *Ibid* 137.
- 54 *Children's Welfare Act 1933* (Vic) s 2.
- 55 *Children's Welfare Act 1954* (Vic) s 16(f).
- 56 *Children's Welfare Act 1954* (Vic) s 16(j)–(k).
- 57 *Children's Welfare Act 1954* (Vic) s 18.
- 58 *Children's Court Act 1958* (Vic) s 22.
- 59 *Children's Court Act 1958* (Vic) s 24(2)(a).
- 60 Committee of Enquiry into Child Care Services in Victoria, above n 41, 80.
- 61 *Child Welfare Act 1958* (Vic) s 17(4).
- 62 Section 41 of the *Children's Court Act 1973* (Vic) stated that when making a supervision order, the Court could 'impose any condition it thinks fit in the interests of the welfare of the child, including conditions to be observed by the parents or persons with whom the child is living'.
- 63 *Children's Court Act 1973* (Vic) s 27.
- 64 A child found to be in need of protection became a 'State ward'.
- 65 Committee of Enquiry into Child Care Services in Victoria, above n 41, 86.
- 66 For a summary of this report, see the section below. For a full discussion of this report, see Appendix D.
- 67 Committee of Enquiry into Child Care Services in Victoria, above n 41, 15.
- 68 This Act renamed the *Social Welfare Act 1970* (Vic) the '*Community Welfare Services Act 1970* (Vic)'.⁶⁸
- 69 *Community Welfare Services Act 1978* (Vic) s 19. The grounds based on the child's behaviour were removed following a recommendation to this effect by the Norgard Committee: see the section below and Appendix D.
- 70 *Community Welfare Services Act 1978* (Vic) s 19.
- 71 *Community Welfare Services Act 1978* (Vic) s 19. This was based on a recommendation made by the Norgard Committee: Committee of Enquiry into Child Care Services in Victoria, above n 41, 87.
- 72 *Child Welfare Practice and Legislation Review*, above n 4, vol 1, 2.
- 73 *Ibid* vol 2, 346.
- 74 *Ibid* 335.
- 75 Vested in the Victorian Supreme Court by s 85 of the *Constitution Act 1975* (Vic): *ibid*.
- 76 *Ibid* 284 (citation omitted).

- 2.45 In 1984, the powers to receive, investigate and take action in relation to child abuse notifications were exercised by the Children’s Protection Society and the Victorian Police.⁷⁷ The government’s involvement had generally been confined to providing services in cases where the Children’s Court had made court orders.⁷⁸
- 2.46 The Carney Committee strongly recommended that all responsibility for coercive intervention should lie exclusively with the state, given the consequences of such intervention for the child’s future.⁷⁹ It accordingly recommended that the Children’s Protection Society should no longer be authorised to undertake investigations into child protection matters, and that responsibility for investigation and intervention be vested in the Community Welfare Services Department and the police under a ‘dual track’ system.⁸⁰
- 2.47 Following the Carney Committee’s recommendation, the Children’s Protection Society ceased its statutory activities in 1985⁸¹ and the Victorian Government—specifically the Community Services Victoria Department (CSV)—became directly involved in child protection services in Victoria for the first time.⁸² CSV was appointed to assume the responsibility for child protection services in conjunction with Victoria Police, which gave rise to the dual track system for child protection proposed by the Carney Committee.⁸³
- 2.48 While a number of the Carney Committee recommendations were adopted, some also pertinent to this reference were not. Appendix D contains a detailed discussion of the report.

Children’s Court Amendment Act 1986 (Vic)

- 2.49 The *Children’s Court (Amendment) Act 1986 (Vic)* was passed in response to the Carney Committee’s report. This Act implemented recommendations that the Carney Committee had made in relation to restructuring the Children’s Courts by separating them into two divisions: the Family Division and the Criminal Division. The reason for this restructuring was the Carney Committee’s recognition of the differing philosophies that informed criminal and protection matters, as well as the ‘many substantive, procedural and dispositional differences [that] require that the cases be treated separately’.⁸⁴

End of the dual track child protection system

- 2.50 In a report published in August 1989, Justice Fogarty described Victoria’s dual track child protection system as the existence of ‘two independent, parallel organisations concerned with child protection’—CSV and Victoria Police—between which ‘[t]here is no accountability’ and neither of which ‘has ultimate responsibility’.⁸⁵
- 2.51 Justice Fogarty concluded that the dual track system should be phased out because ‘[i]n practice, it has not worked’ and ‘[a]s a matter of principle it seems to be unsatisfactory that child protection services should be delivered by two systems which have fundamentally different underlying philosophies and modes of operation’.⁸⁶ Justice Fogarty stated that the ‘proper siting, as a matter of principle, of statutory child protection is within the welfare section of Government, with Police involvement in criminal matters’.⁸⁷

2.52 The Victorian Government adopted the recommendation to phase out the dual track system and transfer primary responsibility for child protection services to a welfare-based system within a government department, and by March 1992 the dual track system had ended and the transfer of responsibility was complete.⁸⁸ The government also implemented Justice Fogarty's recommendation that, if the dual track approach was abolished, a 24-hour child protection service would need to be established by CSV⁸⁹ to replace the 24-hour coverage that the police provided when they were authorised as protective interveners.

Children and Young Persons Act 1989 (Vic)

2.53 In 1989, the Victorian Parliament passed the *Children and Young Persons Act 1989 (Vic)* (the CYP Act 1989). The CYP Act 1989

*was designed to correct welfare practices of the 1960s and 1970s that saw children too readily removed from their parents' care and negligible emphasis placed on family preservation. The Act, hence, established conditions for the exercise of statutory authority in family life and directed that family reunification be a primary consideration for child protection.*⁹⁰

2.54 Adopting recommendations made in the Carney Committee's report (see Appendix D for detail), the CYP Act 1989:

- included principles to guide decision making in the Court⁹¹
- revised the grounds for protection applications, to focus on past harm or the risk of future harm to the child⁹²
- included the Aboriginal Child Placement Principle⁹³
- generally provided for children in Family Division proceedings who were mature enough to provide instructions to be directly represented⁹⁴
- created a new and flexible range of dispositional powers, ranging from minimum intervention (voluntary undertakings) to maximum intervention in the child's life (permanent care orders, where guardianship and custody are vested in the state).⁹⁵

2.55 Responding to the Carney Committee's recommendation,⁹⁶ the CYP Act 1989 also granted power to protective interveners to take a child immediately into safe custody for 24 hours prior to getting a court order.⁹⁷ Under the CYP Act 1989, the Court's power to make an interim accommodation order on the first return date after a child had been taken into safe custody was designed to replace bail proceedings in relation to children in custody pending protection application hearings.⁹⁸

2.56 Importantly, the CYP Act 1989 established the Children's Court as a specialist court, headed by a senior magistrate. However, under the CYP Act 1989, the Children's Court remained connected to the Magistrates' Court, as responsibility for the assignment of magistrates to the Court and ultimate control over the Court remained with the chief magistrate.⁹⁹

77 Justice Fogarty, *Protective Services: A Report*, above n 5, 17.

78 Ibid.

79 Child Welfare Practice and Legislation Review, above n 4, 94.

80 Ibid 223.

81 While the CPS no longer has a role in investigating reports of child abuse, the organisation continues to play a role in the ChildFIRST program as a lead agency for the Northeast region amongst other services. See Submission 27 (CPS) for further detail.

82 Justice Fogarty, *Protective Services: A Report*, above n 5, 17.

83 Ibid.

84 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 May 1986, 1676 (C R T Mathews, Minister for the Arts).

85 Justice Fogarty, *Protective Services for Children in Victoria: An Interim Report* (1989) 57.

86 Ibid 60–1.

87 Ibid 64.

88 Victorian Auditor-General's Office, *Special Report No 43 Protecting Victoria's Children: The Role of the Department of Human Services* (1996) 38.

89 Justice Fogarty, *Protective Services: An Interim Report*, above n 85, 137–8.

90 Allen Consulting Group, *Protecting Children: The Child Protection Outcomes Project* (2003) 26.

91 *Children and Young Persons Act 1989 (Vic)* s 87.

92 *Children and Young Persons Act 1989 (Vic)* s 63.

93 *Children and Young Persons Act 1989 (Vic)* s 119(1)(m), (2).

94 *Children and Young Persons Act 1989 (Vic)* ss 20–1.

95 *Children and Young Persons Act 1989 (Vic)* pt 3, div 6.

96 Child Welfare Practice and Legislation Review, above n 4, 227. Note, however, that the Carney Committee had recommended that safe custody should run for 48 hours. Prior to this Act, children suspected of being in need of care and protection could be immediately apprehended without warrant by either police or an authorised officer: *Social Welfare Act 1970 (Vic)* s 32. If the child was between 15 and 17 years old, he or she was put on remand, and if under 15 was taken to a children's reception centre: *Social Welfare Act 1970 (Vic)* s 32.

97 *Children and Young Persons Act 1989 (Vic)* s 69.

98 Child Welfare Practice and Legislation Review, above n 4, 228; see *Community Welfare Services (Amendment) Act 1983 (Vic)* s 4; *Children's Court Act 1973 (Vic)* s 22(1). Note that the Carney Committee refers to 'safe custody orders' rather than interim accommodation orders, which is the language used in the *Children and Young Persons Act 1989 (Vic)*.

99 Justice Fogarty, *Protective Services: A Report*, above n 5, 137, 150.

FURTHER LEGISLATIVE CHANGES IN CHILD PROTECTION IN THE 1990S**Introduction of mandatory reporting**

- 2.57 In 1990, Victoria was the only state other than Western Australia not to have provisions for mandatory reporting of suspected child abuse.¹⁰⁰ The impetus for the introduction of mandatory reporting in Victoria arose from Daniel Valerio's murder in September 1990.¹⁰¹ Daniel was two years and four months old when his stepfather beat him to death.¹⁰² In the lead up to his death, several professionals had come into contact with Daniel but had failed to intervene.¹⁰³ Daniel's death sparked public outcry and calls for mandatory reporting.
- 2.58 In November 1993, by passage of the *Children and Young Persons (Further Amendment) Act 1993 (Vic)*, the Victorian Government introduced mandatory reporting of suspected serious physical or sexual abuse of children for medical practitioners, nurses, and police, and later, in July 1994, for teachers and school principals. In the year following the introduction of mandatory reporting, notifications increased 38 per cent.¹⁰⁴
- 2.59 Following a second report by Justice Fogarty in 1993,¹⁰⁵ the *Children and Young Persons (Miscellaneous Amendments) Act 1994 (Vic)* was passed. The Act amended section 87 of the CYP Act 1989 to emphasise the paramountcy in protection proceedings of the 'need to protect children from harm, to protect their rights and to promote their welfare'.¹⁰⁶
- 2.60 Also in 1994, in response to Justice Fogarty's recommendation, pre-hearing conferences became a permanent feature of the Family Division of the Children's Court.¹⁰⁷ The CYP Act 1989 had been amended in 1992 to provide for the pre-hearing conferences,¹⁰⁸ but until 1994 they had only been trialled in the Court as a pilot program.¹⁰⁹

2000 TO CURRENT DAY: CREATION OF INDEPENDENT CHILDREN'S COURT WITH A JUDGE AS PRESIDENT

- 2.61 In 2000, the Victorian Parliament passed the *Children and Young Persons (Appointment of President) Act 2000 (Vic)*. This Act implemented the Carney Committee's recommendation—echoed by Justice Fogarty in 1993—to establish the Children's Court as independent from the Magistrates' Court by installing a County Court judge as President of the Court, and vesting control of the Court in the President. The aim of these changes was to 'elevat[e] the status and authority' of the Court and to 'allow the Children's Court to develop its specialist responsibilities autonomously'.¹¹⁰

ATTORNEY-GENERAL'S JUSTICE STATEMENT 1 AND NEW GOVERNMENT ROLES

- 2.62 In May 2004, the Attorney-General published a Justice Statement titled *New Directions for the Victorian Justice System 2004–2014*.¹¹¹ A key initiative of the Attorney-General's plan to modernise the justice system in Victoria was to 'improve access to fair and cost-effective dispute resolution options, focusing on early intervention, out-of-court solutions and the lowest possible levels of intervention'.¹¹²
- 2.63 The Attorney-General stated that 'the aim of a dispute resolution policy should be ... to provide a system that resolves disputes at the lowest possible level of intervention'.¹¹³ He stated that the government needed to commit to assisting the coordination and organisation of alternative dispute resolution services, with a 'strategic view of where services are most needed'.¹¹⁴

- 2.64 In December 2004, the Victorian Government made a number of structural changes in relation to responsibility for children, including:
- the appointment of a new Minister for Children
 - the establishment of an Office for Children
 - the appointment of a new Child Safety Commissioner
 - the creation of the position of Advocate for Children in Care within the Office of the Child Safety Commissioner.¹¹⁵

CHILD WELLBEING AND SAFETY ACT 2005 (VIC)

- 2.65 In November 2005, the Victorian Parliament passed the *Child Wellbeing and Safety Act 2005* (Vic) (the CWS Act 2005). The purpose of the CWS Act 2005 is to provide 'a legislative framework' of 'overarching principles to guide the delivery of child, youth and family services within Victoria, which will apply to universal, secondary and tertiary child, youth and family services'.¹¹⁶
- 2.66 The Minister for Children emphasised that the principles set out in the CWS Act 2005 are designed to be 'complementary' to those set out in the CYF Act 2005.¹¹⁷
- 2.67 The CWS Act 2005 also established the Victorian Children's Council to provide the Premier and Minister for Children with independent expert advice about policies and services,¹¹⁸ and the Children Services Coordination Board to support coordination of child-related government action taken at local and regional levels.¹¹⁹
- 2.68 The CWS Act 2005 also provides that the functions of the Child Safety Commissioner are to:
- advise the Minister for Children about child safety issues
 - promote child-friendly and child-safe practices in the Victorian community
 - review the Working with Children Check
 - advocate on behalf of children in out-of-home care
 - undertake inquiries and report on child deaths known to Child Protection.

THE CHILDREN, YOUTH AND FAMILIES ACT 2005 (VIC)

- 2.69 In 2003, DHS launched the Child Protection Outcomes Project, a comprehensive review of the child protection system in Victoria, consisting of a report by the Allen Consulting Group,¹²⁰ a report following public consultation,¹²¹ discussion papers,¹²² and a white paper.¹²³ For a discussion of these reports and papers, see the section below and Appendix D.
- 2.70 Importantly, in its report the Allen Consulting Group concluded that the CYP Act 1989 was no longer a suitable basis for the statutory child protection system in Victoria, commenting:

It is fourteen years since the formulation of the Children and Young Person's Act. Since that time, mandatory reporting has been introduced, the number of notifications has significantly increased, there have been major changes such as deinstitutionalisation for people with an intellectual disability or a serious mental illness, the scale of substance abuse in the community has increased greatly, and two-thirds of substantiations of child protection notifications now concern children neglected or suffering from emotional abuse. The current legislation is out-of-date. Continuing with the idea of child protection as only an emergency response is inappropriate.¹²⁴

- 100 Justice Fogarty, *Protective Services: An Interim Report*, above n 85, 86–7.
- 101 Seamus Bradley, 'Abuse and the System', *The Age* (Melbourne), 23 October 2002, <www.theage.com.au/articles/2002/10/24/1035416928951.html> at 6 April 2010.
- 102 Ibid.
- 103 Ibid.
- 104 Victorian Auditor-General's Office, *Special Report No 43*, above n 88, 38–40.
- 105 For a summary of the report, see the 'Recent Victorian Reports' section below. For a discussion of the full report, see Appendix D.
- 106 *Children and Young Persons (Miscellaneous Amendments) Act 1994* (Vic) s 14.
- 107 Justice Fogarty, *Protective Services: A Report*, above n 5, 157–9.
- 108 *Children and Young Persons (Amendment) Act 1992* (Vic) s 7.
- 109 Justice Fogarty, *Protective Services: A Report*, above n 5, 157–9.
- 110 Victoria, *Parliamentary Debates*, Legislative Council, 25 May 2000, 1357–8 (M R Thomson, Minister for Small Business).
- 111 Department of Justice (Victoria), *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004).
- 112 Ibid 13.
- 113 Ibid 33.
- 114 Ibid 19.
- 115 It is the Commission's understanding that the impetus behind the introduction of this suite of new changes was ongoing debate in Parliament regarding the establishment of a Children's Commissioner. The Commission also notes that in years prior there had been a spike in the number of deaths of children known to child protection, with 32 deaths in 2002 compared to 12 in 2001: see Victorian Child Death Review Committee, *Annual Report of Inquiries into the Deaths of Children Known to Child Protection* (2009) 16.
- 116 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1365 (Sheryl Garbutt, Minister for Children).
- 117 Ibid.
- 118 *Child Wellbeing and Safety Act 2005* (Vic) s 10.
- 119 *Child Wellbeing and Safety Act 2005* (Vic) s 15.
- 120 Allen Consulting Group, above n 90.
- 121 Freiberg, Kirby and Ward, above n 19.
- 122 Community Care Division, Department of Human Services (Victoria), *Protecting Children: Ten Priorities for Children's Well-Being and Safety in Victoria* (2004); Community Care Division, Department of Human Services (Victoria), *Protecting Children: Ten Priorities for Children's Well-Being and Safety in Victoria—Technical Options Paper* (2004).
- 123 Office for Children, Department of Human Services (Victoria), *Protecting Children ... The Next Steps* (2005).
- 124 Allen Consulting Group, above n 90, 93.

2.71 The Child Protection Outcomes Project culminated in the introduction of the CYF Act 2005. This Act received royal assent on 7 December 2005, but the majority of its provisions came into operation in April 2007. The CYF Act 2005 consolidates and updates the CYP Act 1989 and the *Community Services Act 1970 (Vic)*,¹²⁵ and contains:

- a principle requiring that the ‘best interests of the child must always be paramount’ for all persons working under the Act and that consideration must always be given to the need to protect children from harm, to protect their rights and to promote their development¹²⁶
- a new focus on addressing cumulative harm¹²⁷
- greater acknowledgement of the need for cultural considerations to be taken into account when making decisions about the placement of Aboriginal children, in the form of provision for Aboriginal Family Decision Making (AFDM)¹²⁸
- a requirement to apply the Aboriginal Child Placement Principle, with greater elaboration on its application,¹²⁹ and a requirement that the Secretary provide cultural plans for Aboriginal children under his or her guardianship¹³⁰
- a power of the Children’s Court Family Division to refer any protection proceeding to one of two types of dispute resolution conference, either ‘facilitative’ or ‘advisory’¹³¹
- own motion powers of the Family Division of the Children’s Court to summons a witness to give evidence or produce documents,¹³² to ensure that the Court has all the information ‘necessary to make the best decisions about the care and protection of a child’¹³³
- ‘long-term guardianship to Secretary’ orders for young persons of or over 12 years of age,¹³⁴ which can continue in force until the young person turns 18, but only if the young person consents.¹³⁵

2.72 The CYF Act 2005 also provides, in exceptional circumstances, for a new form of ‘best interests’ representation for children who, in the opinion of the Court, are not mature enough to provide instructions.¹³⁶ On this model, the legal representative must act in accordance with what he or she believes to be the best interests of the child and, to the extent that it is practicable to do so, communicate to the Court the child’s instructions or wishes.¹³⁷

2.73 The CYF Act 2005 also creates two new types of order:

- temporary assessment orders,¹³⁸ which are designed to strengthen the Secretary’s investigatory powers where the Secretary has a reasonable suspicion that a child or young person may be in need of protection, but where families are refusing to cooperate with an investigation¹³⁹
- therapeutic treatment orders, ‘a new basis for intervening earlier with young people [aged 10 to 14] who exhibit sexually abusive behaviour to help prevent ongoing and more serious sexual offences’.¹⁴⁰

CHANGES TO THE CHILDREN'S COURT FOLLOWING THE BOSTON CONSULTING GROUP REPORT IN 2007

- 2.74 In 2007, the Children's Court requested that the Boston Consulting Group (BCG) review the increase in demand at the Court and identify ways of reducing the pressure on the Court and increasing its productivity. BCG completed its report in November of that year and made a number of recommendations.¹⁴¹
- 2.75 As the Victorian Ombudsman noted, BCG's report in 2007 'led to several positive reforms', which included a new Children's Court being opened in Moorabbin.¹⁴² The Ombudsman noted that '[i]t was expected that the new Court would ease congestion in the Melbourne Children's Court and move approximately 23 per cent of the demand from the Metropolitan Region'.¹⁴³
- 2.76 Also following BCG's recommendations,¹⁴⁴ a special mentions court was established in the Children's Court to manage applications brought by safe custody, and additional magistrates were employed in the Melbourne Children's Court.¹⁴⁵

ATTORNEY-GENERAL'S JUSTICE STATEMENT 2 AND INTRODUCTION OF JUDICIAL RESOLUTION CONFERENCES

- 2.77 In October 2008, the Attorney-General published his second Justice Statement. This document, entitled *Attorney-General's Justice Statement 2: The Next Chapter*, continued with the themes of the first Statement, including promoting ADR and 'non-adversarial justice' throughout Victoria.¹⁴⁶ The Attorney-General expressed the government's intentions to encourage mediation in the community, and commented that 'if people need to go to court, the courts will actively seek out ways to identify the core issues in dispute and resolve them using ADR techniques'.¹⁴⁷
- 2.78 The Attorney-General stated that 'Victoria's justice system is based on the traditional adversarial model of court-based adjudication'.¹⁴⁸ He noted that
- in some cases it is actually an inappropriate means for resolving disputes due to:*
- *the emphasis on confrontation, which may inhibit the ability to seek outcomes which may work for all parties concerned*
 - *the vigorous pursuit by lawyers of technical legal points, which may not always assist their clients to achieve their wider goals.*¹⁴⁹
- 2.79 He reiterated his comments from the earlier Justice Statement:
- The aim of the Government's dispute resolution policy is to prevent and minimise disputes, and to provide a system that resolves disputes at the lowest possible level of intervention, with the courts being the last resort.*¹⁵⁰
- 2.80 The Attorney-General stated that the government supports proposals for:
- greater use of court-based ADR, in particular the use of judicial officers in ADR
 - clearer powers of the judiciary to actively manage litigation
 - pre-action protocols to reduce the number of disputes that need to be resolved by litigation.¹⁵¹

- 125 The *Community Welfare Services Act 1970 (Vic)* was renamed the *Community Services Act 1970 (Vic)* in 1987: see *Community Services Act 1987 (Vic)* s 4.
- 126 *Children, Youth and Families Act 2005 (Vic)* s 10.
- 127 *Children, Youth and Families Act 2005 (Vic)* ss 10(e), 162(2).
- 128 *Children, Youth and Families Act 2005 (Vic)* s 12(b).
- 129 *Children, Youth and Families Act 2005 (Vic)* ss 12(c), 13–14.
- 130 *Children, Youth and Families Act 2005 (Vic)* s 176.
- 131 *Children, Youth and Families Act 2005 (Vic)* s 217. These conferences (called DRCs) replaced the pre-hearing conferences under the *Children and Young Persons Act 1989 (Vic)*.
- 132 *Children, Youth and Families Act 2005 (Vic)* s 532.
- 133 Explanatory Memorandum, *Children, Youth and Families Bill 2005 (Vic)* 106.
- 134 *Children, Youth and Families Act 2005 (Vic)* s 275(1)(g).
- 135 *Children, Youth and Families Act 2005 (Vic)* s 290.
- 136 *Children, Youth and Families Act 2005 (Vic)* s 524(4).
- 137 *Children, Youth and Families Act 2005 (Vic)* s 524(11).
- 138 *Children, Youth and Families Act 2005 (Vic)* pt 4.8, div 1.
- 139 Office for Children, Department of Human Services (Victoria), *Protecting Children ... The Next Steps*, above n 123, 45. These orders are similar to 'holding/investigation' orders that the Carney Committee in 1984 recommended should be available: *Child Welfare Practice and Legislation Review*, above n 4, 228–9, 266.
- 140 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1373 (Sherryl Garbutt, Minister for Children).
- 141 Boston Consulting Group, *Children's Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007). For a summary of this report, see paras 2.90 and 2.91. For a fuller discussion of BCG's recommendations, see Appendix D.
- 142 Office of the Victorian Ombudsman, above n 7, 54.
- 143 *Ibid* 54.
- 144 Boston Consulting Group, above n 141, 2.
- 145 Office of the Victorian Ombudsman, above n 7, 55. 'Safe custody' is explained below.
- 146 Department of Justice (Victoria), *Attorney-General's Justice Statement 2: The Next Chapter* (2008) 9.
- 147 *Ibid* 39.
- 148 *Ibid* 40.
- 149 *Ibid*.
- 150 *Ibid*.
- 151 *Ibid* 43.

2.81 Justice Statement 2 also included a new emphasis on court buildings having '[a]ccessible and multi-purpose facilities', designed to reflect the needs of their users.¹⁵² The Attorney-General noted that '[t]he experience of going to court can be highly emotive for some court users', and there is a consensus in favour of a court system that minimises stress.¹⁵³

2.82 Highlighting the need for modern courts that 'meet the changes in demand and population', the Attorney-General specifically singled out the Children's Court, stating:

*The Children's Court is the only court venue that sits daily in both family and criminal divisions. The Government will continue to work on addressing increased demand and workload, resulting from growth of the family division, and increasing complexity of cases by developing a modern court environment that improves case flow management, integrates support services and reduces delay.*¹⁵⁴

2.83 The Attorney-General continued the focus on the Children's Court, aligning its specialist jurisdiction 'with the need for modernisation, better coordination and engagement'.¹⁵⁵ He made the following comments about the Court's specialist jurisdiction:

The Children's Court helps determine the pathways for children and young people in their formative years. If successful, it can divert them away from further contact with the justice and child protection systems.

The court's aim is to always protect the best interests of children and young people by seeking to protect them from harm, protect their rights and promote their wellbeing and development. There is also a need to ensure that a child or young person takes responsibility for their actions.

There is a strong emphasis on strengthening and promoting positive relationships between a child and their parents, family members and other significant persons in the child's life. These principles are reflected in the Children, Youth and Families Act, a major piece of legislative reform that was enacted in 2005.

The Children's Court's workload has increased with the expansion of its criminal jurisdiction to include 17-year-olds. Another significant change has been the establishment of Koori Children's Courts in Melbourne and Mildura. An increase in child protection applications and, possibly, Victoria's higher than expected population growth, has also affected the Court's workload.

*The Government recognises this and in the 2008–09 Budget committed funding for two additional magistrates as well as additional court staff, at a cost of \$6.5 million over four years, and has requested further work be done to estimate the future needs of the court. The Children's Court building at Lonsdale Street is under pressure from the current and projected workload and the options for future solutions are being developed.*¹⁵⁶

2.84 The Attorney-General's declared intention in his Justice Statement 2 to introduce judge-led ADR in Victorian courts was implemented in 2009, when judicial resolution conferences (JRCs) were introduced in the Supreme, County, Magistrates' and Children's courts.¹⁵⁷ Described by the Attorney-General as 'non-determinative, appropriate dispute resolution (ADR) processes presided over by judicial officers',¹⁵⁸ the purpose of JRCs is to enable parties to 'draw on the authority, knowledge and experience of a judicial officer to assist them to negotiate a settlement based on their interests, in addition to their legal rights'.¹⁵⁹

RECENT VICTORIAN REPORTS

NORGARD COMMITTEE REPORT (1976)

- 2.85 A Committee of Enquiry chaired by Mr JD Norgard (the Norgard Committee) reviewed Victoria's child protection system in the mid-1970s.
- 2.86 The Norgard Committee noted that the child welfare legislation in 1976 (the *Social Welfare Act 1970* (Vic)) did 'not contain any clear rationale for official intervention in individual children's affairs', and that the grounds for admission of a child to state guardianship 'basically derive[d] from the nineteenth century'.¹⁶⁰ The Norgard Committee recommended that several of the grounds for state intervention in the *Social Welfare Act 1970* (Vic) be considered for repeal, including the 'vagrancy clauses', the 'exposure to moral danger' ground and the grounds that the child 'is lapsing or likely to lapse into a career of vice or crime', which the Norgard Committee likened to 'preventative detention'.¹⁶¹
- 2.87 In relation to the dispositions available to the Children's Court, the Norgard Committee recommended that the Court should have the power to make short-term custody orders to the state with parents retaining guardianship, and that a guardianship to the state order should only initially be for 12 months.¹⁶²
- 2.88 The Norgard Committee noted that the Children's Court had been 'widely criticised on various grounds' in submissions,¹⁶³ and recommended that children should be legally represented 'whenever the Court is considering making a decision which would alter a child's legal status', or where there is a strong conflict between the interests of the parents and the interests of the child.¹⁶⁴

REPORT OF THE CHILD WELFARE PRACTICE AND LEGISLATION REVIEW (THE CARNEY COMMITTEE'S REPORT)

- 2.89 In December 1982, the Child Welfare Practice and Legislation Review Committee, chaired by Dr Terry Carney, was appointed to review child welfare legislation and practice in Victoria. In 1984, the Carney Committee produced a report titled *Equity and Social Justice for Children, Families and Communities*,¹⁶⁵ which significantly influenced the development of Victoria's child protection system.
- 2.90 The Carney Committee was responsible for a number of recommendations that remain fundamental features of the current child protection system in Victoria. One such recommendation was the creation of the 'safe custody' power. The Carney Committee recognised the need for a power of apprehension in relation to children at immediate risk, and recommended that

*where the authorised intervener carries out an investigation and discovers the child to be in circumstances falling within the definition of being in need of protection, or where there is substantial and immediate risk of physical harm to the child, the authorised intervener should have the power to apprehend the child and place him or her in safe custody.*¹⁶⁶

- 2.91 Importantly, the Carney Committee stated:

*Safe custody is a drastic option and should be reserved for the protection of the child who is at immediate risk. It should not be allowed to become a routine or de facto placement option, usurping the rights of the family.*¹⁶⁷

152 Ibid 10.

153 Ibid 48.

154 Ibid 51.

155 Ibid 52.

156 Ibid.

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

158 Victoria, *Parliamentary Debates*, Legislative Assembly, 28 July 2009, 2252 (Rob Hulls, Attorney-General).

159 Ibid.

160 Committee of Enquiry into Child Care Services in Victoria, above n 41, 25.

161 Ibid 26.

162 Ibid 28, 85.

163 Ibid 79.

164 Ibid 79–80.

165 *Child Welfare Practice and Legislation Review*, above n 4.

166 Ibid 227.

167 Ibid 227 (citation omitted).

- 2.92 Other central features of the current child protection system that have their origins in the Carney Committee's report include:
- the Aboriginal Child Placement Principle¹⁶⁸
 - the six grounds upon which a child can be found to be 'in need of protection', with a focus on the harm suffered, or likely to be suffered, by the child¹⁶⁹
 - the splitting of the Children's Court into two separate divisions—the Criminal Division and the Family Division—so that the Family Division, which hears protection applications, has 'a distinct identity and a philosophy separate from the criminal jurisdiction'¹⁷⁰
 - the Children's Court being headed by a County Court judge, to whom the Carney Committee gave the title 'chief judge'¹⁷¹
 - mediation conferences conducted at court, at any stage in child protection proceedings¹⁷²
 - the less formal process of determining protection applications, with the Family Division being unbound by 'legal forms and ceremonies' and being able to 'determine the manner of its own proceedings' and 'inform and direct itself, on any matter, in such manner as it thinks just'¹⁷³
 - the wide range of 'graded' options for disposition available to the Family Division,¹⁷⁴ ranging from minimum intervention (undertakings),¹⁷⁵ to intermediate intervention (supervision orders),¹⁷⁶ to maximum intervention (custody to a third party, custody to the state, or guardianship and custody to the state orders) in the life of a family.¹⁷⁷
- 2.93 For a fuller discussion of the Carney Committee recommendations that gave rise to the above features of Victoria's system, see Appendix D.
- 2.94 The Carney Committee also recommended that the Children's Court's Family Division should be constituted by a multi-disciplinary panel, consisting of a magistrate or County Court judge, an expert in child and family welfare, and someone with experience in community welfare.¹⁷⁸ The Carney Committee believed that the new Family Division's decision making could 'be vastly improved by including non-legal expertise on the bench', and that this could be done in such a way that the rights of the parties would not be prejudiced.¹⁷⁹ This recommendation was not adopted.

PROTECTIVE SERVICES FOR CHILDREN IN VICTORIA: INTERIM REPORT

- 2.95 In August 1988, Justice Fogarty, a senior member of the Family Court of Australia, was asked to enquire into and advise on the operation of Victoria's child protection system and on measures to improve its effectiveness and efficiency.¹⁸⁰ In February 1989, Justice Fogarty provided the government with an interim report setting out changes that he considered were urgently needed.¹⁸¹
- 2.96 In the introduction to the interim report, Justice Fogarty was critical of the child protection system in Victoria, stating:

*Statutory child protection services in Victoria are in an unsatisfactory state. This is the cumulative result of a series of wrong turns over the past twenty years ... during that period almost every mistake which could have been made has now been made.*¹⁸²

2.97 Justice Fogarty recommended that statutory child protection should be constituted as ‘a narrowly based emergency intervention service’ for children at risk of harm, and should not be confused with long-term welfare programs.¹⁸³ As discussed above, Justice Fogarty also recommended that the dual track child protection system should be phased out.

PROTECTIVE SERVICES FOR CHILDREN IN VICTORIA: FINAL REPORT

2.98 In July 1993, Justice Fogarty completed a second report on Victoria’s child protection system, which included ‘examin[ing] the interface’ between child protection services and the Children’s Court.¹⁸⁴

2.99 Justice Fogarty noted that

*the magistrates, staff, lawyers and workers from the Department are carrying out their duties in increasingly overworked, crowded and under-resourced circumstances ... unless these issues are seriously addressed now, there will be a damaging reduction in the quality of work performed by the Court.*¹⁸⁵

2.100 In response to submissions from the Department of Health and Community Services (the predecessor to the Department of Human Services) that the Children’s Court was or had become ‘too legalistic’, Justice Fogarty stated that he believed such criticism stemmed from a failure to understand that a

*significant reason for the existence of the Children’s Court is that it stands independent of the Department, the children and the parents and represents the community in the determination of these extremely difficult and delicate issues which are likely to have profound, perhaps permanent, effect on the lives of the young children involved. Consequently, it is necessary for the Court to be independent and to be seen to be independent, especially from the Department which is a party in every proceeding before it.*¹⁸⁶

2.101 However, Justice Fogarty conceded that ‘there seems to be no doubt that proceedings in the Children’s Court have become more legalistic in recent years’.¹⁸⁷ He attributed this mainly to the fact that under the CYP Act 1989, the ‘spread of representation’ was intentionally extended, with the consequence that ‘there are frequently three represented parties, namely the Department, child and one or both parents’.¹⁸⁸ Justice Fogarty noted:

*The result is that the proceedings do assume a more legal framework and hearings take longer. However, the resolution of difficulties that arise as a consequence of that is not to be found in diluting the right to representation but by the Court taking greater control of its procedures and the relevance of evidence being called and thus over the length of hearings and delays.*¹⁸⁹

2.102 Justice Fogarty emphasised that a ‘major issue’ in relation to the interface between DHS’s child protection services and the Children’s Court was ‘the question of professionalism on both sides’.¹⁹⁰ He noted that

*the relationship between social workers, the advisory service, lawyers and Legal Aid is at times strained and ... this permeates the process, giving an unnecessary air of legalism and distracting the participants from the main issues.*¹⁹¹

168 Ibid 82.

169 Ibid 218. These grounds were adopted by the legislature in the *Children and Young Persons Act 1989* (Vic) s 63, and substantially remain the current grounds for a protection application in the *Children, Youth and Families Act 2005* (Vic) s 162.

170 Ibid 237.

171 Ibid 403–4. The Carney Committee recommended that the Chief Judge be appointed for seven years, with the possibility of extension, by joint recommendation of the Minister for Community Welfare Services and the Attorney-General, in consultation with the Chief Judge of the County Court: at 404.

172 Ibid 241–2.

173 Ibid 244.

174 Ibid 264.

175 Ibid 269.

176 Ibid 271.

177 Ibid 274.

178 Ibid 238–9.

179 Ibid 238.

180 Justice Fogarty, *Protective Services: An Interim Report*, above n 85, 2.

181 Ibid.

182 Ibid.

183 Ibid 6.

184 Justice Fogarty, *Protective Services: A Report*, above n 5, 170.

185 Ibid 141.

186 Ibid 142–3.

187 Ibid 145.

188 Ibid.

189 Ibid.

190 Ibid 144.

191 Ibid 146.

Justice Fogarty was critical of the inadequate training given to child protection workers whose work involved the Children's Court, specifically those who gave evidence in the Children's Court.¹⁹²

2.103 Justice Fogarty also recommended that:

- pre-hearing conciliation conferences, at that time a pilot scheme, should be extended to become a permanent feature of the Court¹⁹³
- the senior magistrate should issue practice directions in relation to procedure in the Court¹⁹⁴
- the Children's Court should be separated from the Magistrates' Court and headed by a County Court judge, as the Carney Committee had suggested.¹⁹⁵

AUDITOR-GENERAL'S SPECIAL REPORT NO 43: PROTECTING VICTORIA'S CHILDREN: THE ROLE OF THE DEPARTMENT OF HUMAN SERVICES

2.104 In 1996, the Victorian Auditor-General completed a two-year performance audit of the provision of child protection services by the Victorian Government, as well as private sector services. Following this audit the Auditor-General completed two reports: *Special Report No 43: Protecting Victoria's Children: The Role of the Department of Human Services*,¹⁹⁶ and *Special Report No 42: Protecting Victoria's Children: The Role of the Children's Court*.¹⁹⁷

2.105 Report No 42 was not tabled in parliament nor released to the public because legal advice provided by the Solicitor-General suggested that the Auditor-General lacked the authority to audit a court under the *Audit Act 1994* (Vic). The report was, however, provided to the Victorian Government.¹⁹⁸

2.106 The Auditor-General's report on DHS was tabled in the Victorian Parliament on 20 June 1996. The report identified a number of weaknesses in DHS protective services, including the involvement of DHS in protection applications proceedings, and in particular:

- the fact that draft case plans presented to the Children's Court to indicate the course of action planned by DHS 'were often of poor quality and lacked the necessary detail to effectively address the protective concerns and the child's welfare'¹⁹⁹
- the poor quality of evidence presented in court by protection workers which led to protection applications, particularly those brought on sexual abuse grounds, being unsuccessful 'because of poor Court presentations rather than their underlying validity'.²⁰⁰

2.107 The Auditor-General also identified failings in, or resulting from, the provisions of the CYP Act 1989, including an 'over-emphasis on family re-unification',²⁰¹ and a failure to achieve permanency planning, in terms of stable and secure living arrangements for children as opposed to multiple short-term placements.²⁰²

REPORT OF THE COMMUNITY CARE REVIEW (THE CARTER REPORT)

2.108 In 2000, the Community Care Review, led by Professor Jan Carter, was commissioned to examine several issues connected with the Youth and Family Services Redevelopment (YAFSR).²⁰³ Professor Carter published her report in September 2000, which included an examination of Victoria's Child Protection Service.²⁰⁴

2.109 In the report Professor Carter stated that '[t]he relationship between the placement and support system, the child protection system, the Children's Court and the legislation is uncoordinated and discontinuous'.²⁰⁵ Professor Carter was also critical of the CYP Act 1989, commenting:

*The traditional 'child welfare' division of responsibility between the Children's Court (which makes the orders) and the Government (which implements them) is no longer working (if it ever did) in a diverse and fragmented substitute-care system.*²⁰⁶

2.110 Professor Carter identified several deficiencies of the CYP Act 1989, including a lack of 'evidence based, well-researched and effective practice strategies (such as Family Group Conferencing)' and lack of protection for children in care.²⁰⁷ She accordingly recommended that the Attorney-General review the CYP Act 1989,²⁰⁸ and in addition that:

- the legislation around child protection and domestic violence be consolidated
- a framework for a process of mediation between parties be created
- the definitions of child abuse be reviewed and a work plan be set out for the effective deployment of child protection resources
- a mechanism be provided for appealing decisions and hearing grievances.²⁰⁹

THE PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE'S REVIEW OF THE AUDITOR-GENERAL'S REPORT

2.111 In November 2001, following an inquiry into the extent to which DHS had implemented the recommendations made by the Auditor-General in 1996, the Public Accounts and Estimates Committee (PAEC) published a report 'to follow-up outstanding or unresolved issues'.²¹⁰

2.112 The PAEC concluded that the CYP Act 1989, 'despite its numerous amendments, does not reflect legislative developments interstate and overseas or contemporary thinking regarding child protection'.²¹¹ The PAEC accordingly recommended that DHS examine developments in other Australian jurisdictions and overseas with a view to amending the CYP Act 1989.²¹²

2.113 The PAEC also recommended that DHS, in consultation with the Family Division of the Children's Court, 'look at ways of overcoming lengthy delays in decision-making',²¹³ following a complaint that the 'adversarial nature of deliberations' in that Division resulted in long delays in decision making.²¹⁴

2.114 The PAEC also commented on the over-representation of Aboriginal children in the child protection system, particularly those children in out-of-home care. It expressed concern that 'a high proportion of Indigenous children in the care system have no case plans, child care agreements or plans to return home',²¹⁵ and that from submissions it appeared there was a lack of compliance with the Aboriginal Child Placement Principles in the CYP Act 1989.²¹⁶ The PAEC recommended that DHS work with Aboriginal Affairs Victoria and the appropriate Aboriginal peak agency to improve access to support services for Aboriginal children and young people and their families, and 'develop and implement a case management framework for Aboriginal agencies placing Aboriginal children in out-of-home care'.²¹⁷

192 Ibid 73.

193 Ibid 157–9.

194 Ibid 161.

195 Ibid 153.

196 Victorian Auditor-General's Office, *Special Report No 43*, above n 88.

197 Victorian Auditor-General's Office, *Special Report No 42 Protecting Victoria's Children: The Role of the Children's Court* (1996) (unreleased).

198 See Victorian Auditor-General's Office, *Annual Report 1995–96* (1996), under 'Performance Audit Operations'.

199 Victorian Auditor-General's Office, *Special Report No 43*, above n 88, 84.

200 Ibid 194.

201 Ibid 235–8.

202 Ibid 227.

203 The Youth and Family Services Redevelopment consisted of a program of re-engineering a group of government service models and programs mostly delivered by community services organisations in the non-government community-based sector. This program had been run by the Youth and Family Services Division of DHS between 1997 and 1999 under the Kennett Government: Jan Carter, *Report of the Community Care Review* (2000) 3.

204 Ibid 133.

205 Ibid 144–5.

206 Ibid 163.

207 Ibid 163.

208 Ibid 167.

209 Ibid 165.

210 Public Accounts and Estimates Committee, Parliament of Victoria, *Report on the Review of the Auditor-General's Special Report No 43—Protecting Victoria's Children: The Role of the Department of Human Services* (2001) 7.

211 Ibid 65.

212 Ibid 66.

213 Ibid.

214 Ibid 62.

215 Ibid 170.

216 Ibid 166.

217 Ibid 170.

PROTECTING CHILDREN: THE CHILD PROTECTION OUTCOMES PROJECT**Background to the Project**

2.115 In 2002, DHS initiated the Child Protection Outcomes Project (the Project) to review the statutory child protection service in Victoria, and identify the policies, legislation and practice that would achieve the best possible outcomes for children and young people who are subject to statutory intervention, or for the care of those who are at high risk of entering the system.²¹⁸

Allen Consulting Group report

2.116 The first stage of the Project was a review of the Victorian child protection system, including analysis of data and local, national and international literature, conducted by the Allen Consulting Group (ACG). The ACG report, entitled *Protecting Children: The Child Protection Outcomes Project*,²¹⁹ was published in September 2003, and contained proposed directions for reform.

2.117 ACG noted that the CYP Act 1989 was based on the assumption that statutory child protection is an emergency service.²²⁰ ACG questioned whether it was appropriate or effective to continue with this concept, given the steady increase in the numbers of notifications, substantiations—40 per cent of which were re-substantiations, children on care and protection orders, and children placed in care since the enactment of the CYP Act 1989.²²¹ It ultimately concluded that the CYP Act 1989 was out of date, and new legislation was required.²²²

2.118 In addition, ACG stressed the need for ‘intermediate structures’ in the child protection system, to sit between completely voluntary services and the coercive use of legal power.²²³ ACG explained that

*the role of the intermediate level responses in child protection is to seek agreement with the family and other relevant parties on a plan, including necessary support measures, to keep the child safe and hence avoid a formal statutory child protection intervention and court proceedings.*²²⁴

2.119 ACG discussed two possible options for intermediate level responses in Victoria: family group conferencing (FGC), based on the models used in the ACT and New Zealand,²²⁵ and Community Child and Family Support Panels, based on the Scottish ‘children’s hearings’.²²⁶

Kirby, Ward and Freiberg report

2.120 The second stage of the Project was a community consultation process conducted by Mr Peter Kirby (as chair), Ms Lisa Ward and Professor Arie Freiberg (the Panel), to test community reactions to the propositions in the ACG report.²²⁷ The Panel completed its report in April 2004.

2.121 The consultation process revealed that there was broad agreement on the reform directions proposed in the ACG report, including ‘widespread support for the proposed development of a range of “intermediate” responses to bridge the divide between voluntary support and court-mandated service provision’.²²⁸ The Panel accordingly recommended that intermediate or quasi-legal responses to children at risk be expanded to enable child protection workers to work together with families away from the legal system and for extended periods.²²⁹ The Panel canvassed a number of options for responses at the intermediate level, including agreements developed through FGC that could be registered with the Court.²³⁰

2.122 In response to submissions that argued that ‘the Children’s Court procedure is too adversarial’ and ‘negatively affects parents and the relationships between parents and welfare agencies’,²³¹ the Panel acknowledged the ‘need to modify the operation of the adversarial paradigm in the Children’s Court’.²³² To achieve this, the Panel recommended that DHS improve the quality of its investigations and its case presentation in court, and that the Court consider moving towards a more proactive inquisitorial or case management approach.²³³ The Panel also recommended that the Court experiment with a more problem-oriented approach to child protection cases, by taking a more active role in gathering relevant information about the needs of the child and the family, drawing on the experience of welfare professionals, and reviewing the progress of cases.²³⁴

Reform proposals

2.123 In September 2004, as the third stage of the Project, DHS published two papers outlining the proposed reforms to the policies and legislation governing child protection in Victoria.²³⁵ For a list of the key reform proposals canvassed in these papers, see Appendix D under ‘Protecting Children: The Child Protection Outcomes Project’, under the sub-heading ‘Reform proposals’.

EVALUATION OF PRE-HEARING CONFERENCES

2.124 In 2003, the President of the Children’s Court appointed Magistrate Jeanette Maughan and Ms Andrea Dagleis to review and evaluate the role and effectiveness of pre-hearing conferences in the Family Division.²³⁶

2.125 Maughan and Dagleis noted that the amendments to the CYP Act 1989 did not refer to or provide for any particular model of ADR to be used in the pre-hearing conferences,²³⁷ and recommended that mediation, and more particularly facilitative mediation, should be adopted for pre-hearing conferences in the Family Division.²³⁸

2.126 Maughan and Dagleis identified various ‘barriers to conciliation’ in the pre-hearing conference process under the CYP Act 1989.²³⁹ They also noted concerns about:

- the low level of remuneration for legal representatives to participate in pre-hearing conferences, which was said to discourage ‘good practice’ and was a disincentive to carry out detailed preparation and preliminary work for such conferences²⁴⁰
- legal practitioners in Melbourne coming to pre-hearing conferences for only a limited amount of time before leaving to attend to another matter²⁴¹
- protective workers who attended pre-hearing conferences often not having the authority necessary to make decisions that would lead to settlement, and needing to leave the conference to consult or seek advice from their supervisors or senior staff, who had not been privy to the deliberations in pre-hearing conferences²⁴²
- the problem in pre-hearing conferences in Melbourne that the ‘“culture” of each group [the convenors, the protective workers and the legal practitioners] had an exacerbating effect on the other two groups resulting in increasing levels of intolerance and absence of cooperation’.²⁴³

218 The Project was launched as part of a wider strategy in relation to child protection and placement services, outlined in: Community Care Division, Department of Human Services (Victoria), *An Integrated Strategy for Child Protection and Placement Services* (2002).

219 Allen Consulting Group, above n 90.

220 *Ibid.* vi.

221 *Ibid.*

222 *Ibid.* 93.

223 *Ibid.* 56.

224 *Ibid.* 57.

225 *Ibid.* 85–6.

226 *Ibid.* 87–8.

227 Freiberg, Kirby and Ward, above n 19, 1.

228 *Ibid.* 16.

229 *Ibid.* 38.

230 *Ibid.* 39.

231 *Ibid.* 40.

232 *Ibid.*

233 *Ibid.*

234 *Ibid.* 46.

235 Community Care Division, Department of Human Services (Victoria), *Protecting Children: Ten Priorities*, above n 122. In July 2005, the Office for Children, Department of Human Services (Victoria) also published a White Paper entitled *Protecting Children ... The Next Steps*, above n 123.

236 Jeanette Maughan and Andrea Dagleis, *An Evaluation of Pre-Hearing Conferences in the Family Division of the Children’s Court of Victoria* (2005) 6.

237 *Ibid.* 11.

238 *Ibid.* 13–14.

239 *Ibid.* 19.

240 *Ibid.* 28.

241 *Ibid.* 29.

242 *Ibid.* 33.

243 *Ibid.* 63.

- 2.127 To alleviate some of the problems identified with the pre-hearing conferences, Maughan and Daglis recommended that:
- ‘the appropriate bodies consider an increase in fees payable to legal representatives/counsel for pre-hearing conferences’ to address these issues²⁴⁴
 - convenors be given appropriate training in ADR processes, as well as regular ongoing professional development²⁴⁵
 - DHS consider providing legal representation for its workers in pre-hearing conferences²⁴⁶
 - the parties identify the issues in dispute at the mention hearing²⁴⁷
 - a pre-hearing conference coordinator position be created²⁴⁸
 - the Children’s Court issue guidelines for the pre-hearing conferences²⁴⁹
 - the President of the Children’s Court issue a Practice Direction, giving the convenor authority to terminate a pre-hearing conference as a result of the conduct of one of the attendees, and report the reasons for termination to the Court.²⁵⁰

BOSTON CONSULTING GROUP REPORT ON THE CHILDREN’S COURT 2007

- 2.128 In 2007, the Department of Justice, at the request of the Children’s Court, commissioned BCG to investigate ‘recent and future growth in demand at the Children’s Court’, explore the resources necessary to respond to such growth, and identify means of increasing the productivity of the Court.²⁵¹ After discussions with magistrates, court staff, DHS, Victoria Police, VLA, private practitioners and other stakeholders, BCG identified a set of options for improvements to the Court.²⁵²
- 2.129 BCG’s report was completed in November 2007, and contained a number of recommendations to relieve the Court of some of the pressure of the increased demand, including:
- the appointment of two new magistrates to the Court
 - relocation of pre-hearing conference rooms out of court
 - using two old County Court courtrooms for Children’s Court hearings
 - allocation of one courtroom exclusively for safe custody applications callovers and directions hearings.²⁵³
- 2.130 To make more efficient use of Children’s Court magistrates’ time, BCG recommended that a judicial registrar could be given responsibility for hearing uncontested matters such as uncontested adjournments, extensions and rollovers, and for conducting a 9:30 am callover to ascertain what applications by safe custody had come in overnight for hearing that day.²⁵⁴
- 2.131 BCG also recommended changes to the listing of private practitioners’ matters in the Children’s Court, to prevent practitioners from appearing in multiple contests on the same day, and earlier briefing of barristers to increase preparation time before contests.²⁵⁵
- 2.132 Finally, to increase the physical capacity of the Children’s Court, BCG proposed a range of options, including partial decentralisation of the southern region cases to the Moorabbin Court.²⁵⁶

SELECTED REVIEWS IN OTHER JURISDICTIONS

AUSTRALIAN LAW REFORM COMMISSION REPORT NO 18: CHILD WELFARE

Background to the report

2.133 On 18 February 1979, the federal Attorney-General requested that the Australian Law Reform Commission (ALRC) enquire into child welfare law and practice in the ACT. The resulting ALRC report was tabled in parliament on 12 November 1981.

Recommendations in the report

2.134 The ALRC concluded that there needed to be a 'clear distinction' between the procedures for dealing with juvenile offenders on one hand, and non-offenders on the other.²⁵⁷ The ALRC accordingly proposed new proceedings whereby 'a child in need or in danger should be brought before a court by way of an application for a declaration that he is in need of care'.²⁵⁸

2.135 In relation to these new care proceedings, the ALRC considered that 'it is actual or potential harm to the child which should, in general, provide the basis for coercive state intervention'.²⁵⁹ It recommended that the 'uncontrollable child' ground for intervention in the *Child Welfare Ordinance 1957* (ACT) should be replaced with a ground that the child

*is engaging in behaviour that is, or is likely to be, harmful to him and his parents or his guardian are unable or unwilling to prevent him from engaging in that behaviour.*²⁶⁰

Youth Advocate

2.136 The ALRC recommended the creation of a new independent statutory official, to be called the Youth Advocate, who would be responsible for the initiation of care proceedings.²⁶¹ The ALRC envisaged that the Youth Advocate would act 'as a buffer between the agencies handling a case and the court', because he or she would have the power to refuse to initiate court proceedings if in a particular case he or she was not satisfied that sufficient efforts had been made to reach an informal solution.²⁶²

2.137 In addition to the power to initiate proceedings, the ALRC envisioned that the Youth Advocate would have the following functions:

- He or she would be immediately notified if a child was taken into custody, and would be required to either order the release of the child, or apply within 48 hours for an interim court order to secure the child's continued detention.²⁶³
- Once a decision to initiate proceedings had been made, the Youth Advocate would 'act as informant, ensure that the necessary evidence is assembled, and present the case in the Children's Court'.²⁶⁴
- If a child was found to be in need of care, the Youth Advocate would provide advice on the appropriate disposition.²⁶⁵
- The Youth Advocate would also be responsible for chairing court-ordered 'child care' conferences, and reporting the outcome to the court.²⁶⁶

- 244 Ibid 28.
- 245 Ibid 44.
- 246 Ibid 52.
- 247 Ibid 55.
- 248 Ibid 57.
- 249 Ibid 66.
- 250 Ibid 69.
- 251 Boston Consulting Group, above n 141, 1.
- 252 Ibid.
- 253 Ibid 2.
- 254 Ibid 38.
- 255 Ibid 50.
- 256 Ibid 62.
- 257 (Australian) Law Reform Commission, *Child Welfare*, Report No 18 (1981) 75.
- 258 Ibid 218.
- 259 Ibid 221.
- 260 Ibid 227.
- 261 Ibid 241. The ALRC also recommended that a Standing Committee of the Children's Services Council be created to assist the Youth Advocate to make the decision whether to initiate care proceedings in a difficult case, by providing advice from representatives of the agencies responsible for working with the child and the family: at 209.
- 262 Ibid 242.
- 263 Ibid 232-3.
- 264 Ibid 251.
- 265 Ibid 252.
- 266 Ibid 218.

2.138 If a child were made the subject of a residential or supervision order, the Youth Advocate would be responsible for monitoring his or her progress under that order.²⁶⁷ The Youth Advocate would also have the power to bring a case back to court and seek a variation or revocation of an order if he or she was dissatisfied with a child's situation.²⁶⁸

2.139 In relation to the procedural aspects of care proceedings, the ALRC recommended that courts hearing care proceedings

*should place special emphasis on informality, on making the proceedings comprehensible to the child and his parents, and on giving the child an opportunity to participate and to express his views.*²⁶⁹

It suggested that alternatives to formal courtroom settings, such as hearings in chambers, be considered to enable 'round-table informality' where appropriate,²⁷⁰ and that in the case of very young children, the magistrate should have the power to appoint a 'next friend' of a child, where he or she thinks it is in the child's interests that one be appointed.²⁷¹

Outcome of the report

2.140 The position of the Youth Advocate as designed by the ALRC was created by the *Children's Services Act 1986* (ACT) (the CSA). Under the CSA, the Youth Advocate was charged with:

- receiving notifications of children suspected of being in need of care²⁷²
- initiating care proceedings after consultation with the Standing Committee of the Children's Services Council²⁷³
- chairing court-ordered child care conferences²⁷⁴
- bringing applications to revoke, vary or replace existing care orders.²⁷⁵

In 1991, these functions of the Youth Advocate in care proceedings were transferred to the new 'Community Advocate',²⁷⁶ and, in 1994, all of the Community Advocate's functions in relation to care proceedings under the CSA were transferred to the Director of Family Services.²⁷⁷

AUSTRALIAN LAW REFORM COMMISSION REPORT NO 84: SEEN AND HEARD: PRIORITY FOR CHILDREN IN THE LEGAL PROCESS

2.141 On 28 August 1995, the ALRC, in conjunction with the Human Rights and Equal Opportunity Commission, was asked to enquire into and report on issues relating to children and young people in the legal process.

2.142 The Commissions' report, *Seen and Heard: Priority for Children in the Legal Process*, was released on 30 September 1997.²⁷⁸ In the report, the Commissions discussed options for the appropriate model of legal representation for children involved in care and protection applications in children's courts.²⁷⁹ The Commissions recommended that all children who are the subject of a care and protection application should be provided with a lawyer 'as early as possible'.²⁸⁰

2.143 The Commissions also highlighted the need for training of legal representatives working with children, and recommended that '[t]he practice of children's law in the Family Court and State and Territory children's courts should be developed as an area of specialisation'.²⁸¹

- 2.144 The Commissions addressed the problems of the ‘jurisdictional confusion’ in relation to children that arises from the Commonwealth having family law jurisdiction, and the states and territories having child protection jurisdiction.²⁸² The Commissions discussed a number of options for minimising or resolving these problems, including vesting some of the Family Court’s powers in state children’s courts.²⁸³
- 2.145 The Commissions also examined the models of FGC and pre-hearing conferences used in care and protection processes.²⁸⁴ They recommended that the procedure for all conferencing models in care and protection jurisdictions require that:
- in FGCs and pre-hearing conferences the best interests of the child should be the paramount consideration
 - family members and children should have access to independent legal advice before participating in any conference
 - children who are too young to participate or who wish to have additional support during the conference should be represented by a lawyer or advocate of their choice in these conferences
 - convenors of FGCs or pre-hearing conferences should have knowledge of and training in care and protection law, family dynamics and child development issues.²⁸⁵

FAMILY LAW AND CHILD PROTECTION FINAL REPORT

- 2.146 In September 2002, the Child and Family Services Committee of the Family Law Council of Australia (the Council) published a report entitled *Family Law and Child Protection Final Report*.²⁸⁶ The report considered the interaction between state and federal systems when child protection issues arise in cases under the *Family Law Act 1975* (Cth) (the FLA 1975).
- 2.147 The Council made a number of recommendations to reduce problems caused by the ‘jurisdictional overlap’ that occurs due to child protection being a matter for state law and disputes concerning children falling under the Commonwealth FLA 1975.²⁸⁷ One such recommendation was that in child protection proceedings, state and territory children’s courts be given the power to make long-term orders granting residence to one parent and prohibiting contact between the child and the other (abusive) parent.²⁸⁸ The Council suggested that this would remove the need to make a separate application for such an order to the Family Court when a protection application was on foot.²⁸⁹

REPORT OF THE SPECIAL COMMISSION OF INQUIRY INTO CHILD PROTECTION SERVICES IN NSW (THE WOOD REPORT)

- 2.148 In November 2007, the Honourable James Wood AO QC was commissioned by the NSW Government to determine the changes required within the child protection system to cope with future levels of demand once reforms, which had been initiated in 2002, were completed. The Wood Commission published its three-volume report on 24 November 2008.
- 2.149 The Wood Commission made a number of recommendations for amendments to the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the NSW Act), including changes to the powers and processes of the NSW Children’s Court and the test and processes used by the Department of Community Services (DoCS)²⁹⁰ to assess reports of children suspected to be at risk.

- 267 Ibid 252.
 268 Ibid 283.
 269 Ibid 254.
 270 Ibid 254.
 271 Ibid 261.
 272 *Children’s Services Act 1986* (ACT) s 103.
 273 *Children’s Services Act 1986* (ACT) s 78.
 274 *Children’s Services Act 1986* (ACT) s 82.
 275 *Children’s Services Act 1986* (ACT) s 88.
 276 *Community Advocate Act 1991* (ACT).
 277 *Children’s Services (Amendment) Act 1994* (ACT).
 278 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).
 279 Ibid 250–80.
 280 Ibid 286.
 281 Ibid 290.
 282 Ibid 355.
 283 Ibid 372–6.
 284 Ibid 436–42.
 285 Ibid 438–42.
 286 Family Law Council, *Family Law and Child Protection Final Report* (2002).
 287 Ibid 86.
 288 Ibid 81, 86.
 289 Ibid 82–4. This recommendation is discussed in greater detail in Chapter 8 under ‘Cross-jurisdictional issues’.
 290 Since the Wood Report was published, the NSW Department responsible for child protection has been renamed ‘Community Services’, but as the Wood report uses the term ‘DoCS’, that term will be used in the present discussion, and should be read as referring to the current child protection department in NSW.

2.150 The Wood Commission’s recommendations focused on improving the professionalism and efficiency of the existing institutions and staff involved in the child protection system, rather than changing their roles or creating new bodies. The recommendations included that:

- the timeframe in which DoCS was required to file an application after the emergency removal of a child be extended from 24 to 72 hours²⁹¹
- adequate funding be provided to enable ADR to be used prior to and during care proceedings²⁹²
- DoCS commence care applications by filing an application supported by a written summary of the information available to DoCS, rather than filing affidavits in support and all material on which it relies²⁹³
- the Children’s Court be given the power to order, on its own motion, that expert evidence be provided²⁹⁴
- a code of conduct be developed, applicable to all legal representatives in care proceedings, and specialist accreditation be available²⁹⁵
- a trial of a ‘docket system’ be undertaken in the Parramatta Children’s Court for matters in the care and protection jurisdiction²⁹⁶
- a District Court judge be appointed as the senior judicial officer in the Children’s Court²⁹⁷
- Children’s Court registrars be legally qualified and trained in ADR, and should perform ADR and procedural and consent functions.²⁹⁸

291 James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, 508–9, 542 (Recommendation 13.4).
 292 *Ibid* 489–91 (Recommendation 12.1).
 293 *Ibid* 541 (Recommendations 13.2, 13.3).
 294 *Ibid* 462 (Recommendation 11.1(xv)).
 295 *Ibid* 532.
 296 *Ibid* 539, 543 (Recommendation 13.11).
 297 *Ibid* 542 (Recommendation 13.9).
 298 *Ibid* 543 (Recommendation 13.12).

Outcome of the report

2.151 In response to the Wood Report, the NSW Government passed the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW), which adopted all of the recommendations discussed above that were capable of, or required, legislative implementation. The majority of these changes to the Act came into force on 22 January 2010.

Chapter 3

Current Law and Practice in Victoria

CONTENTS

- 66 Introduction
- 66 Institutions and participants involved in child protection proceedings
- 71 The role of Child Protection in bringing protection applications to court
- 76 Child care agreements
- 77 Protection (and other) applications in the Children's Court
- 78 Grounds for determining that a child is in need of protection
- 79 Two pathways to commence protection application proceedings
- 83 Protection applications commenced by safe custody
- 86 Court reports
- 87 Court events and progression of cases through court
- 90 Conduct of proceedings
- 91 Legal representation at the Children's Court
- 94 Protection orders (dispositions)
- 99 Costs orders
- 99 Appeals
- 102 Transfer of child protection orders and proceedings
- 102 Child Protection responsibilities after the Court makes a protection order
- 104 Charter of Human Rights and Responsibilities and international rights instruments

INTRODUCTION

- 3.1 The *Children, Youth and Families Act 2005* (Vic) governs child protection proceedings in Victoria.¹ The Secretary² of the Department of Human Services ('the Department' or 'DHS') may bring a protection application in the Family Division of the Children's Court if he or she considers a child to be 'in need of protection'.³ The Court may make a protection order if it finds that at least one of six separate grounds⁴ for determining a child is in need of protection exists.⁵
- 3.2 This chapter outlines the key institutions and participants in the child protection legal system, including the status and role of children in the process, the principles that key decision makers must apply, and the role of lawyers. This chapter also describes how a case progresses through the Court. Most cases are resolved by agreement, with only three per cent of applications resulting in a final defended hearing. Finally, this chapter considers the relationship between the *Charter of Human Rights and Responsibilities 2006* (Vic) (the Charter)⁶ and the child protection legislative scheme.

INSTITUTIONS AND PARTICIPANTS INVOLVED IN CHILD PROTECTION PROCEEDINGS**THE CHILDREN'S COURT OF VICTORIA**

- 3.3 The *Children, Youth and Families Act 2005* (Vic) (the CYF Act 2005) provides for the continuing operation of the Children's Court of Victoria.⁷ As discussed in Chapter 2, the Court was originally established under enabling legislation in 1906.⁸ The Court comprises a President (who is a judge of the County Court), magistrates, and registrars.⁹
- 3.4 The Court has four Divisions:
- Family Division
 - Criminal Division
 - Koori Court (Criminal Division)
 - Neighbourhood Justice Division.
- 3.5 The Family Division deals with proceedings for the protection of children.¹⁰ Under the *Family Violence Prevention Act 2008* (Vic) (FVP Act) and *Stalking Intervention Orders Act 2008* (Vic) (SIO Act), the Family Division has powers to make, vary, revoke or extend intervention orders if either the affected family member, protected person or respondent is under the age of 18 at the time the order was made.¹¹
- 3.6 In practice, most people refer to the Children's Court as having two Divisions—the Family Division and the Criminal Division. This is because the Koori Court (Criminal Division) and the Neighbourhood Justice Division exercise certain powers from either or both the Family Division and Criminal Division.¹² In addition, the Melbourne Children's Court is physically divided into two areas—albeit in the one building—that separate Family Division proceedings from criminal law matters.

Definition of child

- 3.7 The definition of a 'child' varies under the Act depending on the power the Court is exercising. In the Family Division, a child, for the purposes of initiating a protection application, is a person under the age of 17.¹³ An existing protection order may last until a child is 18 years old.¹⁴ When exercising powers under the FVP Act and the SIO Act, a 'child' is a person under the age of 18 at the time the application is made.¹⁵
- 3.8 When exercising powers in criminal matters in the Criminal Division, Koori Court (Criminal Division) or Neighbourhood Justice Division, a person is a child if they are between the ages of 10 and 18, but under 19 years old when proceedings commence.¹⁶
- 3.9 The Criminal Division has jurisdiction to hear and determine all charges against children summarily (without a jury) with the exception of murder, attempted murder, manslaughter, child homicide, defensive homicide, arson causing death and culpable driving causing death.¹⁷ It also has power to conduct committal hearings for indictable (serious) offences, bail applications and applications for variation or breach of sentencing for children.¹⁸
- 3.10 The Koori Court (Criminal Division) has jurisdiction to deal with Aboriginal children who consent to the jurisdiction of the Koori Court and either intend to plead guilty or have been found guilty of an offence. A sentencing conversation takes place between the judge or magistrate and two Aboriginal Elders or Respected Persons before the judicial officer decides on the appropriate sentence. The Koori Court usually sits at the Melbourne Children's Court once a fortnight. It also sits in some regional centres.
- 3.11 The Neighbourhood Justice Division deals with some criminal law proceedings for children as well as intervention order hearings for children or their family members who have a connection to a particular location.¹⁹ Currently, if a suspected juvenile offender is charged in the City of Yarra, the Neighbourhood Justice Division will sit at the Neighbourhood Justice Centre (NJC) in Collingwood. The Neighbourhood Justice Division does not have jurisdiction to hear protection applications.²⁰

- 1 Also relevant are the *Children, Youth and Families Regulations 2007* (Vic) and the *Children, Youth and Families (Children's Court Family Division) Rules 2007* (Vic).
- 2 The Secretary's powers may be delegated: *Children, Youth and Families Act 2005* (Vic) s 17.
- 3 In 2008-09, protection applications comprised over 99 per cent of the five different primary applications relating to the protection of children: percentage derived from statistics in Children's Court of Victoria, *Annual Report 2008-2009* (2009) (*Annual Report*). The other primary applications are irreconcilable difference applications, temporary assessment order applications, therapeutic treatment applications and permanent care order applications.
- 4 *Children, Youth and Families Act 2005* (Vic) s 162.
- 5 *Children, Youth and Families Act 2005* (Vic) s 274. Protection orders range from those involving minimum state intervention in the life of a family (such as an undertaking) to those that give the Department the decision-making power that a parent would ordinarily have in relation to a child (for instance a guardianship to Secretary order). The various orders are described in this chapter.
- 6 *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- 7 *Children, Youth and Families Act 2005* (Vic) s 504(1).
- 8 *Children's Court Act 1906* (Vic).
- 9 *Children, Youth and Families Act 2005* (Vic) s 504(2).
- 10 *Children, Youth and Families Act 2005* (Vic) s 515(1).
- 11 *Children, Youth and Families Act 2005* (Vic) s 515(2).
- 12 The Koori Court (Criminal Division) deals with criminal law proceedings in prescribed circumstances for Aboriginal children: *Children, Youth and Families Act 2005* (Vic) ss 518-20. The Neighbourhood Justice Division deals with criminal law proceedings and intervention orders for children or parties with a connection to a particular location (currently the City of Yarra): *Children, Youth and Families Act 2005* (Vic) ss 520A-520E.
- 13 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'child'.
- 14 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'child'.
- 15 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'child'; *Family Violence Protection Act 2008* (Vic) ss 4, 146-7; *Stalking Intervention Orders Act 2008* (Vic) s 6. Under the latter two pieces of legislation a child is a person under 18 years.
- 16 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'child'.
- 17 *Children, Youth and Families Act 2005* (Vic) s 516(1).
- 18 *Children, Youth and Families Act 2005* (Vic) s 516(2)-(3); submission 46 (Children's Court of Victoria) 16.
- 19 *Children, Youth and Families Act 2005* (Vic) ss 520A-520E. Children's Court Criminal Division matters sit one day per month. The number of cases initiated has steadily increased since the Neighbourhood Justice Centre (NJC) was established. Statistics gathered indicate that 100 matters were initiated from 1 May 2009 to 30 April 2010. These matters accounted for 2.3 per cent of all matters at the NJC during this period: Neighbourhood Justice Centre (Victoria), *Neighbourhood Justice Centre Statistics 2006-2010*, received 26 May 2010; Neighbourhood Justice Centre (Victoria), *Number of Matters Initiated at the Neighbourhood Justice Centre from 1/05/2009 to 30/04/2010 and Application Type*, received 26 May 2010.
- 20 Section 515 of the *Children, Youth and Families Act 2005* (Vic) confers jurisdiction relating to protection applications on the Family Division only.

The Children's Court metropolitan and regional operations

- 3.12 The judicial members of the Melbourne Children's Court currently comprise the President (a County Court judge) and 11 magistrates,²¹ two of whom are acting magistrates. Magistrates in regional areas also sit as Children's Court magistrates in their regions.
- 3.13 There are two metropolitan venues for the Children's Court: Melbourne and Moorabbin. The Children's Court sits at Melbourne every day for criminal proceedings and Family Division cases. Since June 2009, the Children's Court has been sitting at the Moorabbin Justice Centre to hear protection applications from the Department's southern region.²²
- 3.14 The Children's Court also sits in 38 different courts in the following regions: the Grampians, Loddon Mallee, Barwon South West, Gippsland and Hume. If a regional magistrate needs assistance with a Family Division hearing of several days' duration, a Melbourne Children's Court magistrate will travel to the region for the hearing.²³
- 3.15 The Children's Court of Victoria is a busy state court: in 2008–09 the Family Division heard over 10 000 applications relating to child protection matters, and over 13 000 matters were initiated in the Criminal Division.²⁴

THE DEPARTMENT OF HUMAN SERVICES—CHILD PROTECTION SERVICE

- 3.16 The Child Protection Service operates within the Children, Youth and Families Division of the Department of Human Services. It is responsible for responding to reports about children who may be the subject of abuse. The Secretary holds the most senior executive position within the Department and has numerous powers and functions under the CYF Act 2005. Most of these powers and functions have been delegated to employees or classes of employees under section 17 of the Act.²⁵ Throughout this report, when referring to powers and responsibilities of the Secretary and his or her delegates under the Act, we use the terms 'Secretary', 'Child Protection', 'the Department', 'the Department of Human Services' and 'DHS'.
- 3.17 The Child Protection Service is managed through eight separate regions (three metropolitan regions and five rural regions)²⁶ and one central office. Each region is responsible for delivering a full range of child protection services, from receiving reports and referrals through to applying for and managing court orders.
- 3.18 The Child Protection Service also includes the statewide After Hours Child Protection Emergency Service, which responds to reports of child abuse and neglect out of business hours, and the Streetwork Outreach Service, which provides an outreach service to young people engaged in high risk activities in St Kilda and Melbourne's central business district.
- 3.19 A court officer role (classified as a child protection worker at team leader level) has been introduced in some regions to assist child protection practitioners to prepare for court and to attend court on behalf of the child protection practitioner.²⁷ There are currently six court officer roles throughout the state, based mainly in metropolitan areas.²⁸

The role of protective intervener

3.20 People classed as ‘protective interveners’ may bring a protection application to court and, in certain circumstances, have the power to apprehend a child without parental consent.²⁹ Protective interveners are the Secretary and all members of the police force.³⁰ In practice, police do not bring applications in the Children’s Court as protective interveners. The Secretary has delegated the power to be a protective intervener, with the exception of bringing appeals,³¹ to employees holding a range of positions in the Department including child protection staff at various levels.³² A description of Child Protection roles, classifications and teams is set out in Appendix G.

CHILDREN, PARENTS AND OTHER PARTIES WITH A DIRECT INTEREST IN PROCEEDINGS

- 3.21 Children who are the subject of protection applications are named in those applications. From the age of 12 years, they receive their own copies of court applications, as do their parents.³³ Children do not have the legal status of being a party to a protection application. Children considered mature enough to give instructions to a lawyer are legally represented. Guidelines suggest that children from about the age of seven years generally have sufficient capacity to instruct a lawyer.³⁴
- 3.22 Approximately 45 per cent of children who are the subject of protection applications are of or above seven years old.³⁵ For the 55 per cent who are less than seven years old, separate legal representation is provided only in exceptional circumstances.³⁶
- 3.23 Parents are provided with rights to legal representation under the Act and are usually eligible for grants of legal aid in protection proceedings.³⁷ In addition, people who are considered to have a ‘direct interest in the proceeding’ (for example, proposed carers and foster carers), have specified rights to appear in court.³⁸ The Attorney-General also has the power to appear in protection applications.³⁹

- 21 Two of the magistrates sit at Moorabbin. It is the Commission’s understanding that due to recent retirement, there are currently only 11 sitting judicial officers. The Commission also understands that the Court has been given an allocation in the recent 2010 budget for one additional magistrate. This would bring the total number of judicial officers allocated to the Children’s Court to 13.
- 22 Provided these cases do not require the additional security only available at the Melbourne Children’s Court.
- 23 Submission 46 (Children’s Court of Victoria) 16.
- 24 Boston Consulting Group, *Child Protection Proceedings Taskforce: Children’s Court Data* (2010) 3; Children’s Court of Victoria, *Annual Report*, above n 3, 14: Criminal Division statistics include the Divisions with criminal law jurisdiction; Michael King et al, *Non-Adversarial Justice* (2009) 257.
- 25 By instrument signed by the Secretary on 29 August 2009.
- 26 See Appendix F for list of Child Protection regions and offices.
- 27 It has been suggested that this court officer role followed from a recommendation by the Boston Consulting Group, in their 2007 review of the Children’s Court, to pilot a regional court liaison officer (court officer) model: Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 54–5.
- 28 This includes two officers in the NW Metro region, two in Eastern Metro, one in Southern Metro and one in the Gippsland region.
- 29 *Children, Youth and Families Act 2005* (Vic) s 240.
- 30 *Children, Youth and Families Act 2005* (Vic) s 181.
- 31 Instrument of Delegation, signed 26 August 2009, 117. Copy provided by email from the Department of Human Services on 24 March 2010.
- 32 This includes level 2 child protection workers—the entry level for child protection practitioners who have case management responsibility. See Department of Human Services (Victoria), *Protecting Victoria’s Children: Child Protection Practice Manual*, ‘Child Protection Workforce: Structure and Roles’, Advice No 1043 (23 April 2007), from CD-ROM provided at 23 March 2010.
- 33 *Children, Youth and Families Act 2005* (Vic) ss 242(1)(a), 243(2)(c).
- 34 *Children, Youth and Families Act 2005* (Vic) s 524; Springvale Legal Service, *Lawyers Practice Manual Victoria* (2009) [6.2.3010].
- 35 Statistics provided by the Children’s Court of Victoria on 9 March 2010. The Children’s Court of Victoria has gathered statistics on the age of children on protection applications filed at Melbourne and Moorabbin Children’s Courts. Of the 1674 primary applications filed in metropolitan Melbourne in 2008–09, 49 per cent of children were under the age of seven.
- 36 *Children, Youth and Families Act 2005* (Vic) s 524(4).
- 37 This is discussed in greater detail below.
- 38 *Children, Youth and Families Act 2005* (Vic) s 522(1)(c).
- 39 *Children, Youth and Families Act 2005* (Vic) s 215(2).

VICTORIA LEGAL AID

3.24 Victoria Legal Aid (VLA) is an independent statutory authority established under the *Legal Aid Act 1978 (Vic)*. VLA provides funding for parents and children in Children's Court proceedings if they satisfy a means and merits test.⁴⁰ Funding is subject to limits set out in the *Victoria Legal Aid Grants Handbook*. Both lawyers employed directly by the Youth Legal Service of VLA and private lawyers who are on a VLA-approved panel represent people in Family Division cases.

CHILDREN'S COURT CLINIC

3.25 The Children's Court Clinic, located at the Melbourne Children's Court, is maintained by the Secretary to the Department of Justice pursuant to section 546 of the CYF Act 2005. The Children's Court Clinic 'may make clinical assessments of children; submit reports to courts and other bodies and provide clinical services to children and their families'.⁴¹ The Director of the Clinic employs a limited number of clinicians and also engages a number of private sector clinicians on a sessional basis.

3.26 The Court may request Clinic reports (called 'additional reports') under section 560 of the CYF Act 2005. In 2008–09, the Court referred 712 child protection cases to the Clinic for assessment. The Children's Court states:

*The most usual type of referral from the Family Division is for an assessment of child and family functioning, often including assessment of bonding and attachment. The Clinic also makes recommendations to the Court about what should happen in the child's best interests. Another common referral is to assist the Court in determining whether a child is mature enough to provide instructions to a legal representative.*⁴²

3.27 A Clinic assessment is not usually ordered at an early stage of proceedings unless parties agree. A Clinic assessment *may* provide recommendations on disposition or outcomes that differ from those recommended by the Department.

3.28 In consultations, the Commission heard that the Court was often inclined to prefer Clinic recommendations to those made by Child Protection. As noted in Chapter 1, the Clinic's role and operations are the subject of a separate review by the Department of Justice.

ABORIGINAL AGENCIES

3.29 The Victorian Aboriginal Child Care Agency (VACCA) and the Mildura Aboriginal Corporation (MAC) are Aboriginal organisations that deliver child and family welfare services to Aboriginal communities within Victoria. A protocol between the DHS Child Protection Service and VACCA—together with an agreement between Child Protection and MAC⁴³—established a culturally informed consultation process to respond to reports concerning Aboriginal children at risk of harm.

3.30 The protocol established the Aboriginal Child Specialist Advice and Support Service (ACSASS), which commenced operation in 2002 under the management of VACCA and MAC. ACSASS workers strive to:

- ensure an Aboriginal perspective in risk and safety assessments of Aboriginal children
- develop case planning and decision making for Aboriginal children
- improve engagement of Aboriginal families with support services
- increase the involvement of family and community members in supporting Aboriginal children.⁴⁴

3.31 Section 18 of the CYF Act 2005 enables the Secretary to delegate some functions and powers in relation to Aboriginal children to the principal officer of Aboriginal agencies. To date, there has been no delegation by the Secretary. The Commission understands, however, that the Department and Aboriginal agencies are currently negotiating how Aboriginal agencies may have custody and guardianship responsibilities for Aboriginal children on protection orders.

VICTORIA POLICE

3.32 Victoria Police and Child Protection Service are sometimes jointly involved in particular cases. A protocol established in 1992 under the previous legislation still governs the relationship between the services.⁴⁵ The protocol acknowledges that the *Children and Young Persons Act 1989* (Vic) (CYP Act 1989), like the current CYF Act 2005, authorises the police to issue a protection application and take a child into safe custody. It has been agreed that

*Police will only do so when there is an emergency response required or the child is at imminent risk of significant harm. A protection application will be initiated by Child Protection while arrangements for the child or young person to be taken into safe custody will be organised with the Police.*⁴⁶

3.33 Child Protection must report all new allegations of sexual abuse, physical abuse or serious neglect, in new and existing cases, to Victoria Police.⁴⁷ In these cases, Child Protection may investigate child abuse reports jointly with the Sexual Offences and Child Abuse Unit (SOCAU) of Victoria Police. More recently, two multi-disciplinary SOCIT (Sexual Offences and Child Abuse Investigation Team) services have been established in Frankston and Mildura. SOCIT co-locates child protection practitioners, police officers and sexual assault and abuse counsellors in a service to better coordinate professional responses to investigations about serious abuse.

3.34 Joint visits between Child Protection and police may also occur where there are concerns for the safety of a child protection practitioner or a warrant needs to be executed. In 2008–09, a warrant was obtained in nine per cent of the cases in which Child Protection took a child into safe custody.

THE ROLE OF CHILD PROTECTION IN BRINGING PROTECTION APPLICATIONS TO COURT

REFERRALS AND REPORTS RELATING TO CONCERNS ABOUT A CHILD

3.35 Professionals, including mandatory reporters, and members of the public report concerns about children by directly reporting to Child Protection⁴⁸ or by a referral to Child FIRST⁴⁹—the intake service for community-based child and family services.

Reports (including mandatory reporters)

3.36 Any person who has significant concern about the wellbeing of a child may make a report directly to Child Protection.⁵⁰ A report may also be made before a child is born.⁵¹ Certain professionals, including doctors, nurses, principals, teachers and police officers are classified as ‘mandatory reporters’.⁵² The legislation sets out people in other occupations—including psychologists and post-secondary qualified workers in childcare, youth work, social work and welfare work—who will be classed as mandatory reporters from a particular date or dates that have not yet been set.⁵³

40 See Appendix M for details about Victoria Legal Aid grants for representation in the Family Division of the Children’s Court.

41 *Children, Youth and Families Act 2005* (Vic) s 546(2).

42 Submission 46 (Children’s Court of Victoria) 21.

43 Department of Human Services (Victoria), *Protocol between the Department of Human Services Child Protection Service and the Victoria Aboriginal Child Care Agency* (2002); Department of Human Services (Victoria), *Protocol between the Department of Human Services and Victoria Police* (1992) 25. The Commission understands that this protocol came into effect on 25 August 1998 and is currently in the process of being updated by DHS and Victoria Police.

44 Department of Human Services (Victoria), *Protecting Victoria’s Children: Child Protection Practice Manual*, ‘Responding to Aboriginal Children’, Advice No 1059 (21 August 2007) from CD-ROM provided at 23 March 2010, 235.

45 Department of Human Services (Victoria), *Protecting Victoria’s Children: Child Protection Practice Manual*, ‘Joint Visits with the Police’, Advice No 1184 (23 April 2007) from CD-ROM provided at 23 March 2010.

46 Department of Human Services (Victoria), *Protocol between the Department of Human Services and Victoria Police*, above n 43, 25.

47 Department of Human Services (Victoria), ‘Joint Visits with the Police’, above n 45.

48 *Children, Youth and Families Act 2005* (Vic) s 28.

49 *Children, Youth and Families Act 2005* (Vic) ss 31–2.

50 *Children, Youth and Families Act 2005* (Vic) s 28.

51 *Children, Youth and Families Act 2005* (Vic) s 29.

52 *Children, Youth and Families Act 2005* (Vic) s 182.

53 *Children, Youth and Families Act 2005* (Vic) s 182(1)(e)–(l), (2)–(3).

- 3.37 Mandatory reporters must report concerns that a child is in need of protection from physical or sexual abuse⁵⁴ and may report concerns that a child is in need of protection on any other grounds, such as a concern about emotional abuse or neglect.⁵⁵ Reports made in good faith do not constitute unprofessional conduct or a breach of professional ethics by the person making the report.⁵⁶
- 3.38 A report may be classified as a 'protective intervention report' if a child protection practitioner considers the child in need of protection.⁵⁷ This classification has implications for how the case progresses through the child protection system and is discussed below. Otherwise, the Secretary or his or her delegate may provide advice to the person who made the report, provide advice and assistance to the child, mother of an unborn child or family, or refer the matter to a community-based service.⁵⁸

Referral to Child FIRST (Child and Family Information, Referral and Support Teams)

- 3.39 Child FIRST operates from 25 sites⁵⁹ across the Victorian regions as the intake service for referrals to community-based child and family services under section 31 of the CYF Act 2005. After receiving a referral from a person with concerns about the wellbeing and safety of a child, Child FIRST must report the matter to Child Protection if they consider the child in need of protection. Alternatively, they may provide advice to the person who made the report, provide advice and assistance to the child, mother of unborn child or family, or refer the matter to a community-based service.⁶⁰ In addition, if the referral relates to concerns for an unborn child, Child FIRST or the community-based service may seek advice from Child Protection.⁶¹

PRINCIPLES APPLIED BY CHILD PROTECTION

- 3.40 Child protection practitioners and community service providers must act compatibly with the Charter in deciding upon appropriate action or when making a decision about a child. The relevance of the Charter to child protection work is discussed below.
- 3.41 The Secretary and his or her delegates must consider a number of best interests and decision-making principles when making any decision or taking any action in relation to children.⁶² There are additional decision-making principles for Aboriginal children.⁶³ These principles also apply to community organisations that provide services to children under the CYF Act 2005.⁶⁴ The principles operate from the time of the first report until case closure. If a matter goes to court, child protection workers will be required to demonstrate that they have considered these principles in actions and decisions taken in relation to a child. The principles are summarised below and are set out in full in Appendix I.

Best interests principles

- 3.42 Section 10(1) of the CYF Act 2005 requires the Secretary, community service providers and the Court to consider the child's best interests as the paramount consideration when making any decision or taking any action.⁶⁵ In deciding what is in a child's best interests, it is necessary to consider the need:
- to protect the child from harm
 - to protect the child's rights
 - to promote the child's development (taking into account his or her age and stage of development).⁶⁶

3.43 Practitioners also need to consider, where relevant, an additional 17 matters listed in section 10(3) of the CYF Act 2005, as well as 'any other relevant consideration'.⁶⁷ Eight of the considerations under section 10(3) relate to promoting and supporting the family, with intervention into the family relationship being limited to that necessary to secure the safety and wellbeing of the child.⁶⁸ Other matters include:

- protecting and promoting the Aboriginal culture of an Aboriginal child
- the child's views and wishes
- the effects of cumulative harm
- desirability of stable care
- the child's unique identity
- maintaining a connection to culture
- social, educational, health and housing support for the child
- desirability of uninterrupted education or employment for the child and the possible harmful effects of delay in taking action.⁶⁹

3.44 The complete list of best interests principles in section 10 is set out in Appendix I.

Decision-making principles

3.45 Section 11 of the CYF Act 2005 requires the Secretary or a community service, but not the Court, to consider nine decision-making principles when making a decision or taking an action in relation to a child. These decision-making principles emphasise:

- supporting and assisting parents
- consulting out-of-home caregivers
- fairness and transparency
- collaboration and consensus where possible
- family participation
- understandable processes and meetings
- access to support and information (including provision of interpreters where necessary, provision of copies of case plans and notices of meetings and the opportunity to involve support persons)
- where relevant, the attendance at meetings by a person from the child's cultural community as chosen or agreed by the child or parents.

3.46 The complete list of decision-making principles in section 11 is set out in Appendix I.

Additional decision-making principles for Aboriginal children

3.47 Section 12 of the CYF Act 2005 requires the Secretary or a community service, but not the Court, to consider particular principles when making a decision about an Aboriginal child in recognition of the principle of Aboriginal self-management and self-determination.⁷⁰ There are three broad principles:

- Members of the child's Aboriginal community and other respected Aboriginal people should be given an opportunity, where relevant, to contribute their views.⁷¹

54 *Children, Youth and Families Act 2005* (Vic) s 184.

55 *Children, Youth and Families Act 2005* (Vic) s 183.

56 *Children, Youth and Families Act 2005* (Vic) s 189(a). Section 189 also provides other protections for people making reports in good faith.

57 *Children, Youth and Families Act 2005* (Vic) s 34. Note that a report on an unborn child under s 29 may not be classified as a 'protective intervention report'.

58 *Children, Youth and Families Act 2005* (Vic) s 30.

59 Department of Human Services (Victoria), *How to Make a Referral or Report* (2009) <www.cyf.vic.gov.au/family-services/how-to-make-a-referral-or-report/first-children> at 19 January 2010.

60 *Children, Youth and Families Act 2005* (Vic) s 33.

61 *Children, Youth and Families Act 2005* (Vic) s 33(3)(a).

62 *Children, Youth and Families Act 2005* (Vic) ss 8(2), 10–11.

63 *Children, Youth and Families Act 2005* (Vic) ss 12–14.

64 *Children, Youth and Families Act 2005* (Vic) s 8(3).

65 Read with s 8 of the *Children, Youth and Families Act 2005* (Vic).

66 *Children, Youth and Families Act 2005* (Vic) s 10(2).

67 *Children, Youth and Families Act 2005* (Vic) s 10(3)(r). For the full list of best interests principles, see Appendix I.

68 *Children, Youth and Families Act 2005* (Vic) s 10(3)(a)–(b), (g)–(k), (q).

69 *Children, Youth and Families Act 2005* (Vic) s 10(3)(c)–(f), (l)–(p).

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

71 *Children, Youth and Families Act 2005* (Vic) s 12(1)(a).

- For a decision in relation to placement of an Aboriginal child and for all significant decisions, a meeting convened by an approved Aboriginal convenor should be held and, where possible, attended by the child, the child's parents and extended family, and other appropriate members of the Aboriginal community as determined by the child's parents.⁷² This process is known as Aboriginal Family Decision Making (AFDM).
- For out-of-home care decisions, except voluntary child care agreements, an Aboriginal agency⁷³ must be consulted and the Aboriginal Child Placement Principle must be applied.⁷⁴

Aboriginal Child Placement Principle

3.48 The Aboriginal Child Placement Principle in section 13 of the CYF Act 2005 is not limited to the Secretary and community services, but has broad application under the Act. If it is in an Aboriginal child's best interests⁷⁵ to be placed in out-of-home care, the following must be considered:

- the advice of the relevant Aboriginal agency, except if the decision concerns a voluntary child care agreement⁷⁶
- the criteria set out in section 13(2) and the principles in section 14.

3.49 Both the section 13(2) criteria and the section 14 principles emphasise the need to ensure that the child maintains the closest possible connection to his or her Aboriginal family, community and culture if placement within the child's Aboriginal extended family is not possible.

3.50 Sections 12, 13 and 14 of the Act are set out in Appendix I.

PHASES OF CHILD PROTECTION PROCESSES

3.51 There are five phases of Child Protection processes: intake, investigation, protective intervention, protection order and case closure. The first three phases are described in this chapter to illustrate the circumstances in which some cases progress to court.

Phase one: Intake—is the report a 'protective intervention report'?

3.52 All new Child Protection work, including fresh reports about previously reported children, begins with intake.⁷⁷ Intake involves gathering and clarifying information about the nature and seriousness of concerns. If the child is Aboriginal, intake responsibilities include consulting with the ACSASS.⁷⁸ Intake can include contacting agencies, services and professionals who may be involved with the family to assess information received.

3.53 Intake involves making an assessment about whether a report is a 'protective intervention report', where a child protection practitioner considers a child in need of protection.⁷⁹ For a report that does not meet this classification, the intake worker will provide advice or referral to Child FIRST or another relevant service, and close the file.

3.54 If a matter is assessed as a protective intervention report, the protective worker will decide whether the report is urgent or non-urgent. If a report contains clear information that a child is likely to be at risk of significant harm, the report will be classified as urgent. The case will then progress to the investigation and assessment phase to enable a visit within two days. If the report is not considered urgent, the case will progress to the next phase to enable a visit within 14 days.

Phase two: Investigation and assessment—is harm substantiated?

- 3.55 During this phase, the child protection worker will assess whether the child is in need of protection under section 162 of the CYF Act 2005, ensure the immediate safety of the child and siblings, and assess the level of any cumulative harm to the child by checking any previous reports. A protective intervener must investigate the case in a way that will be in the child's best interests.⁸⁰
- 3.56 A child protection practitioner is required to attempt a visit with parents and children as early as possible in this phase.⁸¹ This phase should be concluded within 28 days.
- 3.57 At this stage, the child protection worker decides whether harm to the child's safety, stability and development is substantiated, and what further intervention is required. If a matter is not substantiated, but there are still significant concerns for the child's wellbeing, information, advice and referral assistance may be provided. If there are no concerns and the matter is not substantiated, the case is closed.
- 3.58 If a matter is substantiated, the child protection worker may consider filing a protection application. Under the CYF Act 2005, a child protection practitioner exercises a broad discretion about whether to initiate a protection application. Section 240 states that if a protective intervener is satisfied on reasonable grounds that a child is in need of protection, he or she may initiate proceedings.⁸²
- 3.59 The Child Protection Practice Manual provides guidance to child protection practitioners about the discretion to initiate proceedings. A protection worker is to bring a protection application before the Children's Court where:
- alleged harm to a child is substantiated
 - a child is assessed as being '*at significant risk of harm*' and is in need of protection'⁸³ (italics added).
- 3.60 Under section 162, a child can be considered 'in need of protection' as a result of suffering past significant harm, without this necessarily involving a risk of future harm.⁸⁴ The Child Protection Practice Manual requires the child protection practitioner to assess whether the child is at risk of future harm before bringing a protection application.⁸⁵
- 3.61 In 2008–09, of the 6344 reports in which harm to the child's safety, stability and development was considered substantiated by Child Protection, 3048 protection applications were filed in court.⁸⁶

Phase three: Protection intervention—best interests plan formulated and risk assessment

- 3.62 This phase involves working with families and other agencies where harm to a child has been substantiated in the investigation and assessment phases. It involves cases that have progressed to court with a protection application and those that have not. A child protection application will not have been made if future risk of harm to a child has not yet been assessed.⁸⁷

Best interests plans

- 3.63 In cases where a protection application has not been made, the child protection practitioner seeks to work intensively with the family and assess the capacity of parents to protect the child in the future and meet his or her safety, stability and developmental needs. The practitioner seeks to engage the family in developing a best interests plan to address protective concerns. Plans are to be developed following principles of collaboration and participation set out in section 11 of the CYF Act 2005.

- 72 *Children, Youth and Families Act 2005* (Vic) s 12(1)(b).
- 73 An 'Aboriginal agency' is one declared by Order of the Governor in Council under s 6 of the *Children, Youth and Families Act 2005* (Vic). Aboriginal agencies include Victorian Aboriginal Child Care Agency (VACCA).
- 74 *Children, Youth and Families Act 2005* (Vic) s 12(1)(c), (2).
- 75 'Aboriginal person' is defined under s 3(1) of the *Children, Youth and Families Act 2005* (Vic) as a person who is descended from an Aborigine or Torres Strait Islander, and identifies as an Aborigine or Torres Strait Islander and is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community.
- 76 *Children, Youth and Families Act 2005* (Vic) s 13(1)(a), (3).
- 77 Reports are made pursuant to ss 183–4 of the *Children, Youth and Families Act 2005* (Vic). For intake processes, see Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition and Purpose of Intake Phase', Advice No 1119 (23 April 2007), from CD-ROM provided at 23 March 2010. See also Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition and Purpose of Investigation and Assessment Phase', Advice No 1171 (23 April 2007), from CD-ROM provided at 23 March 2010.
- 78 Department of Human Services (Victoria), 'Definition and Purpose of Intake Phase', above n 77.
- 79 *Children, Youth and Families Act 2005* (Vic) ss 3, 34, 187.
- 80 *Children, Youth and Families Act 2005* (Vic) s 205.
- 81 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Investigation: Planning and Preparation', Advice No 1182 (23 April 2007), from CD-ROM provided at 23 March 2010.
- 82 *Children, Youth and Families Act 2005* (Vic) s 240.
- 83 Department of Human Services (Victoria), 'Investigation: Planning and Preparation', above n 81.
- 84 *Children, Youth and Families Act 2005* (Vic) s 161(1)(c)–(f) and see discussion below under the heading 'Grounds for determining that a child is in need of protection'.
- 85 Department of Human Services (Victoria), 'Investigation: Planning and Preparation', above n 81.
- 86 Children's Court of Victoria, *Annual Report*, above n 3, 20.
- 87 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition and Purpose of Protective Intervention and Assessment Phase', Advice No 1224 (23 April 2007), from CD-ROM provided at 23 March 2010, 284.

- 3.64 For Aboriginal children, the principles in section 12 of the CYF Act 2005 apply and ACSASS is to be consulted. Under section 12(1)(b) of the Act, significant decisions in relation to an Aboriginal child 'should involve a meeting convened by an Aboriginal convener'. The Child Protection Practice Manual suggests that an AFDM can take place at this stage of protective intervention.⁸⁸ The Commission heard that AFDM conferences did not take place for many Aboriginal children during this period of DHS's involvement.⁸⁹
- 3.65 In some regions, family decision making or family group conferencing (FGC) for children other than Aboriginal children sometimes take place at an early stage.⁹⁰
- 3.66 The best interests plan contains details of all significant planning decisions and actions. The plan should:
- outline evidence of harm or risk of harm to the child
 - make Child Protection's ongoing review and assessment clear
 - identify any additional assessments that may be required
 - identify immediate goals to determine parental strengths and capacity
 - indicate how Child Protection will support the family.⁹¹

The plan is completed in the client information system and must be endorsed by the unit manager. The child protection practitioner then monitors the best interests plan and works toward assigning a level of risk to the child.

Assigning a level of risk to the child

- 3.67 At the end of the protective intervention phase, the practitioner will assign a risk level of either 'no further risk of significant harm' or 'risk of significant harm—child in need of protection'. With a 'no further risk of significant harm' classification, the protection worker will make referrals as appropriate and close the case. With a 'risk of significant harm—child in need of protection' classification, a protection application must be issued.⁹²
- 3.68 The maximum timeframe for protective intervention without a protection application is 90 days from initial receipt of the report, unless a unit manager approves an extension for a further 60 days. After 150 days, a unit manager must decide whether to close and refer the case to other services or issue a protection application. In 2008–09, in 38 per cent of protection applications initiated by the removal of the child (safe custody), Child Protection had been working with the family for 30 or more days.⁹³

CHILD CARE AGREEMENTS

- 3.69 The CYF Act 2005 provides for child care agreements. Through these agreements, arrangements are made for placing children in out-of-home care without a court order.⁹⁴ These agreements are often referred to as 'voluntary placements' or 'voluntary agreements'. Child care agreements are either short-term or long-term written agreements between a parent and service provider—a community service organisation, disability service or Child Protection—to place a child in the care of a service provider or suitable person.

3.70 In 2009, 771 child care agreements were made.⁹⁵ However, Child Protection do not generally consider child care agreements appropriate during a protective investigation. The Child Protection Practice Manual states that voluntary placements are ‘generally inappropriate where children require immediate removal from home ... and do not offer sufficient protection where children are at significant risk from a parent’s actions’.⁹⁶

3.71 The Lawyers Practice Manual takes a very negative view of these voluntary agreements, advising lawyers that these

voluntary agreements can be extremely intrusive ... [and are] often presented to parents in a way which suggests the parents have no alternative but to agree to the proposals. Very often the agreements are considerably more adverse for families than what the Children’s Court would have ordered had the matters been the subject of court applications.

*If the Department of Human Services proposes that any family members be kept apart from other family members or proposes an expert assessment of any family members, then you should advise your clients not to agree. You should advise your clients to force the department to decide whether it wishes to apply to the Children’s Court for orders.*⁹⁷

PROTECTION (AND OTHER) APPLICATIONS IN THE CHILDREN’S COURT

PRIMARY APPLICATIONS

3.72 The Children’s Court hears and determines five types of primary applications concerning the protection of children: protection applications, irreconcilable difference applications, permanent care applications, temporary assessment applications and therapeutic treatment order applications. In 2008–09, there were 3048 primary applications filed in the Children’s Court.⁹⁸ For an outline of each type of primary application, see Appendix H.

Protection application

3.73 The most common primary application is the protection application. In these cases, a child protection worker may bring an application if the practitioner considers, on reasonable grounds, that a child is in need of protection.⁹⁹ Child protection practitioners initiate proceedings if they consider that a court order is required to protect a child. In 2008–09, there were 3034 protection applications initiated by the Child Protection Service, out of a total 3048 primary applications.¹⁰⁰

3.74 If the Court finds that a child is in need of protection,¹⁰¹ often referred to as ‘proof’ of the protection application,¹⁰² the Court may make one of the following protection orders if certain pre-conditions are satisfied:

- an undertaking under section 278 of the Act
- a supervision order
- a custody to third party order
- a supervised custody order
- a custody to Secretary order
- a guardianship to Secretary order
- a long-term guardianship to Secretary order
- an interim protection order.

The range of protection orders, also called dispositions, is discussed in detail below.

88 Ibid 286.

89 Consultations 11 (FCLC), 27 (FVPLS Victoria).

90 Information provided to the Commission from a family group conference convened by the Department of Human Services in the Eastern region.

91 Department of Human Services (Victoria), *Protecting Victoria’s Children: Child Protection Practice Manual*, ‘Planning in Best Interests Case Practice’, Advice No 1282 (17 July 2008), from CD-ROM provided at 23 March 2010, 87.

92 Department of Human Services (Victoria), ‘Definition and Purpose of Protective Intervention and Assessment Phase’, above n 87, 286.

93 *Boston Consulting Group, Child Protection Proceedings Taskforce*, above n 24, 25. In 25 per cent of the protection applications initiated by safe custody, that is, removal of the child from the home, Child Protection had been working with the family for 70 or more days.

94 Child care agreements are described in pt 3.5 of the *Children Youth and Families Act 2005* (Vic).

95 Department of Human Services (Victoria), *Placement and Support: Children, Youth and Families Act 2005 Child Care Agreements* (2010) <www.cyf.vic.gov.au/placement-support/home/children-youth-and-families-act-2005-child-care-agreements> at 19 January 2010.

96 Department of Human Services (Victoria), *Protecting Victoria’s Children: Child Protection Practice Manual*, ‘Voluntary Placements’, Advice No 1531 (23 April 2007), from CD-ROM provided at 23 March 2010.

97 Springvale Legal Service, above n 34, [6.2.102A].

98 Children’s Court of Victoria, *Annual Report*, above n 3, 20–1.

99 *Children, Youth and Families Act 2005* (Vic) ss 240, 181. Members of Victoria Police may also initiate protection applications but in practice the Department has this function: Department of Human Services (Victoria), *Protocol between the Department of Human Services and Victoria Police*, above n 43.

100 Children’s Court of Victoria, *Annual Report*, above n 3, 20–1.

101 *Children, Youth and Families Act 2005* (Vic) s 274. Grounds for finding that a child is in need of care and protection are discussed below under the heading ‘Grounds for determining that a child is in need of protection’. Irreconcilable difference applications are found proven if ‘there is a substantial and irreconcilable difference between the person who has custody of the child and the child to such an extent that the care and control of the child are likely to be seriously disrupted’: s 274(b). The orders that the Court may make for protection applications are also available for irreconcilable difference applications.

102 This is also referred to as ‘establishment’ in other jurisdictions.

SECONDARY APPLICATIONS

- 3.75 Once a primary application has been initiated, further secondary applications may be made either before or after a protection application is made. Secondary applications include the following:
- Interim accommodation order (IAO) applications, both original and new.¹⁰³ These relate to placement of a child pending determination of the primary application.
 - Applications for revocation, variation, extension or breach of various protection orders.¹⁰⁴
 - Applications by joint custodians or guardians of a child regarding the exercise of any right, power or duty.¹⁰⁵ This could arise if there is a dispute between two people with custody and guardianship of a child under a permanent care order who cannot agree on an important decision concerning the child.
 - Applications regarding interstate orders.¹⁰⁶
 - Application for therapeutic treatment (placement) order.¹⁰⁷ This concerns the placement of a child, if necessary, where the court makes a therapeutic treatment order.
- 3.76 Excluding initial IAO applications, the Court dealt with 6866 secondary applications in 2008–09.¹⁰⁸

GROUND FOR DETERMINING THAT A CHILD IS IN NEED OF PROTECTION

- 3.77 Section 162 of the CYF Act 2005 contains six grounds for finding that a child is in need of protection:
- (1) *For the purposes of this Act a child is in need of protection if any of the following grounds exist—*
 - (a) *the child has been abandoned by his or her parents and after reasonable inquiries—*
 - (i) *the parents cannot be found; and*
 - (ii) *no other suitable person can be found who is willing and able to care for the child;*
 - (b) *the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;*
 - (c) *the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;*
 - (d) *the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;*
 - (e) *the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;*

(f) *the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.*

(2) *For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.*¹⁰⁹

- 3.78 The first two grounds in section 162(1) concern situations where there is no suitable carer for the child following the abandonment of the child or death or incapacity of the parents or carers.¹¹⁰ The remaining four grounds concern situations where a parent or caregiver is unlikely to or has failed to protect the child from certain specified harm. The harms are categorised as physical harm; sexual harm; emotional or psychological harm; and harm to physical development or health. This last harm is often used in cases of serious neglect. Any of these four grounds may be proved on the basis of actual harm or likelihood of harm, or both. The Court states that '[n]early all of the protection applications that come before the Court' are brought on one of the latter four grounds.¹¹¹
- 3.79 The harm caused or considered likely to occur must be 'significant'¹¹² or be of a kind that has resulted in or may result in 'significant damage'.¹¹³ The term 'significant' was interpreted in a similar provision in the previous Act by a Supreme Court judge as meaning, "'important" or "of consequence" to the child's emotional or intellectual development' and need not require proof of some lasting or permanent effect.¹¹⁴
- 3.80 In deciding whether significant harm is 'likely', the Court interprets likelihood as whether there is a 'real possibility that cannot sensibly be ignored having regard to the nature and the gravity of the feared harm in the particular case'.¹¹⁵
- 3.81 The harm need not relate to a single instance. It may be harm that has accumulated through 'a series of acts, omissions or circumstances',¹¹⁶ otherwise known as cumulative harm. Cumulative harm is not a separate ground for finding that a child is in need of protection but a concept of harm that encompasses 'multiple adverse circumstances and events in a child's life'.¹¹⁷

TWO PATHWAYS TO COMMENCE PROTECTION APPLICATION PROCEEDINGS

INTRODUCTION

- 3.82 Proceedings commence in the Children's Court through two separate pathways, known as protection applications 'by notice' and 'by safe custody' or apprehension.¹¹⁸ In 2008–09, 78 per cent of the protection applications filed in the Melbourne Children's Court were commenced by safe custody, and in regional Victoria, 48 per cent of protection applications were commenced by safe custody.¹¹⁹ In both pathways, a protective intervener, who is generally a child protection worker,¹²⁰ needs to be satisfied on reasonable grounds that a child is in need of protection as defined by section 162 of the CYF Act 2005.¹²¹
- 3.83 Although each pathway offers very different entries into the Children's Court system (in one case the child is involuntarily removed from their parents and in the other case the child is not), the legislation provides little guidance about which procedure to adopt.

103 *Children, Youth and Families Act 2005* (Vic) ss 515(1)(a), 262, 270.

104 *Children, Youth and Families Act 2005* (Vic) ss 515(1), 255–258, 273, 279, 293, 303, 311.

105 *Children, Youth and Families Act 2005* (Vic) ss 515(1)(n), 283(3), 325.

106 *Children, Youth and Families Act 2005* (Vic) s 515(1)(o), sch 1.

107 *Children, Youth and Families Act 2005* (Vic) ss 515(1)(f), 252. See also Appendix H.

108 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 24, 7. It appears that 241 permanent care orders in cases in 2008–09 were categorised as secondary applications. Although permanent care applications are technically primary applications, when an application for permanent care follows on from other orders it appears to be considered as a secondary application. For instance the Children's Court documents five permanent care orders as finalised primary applications for 2008–09, out of a total of 233 permanent care orders for the same period: *Children's Court of Victoria, Annual Report*, above n 3, 19, 22.

109 *Children, Youth and Families Act 2005* (Vic) s 162.

110 *Children, Youth and Families Act 2005* (Vic) s 162(1)–(2). 'Parent' is broadly defined in s 3 of the Act.

111 Submission 46 (Children's Court of Victoria) 18.

112 *Children, Youth and Families Act 2005* (Vic) s 162(1)(c)–(d), (f).

113 *Children, Youth and Families Act 2005* (Vic) s 162(1)(e).

114 *Director-General of Community Services Victoria v Buckley & Ors* (Unreported, Supreme Court of Victoria, O'Bryan J, 11 December 1992) [5].

115 See, for example, *DOHS v Mr K and Ms D* (Unreported, Children's Court of Victoria, Magistrate Power, 15 June 2009) [17]–[18] in reliance on the English authority of *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

116 *Children, Youth and Families Act 2005* (Vic) s 162(2).

117 Leah Bromfield and Robyn Miller, *Specialist Practice Guide: Cumulative Harm* (2007).

118 *Children, Youth and Families Act 2005* (Vic) s 240. For a diagram of current commencement proceedings and outline of court process see Appendix J.

119 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 24, 2.

120 *Children, Youth and Families Act 2005* (Vic) s 181 defines protective interveners as the Secretary and all members of the police force. The Secretary has delegated his or her powers to classes of employees and most protective interveners are child protection workers.

121 *Children, Youth and Families Act 2005* (Vic) s 240.

- 3.84 Section 241(1) states that if it is 'inappropriate' to make an application by notice, the protective intervener may take the child into safe custody, either with or without a warrant.¹²² While the best interests and decision-making principles must be considered, the most directly applicable best interests principle lies in section 10(3)(g) of the Act: 'that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child'.
- 3.85 The Child Protection Practice Manual advises child protection workers to immediately remove a child only where:
- the consequences of harm for the child are assessed as 'serious' or 'extreme' and
 - the probability of further harm is assessed as 'highly likely' and
 - the child's safety needs cannot be met by available resources and supports.¹²³
- 3.86 The Child Protection Practice Manual also instructs workers to consider other factors, including whether:
- there is an 'immediate and unacceptable risk of harm to the child'
 - 'sufficient measures can be put in place to effectively reduce the level of risk and safely maintain the child at home, for example, an intervention order'
 - there is time for consultation with specialist practitioners or services¹²⁴
 - the best interests of a child are served by immediate removal.¹²⁵
- 3.87 A child protection practitioner must consult his or her supervisor by mobile phone regarding the risk assessment, rationale and required action in order to obtain the approval of a unit manager (or team leader at the After Hours Child Protection Emergency Service and Streetworks Outreach Service) to remove a child.¹²⁶
- 3.88 There has been a steady increase in the proportion of applications commenced by removal of a child. In 2002–03, 58 per cent of applications in the Melbourne Children's Court commenced by safe custody, whereas in 2008–09, the proportion was 78 per cent.¹²⁷ In regional areas, applications by safe custody have grown in the same period from 16 to 48 per cent.¹²⁸

PROCESS FOR PROTECTION APPLICATIONS BY SAFE CUSTODY

- 3.89 The removal of a child by safe custody results in a hearing within 24 hours.¹²⁹ If the Court is not open, the first hearing will take place before a bail justice.¹³⁰ Any bail justice hearing will be followed by a court hearing on the next working day.¹³¹ During the hearings, the protective intervener makes an application to place the child on an IAO until a further order is made. The parents and older children are not provided with any specific documents regarding the application for an IAO. There is, in fact, no court form for the original IAO application.¹³²
- 3.90 When taking a child into safe custody, the protective intervener must give the child's parents (unless they cannot be found after reasonable inquiries) and the child, if he or she is 12 years of age or older, a written statement containing specific information,¹³³ including:
- the contact details of the protective intervener
 - advice that the child has been taken into safe custody
 - contact details for a person who can advise of the child's wellbeing while in safe custody

- the time, date and location of the court hearing or bail justice hearing
- the address and telephone number of VLA.¹³⁴

3.91 The protective intervener must make a protection application to the Court 'as soon as possible' after taking the child into safe custody and give the child's parents (unless they cannot be found after reasonable inquiries) and the child, if he or she is 12 years of age or older, a copy of that application.¹³⁵ In practice, the protection application is often given to the parents and the child at court. Unless a child is 'of tender years', generally under six years old,¹³⁶ they must be physically brought to the Court or the bail justice unless the Court or bail justice orders otherwise.¹³⁷

Safe custody process also applies to secondary applications

3.92 The process of removing a child by safe custody, with or without a warrant, also applies to some secondary applications. These include an application to vary, breach or apply for a new IAO,¹³⁸ or an application to breach a supervision order, supervised custody order or interim protection order.¹³⁹ The protective intervener applies the same considerations in deciding whether to bring one of these secondary applications by safe custody as those applied in commencing proceedings.¹⁴⁰ In addition, for applications concerning breach of an order or a new IAO, the protective intervener needs to be satisfied 'that there is good reason not to proceed' by way of notice.¹⁴¹

Removal of a child by safe custody with a warrant

3.93 The Children's Court noted in its submission that the CYF Act 2005 'is silent on the basis for deciding between taking a child into safe custody and applying for a warrant'.¹⁴² Child protection workers may seek a warrant if they consider police assistance will be required in order to remove the child.¹⁴³ In the year 2008–09, 81 per cent of applications commenced by safe custody did not require a warrant.¹⁴⁴ In cases where a magistrate issues a search warrant, the magistrate has the power to make an IAO placing the child back with his or her parents.¹⁴⁵

- 122 *Children, Youth and Families Act 2005* (Vic) s 241(1)(a)–(b).
- 123 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Circumstances for Immediate Risk Removal', Advice No 1199 (23 April 2007), from CD-ROM provided at 23 March 2010.
- 124 Such as specialist infant protective practitioners (SIPW), high risk adolescent (HRA) program or Intensive Case Management Service (ICMS), Aboriginal Child Specialist Advice and Support Service (ACSASS).
- 125 Department of Human Services (Victoria), 'Circumstances for Immediate Risk Removal', above n 123.
- 126 *Ibid.*
- 127 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 24, 2.
- 128 *Ibid.* 3.
- 129 *Children, Youth and Families Act 2005* (Vic) s 242(2)–(3). The interaction between s 242(2) and s 242(3) is not particularly clear. Section 242(2) directs that applications by safe custody are brought before the Court 'as soon as practicable and, in any event, within one working day after the child was taken into safe custody'. Section 242(3) directs that there must be a bail justice hearing if a child is not 'brought before the Court under subsection (2) within 24 hours'. Subsection (3) applies when a child taken into safe custody cannot be taken before the Court within 24 hours because the Court is not open during this period.
- 130 *Children, Youth and Families Act 2005* (Vic) s 242(3).
- 131 *Children, Youth and Families Act 2005* (Vic) s 242(2). An IAO made by a bail justice remains in force until the application is heard by the Court on the next working day: *Children, Youth and Families Act 2005* (Vic) s 264(3).
- 132 Forms 15 and 16 of the *Children, Youth and Families (Children's Court Family Division) Rules 2007* (Vic) relate, respectively, to an application to vary an interim accommodation order or for a new order, and a notice with respect to breach of an interim accommodation order.
- 133 *Children, Youth and Families Act 2005* (Vic) s 242(1).
- 134 *Children, Youth and Families Regulations 2007* (Vic) reg 15.
- 135 *Children, Youth and Families Act 2005* (Vic) s 240(3).
- 136 A child less than 6 years old is generally regarded as being of tender years: Springvale Legal Service, above n 34, [6.2.205]. Judge Coate, the previous President of the Children's Court of Victoria, 'has expressed the view that it meant a child of less than 5 years of age': Children's Court of Victoria, *Research Materials* (2009) [4.9.1].
- 137 *Children, Youth and Families Act 2005* (Vic) s 242(2)–(4).
- 138 *Children, Youth and Families Act 2005* (Vic) ss 268(1), (6), 269(1), (6), 270(1), (7).
- 139 *Children, Youth and Families Act 2005* (Vic) ss 311, 313, 315.
- 140 *Children, Youth and Families Act 2005* (Vic) ss 268(6), 269(6), 270(7), 315.
- 141 *Children, Youth and Families Act 2005* (Vic) ss 314(1)(a), 269(4), 270(6).
- 142 Submission 46 (Children's Court of Victoria) 52.
- 143 *Children, Youth and Families Act 2005* (Vic) s 241(1)(b), (2).
- 144 Statistics provided by the Department of Human Services on 22 March 2010.
- 145 *Children, Youth and Families Act 2005* (Vic) s 241(2)(b).

APPLICATION FOR INTERIM ACCOMMODATION ORDER AFTER TAKING CHILD INTO SAFE CUSTODY

- 3.94 IAO applications concern the placement of the child until the primary application has been finalised.¹⁴⁶ IAOs may include any conditions that the Court considers to be in the child's best interests.¹⁴⁷ Conditions may relate to access of a parent or other person to the child.¹⁴⁸ The Children's Court states that '[d]etermining interim placement is a significant part of the Court's workload', noting that in 2007–08, the Court made 5820 IAOs.¹⁴⁹
- 3.95 An IAO provides for the following placement options until the next hearing, or resumption of the hearing:
- release of the child, on the undertaking of the child to appear at the next hearing;¹⁵⁰ the Commission understands that this step is uncommon and is only used with older children
 - release of the child into the care of his or her parent, on the undertaking of the parent to produce the child before the Court at the next hearing¹⁵¹
 - placement with a suitable person, on the undertaking of the suitable person to produce the child before the Court at the next hearing¹⁵²
 - placement of the child in an out-of-home care service¹⁵³
 - placement of the child in secure welfare if there is a substantial and immediate risk of harm to the child¹⁵⁴
 - placement of the child in a declared hospital¹⁵⁵
 - placement of the child in a declared parent and baby unit.¹⁵⁶

PROTECTION APPLICATIONS COMMENCED BY NOTICE

- 3.96 A protective intervener who believes that a child is in need of protection may file a protection application in the Children's Court and serve it on a child's parent and the child. The application contains a notice advising of a court hearing on a future date, usually about three weeks from filing.¹⁵⁷ When protection applications are commenced by notice, parents and children must be served with a protection application at least five days before the listed court date.¹⁵⁸ Children are not removed from their parents or caregivers at this stage without parental consent.
- 3.97 The protection report (application report) and a disposition report are usually provided to Department lawyers and other parties on the first date (the mention) that the case is listed in the Court.
- 3.98 On this date, parties may either consent to final orders, which is rare, or adjourn the case for further mention or for a dispute resolution conference (DRC). Although the Court may make an IAO for protection applications commenced by notice,¹⁵⁹ this does not generally occur in Melbourne. Because of the prevalence of safe custody applications, and the number of urgent IAO contests associated with these cases, it is difficult for the protective intervener to argue for an IAO on the first return date when the application has been commenced by notice.

3.99 A child protection practitioner who has commenced an application by notice may seek an IAO to secure conditions considered necessary to ensure the child's protection. Conditions sought may include, for example, requiring a parent to undergo drug and alcohol counselling or attend psychiatric assessment. An IAO contest by evidence needs to be booked and in Melbourne there is usually a waiting period of several weeks. Earlier 'stand-by' contest dates are usually available but, if other listed cases fail to settle, there is no guarantee that the matter will be heard on the stand-by date. It can take months to obtain an IAO when an application is commenced by notice.

PROTECTION APPLICATIONS COMMENCED BY SAFE CUSTODY

- 3.100 This section deals with protection applications commenced by safe custody in the Melbourne Children's Court. The processes and practices followed in other Children's Court venues differ from those in Melbourne, and some are discussed below.
- 3.101 The Melbourne Children's Court conducts IAO hearings each weekday for protection applications filed by 2 pm.¹⁶⁰ VLA has a clerk at court to allocate a separate lawyer to children—generally only to those who are seven years and older—and each parent.¹⁶¹ VLA duty lawyers represent the child unless a previous solicitor–client relationship exists with a parent. Members of a panel of private legal practitioners who undertake duty lawyer work attend the Children's Court in readiness to represent parents and children. Lawyers employed by the Department in the Court Advocacy Unit (CAU) also attend the Court to represent protective interveners.
- 3.102 The protective intervener or authorised child protection practitioner usually provides the assigned CAU lawyer with information concerning the protection application, as well as instructions about the type of IAO sought, including any conditions. In some cases, reports may be available from medical practitioners or other specialists in relation to concerns about a child. The CAU lawyer may provide advice to the protective intervener about whether the order and conditions sought are arguable under the CYF Act 2005 before relaying the protective intervener's final instructions to practitioners for the represented child or children and parents.
- 3.103 After consulting with the CAU lawyer, lawyers for represented children and parents obtain instructions from their clients. Negotiations about the interim placement of the child and any conditions, such as access conditions if the child is being placed outside of the home, generally take place in the corridors of the Children's Court.
- 3.104 A standard list of conditions, from which parties can select appropriate conditions and add any relevant others, is provided on a pink form at the Melbourne and Moorabbin Children's Courts. A copy of this form is found at Appendix K. If agreement is reached, the parties' lawyers then appear in court to seek an IAO by consent.

INTERIM ACCOMMODATION ORDER SUBMISSIONS CONTEST

3.105 If no agreement is reached in relation to an IAO, the Court will hear what is referred to as a 'submissions contest'.

- 146 IAOs may be made in numerous circumstances as set out in s 262 of the *Children, Youth and Families Act 2005* (Vic).
- 147 *Children, Youth and Families Act 2005* (Vic) s 263(7).
- 148 *Children, Youth and Families Act 2005* (Vic) s 263(8).
- 149 Submission 46 (Children's Court of Victoria) 18.
- 150 *Children, Youth and Families Act 2005* (Vic) s 263(1)(a).
- 151 *Children, Youth and Families Act 2005* (Vic) s 263(1)(b).
- 152 *Children, Youth and Families Act 2005* (Vic) s 263(1)(c), (6). A person's suitability follows from a report from the Secretary, or his or her delegate, having regard to particular matters, including criminal history checks, set out in the *Children, Youth and Families Regulations 2007* (Vic) reg 16. Suitable persons are often extended family members.
- 153 *Children, Youth and Families Act 2005* (Vic) ss 3, 263(1)(d). Out-of-home care services are operated by the Department or a community service and include foster care and residential care in a group home.
- 154 *Children, Youth and Families Act 2005* (Vic) s 263(1)(e). Note that inadequate accommodation is not, of itself, a sufficient reason for placing a child in secure welfare: *Children, Youth and Families Act 2005* (Vic) s 263(5). Two gender-separated secure welfare services operate in Victoria.
- 155 *Children, Youth and Families Act 2005* (Vic) s 263(1)(f). The hospital chief executive provides a Form 13 statement under *Children, Youth and Families (Children's Court Family Division) Rules 2007* stating that a bed is available.
- 156 *Children, Youth and Families Act 2005* (Vic) s 263(1)(g). The chief executive of the parent and baby unit provides a form 13 statement under *Children, Youth and Families (Children's Court Family Division) Rules 2007* stating that a place is available.
- 157 Children's Court of Victoria, *Research Materials*, above n 136, [4.9.2].
- 158 *Children, Youth and Families Act 2005* (Vic) s 594; *Children, Youth and Families (Children's Court Family Division) Rules 2007* (Vic) form 10. The application must be served on the child only when he or she is 12 years of age or older.
- 159 *Children, Youth and Families Act 2005* (Vic) s 262(1)(b).
- 160 Children's Court of Victoria, *Practice Note No 1 of 2008 — Applications by Apprehension*, 29 May 2008, 1: issued pursuant to s 592 of the *Children, Youth and Families Act 2005* (Vic).
- 161 Parents and older children generally have their own separate lawyers as their interests may not coincide and conflicts of interest are to be avoided: *Children, Youth and Families Act 2005* (Vic) s 524(6). The issue of conflict of interest in relation to representation is dealt with in Chapters 8 and 9.

- 3.106 Submissions contests involve oral arguments from lawyers, based on their client's instructions, concerning why a particular outcome should be ordered by the Court. For the most part, witnesses do not give evidence.¹⁶² Child protection workers and family members, often including children, sit behind their lawyers and generally do not directly talk to the magistrate or judge. In Melbourne and Moorabbin, lawyers for children or parents will generally seek the release of DHS case notes before commencing a submissions contest. Lawyers for the Department generally refuse to provide these notes without an order from the Court. Until recently, the Court usually ordered the release of the notes pursuant to section 11 of the *Evidence Act 1958* (Vic). Since the repeal of that Act, a subpoena must now be filed to gain access to the notes, because there is no equivalent provision in the *Evidence Act 2008* (Vic).¹⁶³
- 3.107 IAO submissions contests take place in a highly charged, emotional environment because they concern the living arrangements for children recently removed from the care of their parents. The high volume caseload, less than desirable working conditions and congested space all add to the stress of the participants in these hearings. The Lawyers Practice Manual discusses the advantage for parents and children in contesting the initial application for an IAO:

*Although it may be traumatic for the parties, contesting the application for an interim accommodation order can provide a useful dry run for later hearings and a valuable indication of the type of evidence to be produced later. Because delays of some months between the time the protection application is made and the hearing of a contested application are common, the placement of the child away from the parents for such a period under an interim accommodation order can be traumatic. It can also establish a new status quo of the child being away from home which may prejudice the case of the child or parents at a later date when the hearing is held. Obtaining an interim accommodation order that involved the child remaining with their parents can therefore be important if the finding or disposition sought by the department is to be contested.*¹⁶⁴

- 3.108 The Lawyers Practice Manual describes the role of the lawyer for the child in a contested IAO hearing as similar to that 'in bail applications', stating that
- the role of the child's advocate will generally be to seek to show how the child's best interest may be served while having the least restrictive terms incorporated in the order. This will often be a matter for negotiation and discussion with the protective intervener or the department's legal representative, but where they have formed the view that the child was in danger when apprehended and that that situation has not altered, then cross-examination and argument needs to be directed to countering the bases of these objections.*¹⁶⁵

How does the Court decide interim accommodation order hearings?

- 3.109 When determining the outcome of an IAO application, the Court must consider the best interests principles in section 10 of the Act, as well as the principles for placement of Aboriginal children under sections 13 and 14 of the Act if the child is Aboriginal. While a child may have been at unacceptable risk of harm at the time of removal from his or her parents, the Court must assess risk at the time of the hearing.¹⁶⁶

3.110 The Court exercises a broad discretion in balancing the many principles in section 10 of the Act. There is a need to ensure that intervention in the family relationship is limited to that necessary to secure the safety and wellbeing of the child,¹⁶⁷ and that a child is only to be removed from the care of a parent if there is unacceptable risk of harm to the child.¹⁶⁸ The Court may make an IAO returning a child to the parents with conditions concerning their conduct.¹⁶⁹

3.111 The Children’s Court states:

*It is the experience of the Court that in matters where children are apprehended and brought to court, a significant percentage are returned home on an interim accommodation order (approximately 50%). In many of those cases, the Court, having found that the child was at risk of harm in the care of his or her parent or parents, determined that the risk could be ameliorated and rendered acceptable by court-imposed conditions.*¹⁷⁰

INTERIM ACCOMMODATION ORDER CONTEST WITH EVIDENCE

3.112 If a party to an IAO submissions contest is not satisfied with the outcome, they may book a hearing for an IAO by evidence.¹⁷¹ The evidence called at these hearings is limited to that relevant to determine placement of the child or disputed conditions of an IAO.

DURATION OF AN INTERIM ACCOMMODATION ORDER MADE BY THE COURT

3.113 If an older child is released on their own undertaking, or a child is placed with a parent on an IAO, there is no limit to the length of the order.¹⁷² IAOs of this nature may be extended for any length of time subject to the child’s best interests.¹⁷³

3.114 If a child is placed out of the home, in circumstances other than an older child being released on their own undertaking, an IAO may be no longer than 21 days.¹⁷⁴ If the parties agree to a period longer than 21 days, the case will be listed on the 22nd day for ‘rollover’, at which time the IAO is extended. Only a DHS lawyer attends this mention before the Court. Other than placement of a child in secure welfare, this type of IAO may be repeatedly extended for 21-day periods, subject to the child’s best interests.¹⁷⁵

3.115 For children placed on an IAO in secure welfare—a lock-up facility—a 21-day IAO may only be extended once, for no longer than 21 days.¹⁷⁶

PRACTICE AT CHILDREN’S COURTS OTHER THAN MELBOURNE

3.116 The Moorabbin Children’s Court hears contested initial interim accommodation applications on the day of filing the protection application following the removal of children by safe custody. Duty lawyers from VLA and the private profession, as well as DHS lawyers, are based at Moorabbin to represent parties each weekday. The CAU lawyers at Moorabbin have been providing lawyers for parents and children with a Statement of Grounds and Summary Information Form (known as ‘Form B’) for protection applications brought by safe custody. These forms (set out at Appendix L) provide some written detail of DHS protective concerns. They are supplied as a communication tool, and a disclaimer on the form indicates that the document ‘does not constitute the basis of all the protective concerns and or evidence DHS intends to, or may seek to rely upon in proceedings before the Court’.

162 *Grandell v Hartrick (No 1)* (Unreported, Supreme Court of Victoria, Beach J, 1 February 1994); evidence may be limited to that of the child protection applicant.

163 Advice to legal practitioners for parents and children in the *Lawyers Practice Manual Victoria*, Springvale Legal Service, above n 34: [6.2.404] states that the ‘notes often provide information in support of the client’s position or inconsistent with the departmental position’.

164 *Ibid* [6.2.404].

165 *Ibid* [6.2.403].

166 *DOHS v W* (Unreported, Children’s Court of Victoria, 20 April 2004) cited in Children’s Court of Victoria, *Research Materials*, above n 136, [5.11.6].

167 *Children, Youth and Families Act 2005* (Vic) s 10(3)(a).

168 *Children, Youth and Families Act 2005* (Vic) s 10(3)(g).

169 *Children, Youth and Families Act 2005* (Vic) s 263(7). See *Purcell v RM* [2004] VSC 14 per Gillard J at [36] when considering appropriate conditions for an interim accommodation order under the previous legislation: *Children and Young Persons Act 1989* (Vic).

170 Submission 46 (Children’s Court of Victoria) 53.

171 *Grandell v Hartrick (No 2)* (Unreported, Supreme Court of Victoria, Beach J, 2 August 1994) is accepted as authority for the right of parties to an interim accommodation hearing with evidence.

172 *Children, Youth and Families Act 2005* (Vic) s 264(1).

173 *Children, Youth and Families Act 2005* (Vic) s 267(2).

174 *Children, Youth and Families Act 2005* (Vic) s 264(2). The order lasts until the 22nd day.

175 *Children, Youth and Families Act 2005* (Vic) s 267(2)(b).

176 *Children, Youth and Families Act 2005* (Vic) ss 264(2), (4), 267(2)(c).

- 3.117 In regional areas, parents and children rarely have an opportunity to contest an IAO on the first court date, as legal representation is not readily available and court time may also be unavailable.¹⁷⁷ In those circumstances, the Court will make an IAO for up to 21 days and list the case for an IAO submissions hearing.
- 3.118 During that period, a child is generally placed out of the home following the initial removal by safe custody. In practical terms, for parents and children in regional areas, the first real opportunity to contest the initial out-of-home placement decision by a protective intervener may be several days or up to three weeks after the initial intervention.

COURT REPORTS

INTRODUCTION

- 3.119 After the first court event (the IAO hearing for protection applications commenced by safe custody, or the first mention for protection applications commenced by notice), the child protection practitioner assigned to a child's case will prepare protection (or application) and disposition reports for the Court.
- 3.120 Part 7.8 of the CYF Act 2005 concerns reports to the Court in both Family Division and Criminal Division cases. The relevant reports to the Court for protection applications include:
- protection reports, commonly referred to as 'application reports'
 - disposition reports, relating to the type of order the Department seeks
 - additional reports, including reports from the Children's Court Clinic and other experts.¹⁷⁸
- 3.121 Written reports are a central part of the information provided to the Court in child protection cases. The authors of reports for the Court must inform people they interview that any information provided may be included in the report.¹⁷⁹ Report authors must be available to give evidence about their reports if required to.¹⁸⁰ The Court must not take into consideration any disputed matter in a report unless satisfied that it is true on the balance of probabilities.¹⁸¹ If a report author does not attend court after proper notification, then the report, or the disputed part of the report, cannot be considered by the Court unless the child or parent consents.¹⁸²
- 3.122 The Court may order or approve the restriction of access to reports, or parts of reports, to a child, parent, party or other specified person. Non-release of reports or parts of reports occurs if access to information in the report would prejudice the physical or mental health of the child or parent.¹⁸³ The Commission understands that it is rare for the Department to seek to restrict access to a protection report or disposition report. The Children's Court Clinic is more likely to apply to limit access to its reports.¹⁸⁴

PROTECTION REPORTS (APPLICATION REPORTS)

- 3.123 Although the legislation provides that the Court may order the Secretary to submit a protection report concerning the child,¹⁸⁵ in practice the Department usually provides a protection report without a specific court order.

DISPOSITION REPORTS

- 3.124 The Court must not make a protection order, other than an undertaking, unless it has received and considered a disposition report.¹⁸⁶ The Secretary must submit a disposition report if the Court is satisfied that a child is in need of protection.¹⁸⁷ In practice, the Department generally prepares and submits a disposition report with the protection report.

3.125 A disposition report must include a number of matters that are set out in section 558 of the CYF Act 2005. They include:

- any draft case plan that exists for a child
- recommendations concerning the order that the Secretary seeks and services that ought to be provided to the child and family
- a statement setting out the steps taken to provide services to enable the child to remain in the custody or guardianship of a parent, if an order is sought for the removal of custody or guardianship from a parent
- any other information the Court requires.

ADDITIONAL REPORTS—INCLUDES CLINIC REPORTS AND OTHER EXPERT REPORTS

3.126 Under section 560 of the CYF Act 2005, the Court has power to order additional reports in any proceeding in which a disposition order is required or in circumstances in which the Court has ordered a disposition report.¹⁸⁸ The Court's power to order reports from the Children's Court Clinic is found in section 560(b).¹⁸⁹ The Court may also order additional reports from the Secretary of the Department or an independent expert.

COURT EVENTS AND PROGRESSION OF CASES THROUGH COURT

3.127 Once a protection application is filed, a case progresses through the Court via various court 'events'. A diagram of the current court process is at Appendix J. These events include mentions, DRCs, directions hearings and judicial resolution conferences (JRCs). Parties may reach agreement and the Court may make final orders at any stage of the process. There are very few Practice Directions issued by the Court to guide parties through the process.

3.128 If the parties are unable to agree on proof of the protection application or disposition, then the matter is listed for contested hearing. In practice, less than three per cent of all primary and secondary protection applications proceed to a final hearing.¹⁹⁰

MENTIONS

3.129 A mention is a case management hearing. When protection applications begin by notice, the first listing is a mention. Cases may be listed for mention at any time throughout the court process. A case may be listed for mention, rather than another specific court event, to assess whether certain actions have been taken.

DISPUTE RESOLUTION CONFERENCES (DRCS)

3.130 Most contested protection applications are referred to a DRC.¹⁹¹ The purpose of the DRC is to give the parties 'the opportunity to agree or advise on the action that should be taken in the best interests of the child'.¹⁹² An independent convenor chairs the conference.¹⁹³ Sessional convenors with social science qualifications are employed at the Melbourne Children's Court. Registrars or court project officers have been appointed as convenors at Moorabbin Children's Court and rural courts.

3.131 Under section 217(3) of the Act, a convenor may choose to preside over an 'advisory conference' or a 'facilitative conference'. The purpose and role of the convenor differs in each type of conference. In practice, convenors adopt the facilitative conference only. In a facilitative conference, the convenor helps parties identify issues, consider alternatives and try to reach agreement in the child's best interests.¹⁹⁴ A written report of any conclusions reached is provided to the Court.¹⁹⁵

177 Consultation 27 (FVPLS Victoria).

178 *Children, Youth and Families Act 2005* (Vic) s 547(a)–(c). Subsections (d) and (e) concern reports for therapeutic treatment applications and therapeutic treatment (placement).

179 *Children, Youth and Families Act 2005* (Vic) s 549.

180 *Children, Youth and Families Act 2005* (Vic) s 550.

181 *Children, Youth and Families Act 2005* (Vic) s 551(1)(a).

182 *Children, Youth and Families Act 2005* (Vic) ss 550, 551(2).

183 *Children, Youth and Families Act 2005* (Vic) ss 556, 559, 561–2.

184 Under s 562(4) of the *Children, Youth and Families Act 2005* (Vic).

185 *Children, Youth and Families Act 2005* (Vic) s 553.

186 *Children, Youth and Families Act 2005* (Vic) s 276(1)(a).

187 *Children, Youth and Families Act 2005* (Vic) s 557(1)(a)(i). Disposition reports must also be provided on proof of irreconcilable difference applications and applications relating to breaches of a supervision order, supervised custody order or an interim protection order: *Children, Youth and Families Act 2005* (Vic) s 557(1)(a)(ii)–(iii).

188 Under s 557(1) of the *Children, Youth and Families Act 2005* (Vic).

189 The request is made to the Secretary of the Department of Justice under s 560(b) of the *Children, Youth and Families Act 2005* (Vic). The Children's Court Clinic is responsible to the Secretary of the Department of Justice.

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

191 *Children, Youth and Families Act 2005* (Vic) s 217.

192 *Children, Youth and Families Act 2005* (Vic) s 217(2).

193 Convenors are appointed under s 227(1) and (2) of the *Children, Youth and Families Act 2005* (Vic) by the Governor in Council on the recommendation of the Attorney-General. Convenors must be of good character and have appropriate qualifications and experience.

194 *Children, Youth and Families Act 2005* (Vic) s 218.

195 *Children, Youth and Families Act 2005* (Vic) s 218(2)(c).

3.132 The purpose of an advisory conference is to 'recommend to the Court the action to be taken in the best interests of the child'.¹⁹⁶ However, the advisory conference model has proved highly problematic, and, as a result, parties have avoided using it. The Children's Court notes that

*families and lawyers for families will not participate in advisory conferences. It seems the report back provisions for these conferences are regarded as problematic and compromising fundamental principles around confidentiality. This has meant that virtually all conferences in Victoria are currently conducted as facilitative conferences. With the failure of the advisory conference, approaches that prevailed under the old pre hearing system have continued under the facilitative conference model. It is the Court's view that the legislative provisions around facilitative and advisory conferences will need to be amended in recognition of the failings of the current model.*¹⁹⁷

3.133 Both the Secretary (in practice the child protection practitioner) and the child's parents are required to attend a DRC.¹⁹⁸ The Court may order, in addition, that the following people attend:

- the child
- the child's relatives
- if the child is Aboriginal, a member of the child's community as agreed by the parents
- if the child is from an ethnic background, a member of the relevant ethnic community
- disability advocates if required
- any support person requested by the child
- legal representatives for the parents and child.¹⁹⁹

3.134 The Children's Court has issued guidelines for DRCs. These guidelines set out the roles of participants and the process for conducting proceedings.²⁰⁰ Consultations revealed that the ideals set out in the guidelines do not generally align with practice.²⁰¹

3.135 A review conducted by the Boston Consulting Group in 2007 found that the 'settlement' rate for DRCs (then called 'pre-hearing conferences') in Melbourne was a low 31.2 per cent.²⁰² In response, on 1 June 2009 the Children's Court implemented a new DRC model at the Moorabbin Children's Court. Of the 167 DRCs that were conducted using this new model between 1 June 2009 and 18 March 2010, 39.5 per cent settled at the DRC.²⁰³

DIRECTIONS HEARINGS

3.136 If a case has failed to resolve following a DRC or other court event, it is listed for directions hearing and given a date for final hearing. The directions hearing takes place approximately two weeks before the final hearing.

3.137 Directions hearings are case management events attended by legal representatives for the parties. The Children's Court website research materials indicate that directions hearings:

- give parties a further opportunity to negotiate a resolution
- enable the magistrate or judge to informally mediate to achieve an outcome

- enable the case to be ready for hearing if it is unable to be resolved, with the narrowing of issues and ‘settling the mechanics of the case’. Examples include ascertaining the witnesses to be called, the length of proceedings, whether an interpreter is required and whether proof of the application is conceded.²⁰⁴

- 3.138 The Children’s Court advised the Commission that directions hearings ‘are now being conducted in a way that anticipates how the Court may operate a judicial conferencing process’.²⁰⁵ The Court suggested that directions hearings could be improved if the delay between a DRC and a directions hearing was reduced, if the barristers briefed for the final hearing were the lawyers appearing at the directions hearing, and if updated reports from the Department were lodged prior to this hearing.²⁰⁶
- 3.139 In consultations and submissions, legal practitioners confirmed a trend towards more court intervention at directions hearings. While this approach was generally supported, there was criticism of the lack of adequate remuneration for the time and skill required to prepare for the directions hearings.²⁰⁷

JUDICIAL RESOLUTION CONFERENCES (JRCS)

- 3.140 Judicial resolution conferences now occur in some cases in the Children’s Court following an amendment to the CYF Act 2005 that came into operation on 14 September 2009.²⁰⁸
- 3.141 A JRC is presided over by the President or a magistrate for the purposes of negotiating settlement of a dispute by way of mediation, early neutral evaluation, settlement conference or conciliation.²⁰⁹ Discussions are confidential; anything said or done in a JRC is not admissible as evidence in any further hearing in the Family Division of the Court.²¹⁰ If the case does not resolve, the presiding magistrate or judge does not go on to hear the case and cannot be compelled to give evidence.²¹¹
- 3.142 A JRC can occur at any time between commencement of a protection application and final orders. There are no rules as yet, although the Court has prepared a draft Practice Direction.²¹²

CONTESTED HEARING

- 3.143 Cases that fail to resolve by negotiation proceed to final hearing. Only three per cent of all applications require a judicial officer to hear evidence, make findings and make orders.²¹³ Child protection workers and any additional expert who has prepared a report may be required for cross-examination. Parents generally give evidence and may be cross-examined. It is rare for a child to give evidence.²¹⁴
- 3.144 Some contested hearings can be quite lengthy.²¹⁵ At times, parents and children may concede that the grounds for the application are made out, that is, that a child is in need of protection, but they may disagree with the Department about disposition. This concession may limit the number of witnesses required for cross-examination. The Lawyers Practice Manual contains the following advice for legal practitioners:

Tactically it may often be better to contest the protection application, which means that all the witnesses for the applicant will give oral evidence and be subject to cross-examination, rather than simply consent to written reports prepared by the applicant’s witnesses being tendered in whole without comment. In practice the number of protection applications that are dismissed are minimal, but a strongly contested application can lay the groundwork for a favourable disposition ... A protection application, like the hearing of a criminal charge, calls first for an adjudication on whether the grounds have been made out and the subsequent disposition of the matter.²¹⁶

196 *Children, Youth and Families Act 2005* (Vic) s 219(1). Convenors, when adopting the advisory model, are to appraise matters in dispute and provide a written report on outcomes of the dispute and how outcomes might be achieved: *Children, Youth and Families Act 2005* (Vic) s 219(2).

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

198 *Children, Youth and Families Act 2005* (Vic) s 222(1).

199 *Children, Youth and Families Act 2005* (Vic) s 222(2)–(6).

200 *Children, Youth and Families Act 2005* (Vic) s 220.

201 DRCs are discussed in greater detail in relation to Option 1 in Chapter 7.

202 Submission 46 (Children’s Court of Victoria) 37.

203 *Ibid* 38.

204 Children’s Court of Victoria, *Research Materials*, above n 136, [4.9.4].

205 Submission 46 (Children’s Court of Victoria) 72.

206 *Ibid*.

207 Consultation 6 (Private Practitioners 1).

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

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

210 *Children, Youth and Families Act 2005* (Vic) s 527A(1). However, the Children’s Court is of the view that there is currently no ‘bar to admissibility in any other court processes of anything said or done by a person in the course of a JRC’: submission 46 (Children’s Court of Victoria) 41.

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

212 Submission 46 (Children’s Court of Victoria) 41.

213 *Ibid* 23.

214 It is more common for older children to give evidence in a contested interim accommodation order hearing where the Department is seeking that the child be placed in secure welfare (that is, in a locked facility).

215 A recent case lasted longer than 70 days.

216 Springvale Legal Service, above n 34, [6.2.505].

CONDUCT OF PROCEEDINGS

3.145 Part 4.7 of the CYF Act 2005 contains procedures that are specific to the Family Division of the Children's Court.²¹⁷ Section 215(1) of the Act, which governs the conduct of proceedings, provides that the Court

- (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.*

CONDUCTING PROCEEDINGS IN AN INFORMAL MANNER, WITHOUT REGARD TO LEGAL FORMS

3.146 Sections 215(1)(a) and (b) require informality of proceedings.²¹⁸ The Court suggests that historically, judicial interpretation of these types of provisions has been restrictive.²¹⁹ Provisions of this nature do not allow courts to dispense with the rules of procedural fairness.²²⁰ The Court's submission highlighted recent decisions of the High Court and Family Court which 'appear to have approved a somewhat more informal approach in children's matters'.²²¹ Some of these decisions, relying upon the overriding 'best interests' consideration, suggest that proceedings concerning children's welfare are 'not entirely *inter partes*'²²² and 'not strictly adversarial'.²²³

3.147 The Court's submission acknowledged that the same overriding best interests consideration has meant some of its Family Division matters are not fully adversarial, and that 'the Court has the power—and in some instances a duty—to inquire about issues which it considers relevant to the best interests of the subject child'.²²⁴ In its submission, the Children's Court commented that its current operating model is adversarial and not the 'optimal stage' for the decision making it undertakes in the Family Division.²²⁵ The Court stated that its power to 'make a proper inquiry about best-interest matters is quite limited'²²⁶ and that it needs to be enabled to 'run less adversarial trials without being fettered by a restrictive interpretation of [these] sections'.²²⁷

3.148 The submission suggested that relevant sections from the *Family Law Act 1975* (Cth) relating to less adversarial trials, if amended appropriately, would provide a 'sound platform' for such trials in the Family Division of the Children's Court.²²⁸

COURT MAY INFORM ITSELF IN ANY MANNER IT SEES FIT, DESPITE RULES OF EVIDENCE

3.149 Section 215(d) of the CYF Act 2005, which provides that the Court may inform itself on a matter as it sees fit and is not bound by the rules of evidence, 'appears to give the Court free rein in determining the admissibility of evidence and the weight to be afforded to it'.²²⁹ Section 532 of the CYF Act 2005 gives the Court the power, on its own motion, to issue a summons for a witness to give evidence, or produce documents or things, or both. The parties to the proceeding may also apply to the Court for such a summons to be issued.²³⁰

3.150 In its submission, the Court stated that judicial interpretation of similar provisions have somewhat ‘fettered the plain words of [section 215(1)(d)]’.²³¹ The Court suggested that these judgments have held that such provisions do not render the rules of evidence irrelevant and that they should still be applied unless there is a sound reason for dispensing with them.²³² While there is competing case law to suggest that this view of an evidentiary freedom power is too narrow,²³³ the Children’s Court has not interpreted its powers in section 215(1) of the CYF Act 2005 expansively.

Use of expert evidence

3.151 Expert evidence is often led in contested cases.²³⁴ The Lawyers Practice Manual advises lawyers that

*The grounds listed in s 162 involve the court at times in making speculative decisions and value judgments. However, in contested cases the court can be assisted by expert evidence from a range of professionals, including social workers, psychiatrists, psychologists, maternal and child health nurses and doctors, in relation to matters in dispute, eg behavioural indicators of sexual abuse, developmental milestones in children, the impact of psychiatric condition of the parent or alcohol/drug use on child’s emotional development, etc.*²³⁵

3.152 These expert witnesses may give evidence of facts from observation, or opinions or inferences.²³⁶ The Court decides if a particular witness is qualified to give an opinion and determines the weight given to evidence of this nature.²³⁷

THE STANDARD OF PROOF

3.153 Section 215(1)(c) of the CYF Act 2005 provides that the Family Division of the Court ‘must consider evidence on the balance of probabilities’. In cases involving sexual abuse allegations, reference has often been made to the common law ‘*Briginshaw* test’,²³⁸ which is sometimes erroneously seen as requiring a standard of proof that is higher than the usual civil standard in cases where there is an allegation of grave wrongdoing.²³⁹

3.154 This issue is now governed by section 140 of the *Evidence Act 2008* (Vic), which provides that in a civil proceeding, the Court must be satisfied that the case has been proved on the balance of probabilities, but that in deciding whether it is so satisfied, the Court must take into account

- (a) *the nature of the cause of action or defence; and*
- (b) *the nature of the subject-matter of the proceeding; and*
- (c) *the gravity of the matters alleged.*

LEGAL REPRESENTATION AT THE CHILDREN’S COURT

INTRODUCTION

3.155 Lawyers generally represent the Department, parents, children who are considered mature enough to give instructions, and other interested parties in protection application proceedings before the Children’s Court. Other interested parties may include potential or actual permanent carers, foster carers or kinship carers.²⁴⁰ In exceptional circumstances, children who are not of an age considered mature enough to give instructions have separate legal representation in proceedings.²⁴¹

217 *Children, Youth and Families Act 2005* (Vic) pt 4.7. Note other areas of the Act relating to court procedure: pt 7.3 governs general court procedures; s 522 imposes procedural guidelines on the Court that include ensuring that the proceedings are comprehensible to, and allow for the full participation of, the child, parents and other parties with a direct interest.

218 *Children, Youth and Families Act 2005* (Vic) s 215(1)(a)–(b).

219 Submission 46 (Children’s Court of Victoria) 76; Children’s Court of Victoria, *Research Materials*, above n 136 [4.8.1].

220 Children’s Court of Victoria, *Research Materials*, above n 136, [4.8.1].

221 Submission 46 (Children’s Court of Victoria) 76.

222 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, cited in submission 46 (Children’s Court of Victoria) 76.

223 *Re Lynette* (1999) FLC 92–863, cited in submission 46 (Children’s Court of Victoria) 76.

224 Submission 46 (Children’s Court of Victoria) 77.

225 *Ibid* 78.

226 *Ibid* 77.

227 *Ibid* 78.

228 *Ibid* 79–80.

229 *Ibid* 80.

230 *Children, Youth and Families Act 2005* (Vic) s 532(2).

231 Submission 46 (Children’s Court of Victoria) 80.

232 *A & B v Director of Family Services* (1996) 20 Fam LR 549, cited in submission 46 (Children’s Court of Victoria) 80.

233 See, for example, *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 ALR 482, 492.

234 Springvale Legal Service, above n 34, [6.2.602]; Children’s Court of Victoria, *Research Materials*, above n 136, [4.8.4].

235 Springvale Legal Service, above n 34, [6.2.602].

236 Children’s Court of Victoria, *Research Materials*, above n 136, [4.8.4].

237 *Ibid*.

238 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

239 See, for example, *Victoria v Macedonian Teachers’ Association of Victoria Inc* (1999) 91 FCR 47, 50.

240 *Children, Youth and Families Act 2005* (Vic) s 524. The Attorney-General may also be legally represented if choosing to intervene in a proceeding: *Children, Youth and Families Act 2005* (Vic) s 215(2).

241 *Children, Youth and Families Act 2005* (Vic) s 524(4).

3.156 Under the CYF Act 2005, the Secretary is 'a party to any proceeding before the Family Division'.²⁴² Child protection practitioners may appear personally in court, and the Secretary may be represented by another authorised employee, including non-legally qualified court officers, or by a legal practitioner.²⁴³ At Melbourne and Moorabbin Children's Courts the Secretary is usually represented by lawyers from the Department's CAU.

REPRESENTATION FOR CHILD PROTECTION PRACTITIONERS— COURT ADVOCACY UNIT (CAU)

3.157 The CAU is a legal unit within the Department. The CAU is staffed by approximately 25 lawyers, and may employ senior advocates—in-house counsel. In contested cases, a CAU lawyer or a barrister briefed by the CAU will appear for the child protection practitioner.

3.158 Many different CAU lawyers may appear for a child protection practitioner throughout the course of proceedings. Child protection practitioners often do some of the preparatory legal work for contested hearings, such as issuing and serving subpoenas and formulating witness lists.²⁴⁴ The CAU also provides a statewide daily telephone duty service to assist child protection practitioners in relation to Children's Court proceedings.

3.159 The Child Protection Practice Manual states that the role of CAU lawyers and court officers is to act on the child protection practitioner's instructions and advise the practitioner on all aspects of the case.²⁴⁵ The Manager of the CAU advised the Commission that all lawyers employed or engaged by the Department are bound by the Model Litigant Guidelines published by the Victorian Government Solicitors Office. The guidelines direct government lawyers to exercise independent legal judgment when assessing a client's instructions and presenting a case.

3.160 The CAU sits within the Legal Services Branch of the Department of Human Services, which is responsible for all legal advice and policy for the Department.²⁴⁶

Lawyers for child protection practitioners in rural areas

3.161 DHS offices in rural regions employ lawyers to act in child protection matters. For instance, in the Hume region two in-house lawyers, directly managed by the child protection regional office, represent the Department in child protection proceedings. Child protection practitioners often appear in person in urgent applications in regional Children's Courts.²⁴⁷

LAWYERS FOR PARENTS

3.162 Parents are usually legally represented in protection applications. The Court may adjourn proceedings to enable a parent to obtain legal representation.²⁴⁸ Most of the parents who are parties to protection applications are eligible for a grant of legal assistance from VLA and are represented by either a private lawyer from a panel overseen by VLA or an in-house VLA lawyer.²⁴⁹ See Appendix M for details of the guidelines for VLA funding for proceedings in the Family Division of the Children's Court.

3.163 Other interested persons, such as actual or potential foster carers, permanent carers and kinship carers, are sometimes legally represented.²⁵⁰

LAWYERS FOR CHILDREN AND TYPES OF LEGAL REPRESENTATION

- 3.164 A child who, in the opinion of the Court, is considered mature enough to give instructions, must be legally represented in child protection proceedings.²⁵¹ A child who, in the opinion of the Court, is not mature enough to give instructions, is only legally represented if, in exceptional circumstances, the Court determines it is in the child's best interests for the child to be represented.²⁵² At the time of the Children's Court submission, this power to have children represented on a best interests basis had been exercised in only 33 cases since the CYF Act 2005 commenced operations.²⁵³
- 3.165 If a child is entitled to legal representation, the Court 'must' adjourn the hearing of the proceeding to enable the child to obtain legal representation.²⁵⁴ There are limited exceptions to this general rule for a child considered mature enough to give instructions.²⁵⁵ VLA will fund lawyers for all children who are entitled to representation under the CYF Act 2005.²⁵⁶ According to VLA's funding guidelines, a child aged seven years or older is generally considered mature enough to give instructions and is eligible for a grant of legal aid.²⁵⁷
- 3.166 The age of seven is a guide and lawyers are expected to assess each child's capacity to give instructions. Assistance in this task is provided by the Victoria Law Foundation's 1999 publication, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court*.²⁵⁸ In practice, most children are assessed as having sufficient maturity to instruct a lawyer from the age of seven and the Court accepts the lawyer's assessment of the child's capacity. In cases of uncertainty, the Court may refer the child to the Children's Court Clinic for an assessment of the child's capacity to instruct a lawyer.

Direct representation

- 3.167 A lawyer acting for a child considered mature enough to give instructions²⁵⁹ 'must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child'.²⁶⁰ Under this direct representation or 'instructions' model of representation, a child may also be represented by a layperson who is not a legal practitioner or a parent of the child.²⁶¹

- 242 *Children, Youth and Families Act 2005* (Vic) s 215(3)–(6).
- 243 *Children, Youth and Families Act 2005* (Vic) s 215(3).
- 244 Consultations 3 (CAU), 10 (VFPMs).
- 245 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Court Advocacy Unit', Advice No 1070 (23 April 2007), from CD-ROM provided at 23 March 2010.
- 246 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Legal Services Branch', Advice No 1337 (23 April 2007), from CD-ROM provided at 23 March 2010.
- 247 Consultations 13 (DHS CP Workers Hume), 18 (DHS CP Workers Gippsland).
- 248 *Children, Youth and Families Act 2005* (Vic) s 524(1)(c).
- 249 For an outline of the functions of Victoria Legal Aid in child protection proceedings see para 3.24.
- 250 *Children, Youth and Families Act 2005* (Vic) s 524(1)(d).
- 251 *Children, Youth and Families Act 2005* (Vic) ss 524(2), 525(1). Section 525(1) sets out 30 types of protection proceedings in which a child must be legally represented, subject to s 524. The Children's Court submission points out that s 525(1) fails to include 7 types of child protection applications as a result of a drafting error: submission 46 (Children's Court of Victoria) 82. The omitted applications are: applications to extend therapeutic treatment orders, therapeutic treatment (placement) orders, and interim accommodation orders under ss 255(1)(a)–(b) and 267; applications to vary undertakings and interim protection orders under ss 279 and 299(e); and, applications to revoke undertakings and interim protection orders in ss 279 and 303(g). In practice, if children are entitled to representation for primary applications they continue to be represented for these particular omitted secondary applications.
- 252 *Children, Youth and Families Act 2005* (Vic) s 524(4).
- 253 Submission 46 (Children's Court of Victoria) 61.
- 254 *Children, Youth and Families Act 2005* (Vic) s 524(2), (4).
- 255 The Court may continue with the hearing if the child failed to obtain legal representation given the opportunity, or if a lay advocate, who is not a parent, is given leave of the Court to appear for the child: *Children, Youth and Families Act 2005* (Vic) s 524(3), (8).
- 256 Victoria Legal Aid, *Grants Handbook* (12th ed, 2001) 30. Refer to Appendix M for details of Victoria Legal Aid funding.
- 257 The view that children plus or minus the age of seven are generally capable of giving instructions appears to have originated from advice contained in a 1992 protocol between the Department of Health and Community Services and the Legal Aid Commission. Andrew McGregor, then manager of Victoria Legal Aid's Youth Legal Service, states that 'The age of seven is used solely as a guide in terms of the age at which it is likely for the child to have developed maturity sufficient to instruct, and is based on expert opinion provided by the Director of the Children's Court Clinic, Dr Pat Brown': 'The Representation of Young Children in the Family Division of the Children's Court in Victoria' (2000) 24 *Australian Children's Rights News* 19, 19.
- 258 The guidelines, although written prior to the proclamation of the *Children, Youth and Families Act 2005* (Vic), are still considered relevant by practitioners.
- 259 Under s 524(2) of the *Children, Youth and Families Act 2005* (Vic).
- 260 *Children, Youth and Families Act 2005* (Vic) s 524(10).
- 261 *Children, Youth and Families Act 2005* (Vic) s 524(8)–(9).

Best interests representation

- 3.168 A child who, in the opinion of the Court, is not mature enough to give instructions, will be represented on a 'best interests' basis only in 'exceptional circumstances'.²⁶² The Court must determine if it is in the child's best interests for the child to be represented.²⁶³ A lawyer must 'act in accordance with what he or she believes to be in the best interests of the child'.²⁶⁴ Legal practitioners must also communicate to the Court the wishes expressed or instructions given by the child to the extent that it is practicable to do so.²⁶⁵
- 3.169 The Commission is not aware of any Victorian guidelines to assist legal practitioners represent children on a best interests basis in child protection cases. The Children's Court submitted that in the limited number of instances in which the Court has appointed a lawyer, legal representatives have generally assisted the Court in making its decisions in the best interests of the represented child.²⁶⁶

Children's participation

- 3.170 The CYF Act 2005 provides that, 'as far as practicable', the Court must allow the child 'to participate fully in the proceeding'.²⁶⁷ Legally represented children sometimes attend proceedings or parts of proceedings and directly participate.

PROTECTION ORDERS (DISPOSITIONS)**INTRODUCTION**

- 3.171 If the Court finds that a child 'is in need of protection',²⁶⁸ it may make a protection order if certain pre-conditions are satisfied. The Court must have received and considered a disposition report from the Child Protection Service and be satisfied that the Child Protection Service has taken all reasonable steps to provide the services necessary in the best interests of the child.²⁶⁹
- 3.172 If a protection order requires removing a child from the custody of his or her parent, the Court must be satisfied that all reasonable steps have been taken by the Child Protection Service to enable the child to remain at home.²⁷⁰ Lack of suitable accommodation is not by itself a sufficient reason.²⁷¹

ORDER UNDER SECTION 272—'NO PROOF' UNDERTAKING

- 3.173 The Court may order the child, a parent, or the person with whom the child is living to enter into a written undertaking to do, or refrain from doing, certain things.²⁷² An order of this nature is not technically a protection order.²⁷³ The undertaking may last for up to six months or a maximum of 12 months if special circumstances exist.²⁷⁴ The order may include any conditions that the Court considers in the child's best interests.²⁷⁵ This order may only be made with the consent of the person giving the undertaking.²⁷⁶ The order may be varied or revoked, but no application may be made for non-compliance with the undertaking.²⁷⁷
- 3.174 These section 272 orders may be made in cases where Child Protection is withdrawing the protection application and the application is subsequently struck out by the Court. In 2008–09, the Court made a section 272 order in 113 out of the 397 cases that were struck out.²⁷⁸ In the same year, the Court made 36 orders under section 272 after either dismissing the protection application or refusing to make a protection order.

PROTECTION ORDER UNDERTAKING

- 3.175 The Court also has the power to order an undertaking if it finds the protection application proven.²⁷⁹ The person giving the undertaking must consent to the order.²⁸⁰ The undertaking requires a child, parent or person caring for a child to agree in writing to do or refrain from doing certain things.
- 3.176 The undertaking may be made for six months, or up to 12 months in special circumstances.²⁸¹ This undertaking may be varied or revoked.²⁸² There are no 'breach' applications for undertakings. Child Protection only considers an undertaking appropriate where the future risk of significant harm can be adequately managed in the community.²⁸³ In 2008–09 the Court made 121 undertakings under section 278 in 2849 finalised primary applications.²⁸⁴

SUPERVISION ORDER

- 3.177 A child remains in the care of his or her parents when a supervision order is made under section 280 of the CYF Act 2005. Under this order, Child Protection has powers to visit the child at home and carry out supervisory functions.²⁸⁵ Supervision orders may be made for 12 months, or up to two years in special circumstances.²⁸⁶ A supervision order may impose conditions on the child or parent as needed in the child's best interests,²⁸⁷ for example, that parents attend counselling for drug and alcohol abuse, undergo drug testing, or attend a parenting course.
- 3.178 While a supervision order may be extended for up to two years from the date the extension is granted,²⁸⁸ the Secretary must review the operation of the order before the end of 12 months for the order to continue.²⁸⁹ If, within that period, the Secretary fails to provide a notice to the Court, the child and parents that the order continues to be in the child's best interests, the order lapses.²⁹⁰ Supervision orders may be continually extended.²⁹¹
- 3.179 Secondary applications may be made for varying, revoking or breaching a supervision order.²⁹² In 2008–09, the Court made 1160 supervision orders out of the 2849 finalised primary applications.²⁹³

- 262 *Children, Youth and Families Act 2005* (Vic) s 524(4).
- 263 *Children, Youth and Families Act 2005* (Vic) s 524(4).
- 264 *Children, Youth and Families Act 2005* (Vic) s 524(11)(a).
- 265 *Children, Youth and Families Act 2005* (Vic) s 524(11)(b).
- 266 Submission 46 (Children's Court of Victoria) 61.
- 267 *Children, Youth and Families Act 2005* (Vic) s 522(1)(c).
- 268 *Children, Youth and Families Act 2005* (Vic) s 274. Irreconcilable difference applications are found proven if 'there is a substantial and irreconcilable difference between the person who has custody of the child and the child to such an extent that the care and control of the child are likely to be seriously disrupted': *Children, Youth and Families Act 2005* (Vic) s 274(b). The orders that the Court may make for protection applications are also available for irreconcilable difference applications.
- 269 *Children, Youth and Families Act 2005* (Vic) s 276(1). Note that a disposition report is not required if the Court makes an undertaking.
- 270 *Children, Youth and Families Act 2005* (Vic) s 276(2).
- 271 *Children, Youth and Families Act 2005* (Vic) s 276(3).
- 272 *Children, Youth and Families Act 2005* (Vic) s 272(2).
- 273 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'protection order'; compare s 272 to s 278. A s 272 undertaking is an order that the Court may make in the absence of proof of the protection application.
- 274 *Children, Youth and Families Act 2005* (Vic) s 272(3).
- 275 *Children, Youth and Families Act 2005* (Vic) s 272(4).
- 276 *Children, Youth and Families Act 2005* (Vic) s 272(5).
- 277 *Children, Youth and Families Act 2005* (Vic) s 273.
- 278 Children's Court of Victoria, *Annual Report*, above n 3, 22. In 2008–09, a total of 2849 primary applications were finalised.
- 279 *Children, Youth and Families Act 2005* (Vic) s 278(1).
- 280 *Children, Youth and Families Act 2005* (Vic) s 278(4).
- 281 *Children, Youth and Families Act 2005* (Vic) s 278(2).
- 282 *Children, Youth and Families Act 2005* (Vic) s 279.
- 283 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition: Protection Order Descriptions', Advice No 1336 (23 April 2007), from CD-ROM provided at 23 March 2010.
- 284 *Children's Court of Victoria, Annual Report*, above n 3, 22.
- 285 *Children, Youth and Families Act 2005* (Vic) ss 280(1), 282.
- 286 *Children, Youth and Families Act 2005* (Vic) s 280(2).
- 287 *Children, Youth and Families Act 2005* (Vic) s 281.
- 288 *Children, Youth and Families Act 2005* (Vic) s 280(2)(b).
- 289 *Children, Youth and Families Act 2005* (Vic) s 280(3)(a).
- 290 *Children, Youth and Families Act 2005* (Vic) s 280(3)–(4).
- 291 *Children, Youth and Families Act 2005* (Vic) ss 293, 296(1).
- 292 *Children, Youth and Families Act 2005* (Vic) ss 299, 300, 311.
- 293 Children's Court of Victoria, *Annual Report*, above n 3, 22.

CUSTODY TO THIRD PARTY ORDER

- 3.180 A custody to third party order, which is relatively rare, causes a child to be placed in the care and custody of a named person, and not a community service, for a period up to 12 months.²⁹⁴ The order may include any condition in the child's best interests, including access to a parent, and, for an Aboriginal child, it may incorporate a cultural plan.²⁹⁵ Conditions must not give any powers or duties to Child Protection.²⁹⁶ This order cannot be extended or breached.²⁹⁷ An application may be made to vary or revoke the order, but not by Child Protection.²⁹⁸ Sometimes this order is made where the person caring for the child is a proposed long-term carer and the carer is yet to make an application to the Family Court for parental responsibility orders. In 2008–09, the Court made only eight custody to third party orders out of the 2849 finalised primary applications.²⁹⁹

SUPERVISED CUSTODY ORDER

- 3.181 A supervised custody order is made where a child has a definite named carer or carers and custody of the child is transferred to that person or persons for the period of the order.³⁰⁰ In making this order, the ultimate objective is reunification of the child with his or her parents and the Court must direct the parties to take all reasonable steps to achieve this goal.³⁰¹
- 3.182 The order may last up to 12 months and may be extended for up to two years from the date the extension is granted, provided the Court considers reunification is still achievable.³⁰² If an order is granted for more than 12 months, the Secretary must review the order within 12 months and notify the Court and parties that it is still in the child's best interests, or the order lapses.³⁰³
- 3.183 Conditions in the best interests of the child may be attached to the order, including conditions for access by parents and a cultural plan if the child is Aboriginal.³⁰⁴ The Secretary may direct that the child return to the custody of his or her parents during the period of the order if it is in the child's best interests.³⁰⁵ The order is then deemed to be a supervision order instead of a supervised custody order.³⁰⁶ A supervised custody order may be varied, revoked or breached.³⁰⁷
- 3.184 In 2008–09, the Court made 107 supervised custody orders out of the 2849 finalised primary applications that year.³⁰⁸

CUSTODY TO SECRETARY ORDER

- 3.185 Under a custody to Secretary order, the Department determines where a child will live. This usually involves placement of the child in foster care or community care. The Department may place a child with a parent, although this is 'relatively uncommon, at least in the early life of such order'.³⁰⁹ In deciding whether or not to make an order, the Court must consider advice from Child Protection about whether it is a 'workable option'.³¹⁰ Unlike a supervised custody order, there is no necessary 'ultimate objective' to work towards reunification between child and parent when making a custody to Secretary order.³¹¹
- 3.186 Goals regarding reunification or out-of-home care may be made in a case plan prepared by Child Protection following the making of a custody to Secretary order.³¹² A custody to Secretary order may be made for 12 months.³¹³ It may include any conditions in the child's best interests, including access conditions for parents or other people, and, if the child is Aboriginal, a cultural plan.³¹⁴
- 3.187 The Secretary may apply to extend a custody to Secretary order.³¹⁵ Considerations for extending a custody to Secretary order and a guardianship to Secretary order are discussed below. In 2008–09, the Court made 684 custody to Secretary orders out of the 2849 finalised primary applications that year.³¹⁶

GUARDIANSHIP TO SECRETARY ORDER

- 3.188 Under a guardianship to Secretary order, the Secretary is granted custody and guardianship of a child to the exclusion of everyone else.³¹⁷ Although this order may be made for up to two years, for the order to continue beyond 12 months the Secretary must, within 12 months, review the operation of the order and provide a notice to the Court, the child and parents that the order continues to be in the child's best interests.³¹⁸ Under this order, the Secretary has rights that a parent would ordinarily have in relation to a child. As there are no conditions concerning the conduct of parents or children attached to a guardianship order, the order cannot be varied or breached.
- 3.189 The Secretary, a parent or child may apply to revoke a guardianship order.³¹⁹ If the Court revokes a guardianship to Secretary order and a child is still in need of protection, the Court may only make a supervision order or an order for an undertaking.³²⁰ A guardianship to Secretary order may be extended in accordance with provisions described below. In 2008–09, the Court made 74 guardianship orders out of the 2849 finalised primary applications that year.³²¹

Applications for extensions of custody to Secretary orders and guardianship to Secretary orders

- 3.190 The Secretary may apply to extend a custody to Secretary order or guardianship to Secretary order.³²² In cases where the original order has been in force for less than 12 months, custody can be extended for an additional 12 months.³²³ If the order has been in force for 12 months or more, custody can be extended for up to two years at a time.³²⁴ An extension of two years is, however, limited. The Court can extend the order for a maximum period of 12 months if it is satisfied that:
- it is not in the child's best interests to be returned to the custody of his or her parents
 - a permanent care or similar order made by another court would be in the child's best interests, for example, an adoption order or parenting order
 - there is no likelihood of reunification.³²⁵

294 Ibid; *Children, Youth and Families Act 2005* (Vic) s 283.

295 *Children, Youth and Families Act 2005* (Vic) s 283(1)(e).

296 *Children, Youth and Families Act 2005* (Vic) s 283(1)(f).

297 *Children, Youth and Families Act 2005* (Vic) ss 293(1), 311.

298 *Children, Youth and Families Act 2005* (Vic) ss 299, 300(d), 303, 304(1)(c).

299 Children's Court of Victoria, *Annual Report*, above n 3, 22.

300 *Children, Youth and Families Act 2005* (Vic) s 284.

301 *Children, Youth and Families Act 2005* (Vic) s 284(4).

302 *Children, Youth and Families Act 2005* (Vic) ss 295(1), 296(1).

303 *Children, Youth and Families Act 2005* (Vic) s 298.

304 *Children, Youth and Families Act 2005* (Vic) s 284(1)(e).

305 *Children, Youth and Families Act 2005* (Vic) s 284(1)(f).

306 *Children, Youth and Families Act 2005* (Vic) s 286(1)(c).

307 *Children, Youth and Families Act 2005* (Vic) ss 299, 303, 311.

308 Children's Court of Victoria, *Annual Report*, above n 3, 22.

309 Submission 46 (Children's Court of Victoria) 112.

310 *Children, Youth and Families Act 2005* (Vic) s 287.

311 Compare *Children, Youth and Families Act 2005* (Vic) s 284(4).

312 The Act requires that a case plan must contain all 'significant' decisions concerning the child and decisions that 'relate to the present and future care and wellbeing of the child, including the placement of, and access to, the child': *Children, Youth and Families Act 2005* (Vic) s 166(2).

313 *Children, Youth and Families Act 2005* (Vic) s 287(1)(c).

314 *Children, Youth and Families Act 2005* (Vic) s 287(1)(d).

315 *Children, Youth and Families Act 2005* (Vic) s 296(2).

316 Children's Court of Victoria, *Annual Report*, above n 3, 22.

317 *Children, Youth and Families Act 2005* (Vic) s 289(1)(a).

318 *Children, Youth and Families Act 2005* (Vic) s 289(1)(b), (2)–(3).

319 *Children, Youth and Families Act 2005* (Vic) s 305.

320 *Children, Youth and Families Act 2005* (Vic) s 310(5). The Court does not have power in this circumstance to make a custody to Secretary order, for instance.

321 Children's Court of Victoria, *Annual Report*, above n 3, 22.

322 *Children, Youth and Families Act 2005* (Vic) s 296(2).

323 *Children, Youth and Families Act 2005* (Vic) s 297(1)(e).

324 *Children, Youth and Families Act 2005* (Vic) s 296(2).

325 *Children, Youth and Families Act 2005* (Vic) s 297.

3.191 In these circumstances, the Court may direct the Secretary to take steps to ensure that another person applies to a court in relation to custody or guardianship of the child within the 12-month period.³²⁶

3.192 A custody to Secretary order or guardianship order is suspended when an application, with the prior consent of the Secretary, is made for relevant parenting orders under the *Family Law Act 1975* (Cth), and it expires when any parenting orders are made.³²⁷

3.193 In determining any application for an extension of a custody to Secretary order or guardianship to Secretary order, the Court must consider the appropriateness of making a permanent care order for the child before considering the benefits of the child remaining in the custody or guardianship of the Secretary.³²⁸ The Court must also take the following matters into account:

- the nature of the relationship of the child with his or her parents and the access between the child and the parents
- the capacity of the parents to fulfil the duties and responsibilities of parenthood
- any action taken by a parent to fulfil the goals of the case plan
- the effects on the child of continued separation from the parents
- any other relevant fact in considering what is in the child's best interests.³²⁹

The Court may extend the custody to Secretary order if it is in the child's best interests.³³⁰

Long-term guardianship to Secretary order

3.194 A long-term guardianship order grants custody and guardianship of a child aged 12 years or older to the Secretary.³³¹ The order may last until the child turns 18 or until the child marries, whichever is earlier.³³² To make a long-term guardianship order, the Court must be satisfied that there is a long-term carer or carers with whom the child can live, that the child and the Secretary consent to the order, and that the order is in the child's best interests.³³³ The Secretary must apply to revoke the order if the child's placement with the carer has broken down.³³⁴ In other circumstances, a child, a parent, with leave of the Court, or the Secretary may apply to revoke the order.³³⁵

3.195 There are no conditions attached to this order so there are no applications for breach or variation. To prevent the order from lapsing, the Secretary must review the operation of the order every 12 months and provide a notice to the Court, the child and parents that the order continues to be in the child's best interests.³³⁶

3.196 A long-term guardianship order is suspended when an application, with prior consent of the Secretary, is made for relevant parenting orders under the *Family Law Act 1975* (Cth), and expires when any parenting orders are made.³³⁷ In 2008–09, the Court made 43 long-term guardianship orders.³³⁸

Interim protection order

- 3.197 Before making a protection order, the Court may make an interim protection order for a maximum period of three months when the Court considers it desirable ‘to test the appropriateness of a particular course of action’.³³⁹ The order may also be made upon revocation of a supervised custody order, custody to third party order or breach of a supervised custody order or supervision order.³⁴⁰
- 3.198 The interim protection order may include any conditions on parents, a child or a carer that are in the child’s best interests, including conditions about where the child lives and access by a parent or other person.³⁴¹ The Secretary is responsible for implementing the order.³⁴² The Court may order that a further report—often a Clinic report—be prepared.³⁴³ Before the end of the interim protection order, the Court must consider a further disposition report and then make or refuse to make a protection order.³⁴⁴ The Court cannot extend or make a new interim protection order.³⁴⁵
- 3.199 The Secretary, parent or child may apply to vary or revoke an interim protection order.³⁴⁶ The Secretary may bring an application for breach of conditions by a child, parent or carer.³⁴⁷ On a breach application, the Court may:
- confirm the interim protection order
 - end the interim protection order with the making of an interim accommodation order
 - vary any conditions
 - revoke the order, and may make a further protection order (but not a further interim protection order).³⁴⁸
- 3.200 In 2008–09, the Court made 893 interim protection orders.³⁴⁹

COSTS ORDERS

- 3.201 The parties to child protection proceedings in the Children’s Court are usually responsible for their own legal costs. Most parents and represented children in child protection proceedings have legal representation provided by VLA.
- 3.202 The Children’s Court has powers given to the Magistrates’ Court under the *Magistrates’ Court Act 1989* (Vic),³⁵⁰ including the power to order costs against a person or legal practitioner.³⁵¹ It is very uncommon, however, for the Court to order costs against a party in child protection proceedings.³⁵² In *DHS v Hanrahan & Maher*,³⁵³ Justice Hampel held that costs may be awarded when a protection application is withdrawn.

APPEALS

- 3.203 The parties have a right to appeal against a Children’s Court order. Appeals are heard by either the County Court or Supreme Court, depending on the type of order appealed from, who the original decision maker was, and whether it is an appeal on a question of law. Parties must lodge an application for appeal under the Act within 28 days,³⁵⁴ or 30 days for an appeal on a question of law.³⁵⁵ As IAOs last for only 21 days, appeals against this type of order are often filed within 24 hours.

- 326 *Children, Youth and Families Act 2005* (Vic) s 297(1)(f).
- 327 *Children, Youth and Families Act 2005* (Vic) ss 288, 289(4).
- 328 *Children, Youth and Families Act 2005* (Vic) s 295(2).
- 329 *Children, Youth and Families Act 2005* (Vic) s 295(3).
- 330 *Children, Youth and Families Act 2005* (Vic) s 294.
- 331 *Children, Youth and Families Act 2005* (Vic) s 290(1)(a)–(b).
- 332 *Children, Youth and Families Act 2005* (Vic) s 290(1)(c).
- 333 *Children, Youth and Families Act 2005* (Vic) s 290(2).
- 334 *Children, Youth and Families Act 2005* (Vic) s 306(2).
- 335 *Children, Youth and Families Act 2005* (Vic) s 306(1).
- 336 *Children, Youth and Families Act 2005* (Vic) s 290(3)–(4).
- 337 *Children, Youth and Families Act 2005* (Vic) ss 290(5), 288.
- 338 Children’s Court of Victoria, *Annual Report*, above n 3, 19.
- 339 *Children, Youth and Families Act 2005* (Vic) s 291(1)(b), (3)(e).
- 340 *Children, Youth and Families Act 2005* (Vic) s 291(2).
- 341 *Children, Youth and Families Act 2005* (Vic) s 291(3)(f).
- 342 *Children, Youth and Families Act 2005* (Vic) s 291(3)(a).
- 343 *Children, Youth and Families Act 2005* (Vic) s 291(3)(c).
- 344 *Children, Youth and Families Act 2005* (Vic) s 291(6).
- 345 *Children, Youth and Families Act 2005* (Vic) s 291(6).
- 346 *Children, Youth and Families Act 2005* (Vic) ss 299(e), 303(g).
- 347 *Children, Youth and Families Act 2005* (Vic) s 311(c).
- 348 *Children, Youth and Families Act 2005* (Vic) ss 311, 317–18.
- 349 Children’s Court of Victoria, *Annual Report*, above n 3, 19.
- 350 *Children, Youth and Families Act 2005* (Vic) s 528.
- 351 *Magistrates’ Court Act 1989* (Vic) ss 131–2.
- 352 Children’s Court of Victoria, *Research Materials*, above n 136, [3.9.3].
- 353 *Secretary to the Department of Human Services v His Worship Mr Hanrahan & Maher & Ors* (Unreported, Supreme Court of Victoria, Hampel J, 10 December 1996).
- 354 *Children, Youth and Families Act 2005* (Vic) s 425(1).
- 355 *Children, Youth and Families Act 2005* (Vic) s 329(4)(a).

FULL RE-HEARING (HEARING *DE NOVO*)

3.204 The parties, including specified persons, may appeal against certain orders of the Children’s Court to the County Court, if the original decision was made by a Court magistrate, or to the Supreme Court, if the original decision was made by the President of the Court. The types of orders providing a right of appeal with a full re-hearing include:

- a protection order³⁵⁶
- the dismissal of a protection application or irreconcilable difference application³⁵⁷
- an undertaking under section 272 of the Act³⁵⁸
- orders relating to the variation, revocation, extension and breach of various orders³⁵⁹
- permanent care orders³⁶⁰
- orders dismissing various applications.³⁶¹

Pending an appeal, the Court is to hear and determine an application for a stay of an order as expeditiously as possible.³⁶²

3.205 A parent, the child, the Secretary, the person granted custody and guardianship in a permanent care order, and the Attorney-General—if the Attorney-General appeared in the original proceeding—may lodge appeals.³⁶³

3.206 Appeals operate as re-hearings of the original proceedings. The appellate court is to consider the matter afresh, on the evidence presented.³⁶⁴ The procedures for an appeal from a decision in the Family Division of the Court are cross-referenced to sections relating to appeals in the Criminal Division of the Court, with necessary modifications. Relevant sections set out matters regarding:

- how an appeal is commenced³⁶⁵
- the determination of appeal³⁶⁶
- the effect of failing to appear³⁶⁷
- the abandonment of appeal³⁶⁸
- legal representation³⁶⁹
- explanation of and reasons for orders³⁷⁰
- the circumstances in which an appeal case, or part of a case, is open to the public.³⁷¹

APPEAL ON A QUESTION OF LAW

3.207 A party to proceedings before the Family Division of the Children’s Court, or the Attorney-General—if represented in the original proceedings—may appeal to the Supreme Court on a question of law from a final order of the Court.³⁷² The appellant must demonstrate that the Children’s Court made an error of law, such as the misapplication of a legal principle.³⁷³

3.208 A person who appeals on a question of law is deemed to have abandoned finally and conclusively any other right under the Act or any other Act to appeal to the County Court or the Trial Division of the Supreme Court.³⁷⁴

JUDICIAL REVIEW

3.209 There is also a right to challenge the decision-making process by means of judicial review in the Supreme Court.³⁷⁵ This procedure enables a party to appeal a decision that is not a final order. Judicial review is limited; it focuses on the jurisdiction and legality of court actions, not on whether the decision was correct.³⁷⁶

APPEAL TO SUPREME COURT FOR INTERIM ACCOMMODATION ORDERS

3.210 A child, parent or protective intervener may appeal to the Supreme Court against an IAO or an order dismissing an IAO application.³⁷⁷ The Supreme Court can make any other order it thinks ought to have been made in place of the Court's original order or dismissal, or it can dismiss the appeal.³⁷⁸ The appeal operates as a re-hearing on the original material, but the Supreme Court may consider any other relevant material.³⁷⁹

APPEALS IN PRACTICE

3.211 It is rare for child protection decisions to be the subject of an appeal or review. The Children's Court reports that in the financial year 2007–08, 12 child protection cases were appealed or reviewed.³⁸⁰ In three of these cases, the Court's original decision was either partly or wholly overturned.³⁸¹

3.212 IAO appeals are also unusual. Over the past five years, there has been an average of two appeals per year,³⁸² only one of which was successful.³⁸³

3.213 The Children's Court regularly hears IAO contests by evidence in circumstances where a party has not been satisfied with the judicial officer's decision following an IAO contest by submission. In a sense, this is a form of internal review and is cheaper and more convenient than an appeal to the Supreme Court. The Court also hears many applications for breaches of IAO conditions.³⁸⁴ If initiated by safe custody, these applications may be back before the Court or a bail justice within 24 hours.³⁸⁵ Between September 2002 and June 2007, applications for breach of IAO conditions grew by 17 per cent per year.³⁸⁶

356 *Children, Youth and Families Act 2005* (Vic) s 328(1)(a).

357 *Children, Youth and Families Act 2005* (Vic) s 328(1)(b).

358 *Children, Youth and Families Act 2005* (Vic) s 328(1)(c).

359 *Children, Youth and Families Act 2005* (Vic) s 328(1)(i)–(k).

360 *Children, Youth and Families Act 2005* (Vic) s 328(1)(n).

361 *Children, Youth and Families Act 2005* (Vic) s 328(1)(m), (o).

362 *Children, Youth and Families Act 2005* (Vic) s 328(9).

363 *Children, Youth and Families Act 2005* (Vic) s 328(2).

364 *Mr and Mrs X v Secretary to the Department of Human Services and Anor* (Unreported, Supreme Court of Victoria, Common Law Division, Gillard J, 12 May 2003) [58], [60].

365 *Children, Youth and Families Act 2005* (Vic) s 328(6)(a), refers to s 425 except sub-s 3(a).

366 *Children, Youth and Families Act 2005* (Vic) s 328(6)(b), refers to s 426(1)–(2), (4)–(5).

367 *Children, Youth and Families Act 2005* (Vic) s 328(6)(e), refers to s 430D, and s 328(6)(f) refers to s 430E.

368 *Children, Youth and Families Act 2005* (Vic) s 328(6)(d), refers to s 430C except sub-ss (3)–(4).

369 *Children, Youth and Families Act 2005* (Vic) s 328(6)(j), refers to s 430ZE.

370 *Children, Youth and Families Act 2005* (Vic) s 328(6)(l), refers to s 430ZG.

371 *Children, Youth and Families Act 2005* (Vic) s 328(6)(i), refers to s 430ZD.

372 *Children, Youth and Families Act 2005* (Vic) ss 329–30.

373 See, for example, *Director-General of Community Services Victoria v Buckley & Ors* (Unreported, Supreme Court of Victoria, O'Bryan J, 11 December 1992).

374 *Children, Youth and Families Act 2005* (Vic) s 328(5).

375 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 56.01.

376 *Mr and Mrs X v Secretary to the Department of Human Services and Anor* (Unreported, Supreme Court of Victoria, Common Law Division, Gillard J, 12 May 2003) [23]–[26]. See, for example, *Dr John Paterson v Keith Smith & Gregory Levine* (Magistrate, Children's Court) (Unreported, Supreme Court of Victoria, Harper J, 29 June 1993)—held the Court's decision was beyond jurisdiction; *PR v the Department of Human Services* [2007] VSC 338 (Unreported, Osborn J, 27 August 2007)—application for judicial review dismissed.

377 *Children, Youth and Families Act 2005* (Vic) s 271(1).

378 *Children, Youth and Families Act 2005* (Vic) s 271(2)–(3).

379 *Purcell v RM & Ors* [2004] VSC 14 (Unreported, Gillard J, 9 January 2004) [25].

380 Submission 46 (Children's Court of Victoria) 14.

381 *Ibid.*

382 *Ibid.* 53.

383 *Ibid.*

384 Under s 269 of the *Children, Youth and Families Act 2005* (Vic), a protective intervener, satisfied on reasonable grounds that there has been a failure to comply, may initiate an application for breach of an interim accommodation order or any condition attached to it.

385 *Children, Youth and Families Act 2005* (Vic) s 269(5).

386 Boston Consulting Group, *Children's Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007), 16. The new data released by the Boston Consulting Group in February 2010 does not appear to include relevant data regarding breach of interim accommodation orders: *Boston Consulting Group, Child Protection Proceedings Taskforce*, above n 24.

3.214 Some appellate courts have suggested that because the Children's Court is a specialist court dedicated to matters relating to children, they should be reluctant to interfere with the exercise of discretionary powers. In the *Department of Human Services v Yalniz*,³⁸⁷ Justice Nathan held that protection applications are *sui generis* and, in order for the Children's Court to ensure the protection of children, the rules of procedure can be tailored by the Court.³⁸⁸ Similarly, Justice Beach emphasised the special role of the Children's Court by observing that the Supreme Court should be reluctant to interfere with Children's Court orders and 'should only do so where it is abundantly clear that some significant error has been made'.³⁸⁹ Similar comments have been made in more recent decisions.³⁹⁰

TRANSFER OF CHILD PROTECTION ORDERS AND PROCEEDINGS

3.215 The CYF Act 2005 provides for the transfer of protection proceedings or protection orders between Victoria and another Australian state or territory, or between Victoria and New Zealand.³⁹¹ The Secretary can transfer protection orders administratively, if the persons affected by the order, such as the child's parents and any other person who is granted access to the child under the order, consent.³⁹² If consent cannot be obtained, the Secretary may apply to the Children's Court for an order to transfer the child protection order.³⁹³

3.216 The Children's Court can also transfer protection proceedings that have not been finalised to the Children's Court in any participating state or territory.³⁹⁴

CHILD PROTECTION RESPONSIBILITIES AFTER THE COURT MAKES A PROTECTION ORDER

PROTECTION ORDER PHASE—CASE PLANS, STABILITY PLANS, CULTURAL PLANS

3.217 Child Protection refers to the protection order phase as the fourth phase in the context of their casework practice. It commences when the Court has found the protection application proven and a protection order has been made in respect of a child. The child protection practitioner monitors, oversees and seeks to ensure that parents adhere to conditions of the protection order for the period of the order. The practitioner continues to assess the safety and wellbeing of the child. This may involve bringing a further application to court for breach, variation, revocation or extension of a protection order.

3.218 During this phase, the child protection practitioner formulates a case plan within six weeks of the making of a protection order,³⁹⁵ establishes a stability plan where required,³⁹⁶ and establishes a cultural support plan or cultural plan for an Aboriginal child.³⁹⁷

Case plan

3.219 If the Court makes a supervision order, supervised custody order, custody to the Secretary order, guardianship order, long-term guardianship order or therapeutic treatment (placement) order, then the Department must prepare a case plan for the child within six weeks of the order.³⁹⁸

3.220 The case plan is often referred to as the 'statutory case plan' or the 'statutory best interests case plan', to distinguish it from the original 'best interests plan' created during the protection intervention phase.

- 3.221 The case plan must contain all of the Secretary's significant decisions concerning the child that relate to the child's present and future wellbeing, including the placement of and access to the child.³⁹⁹ The best interests principles in section 10 and the decision-making principles in section 11 of the CYF Act 2005 apply to Child Protection when making case plans. If a child is Aboriginal, the principles in section 12 and, where relevant, sections 13 and 14, apply.
- 3.222 Family members attend case plan meetings and may have support persons present, although it is very rare for parents or children to be legally represented at case plan meetings.
- 3.223 A grant of legal aid for a lawyer to attend a case plan meeting for a party is only available in special circumstances. This would occur, for instance, if a parent or older child lacked capacity to participate because of an intellectual disability. Children are generally not legally represented at case plan meetings. Copies of the plan must be provided to the child and parents within 14 days of preparation together with a notice advising of procedures for an internal review.⁴⁰⁰
- 3.224 In submissions and consultations, the Commission heard concerns about how case plans and, where a protection order had not yet been made, best interests plans, could be designed to achieve a particular goal or outcome, but that outcome was in dispute between family members and Child Protection. For example, following a 12-month custody to Secretary order, Child Protection may create a plan with a goal of permanent care for the child, when parents seek to be reunified with the child at the end of the 12-month period.
- 3.225 If the custody to Secretary order contained a broadly expressed access condition, then the case plan may only include the minimum access necessary under the order in support of a permanent care goal. Legal practitioners for parents and children argued that a low level of access would interfere with the parents and/or child's goal for reunification. Child protection practitioners also expressed concern about this issue, stating that they had statutory obligations to create a plan in the child's best interests and they could not know when court proceedings would be finalised.⁴⁰¹

Review of case plans

- 3.226 The Secretary must review case plans from time to time 'as appears necessary'. Parents and children may seek an internal review of a case plan decision, and if unsatisfied with the result, they have a right of review through the Victorian Civil and Administrative Tribunal (VCAT).⁴⁰² Parties and/or children who are capable of providing instructions are not routinely legally represented at any VCAT review. Special circumstances must be shown.⁴⁰³ In 2009, there were only 12 case plan reviews to VCAT.⁴⁰⁴ The Children's Court does not have jurisdiction to review case plan decisions.

Stability plan

- 3.227 Following the making of an IAO or a protection order by the Court, unless it is contrary to the child's interests, the Secretary must prepare a stability plan if a child is in out-of-home care and has been so for a designated period since the order was made.⁴⁰⁵ The designated periods vary according to the age of the child: for children under two years old at the date of the order, the period is 12 months in total; for children of two to under seven years old, the period is 18 months; and for children above seven years old, the period is two years out of three years since the order was made.⁴⁰⁶

- 387 *Secretary of the Department of Human Services v Yalniz* [2001] VSC 231 (Unreported, Nathan J, 13 July 2001) [21].
- 388 Ibid.
- 389 *Hien Tu v Secretary of Department of Human Services* [1999] VSC 42 (Unreported, Beach J, 23 February 1999) [21].
- 390 *Purcell v RM & Ors* [2004] VSC 14 (Unreported, Gillard J, 9 January 2004) [27]–[28]; *CJ v Department of Human Services* [2004] VSC 317 (Unreported, Habersberger J, 9 August 2004) [21]–[22]; *The Secretary, Department of Human Services v Merigan & Anor* [2006] VSC 129 (Unreported, Hansen J, 21 February 2009) [13]–[14]: Hansen J held that 'I would, with respect, take the position that the decision of an experienced Magistrate in a specialist court is to be afforded respect and weight in consequence that it is such a decision, but doing so, in the end the decision must nevertheless be regarded in the context of all the relevant facts and circumstances of the case.'
- 391 *Children, Youth and Families Act 2005* (Vic) ss 335, 228, sch 1.
- 392 *Children, Youth and Families Act 2005* (Vic) sch 1, cl 4.
- 393 *Children, Youth and Families Act 2005* (Vic) sch 1, pt 2, div 2.
- 394 *Children, Youth and Families Act 2005* (Vic) sch 1, pt 3.
- 395 *Children, Youth and Families Act 2005* (Vic) s 167.
- 396 *Children, Youth and Families Act 2005* (Vic) s 170.
- 397 *Children, Youth and Families Act 2005* (Vic) s 176.
- 398 *Children, Youth and Families Act 2005* (Vic) s 167.
- 399 *Children, Youth and Families Act 2005* (Vic) s 166.
- 400 *Children, Youth and Families Act 2005* (Vic) ss 167(2), 331.
- 401 Consultation 6 (Private Practitioners 1).
- 402 *Children, Youth and Families Act 2005* (Vic) ss 331, 333. Decisions relating to the recording of information in the central register may also be reviewed by VCAT: *Children, Youth and Families Act 2005* (Vic) s 333(1)(b).
- 403 Victoria Legal Aid, *Grants Handbook*, above n 256, 94. Refer to Appendix M for details of Victoria Legal Aid funding.
- 404 Email from Justice Ross, President of VCAT, to the Commission, 31 May 2010.
- 405 *Children, Youth and Families Act 2005* (Vic) ss 170–1.
- 406 *Children, Youth and Families Act 2005* (Vic) s 170(3).

3.228 A stability plan sets goals for the child’s long-term out-of-home care.⁴⁰⁷ It may include details of the proposed carer, the type of court order that the Secretary considers would support the long-term placement of the child in out-of-home care, future access arrangements for parents and siblings, and other considerations for best meeting the child’s needs.⁴⁰⁸

Cultural plan

3.229 If an Aboriginal child has been placed in out-of-home care under a guardianship to Secretary order or long-term guardianship to Secretary order, the Secretary must prepare a cultural plan for the child.⁴⁰⁹ A cultural plan sets out how the child is to remain connected to his or her Aboriginal community and culture.⁴¹⁰ The Secretary must monitor the carer’s compliance with the cultural plan.⁴¹¹

3.230 The Commission heard that cultural plans would also be desirable for Aboriginal children placed on custody to Secretary orders and other orders involving placement in out-of-home care.⁴¹²

CASE CLOSURE BY CHILD PROTECTION

3.231 Case closure is the last of the five phases of child protection work. A case can close following the recording of a particular outcome at any of the four preceding phases. At the end of the protection order phase, recorded outcomes may indicate:

- that ‘no further action is required’
- that advice, information, and referral were provided
- that harm was substantiated but sufficient safety was provided
- a ‘move to closure’.⁴¹³

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES AND INTERNATIONAL RIGHTS INSTRUMENTS

INTRODUCTION

3.232 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) contains a number of human rights relevant to this review of child protection processes. Some international human rights instruments are also important.

3.233 While children have not always been seen as people with rights, various assumptions concerning the status of children fell away during the 20th century.⁴¹⁴ In earlier times, it had been suggested that children should not be entitled to rights because the enjoyment of rights is contingent on capacity to exercise rights, which some children lacked.⁴¹⁵ It is now widely accepted that capacity is not a precondition to the enjoyment of human rights, and that all persons have rights by virtue of their humanity.⁴¹⁶

3.234 Theorists have contended that the concept of rights should not be confined to those who can lay claim to or waive them,⁴¹⁷ and that children can therefore be considered to have rights. This is the ‘interest’ theory of rights, and enables children to benefit from rights even though they may lack capacity to make what adults consider ‘reasoned decisions’.⁴¹⁸ An evolving conception of autonomy applies to children, reflecting their age and level of maturity and enabling them to become active agents in matters affecting them.⁴¹⁹ Widespread support for the *UN Convention on the Rights of the Child* (CROC)⁴²⁰ demonstrates that children are now considered rights-bearing subjects.

3.235 Child protection matters and human rights interact in a number of ways, including:

- balancing the rights of families and children
- the separation of children from their families
- the representation and participation of children in child protection processes
- the right to a fair hearing
- cultural rights as they apply to children.

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (VIC)

3.236 Victoria is one of two Australian jurisdictions with a charter of rights.⁴²¹ The Charter came into full operation on 1 January 2008.⁴²² The Charter gives statutory recognition to 20 civil and political rights and freedoms primarily derived from the *International Covenant on Civil and Political Rights* (ICCPR).⁴²³ The purpose of the Charter is to protect and promote the human rights of all persons who are present in Victoria.⁴²⁴ The Charter establishes a ‘dialogue model’ of human rights protection, whereby the government, courts and parliament are assigned specific roles to ensure that human rights are protected and promoted in Victoria. Laws are to be developed and interpreted compatibly with human rights, and government and public authorities are required to act consistently with human rights.⁴²⁵ Children benefit from almost all human rights set out in the Charter, as persons.⁴²⁶ A number of human rights principles enshrined in the Charter are pertinent to the current law and practice of child protection in Victoria.⁴²⁷

3.237 Under the Charter, it is unlawful for a public authority to ‘act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right’.⁴²⁸ However, this provision does not apply ‘if, as a result of a [Commonwealth or state statutory provision] or otherwise under law, the public authority could not reasonably have acted differently or made a different decision’.⁴²⁹ The Department is a public authority and organisations undertaking functions of a public nature on behalf of the Department are also public authorities under the Charter when performing those functions.⁴³⁰

407 *Children, Youth and Families Act 2005* (Vic) s 169.

408 *Children, Youth and Families Act 2005* (Vic) s 169(3).

409 *Children, Youth and Families Act 2005* (Vic) s 176(1).

410 *Children, Youth and Families Act 2005* (Vic) s 176(2)–(3).

411 *Children, Youth and Families Act 2005* (Vic) s 176(4).

412 Consultation 27 (FVPLS Victoria).

413 Department of Human Services (Victoria), *Protecting Victoria’s Children: Child Protection Practice Manual*, ‘Definition and Purpose of Case Closure’, Advice No 1531 (23 April 2007), from CD-ROM provided at 23 March 2010.

414 John Tobin, ‘The Development of Children’s Rights’ in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 23, 25–7.

415 *Ibid* 28.

416 *Ibid* 29.

417 Jane Fortin, *Children’s Rights and the Developing Law* (3rd ed, 2009) 13.

418 *Ibid*.

419 Tobin, above n 414, 29; *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 5, 12 (entered into force 2 September 1990) (CROC).

420 At 17 May 2010, 193 countries were party to the *Convention on the Rights of the Child*. This excludes Somalia and the United States of America, which are only signatories to the Convention.

421 The other is the Australian Capital Territory. See the *Human Rights Act 2004* (ACT).

422 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2.

423 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 1.

424 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(1). ‘Person’ is defined in s 3(1) to mean a human being, and ‘child’ means a person under 18 years of age.

425 *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 3.

426 A notable exception is the right to vote which is legitimately restricted on the basis of age: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 18(2)(a).

427 All submissions which considered the human rights implications of child protection identified the Charter as central to the current law and practice of child protection.

428 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1).

429 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(2).

430 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4. A number of submissions highlighted the Charter obligations on DHS, including: submissions 33 (Youthlaw), 24 (WHCLS), 45 (FCLC), 25 (LIV).

- 3.238 An act of a public authority that is unlawful under the Charter⁴³¹ does not give rise to an independent right to relief or a remedy,⁴³² but may be used as an additional ground in a non-Charter cause of action relating to the unlawful conduct of a public authority.⁴³³ That is, an act by a public authority that is incompatible with the Charter does not give rise to a freestanding cause of action against the public authority, but may be used as part of an existing cause of action. There is no entitlement to damages for a breach of the Charter.⁴³⁴ The Charter expanded the functions of the Victorian Ombudsman to include 'the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter'.⁴³⁵
- 3.239 The Charter acknowledges that human rights, in general, are not absolute, but *may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors*.⁴³⁶
- 3.240 When determining whether any limitations on rights are reasonable, the relevant facts to consider include:
- the nature of the right
 - the importance of the limitation
 - the nature and extent of the limitation
 - the relationship between the limitation and its purpose
 - whether there is a less restrictive way to achieve the purpose of the limitation
 - any other relevant factors.⁴³⁷

These factors are to be taken into account when human rights are engaged in most, if not all, child protection matters.

INTERNATIONAL CONVENTIONS

- 3.241 Australia is state party to a number of key international conventions that protect and promote the rights of families and children. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides that families should be afforded the widest possible protection and assistance.⁴³⁸ Furthermore, states are to adopt special measures to protect and assist children and young people without discrimination on the basis of parentage or other conditions.⁴³⁹ The ICCPR also provides specific rights protecting the rights of families and children.⁴⁴⁰ As the natural and fundamental group unit in society, the family is entitled to protection by society and the state.⁴⁴¹ Every child, without discrimination, has 'the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State'.⁴⁴² CROC sets out internationally accepted principles for promoting and protecting the fundamental human rights of children, including principles for child protection.⁴⁴³ It entitles each person under the age of 18 to the rights set out within it.⁴⁴⁴ The relevant substantive rights will be discussed at length below.
- 3.242 Australia has ratified all of these international conventions.⁴⁴⁵ At the time of ratification, Australia lodged only one reservation to CROC.⁴⁴⁶ Ratification of CROC and other international instruments indicates that not only is Australia committed to the human rights principles protected and promoted in these conventions, but it also consents to the legal obligations which flow from them. As a state party, Australia must protect, respect and fulfil the human rights relevant to children and families enshrined in the ICCPR, ICESCR and CROC.

3.243 Under each of these international rights instruments, Australia accepts an obligation in good faith to enable enjoyment of the rights within domestic law.⁴⁴⁷ International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right can also play an important role in interpreting rights under the Charter.⁴⁴⁸ The Charter itself provides that it must be reviewed after four years of operation. One of the matters to be considered is whether the rights in CROC should be included in the Charter.⁴⁴⁹

PROTECTION OF FAMILIES AND CHILDREN— A BALANCING EXERCISE

Protection of families as the fundamental group unit of society

3.244 The Charter recognises that ‘families are the fundamental group unit of society and are entitled to be protected by society and the State’,⁴⁵⁰ although ‘family’ is not defined. The Explanatory Memorandum to the Charter states that the section is to be interpreted broadly so that it may ‘be given a meaning that recognises the diversity of families that live in Victoria, all of whom are worthy of protection’.⁴⁵¹ The United Nations Human Rights Committee (UNHRC) has held that under article 23(1) of the ICCPR, on which this Charter right is modelled,⁴⁵² states are required to adopt legislative, administrative or other measures to protect the family.⁴⁵³

3.245 CROC reinforces the importance of the family as the fundamental group of society and natural environment for the growth and wellbeing of all its members, particularly children.⁴⁵⁴ A broad and non-discriminatory perception of families is supported in CROC, and article 5 requires states to respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community, in providing guidance and support to the child.⁴⁵⁵

3.246 In the CYF Act 2005, it is ‘parent and child’, not ‘family’, that is described as the fundamental group unit of society.⁴⁵⁶ Although ‘parent’ is given a relatively broad definition under the CYF Act 2005,⁴⁵⁷ the relevant rights instruments⁴⁵⁸ are unanimous in identifying the ‘family’ as the fundamental group unit of society and the unit which is to be protected. It is surprising that legislation entitled the *Children, Youth and Families Act* does not give priority to the status of the family.

431 Pursuant to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 28.

432 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 28.

433 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(1).

434 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

435 *Ombudsman Act 1973* (Vic) s 13(1A); *Charter of Human Rights and Responsibilities Act 2006* (Vic) sch 2.

436 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

437 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

438 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 10(1) (entered into force 3 January 1976).

439 *Ibid* art 10(3). This was discussed in submissions 45 (FCLC), 26 (FVPLS Victoria).

440 The ICCPR was noted in submissions, including: submissions 45 (FCLC), 26 (FVPLS Victoria).

441 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 23(1) (entered into force 23 March 1976).

442 *Ibid* art 24(1).

443 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

444 *Ibid* art 1.

445 Australia became a signatory to the ICCPR on 18 December 1972 and ratified on 13 August 1980. Australia became a signatory to the ICESCR on 18 December 1972 and ratified on 10 December 1975. Australia became a signatory to CROC on 22 August 1990 and ratified on 17 December 1990.

446 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(c) (entered into force 2 September 1990). Note that this reservation relates to the separation of children from adults in prison.

447 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980): ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith; Tobin, above n 414, 29.

448 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2).

449 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44(2)(a)(ii).

450 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1).

451 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 14.

452 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 23(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 14. Note that article 23(1) of the ICCPR refers to the family as the ‘natural and fundamental group unit of society’, while the word ‘natural’ is omitted from s 17(1) of the Charter.

453 Human Rights Committee, *General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses* (Art 23), 39th sess, UN Doc/HRV/GEN/1/Rev 6 (27 July 1990) [3].

454 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, Preamble (entered into force 2 September 1990).

455 *Ibid* art 5.

456 *Children, Youth and Families Act 2005* (Vic) s 10(3)(a).

457 *Children, Youth and Families Act 2005* (Vic) s 3. ‘Parent’ is defined as the father and mother of the child, the spouse of the father or mother, the domestic partner of the father or mother, a person named as the father or mother in the Register of Births, Deaths and Marriages, a person who acknowledges he is the father by an instrument under the *Status of Children Act 1974* and a person in respect of whom the court has made a declaration finding that the person is the father of the child.

458 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 23(1) (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990).

- 3.247 While the CYF Act 2005 refers to the need to strengthen, preserve and promote positive relations between the child and other family members,⁴⁵⁹ and encourages placement with family members when the child is removed from his or her parents,⁴⁶⁰ it emphasises the parent–child relationship rather than that of the ‘family’. The Committee on the Rights of the Child (CRC) has noted that CROC applies to various forms of families, including not only the extended family as provided for by local custom,⁴⁶¹ but also ‘the nuclear family, re-constructed family, joint family, single parent family, common-law family and adoptive family’.⁴⁶²
- 3.248 The right to family protection is not only a parental right, but also a right of the child. In order to maintain personal relations and direct contact with both parents on a regular basis, CROC requires states parties to respect the right of the child who is separated from one or both parents, unless it is contrary to the child’s best interests.⁴⁶³ The protection of the family as the fundamental group unit of society is an important children’s right, especially in light of research which depicts some ‘[out-of-home] care leavers as being particularly disadvantaged and as having significantly reduced life chances’.⁴⁶⁴

Protection of children

- 3.249 The Charter section which provides for the protection of families also provides for the protection of children.⁴⁶⁵ The Charter recognises the special vulnerability of children and provides that ‘every child has the right, without discrimination,⁴⁶⁶ to such protection as is in his or her best interests and is needed by him or her by reason of being a child’.⁴⁶⁷ The CRC recognises that child protection is of the utmost importance and requires a multi-disciplinary approach to ensure children are protected and their families are supported.⁴⁶⁸

Responsibility for protecting children

- 3.250 According to the UNHRC,⁴⁶⁹ responsibility for guaranteeing the necessary protection of children lies primarily with the family, particularly the parents, who are to be assisted by the state, society, and social institutions.⁴⁷⁰ Furthermore, states are to adopt every social and economic measure to prevent children from being victims of violence and cruel and inhuman treatment, as well as other measures to protect children and promote their development and education.⁴⁷¹
- 3.251 CROC provides the human rights basis for the protection of children, apportioning responsibility for this between parents and the state. Article 19 provides:
- (1) *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
 - (2) *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*⁴⁷²

3.252 States are obliged to consult children and families, and enact legislation and adopt policies to protect children from harm.⁴⁷³ The principle of social responsibility is to inform all legislation and policies, as the state and every adult are responsible for protecting children.⁴⁷⁴ In undertaking such care and protection as is necessary for the child's wellbeing, states are to consider the rights and duties of the child's parents or guardians and take all appropriate legislative and administrative measures.⁴⁷⁵

3.253 CROC also provides that the primary responsibility for securing and providing conditions of living necessary for the child's development lies with parents or others responsible for the child.⁴⁷⁶ Both parents share common responsibilities for the child's upbringing and development and their primary concern should be the child's best interests.⁴⁷⁷ The CRC recommends that governments, in collaboration with civil society, take all necessary measures to support parents to fulfil their parental responsibilities.⁴⁷⁸ Australia, as a state party, is to provide material assistance and support programs to those families in need, with particular regard to nutrition, clothing and housing.⁴⁷⁹ Additionally, Australia is to render appropriate assistance to those with child-rearing responsibilities, which includes ensuring the development of institutions, services and facilities for the care of children.⁴⁸⁰

3.254 Throughout CROC⁴⁸¹ and the ICCPR,⁴⁸² parents, family and persons having care of the child are named as the parties responsible for providing care and protection for the child, supported in their role by the state. The Charter does not apportion responsibility for this task.⁴⁸³

The right to life and protection from torture and cruel, inhuman or degrading treatment

3.255 The Charter protects key physical integrity rights which are central to child protection. Section 9 provides that 'every person has the right to life and has the right not to be arbitrarily deprived of life'.⁴⁸⁴ The right to life should not be narrowly interpreted.⁴⁸⁵ The right to life not only imposes a negative duty on the state to refrain from arbitrary deprivation of life, but can also require the state to adopt positive measures.⁴⁸⁶ In the context of child protection, this means that the state has a positive duty to protect the life of vulnerable children.⁴⁸⁷ Accordingly, CROC provides that states parties shall ensure, to the maximum extent possible, the survival and development of the child.⁴⁸⁸

459 *Children, Youth and Families Act 2005* (Vic) s 10(3)(b).

460 *Children, Youth and Families Act 2005* (Vic) s 10(3)(h).

461 Committee on the Rights of the Child, *Day of General Discussion: Children Without Parental Care*, 40th sess, CRC/C/153 (17 March 2006) [644].

462 *Ibid.*

463 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 9(3) (entered into force 2 September 1990). This right is also discussed below.

464 Guy Johnson et al, *Australian Housing and Urban Research Institute Final Report: Pathways from Out-of-Home Care* (2010) 8. The study emphasises, however, that those leaving out-of-home care are a heterogeneous group with varied backgrounds and experiences.

465 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

466 Discrimination is on the basis of an attribute as set out in s 6 of the *Equal Opportunity Act 1995* (Vic). Listed bases for discrimination are: age; breastfeeding; gender identity; impairment; industrial activity; employment activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sexual orientation; and personal association (whether as relative or otherwise) with a person who is identified by reference to any of the above attributes.

467 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2). The Charter right to protection for children is derived from the ICCPR: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 24(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 14. Note that there is an equivalent to this right in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 3(1)–(2) (entered into force 2 September 1990).

468 Committee on the Rights of the Child, *Day of General Discussion*, above n 461, [649]–[650].

469 Commenting on the ICCPR article from which the Charter right to protection of children is derived.

470 Human Rights Committee, *General Comment 17: Rights of the Child* (Art 24), 35th sess, UN Doc HRI/GEN/1/Rev 6 (7 April 1989) [6]. The importance of state and social support for families was emphasised in submissions, see for example, submission 24 (WHCLS).

471 Human Rights Committee, *General Comment 17*, above n 470, [3].

472 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 19 (entered into force 2 September 1990).

473 Committee on the Rights of the Child, *Day of General Discussion*, above n 461, [651].

474 *Ibid* [652].

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

476 *Ibid* art 27(2).

477 *Ibid* art 18(1).

478 Committee on the Rights of the Child, *Day of General Discussion*, above n 461, [647], [649], [689].

479 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 27(3) (entered into force 2 September 1990).

480 *Ibid* art 18(2).

481 *Ibid* arts 18(1)–(2), 19(2), 27(2)–(3).

482 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 24(1) (entered into force 23 March 1976).

483 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

484 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9. The formulation of this Charter right is based on: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 6(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 10. Note that there is an equivalent to this right in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 6(1) (entered into force 2 September 1990).

485 Human Rights Committee, *General Comment 06: The Right to Life* (Art 6), 16th sess, UN Doc HRI/GEN/1/Rev 6 (30 April 1982) [1].

486 *Ibid* [5].

487 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Human Rights and Child Protection', Advice No 1568 (31 December 2007), from CD-ROM provided at 23 March 2010, 44.

488 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 6(2) (entered into force 2 September 1990).

3.256 Protection from torture and cruel, inhuman or degrading treatment is enshrined in section 10 of the Charter.⁴⁸⁹ This right is concerned not only with the physical integrity of individuals, but also with their mental integrity and their inherent dignity as human beings.⁴⁹⁰ Although section 10 is phrased in negative terms, it may give rise to positive state obligations, such as taking steps to prevent and minimise the risk and occurrence of acts of torture and cruel, inhuman and degrading treatment by persons acting in a private capacity, and to investigate allegations of such conduct.⁴⁹¹ When making decisions and taking action, the Department and other public authorities must consider the obligation to protect children from inhuman or degrading treatment by family members, legal guardians or out-of-home carers.⁴⁹²

Balancing the protection of the child in his or her best interests and protection of the family

- 3.257 Protection of the family and protection of children exist as separate rights under the ICCPR,⁴⁹³ but in the Charter they are two subsections of section 17.⁴⁹⁴ The reason for this drafting decision is not explained in the Explanatory Memorandum of the Charter, nor in the Parliamentary Debates.⁴⁹⁵
- 3.258 The structure of section 17 of the Charter suggests that its two parts are to be read together and that one qualifies the other. The Explanatory Memorandum to the *Children and Young People Bill 2008* (ACT) (CYP Bill 2008) discusses the relationship between these two rights under the *Human Rights Act 2004* (ACT) (HRA 2004).⁴⁹⁶ The CYP Bill 2008, like the Victorian CYF Act 2005, emphasised the role of the family in providing care and protection for young people, but limited this by allowing for protective intervention in cases of abuse, neglect or risk thereof.⁴⁹⁷ This was considered the appropriate way to balance the right to protection of the family and the right to protection of children when those two rights conflict under the HRA 2004.
- 3.259 The family's right to protection may sometimes need to be infringed in order to protect the child.⁴⁹⁸ The Child Protection Practice Manual notes, however, that there are many principles in the CYF Act 2005 to ensure that when the rights of the family are limited by action taken to protect a child, 'there is a reasonable and proportionate connection between the limits and their purpose'.⁴⁹⁹ The example provided is the best interests provisions of the CYF Act 2005,⁵⁰⁰ which require that intervention into the parent-child relationship is limited to that necessary to secure the child's safety and wellbeing.⁵⁰¹
- 3.260 The concept of 'best interests' is particularly important to the interpretation and application of section 17(2) of the Charter—the right of children to protection. The child's best interests are to be a primary consideration in all actions concerning children.⁵⁰² This includes decisions made by courts, administrative or legislative bodies, and actions undertaken by public or private social welfare institutions.⁵⁰³ Consistent with this approach, the CYF Act 2005 declares that the best interests of the child are paramount and establishes best interests principles to be considered when making a decision or taking action in relation to a child.⁵⁰⁴

Right against unlawful and arbitrary interference with privacy, family and home

- 3.261 The Charter right of a person 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'⁵⁰⁵ is closely related to the right to protection of families.⁵⁰⁶ Justice Bell, sitting as the President of VCAT, recently said that

*The rights to privacy, family, home and correspondence in section 13(a) are of fundamental importance to the scheme of the Charter. Their purpose is to protect and enhance the liberty of the person—the existence, autonomy, security and wellbeing of every individual in their own private sphere.*⁵⁰⁷

3.262 The Charter right to privacy, family, home and correspondence⁵⁰⁸ is engaged when public authorities enter a family's home without consent and remove a child believed to be in need of protection. This right, however, does not prohibit all interference—only that which is unlawful or arbitrary. This means that interference may only take place in a manner permitted by law that is reasonable in the particular circumstances.⁵⁰⁹ 'Reasonableness' in this context requires that the interference is proportional to the end sought and necessary in the circumstances.⁵¹⁰ Interference with privacy, family or the home may be considered a reasonable limitation of the right in circumstances where it is necessary to protect the child and his or her best interests.⁵¹¹ Any decision pertaining to interference will involve an exercise in balancing competing rights.

SEPARATION OF CHILDREN FROM THEIR FAMILIES

General

3.263 Some human rights are engaged when children are separated from their parents or families for their protection.⁵¹² The family's right to protection must be considered in these circumstances.⁵¹³ This issue was addressed in an ACT Supreme Court decision relating to the rights engaged when making an interim care and protection order.⁵¹⁴ Justice Crispin held that it would be

*an error of law for a court ... to make orders authorising the removal of children from the parents or the substantial exclusion of a parent from the family without having due regard for the importance of the family unit and the entitlement to protection provided by [section 11(1)].*⁵¹⁵

489 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10. Article 7 of the ICCPR is the basis for this Charter right: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 10. Note that there is an equivalent to this right in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37 (entered into force 2 September 1990).

490 Human Rights Committee, *General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)*, 44th sess, UN Doc HRV/GEN/1/Rev 6 (10 March 1992) [2].

491 *Ibid* [2], [8], [10].

492 Department of Human Services (Victoria), 'Human Rights and Child Protection', above n 487, 45.

493 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 23(1), 24(1) (entered into force 23 March 1976).

494 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17.

495 Note however that in Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2644, Richard Della-Riva states 'It says in the bill that to define a right is to limit that right. We see some fundamental issues with what that statement means in relation to clause 17'. He did not get time to discuss this issue.

496 Explanatory Memorandum, Children and Young People Bill 2008 (ACT) 96. Note that s 11(1)–(2) of the *Human Rights Act 2004* (ACT) are largely analogous to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1)–(2) regarding protection of families as the basic or fundamental group unit of society and protection of children.

497 Explanatory Memorandum, Children and Young People Bill 2008, above n 496, 96.

498 Department of Human Services (Victoria), 'Human Rights and Child Protection', above n 487, 40.

499 *Ibid*.

500 *Children, Youth and Families Act 2005* (Vic) s 10; Department of Human Services (Victoria), 'Human Rights and Child Protection', above n 487, 40.

501 *Children, Youth and Families Act 2005* (Vic) s 10(3)(a); Department of Human Services (Victoria), 'Human Rights and Child Protection', above n 487, 40. Submissions that recognised this link and the importance of best interests include: submissions 33 (Youthlaw), 24 (WHCLS), 43 (VCOSS & YACVic), 44 (CHP).

502 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 3(1) (entered into force 2 September 1990). Regarding 'best interests', see also, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 18(1) (entered into force 2 September 1990); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

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

504 *Children, Youth and Families Act 2005* (Vic) s 10.

505 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a). It should be noted that this right is a negative right against interference, rather than the 'right to respect' for private, family and home life as protected by article 8 of the *European Convention on Human Rights: Director of Housing v Sudi* [2010] VCAT 328 [28]. See also, *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3, art 16(1) (entered into force 2 September 1990): art 16(1) states 'no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation'.

506 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 17(1). This right is modelled on: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 13.

507 *Director of Housing v Sudi* [2010] VCAT 328 [29].

508 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

509 Human Rights Committee, *General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)*, 32nd sess, UN Doc HRV/GEN/1/Rev 6 (8 April 1988).

510 Human Rights Committee, *Toonen v Australia: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) [8.3].

511 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2). Interference in the form of entering a family's home and removing a child is lawful in the sense that it is envisaged under the *Child, Youth and Families Act 2005* (Vic) ss 240–1. The arbitrariness or otherwise of the action will depend on whether interference is reasonable in the particular circumstances.

512 This issue was raised in submissions, including submission 25 (LIV).

513 Human Rights Committee, *General Comment 17*, above n 470, [6]. The Human Rights Committee held that 'in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require'.

514 *A v Chief Executive, Department of Disability, Housing and Community Services* [2006] ACTSC 43.

515 *A v Chief Executive, Department of Disability, Housing and Community Services* [2006] ACTSC 48. The *Human Rights Act 2004* (ACT) s 11(1) provides that '[t]he family is the natural and basic group unit of society and is entitled to be protected by society'.

3.264 Article 9(1) of CROC relates directly to the separation of children from their parents, and states that a child is not to be

*separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents.*⁵¹⁶

3.265 If a child is removed from his or her family in these circumstances, all interested parties are to be given the opportunity to participate and voice their views in such proceedings.⁵¹⁷ States are obliged to respect the child's right to maintain regular contact and personal relations with his or her parents, unless it would be contrary to the child's best interests.⁵¹⁸

The right to liberty and security of person and humane treatment when deprived of liberty

3.266 Rights to liberty and security of the person, and the right to humane treatment when deprived of liberty, are also closely related to the removal of children. Section 21 of the Charter provides for a person's right to liberty and security.⁵¹⁹ Under the Charter, a person is not to be subjected to arbitrary arrest or detention,⁵²⁰ and a person must not be deprived of his or her liberty, except on grounds established by law, and in accordance with procedures established by law.⁵²¹ Any person deprived of their liberty by detention or arrest can apply to a court for a declaration or order regarding the lawfulness of the detention. The court is to make a decision without delay and order the release of the person if it finds the detention is unlawful.⁵²²

3.267 Persons deprived of liberty must be treated with humanity and respect for their dignity.⁵²³ The right to humane treatment when deprived of liberty applies to anyone deprived of liberty under the laws and authority of the state, including protective detention in welfare facilities.⁵²⁴ This section complements the prohibition on torture and cruel, inhuman and degrading treatment or punishment in the Charter by protecting against less severe forms of ill-treatment while deprived of liberty.⁵²⁵ A positive obligation is imposed on the state to ensure that detained persons are treated with humanity and dignity.⁵²⁶

REPRESENTATION AND PARTICIPATION OF CHILDREN IN CHILD PROTECTION PROCESSES

3.268 Children's participation in proceedings affecting them and the representation of children are closely related children's rights issues. Some children may be able to express their own views, while others may want or need a representative to do this for them. The extent to which children will be able to participate and be heard in proceedings will depend on whether they are represented, and the mode of any representation.⁵²⁷

3.269 Article 12 of CROC relates directly to the participation and representation of children in matters affecting them. It provides that where a child is capable of forming his or her own views, states parties shall allow the child to express those views freely in all matters affecting him or her.⁵²⁸ These views are to be given due weight in accordance with the age and maturity of the child.⁵²⁹ The right requires that the child be provided with an opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative.⁵³⁰

3.270 In addition, CROC's reference to the 'evolving capacities of the child'⁵³¹ and the requirement for the child's best interests to be a primary consideration in all actions concerning children is central to participation and representation.⁵³² As noted previously, when a child is separated from his or her parents against their will, even if it is necessary in the child's best interests, all interested parties must be given the opportunity to participate and voice their views in proceedings.⁵³³ The child is clearly an interested party.

3.271 These CROC rights require that children have a voice in proceedings affecting them, regardless of the model of representation adopted. The incorporation of participation rights in CROC was seen as a recognition of the child as a subject of civil and political rights accorded to adults, rather than just as objects of concern or subjects of welfare rights.⁵³⁴ Article 12 of CROC has been termed the 'participation principle', requiring decision makers to listen to children, enable them to express their views and consider those views when making decisions.⁵³⁵ An important aspect of the right to participate directly is that the child has the right to express his or her views 'freely'.⁵³⁶ This has been interpreted by the CRC to mean that the child can express his or her views without pressure and can choose whether he or she wishes to express a view or not.⁵³⁷

3.272 Although it is possible to interpret article 12 of CROC as mandating only a consultative form of participation,⁵³⁸ some commentators have addressed the importance of children having a direct participation role if they wish to.⁵³⁹ It has been the 'conventional wisdom' that indirectly hearing children's views through a representative is preferable to judges speaking with children directly.⁵⁴⁰ However, that notion is now being challenged and research has found that many children would like to be more involved with decisions that profoundly affect their lives.⁵⁴¹ One reason given by children for wanting to speak directly with the judge is that the judge then knows 'exactly how they felt without any mixed messages or misinterpretation'.⁵⁴²

516 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 9(1) (entered into force 2 September 1990).

517 *Ibid* art 9(2). The question of children's right to participate in proceedings is discussed in 'Representation and Participation of Children in Child Protection Processes', below.

518 *Ibid* art 9(3).

519 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(1).

520 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(2).

521 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(3). There are equivalent rights to s 21(1)–(3) of the Charter in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(c) (entered into force 2 September 1990).

522 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(7). Article 9 of the of the ICCPR is the basis for s 21(1)–(7) of the Charter, except that there is no right to compensation for breach of the right under the Charter: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 16. The UN HRC considers that art 9 of the ICCPR protections extend to all deprivation of liberty and all persons deprived of their liberty by detention or arrest, except for specific provisions applicable to persons against whom criminal charges are brought: Human Rights Committee, *General Comment 08: Right to Liberty and Security of Persons (Art 9)*, 16th sess, UN Doc HRVGEN/1/Rev 6 (30 June 1982) [1].

523 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22(1). Section 22(1) of the Charter is modelled on: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 10(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 17. Note that there is an equivalent to this right in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(c) (entered into force 2 September 1990). The additional requirement in art 37(c) of CROC is that the manner in which a child is to be treated takes into account the needs of persons his or her age.

524 Human Rights Committee, *General Comment 09: Humane Treatment of Persons Deprived of Liberty (Art 10)*, 16th sess, UN Doc HRI/GEN/1/Rev 6 (30 July 1982) [2].

525 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10.

526 Human Rights Committee, *General Comment 09*, above n 524, [3].

527 Nicola Ross, 'Legal Representation of Children' in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 544, 545.

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

529 *Ibid*.

530 *Ibid* art 12(2).

531 *Ibid* art 5.

532 *Ibid* art 3.

533 *Ibid* art 9(2).

534 Ross, above n 527, 549.

535 *Ibid* 550.

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

537 Committee on the Rights of the Child, *General Comment 12: The Right of the Child to be Heard*, 51st sess, CRC/IC/GC/12 (20 July 2009) [22].

538 Ross, above n 527, 550.

539 Judy Cashmore and Patrick Parkinson, 'What Responsibility do Courts have to Hear Children's Voices?' (2007) 15 *International Journal of Children's Rights* 43.

540 *Ibid* 49.

541 *Ibid*.

542 *Ibid* 51.

- 3.273 This perspective was reinforced in the report from the CREATE Foundation, which consulted children and young people for the purposes of this reference and compiled their views.⁵⁴³ When asked how they would make a child feel comfortable in court if they were the judge, a participant responded that they would do this by 'letting the young person have a say about their situation'.⁵⁴⁴ Another participant recalled an incident in which he or she spoke up to correct the lawyer, who had said something wrong, and 'would prefer that the children speak themselves'.⁵⁴⁵
- 3.274 Participation of the child in proceedings before the Children's Court is provided for under the CYF Act 2005.⁵⁴⁶ Various other Australian jurisdictions also provide that the child must be given the opportunity to express his or her views or wishes directly to the court in child protection proceedings if he or she wants to and is capable of doing so.⁵⁴⁷ For reasons elucidated in Chapter 8, the Commission suggests that the relevant section of the CYF Act 2005 be amended to take into account some additional considerations.

Representation of children in child protection proceedings⁵⁴⁸

- 3.275 Although neither the Charter nor CROC is prescriptive about the model of representation for children, concerns have been raised regarding the fact that under the CYF Act 2005, children will usually only be represented on the basis that they are capable of giving instructions.⁵⁴⁹
- 3.276 The CRC has suggested that children's views should always be presented to the court, either directly or through some form of representative. This is certainly the case where the child is capable of forming his or her own views.⁵⁵⁰ On the text of CROC alone, the situation is less clear regarding infants or children who are not capable of forming their own views. However, the CRC has clarified the approach to be taken for very young children, providing that
- States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences.*⁵⁵¹
- 3.277 The CRC has also emphasised that article 12 applies to both younger and older children.⁵⁵² As rights-bearers, even the youngest children should be allowed to express their views and have those views given due weight in accordance with the age and maturity of the child.⁵⁵³ Regarding the age at which children should be considered able to express their views, researchers have contended that even very young children are capable of understanding their experiences and expressing their views, and are therefore capable of participating in decision making.⁵⁵⁴ Freeman notes that 'even small children can show a preference, and most children can understand a situation'.⁵⁵⁵
- 3.278 Pursuant to both the text of CROC and explanatory comments from the CRC, children who are capable of forming views are to have those views put before the court, either by them directly or by a representative.⁵⁵⁶ If a child is not deemed capable of forming views, even on a very broad and inclusive definition of 'capable of forming views',⁵⁵⁷ then he or she must be represented by someone acting in his or her best interests.⁵⁵⁸ This is consistent with article 3, which provides that best interests must be a primary consideration in all actions concerning children.⁵⁵⁹

3.279 Participation and representation of children are also closely related to whether children are parties to proceedings in matters that affect them.⁵⁶⁰ Although the child is not automatically a party to proceedings under the CYF Act 2005, various other Australian jurisdictions provide for the child to be a party.⁵⁶¹ Giving the child status as a party would support the overarching concept of children's participation in decisions that affect them.⁵⁶²

THE RIGHT TO A FAIR HEARING

3.280 Where a person is charged with a criminal offence or is party to civil proceedings, the Charter protects the right to a fair and public hearing by a competent, independent and impartial court or tribunal.⁵⁶³ The issue of fair hearing in child protection proceedings was raised in a number of submissions.⁵⁶⁴

3.281 The section of the Charter which sets out the right to a fair hearing has 'created its own universe populated by two species of proceedings'—criminal and civil.⁵⁶⁵ While the Charter does not define civil proceedings, the term is to be defined by reference to the nature of the proceedings, the form and character of the action and the nature of the jurisdiction being exercised.⁵⁶⁶ 'Civil proceeding' has often been defined as any proceeding that is not criminal in nature.⁵⁶⁷ On this definition, child protection proceedings are civil in nature.

3.282 Incorporating child protection proceedings within the ambit of the Charter right to a fair hearing⁵⁶⁸ is consistent with a recent decision of the United Kingdom High Court, which held that '[a]ll the parties in care proceedings are entitled to a fair hearing in the determination of their civil rights and obligations'.⁵⁶⁹ It must be noted, however, that to classify child protection proceedings as civil for the purposes of the Charter is an artificial characterisation, for these proceedings are 'truly a creature of statute, neither civil nor criminal in nature. They are therefore *sui generis*'.⁵⁷⁰

543 The report can be accessed at Victorian Law Reform Commission, *Child Protection—Community Group Devolved Consultation Reports*, <www.lawreform.vic.gov.au/wps/wcm/connect/justlib/law+reform/home/current+projects/child+protection/lawreform+-+child+protection+-+community+group+devolved+consultation+reports>.

544 CREATE Foundation, *Children and Young People in Care Consultation for the Victorian Law Reform Commission* (2010) 23.

545 *Ibid*.

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

547 See, eg, *Children's Protection Act 1993* (SA) s 48; *Children and Young People Act 2008* (ACT) s 352; *Children, Young Persons and Their Families Act 1997* (Tas) s 56. Western Australia's Act requires that the child is made aware of his or her right to be present in court, and is provided with any support services considered appropriate to enable the child to participate in the proceedings: *Children and Community Services Act 2004* (WA) s 149(3).

548 The human rights implications of adopting a particular model of representation for children are further discussed in Chapter 8.

549 The representation model currently employed under the CYF Act 2005 is discussed earlier in this chapter. This issue was raised in submissions, see for example: submissions 38 (VALS), 46 (Children's Court of Victoria) 57–67. Note that the Children's Court submission was not unanimous on this point, with only some members advocating for a change in the model of representation for children.

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

551 Committee on the Rights of the Child, *General Comment 07: Implementing Rights in Early Childhood*, 40th sess, CRC/C/GC/7/Rev 1 (20 September 2006) [13].

552 *Ibid* [14].

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

554 Anna Smith 'Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory' (2002) 10 *International Journal of Children's Rights* 73, 82–5. This was discussed in submission 38 (VALS).

555 Michael Freeman, 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5, 12.

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

557 Committee on the Rights of the Child, *General Comment 12*, above n 537, [21].

558 Committee on the Rights of the Child, *General Comment 07*, above n 551, [13].

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

560 The child still has standing in appeal proceedings: *Children, Youth and Families Act 2005* (Vic) s 328(2).

561 See *Children and Young People Act 2008* (ACT) s 700; *Children's Protection Act 1999* (SA) s 46(1); *Children, Young Persons and Their Families Act 1997* (Tas) s 64; *Children and Community Services Act 2004* (WA) s 147.

562 The Commission makes a proposal in relation to this in Chapter 8.

563 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1). This right is modelled on: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14(1) (entered into force 23 March 1976); Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006*, above n 423, 18.

564 See submissions 24 (WHCLS), 26 (FVPLS Victoria), 33 (Youthlaw), 45 (FCLC), 46 (Children's Court of Victoria) 99–100.

565 *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009) [411]. Note that *Kracke* was disapproved of in *R v Momclicovic* [2010] VSCA 50, but not regarding this particular point of law.

566 *Ibid*; see also, *Butterworth's Concise Australian Legal Dictionary* (2nd ed, 1998) and the *Oxford Australian Law Dictionary* (2010). Note also that the Children's Court submission proceeds on the basis that child protection proceedings are civil in nature: submission 46 (Children's Court of Victoria) 99–100.

567 *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009) [412]. Note also that submission 46 (Children's Court of Victoria) 99–100 proceeds on the basis that child protection proceedings are civil in nature.

568 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

569 *W (Children)* [2010] UKSC 12 [3] (Lady Hale).

570 *J v Lieschki* (1987) 162 CLR 447, 451 (Wilson J).

- 3.283 The right to a fair hearing comprises several express elements: the fairness of proceedings, the public nature of proceedings and the competence, independence and impartiality of the decision maker.⁵⁷¹ As well as these express elements, the right may also encompass several implied elements.⁵⁷² These include a right of access to the court, a right to advice and representation, a right to hearing without undue delay, and a right to disclosure of relevant evidence.⁵⁷³
- 3.284 The right to a fair hearing will not be limited if persons involved in dispute resolution processes retain the opportunity to access judicial adjudication if they are unable to resolve their dispute by agreement. In order to be compatible with the right to a fair hearing, it is necessary that any compulsory dispute resolution process does not cause undue delay or expense.⁵⁷⁴ Effective dispute resolution processes would ideally enhance the right to a fair hearing by reducing the number of cases in the court and ensuring speedy access to justice for those whose cases progress to judicial adjudication.⁵⁷⁵

CULTURAL RIGHTS

- 3.285 The Charter protects the cultural rights of all persons with a particular cultural, religious, racial or linguistic background.⁵⁷⁶ It also grants four additional rights to Aboriginal people, including the right to maintain their 'kinship ties' and 'distinctive spiritual, material and economic relationship with land and waters and other resources with which they have a connection under traditional laws and customs'.⁵⁷⁷ The obligation is negatively phrased, so public authorities are obliged not to deny the right rather than positively obliged to assist groups with the development and maintenance of their culture and cultural rights. A number of submissions and consultations highlighted the importance of protecting and promoting cultural rights in the child protection system.⁵⁷⁸ The over-representation of Aboriginal children in out-of-home care is of great concern, both locally and internationally.⁵⁷⁹
- 3.286 CROC also provides that in states where ethnic, religious or linguistic minorities exist, or where there are persons of indigenous origin, children belonging to those minorities or indigenous groups shall not be denied the right to enjoy their own culture, practise their own religion and use their own language in community with other members of their group.⁵⁸⁰ Other international instruments identified by submissions⁵⁸¹ as relevant to the cultural rights of families and children include:
- *United Nations Declaration on the Rights of Indigenous Peoples*⁵⁸²
 - *United Nations Declaration on the Elimination of Violence Against Women*.⁵⁸³
- 3.287 The CYF Act 2005 recognises cultural rights within the best interests principles,⁵⁸⁴ and includes specific decision-making principles for Aboriginal children.⁵⁸⁵ One such principle provides that in recognition of Aboriginal self-determination, a decision in relation to an Aboriginal child should involve a meeting convened by an Aboriginal convenor, approved by an Aboriginal agency.⁵⁸⁶ This decision-making process (AFDM) may involve the child, their parents, members of the child's extended family, and other appropriate members of the Aboriginal community.⁵⁸⁷ The Child Protection Practice Manual states that AFDM operates in every region.⁵⁸⁸ However, submissions raised concerns about the AFDM program being under-utilised due to resource constraints.⁵⁸⁹ The submission from Aboriginal Family Violence Prevention and Legal Service Victoria raised a concern that '[v]ery few AFDMs are occurring due to lack of available convenors and at times unwillingness of DHS to convene meetings ... Regional variations are evident'.⁵⁹⁰ That submission also expressed concern that VLA does not fund lawyers for children or families at AFDM or best interests planning meetings.⁵⁹¹

3.288 Another important principle of the CYF Act 2005 is the Aboriginal Child Placement Principle, which provides that when an Aboriginal child is to be placed in out-of-home care, he or she must be placed with Aboriginal extended family or relatives wherever possible.⁵⁹² Although a cultural support plan is not mandatory in all cases, the Department recommends as good practice that a plan is developed for all Aboriginal children placed in out-of-home care, whether placed with Aboriginal carers or not.⁵⁹³ Even if a cultural support plan is not required, the court must not make a permanent care order placing an Aboriginal child solely with a non-Aboriginal person unless the court has received a report from an Aboriginal agency recommending the order.⁵⁹⁴

3.289 The CYF Act 2005 provides for the enjoyment of cultural rights in numerous ways. However, cultural rights under the Charter and CROC will only be upheld if the relevant CYF Act 2005 provisions are utilised and complied with.

- 571 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).
- 572 Kylie Evans and Alistair Pound, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 165.
- 573 *Ibid.* This issue was raised by submission 45 (FCLC), which noted that the right to a fair hearing includes elements of procedural fairness and access to justice.
- 574 The interaction between compulsory dispute resolution processes and the right to a fair hearing was also discussed in Victorian Law Reform Commission, *Civil Justice Review: Report*, Report No 14 (2008) 262–3.
- 575 Dispute resolution is discussed in greater depth in Chapter 7.
- 576 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1).
- 577 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(2).
- 578 Including submissions 45 (FCLC), 26 (FVPLS Victoria), 39 (VACCA), 38 (VALS).
- 579 Committee on the Rights of the Child, *Concluding Observations on Australia*, 40th sess, CRC/C/15/Add 268 (20 October 2005) [37], [75]–[77]. This issue was raised in submissions, see for example, submission 27 (FVPLS Victoria). This is also discussed at length in Chapter 1.
- 580 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 30 (entered into force 2 September 1990).
- 581 Submission 26 (FVPLS Victoria).
- 582 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (13 September 2007). Since its adoption, Australia has reversed its position and now endorses the Declaration as of 3 April 2009.
- 583 *United Nations Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 85th plen mtg, UN Doc A/RES/48/104 (20 December 1993).
- 584 *Children, Youth and Families Act 2005* (Vic) s 10(c), (l)–(m).
- 585 *Children, Youth and Families Act 2005* (Vic) ss 12–14.
- 586 *Children, Youth and Families Act 2005* (Vic) s 12. This practice is referred to as Aboriginal Family Decision Making (AFDM). The Department's Practice Manual states that AFDM processes are co-convened by a child protection convenor and a convenor from an Aboriginal agency: Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Family Decision Making', Advice No 1296 (17 July 2008), from CD-ROM provided at 23 March 2010, 127.
- 587 *Children, Youth and Families Act 2005* (Vic) s 12.
- 588 Department of Human Services (Victoria), 'Family Decision Making', above n 586, 127.
- 589 See, for example, submissions 26 (FVPLS Victoria), 38 (VALS).
- 590 Submission 26 (FVPLS Victoria).
- 591 *Ibid.*
- 592 *Children, Youth and Families Act 2005* (Vic) s 13.
- 593 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Cultural Support Plans', Advice No 1060 (23 April 2007), from CD-ROM provided at 23 March 2010, 248.
- 594 *Children, Youth and Families Act 2005* (Vic) s 323.

Chapter 4

Current Law and Practice in Other Australian Jurisdictions

CONTENTS

- 120 Introduction
- 120 Australian Capital Territory
- 124 New South Wales
- 128 Northern Territory
- 132 Queensland
- 137 South Australia
- 141 Tasmania
- 145 Western Australia
- 149 Australian family law
children's disputes

Current Law and Practice in Other Australian Jurisdictions

INTRODUCTION

4.1 This chapter examines the current law and practice in child protection matters in other Australia jurisdictions. It also considers some aspects of Commonwealth family laws. See Appendix N for a table showing the major differences between the Australian jurisdictions.

AUSTRALIAN CAPITAL TERRITORY

GENERAL OVERVIEW

4.2 The ACT statutory child protection system is governed by the *Children and Young People Act 2008* (ACT) (the ACT Act 2008). If the Office for Children, Youth and Family Support—a unit of the Department of Disability, Housing and Community Services (the Department)—believes on reasonable grounds that a child is in need of care and protection, it can file a care and protection application. The application is determined by the ACT Children's Court, which is presided over by a single children's magistrate.

4.3 Key distinguishing features of the ACT child protection system include:

- The ACT Public Advocate has a role in reviewing emergency removals of children, and power to attend court and case management conferences involving young children and represent certain children on the best interests model if required.
- The Department can apply to the Children's Court to register an agreement reached at a family group conference (FGC), which acts like a court order, although such an agreement cannot transfer parental responsibility for the child or young person to the Department.
- Lawyers representing children in the Children's Court have discretion about what model of representation—best interests or direct representation—they consider appropriate to use, based on their assessment of the child's maturity.

THE ROLE OF THE PUBLIC ADVOCATE

4.4 A unique feature of the ACT child protection system is the role of the ACT Public Advocate. The Public Advocate reviews all emergency removals of children and young people under the ACT Act 2008, and attends court and case management conferences—particularly in circumstances involving children under two years old—and undertakes best interests advocacy where required.¹

4.5 In 2008–09, the Public Advocate provided best interests advocacy for 408 children and young people, which included attending court on 78 occasions, taking part in 105 care matters and 20 case conferences, undertaking 10 home visits and conducting audits of 15 Department files.²

4.6 The Public Advocate must also be notified whenever an application is made for any of the orders, or an extension of those orders, available under the care and protection chapters of the ACT Act 2008,³ and is entitled to appear and be heard and call witnesses in any application, proceeding or matter under the ACT Act 2008.⁴

FAMILY GROUP CONFERENCING

- 4.7 Under the ACT Act 2008, the Department's Chief Executive may arrange for an FGC if he or she believes on reasonable grounds that a child or young person is in need of care and protection, and that arrangements should be made to secure that child or young person's care and protection.⁵ The Department will then appoint and assign an independent facilitator who is responsible for deciding who to invite to the FGC, and for organising and conducting it.⁶ The facilitator must invite:
- a representative of the Department
 - anyone who has parental responsibility for the child or young person, unless the facilitator considers that it would not be in the child's best interests for that person to attend
 - the child or young person, if the facilitator is satisfied they can understand and take part in the FGC.⁷
- 4.8 A lawyer may not represent participants in FGCs, but a support person may assist any participants other than the Department's representative in the FGC.⁸
- 4.9 If an FGC facilitator is satisfied that the participants who have parental responsibility for the child or young person and the Department's representative have reached an agreement about arrangements for the child, the facilitator may propose that the parties enter into an FGC agreement.⁹ Before the parties enter into any agreement, the facilitator must give those with parental responsibility for the child or young person, and the young person if he or she is 15 years or older, an opportunity to obtain legal advice.¹⁰ If the facilitator is satisfied that the child or young person can understand the proposed agreement, the child or young person's views and wishes must be considered and, if over 15, he or she must also consent to the agreement.¹¹
- 4.10 Importantly, an FGC agreement cannot transfer parental responsibility for the child or young person to the Department.¹² If an FGC agreement is finalised, the Department may apply to the Children's Court to have it registered, and if registered it will have effect as if it were a care and protection order made by the Court.¹³

EMERGENCY REMOVAL POWERS AND ORDERS

- 4.11 If a Department employee or a police officer believes on reasonable grounds that a child or young person is in immediate need of care and protection, or is likely to be in immediate need of care and protection if emergency action is not taken, the employee or police officer may remove the child or young person.¹⁴
- 4.12 Once removed, the Department's Chief Executive has daily care responsibility for the child or young person for no longer than two court working days. After this time, the Department must return the child or young person to someone who has parental responsibility for the child unless the Department is granted an order by the Children's Court.¹⁵ During the time that the Chief Executive has responsibility for a child or young person following an emergency action, a parent, former caregiver, the Public Advocate or the child or young person may apply to the Children's Court for the release of the child or young person to a nominated person.¹⁶

1 Public Advocate of the ACT, *Annual Report 2008-2009* (2009) 19. The current role of the ACT Public Advocate in child protection proceedings is not to be confused with the role that the Youth Advocate played between 1986 and 1994, referred to in Chapter 2. The Youth Advocate had responsibility for initiating protection applications in the ACT Children's Court, and presented the case for the applicant at court. The Youth Advocate was renamed the Community Advocate in 1991, and in 1994 the Community Advocate was relieved of the responsibility for initiating and having carriage of protection proceedings in the Children's Court. The Public Advocate, the successor to the Community Advocate, also does not have the functions that the Youth Advocate once exercised.

2 Ibid 20–1.

3 *Children and Young People Act 2008* (ACT) ss 377, 379, 386, 419, 427, 445, 452, 469, 541, 560.

4 *Court Procedures Act 2004* (ACT) s 74C.

5 *Children and Young People Act 2008* (ACT) s 80(2).

6 *Children and Young People Act 2008* (ACT) ss 78–9, 82.

7 *Children and Young People Act 2008* (ACT) s 83(1).

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

9 *Children and Young People Act 2008* (ACT) s 85(1)–(2).

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

11 *Children and Young People Act 2008* (ACT) ss 85(3)(a)(ii), 86.

12 *Children and Young People Act 2008* (ACT) s 76(2).

13 *Children and Young People Act 2008* (ACT) ss 390(2), 393. The Department must give notice to the Public Advocate if it makes an application to register an FGC agreement, and the Court will only register the agreement if satisfied that it could make a care and protection order to the same effect as the agreement: *Children and Young People Act 2008* (ACT) ss 390(4), 391.

14 *Children and Young People Act 2008* (ACT) ss 403, 405–6. If a police officer takes emergency action, he or she must immediately notify the Chief Executive: s 408(1). If an employee of the Department takes emergency action or is notified that emergency action has been taken, he or she must notify the Public Advocate and the Children's Court as soon as practicable: s 408(3).

15 *Children and Young People Act 2008* (ACT) ss 410, 415.

16 *Children and Young People Act 2008* (ACT) ss 416–17.

Current Law and Practice in Other Australian Jurisdictions

APPRAISAL AND ASSESSMENT ORDERS

- 4.13 In order to assess whether an application for a care and protection order should be made in relation to a child, the Department can apply for either an appraisal order or an assessment order. An appraisal order enables the Department to assess whether a child is in need of care and protection by gathering information and making inquiries about either the child or young person or someone else,¹⁷ and may include temporary transfer of parental responsibility to the Department's Chief Executive.¹⁸ These orders last for four weeks, with the potential for one extension of a further four weeks.¹⁹
- 4.14 Assessment orders enable the Department to arrange for a care and protection assessment of a child or young person, which can include a medical, dental, social, developmental, psychological and/or psychiatric assessment.²⁰ Assessment orders last 10 weeks, with one potential extension for no longer than a further eight weeks.²¹

COURT PROCESSES AND PROCEDURE

- 4.15 The Department's Chief Executive may apply to the Children's Court for a care and protection order if he or she believes on reasonable grounds that a child or young person is in need of care and protection.²²
- 4.16 The ACT Act 2008 defines a child or young person as 'in need of care and protection' if:
- (1) *the child or young person*
 - (a) *has been abused or neglected, or*
 - (b) *is being abused or neglected, or*
 - (c) *is at risk of abuse or neglect; and*
 - (2) *no-one with parental responsibility for the child or young person is willing and able to protect the child or young person from suffering the abuse or neglect.*²³
- 4.17 The parties to an application include the child or young person, as well as the Public Advocate, if he or she applies to be joined.²⁴ Any party to a proceeding may be legally represented.²⁵ The child or young person may be represented by a lawyer, or a litigation guardian if the Court grants leave for one to be appointed,²⁶ or both.²⁷ If a child is not legally represented, the Court may only proceed to hear the application if it is satisfied that the child or young person has had a reasonable opportunity to obtain legal representation, and the child's best interests will be adequately represented in the proceeding.²⁸
- 4.18 The ACT Act 2008 does not direct the legal representative of the child about the model of representation he or she should adopt. It merely requires the lawyer to inform the Court whether he or she is acting on the child or young person's instructions, or acting in their best interests, or both.²⁹ In practice, the legal representative will act on the instructions of an older child if the lawyer considers that the child's views are consistent with their best interests. For a younger child, the lawyer will present the child's wishes to the Court and, in addition, make submissions about the outcome the lawyer considers would be in the child's best interests.³⁰ Regardless of the model of representation, the representative of the child or young person must ensure that the views and wishes stated by the child or young person are put to the Court.³¹

4.19 The Children’s Court must give initial consideration to a care and protection application within five working days of it being filed.³² The Court must proceed informally,³³ is not bound by the rules of evidence, and can inform itself as it sees fit.³⁴

4.20 The Children’s Court may adjourn the hearing of a care and protection application and order that the parties attend a ‘court-ordered meeting’ to ‘identify or resolve matters in dispute’.³⁵ The court-ordered meeting may be attended by anyone who was notified of the care and protection application, including the Public Advocate,³⁶ as well as legal representatives for the parties.³⁷ The Court appoints a person to convene the meeting, usually a registrar,³⁸ and that person must report the outcome of the meeting to the Children’s Court.³⁹

FINAL ORDERS

4.21 After a hearing, the Children’s Court may make the following orders:

- Care and protection orders,⁴⁰ which may contain provisions relating to:
 - contact⁴¹
 - drug use⁴²
 - enduring parental responsibility—parental responsibility to someone other than the Chief Executive until the child or young person turns 18⁴³
 - residence⁴⁴
 - short-term parental responsibility (for two years)⁴⁵
 - long-term parental responsibility—parental responsibility to the Chief Executive until the child or young person turns 18⁴⁶
 - supervision.⁴⁷
- Domestic violence and protection orders act orders—these orders are available under the *Domestic Violence and Protection Orders Act 2008* (ACT). The Children’s Court can make an order if it is satisfied that a person has engaged in domestic violence⁴⁸ towards the child or young person subject to the care and protection application.⁴⁹

17 *Children and Young People Act 2008* (ACT) s 366.

18 *Children and Young People Act 2008* (ACT) ss 372–6. Applications for appraisal orders can be heard urgently, and if practicable should be heard by the Court on the day of filing, and the Court must hear them within five working days of filing: ss 377, 380.

19 *Children and Young People Act 2008* (ACT) s 384.

20 *Children and Young People Act 2008* (ACT) ss 367, 436.

21 *Children and Young People Act 2008* (ACT) ss 449, 454.

22 *Children and Young People Act 2008* (ACT) ss 424–5. A person other than the Chief Executive of the Department can only make an application for a care and protection order with leave of the Court: s 425(c). The Public Advocate must be notified whenever a care and protection application is made: s 427.

23 *Children and Young People Act 2008* (ACT) s 345.

24 *Children and Young People Act 2008* (ACT) s 700. Also, s 74A of the *Court Procedures Act 2004* (ACT) provides that ‘a child or young person has a right to take part in a proceeding in a court in relation to the child or young person’.

25 *Children and Young People Act 2008* (ACT) s 709.

26 *Court Procedures Act 2004* (ACT) s 74F.

27 *Court Procedures Act 2004* (ACT) s 74E(1).

28 *Court Procedures Act 2004* (ACT) s 74G.

29 *Court Procedures Act 2004* (ACT) s 74E.

30 Telephone conversation with Matt Kamarul, lawyer from Legal Aid ACT, 19 May 2010.

31 *Court Procedures Act 2004* (ACT) s 74E(2). Also, the ACT Act imposes an obligation on all decision makers under care and protection chapters of the Act to give a child or young person a reasonable opportunity to express his or her wishes directly to the decision maker, if capable of such expression: *Children and Young People Act 2008* (ACT) s 352.

32 *Children and Young People Act 2008* (ACT) s 430(1).

33 *Children and Young People Act 2008* (ACT) s 712.

34 *Children and Young People Act 2008* (ACT) s 716.

35 *Children and Young People Act 2008* (ACT) s 431(2)(a).

36 See *Children and Young People Act 2008* (ACT) s 427.

37 *Children and Young People Act 2008* (ACT) s 432(1)(b)(ii).

38 *Children and Young People Act 2008* (ACT) s 432(2).

39 *Children and Young People Act 2008* (ACT) s 432(4).

40 *Children and Young People Act 2008* (ACT) ss 422, 464.

41 *Children and Young People Act 2008* (ACT) s 485.

42 *Children and Young People Act 2008* (ACT) s 488.

43 *Children and Young People Act 2008* (ACT) s 481.

44 *Children and Young People Act 2008* (ACT) s 484.

45 *Children and Young People Act 2008* (ACT) s 476.

46 *Children and Young People Act 2008* (ACT) s 479.

47 *Children and Young People Act 2008* (ACT) s 489.

48 This includes psychological abuse, which is defined to include exposing a child or young person to violence towards someone the child or young person lives with: *Children and Young People Act 2008* (ACT) ss 458, 461.

49 *Children and Young People Act 2008* (ACT) ss 458–60.

Current Law and Practice in Other Australian Jurisdictions

- Therapeutic treatment orders—under these orders, the child or young person is directed to be confined at a therapeutic treatment place, for the implementation of a therapeutic treatment plan, and daily care responsibility is transferred to the Chief Executive for the period of confinement.⁵⁰

NEW SOUTH WALES

GENERAL OVERVIEW

- 4.22 Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the NSW Act 1998), the Community Services Department (the Department) is responsible for making applications to the NSW Children’s Court for a care order in relation to a child. The NSW Children’s Court comprises a children’s registrar (who conducts callovers and preliminary conferences, hears applications for adjournments and makes procedural directions), 13 specialist children’s magistrates, and the Court President, who is a District Court judge.⁵¹
- 4.23 Key distinguishing features of the NSW child protection system include:
- Care plans developed through alternative dispute resolution (ADR)⁵² can be registered with the Court, and form the basis of consent orders.
 - The grounds upon which the Court may make a care order include a ground that ‘the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection’.
 - The Court has the power to appoint a guardian *ad litem* in addition to a legal representative for a child in care proceedings.
 - The Court can make an order allocating parental responsibility to one parent to the exclusion of the other parent.
- 4.24 Following a recent review of the child protection system by former Supreme Court justice James Wood,⁵³ substantial amendments were made to the NSW Act 1998. This review is discussed in Chapter 2 and Appendix E.

PRE-COURT ADR, CARE PLANS AND PARENT RESPONSIBILITY CONTRACTS

- 4.25 The NSW Act 1998 provides that the Department is to ‘consider the appropriateness’ of using ADR to reduce the likelihood of needing to make an application for a care order.⁵⁴ The NSW Act 1998 also provides for care plans to be ‘developed by agreement in the course of alternative dispute resolution’, after which they can be registered in the Children’s Court.⁵⁵ The care plans can also form the basis of orders by consent in the Children’s Court, without the need for a care application.⁵⁶
- 4.26 The NSW Act 1998 also provides for parent responsibility contracts, which are agreements made by the Department and the primary caregivers of a child and registered with the Court.⁵⁷ The contracts may impose conditions on the primary caregiver,⁵⁸ breach of which may lead to a presumption in subsequent care proceedings that a child is in need of care and protection.⁵⁹ Importantly, a parent responsibility contract cannot provide for the transfer of parental responsibility for the child or for the placement of the child or young person in out-of-home care.⁶⁰

4.27 The Wood Report noted that the ADR mechanisms that existed in the NSW Act 1998 were ‘not used to any significant extent’, and questioned ‘whether some of the decisions in relation to all or some children and young persons could be made in a forum other than the Children’s Court’.⁶¹

EMERGENCY REMOVAL POWERS AND ORDERS

4.28 If a Department employee or a police officer is satisfied on reasonable grounds that a child or young person is at immediate risk of serious harm, and that the making of an apprehended violence order would not be sufficient to protect the child or young person from that risk, the employee or police officer can remove the child or young person from the place of risk without a warrant.⁶² If a child or young person is removed under the emergency protection power, the Department must apply to the Children’s Court for a care order⁶³ no later than 72 hours after the removal.⁶⁴ At the hearing of the application the Department must explain to the Court why removing the child without a warrant was necessary.⁶⁵

4.29 Alternatively, the employee or a police officer can apply to an authorised officer⁶⁶ for a warrant to search premises for and to remove a child,⁶⁷ or the Children’s Court can make an order for a child’s removal when a care application in relation to that child or young person is made.⁶⁸

ASSESSMENT ORDERS

4.30 The Court may order that the child or young person receive a psychological, psychiatric or other medical examination, or another type of assessment, or both.⁶⁹ If the Court makes an assessment order, it must appoint the Children’s Court Clinic to prepare and submit the assessment report to the Court, unless the Clinic informs the Court that it is unable to do so, or that there is someone more appropriate to conduct the assessment.⁷⁰

50 *Children and Young People Act 2008* (ACT) s 532. See generally pt 16.2 of the Act for details about these orders.

51 Department of Justice and Attorney General (NSW), *Children’s Court* <www.lawlink.nsw.gov.au/lawlink/childrens_court/all_cc.nsf/pages/CC_about_us> at 21 May 2010.

52 Please note that ‘alternative dispute resolution’ is the language used in the NSW Act 1998: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37. ADR is used throughout this report to refer to both ‘alternative dispute resolution’ and ‘appropriate dispute resolution’—the language used by Attorney-General Rob Hulls in both the Commission’s terms of reference and Department of Justice (Victoria), *Attorney-General’s Justice Statement 2: The Next Chapter* (2008) 5.

53 See James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) (‘the Wood Report’). See Chapter 2 for a discussion of the Wood Report.

54 The Director-General is also to consider using ADR if an application for a care order has already been filed, in order to ‘work towards the making of consent orders that are in the best interests of the child or young person concerned’: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37(1).

55 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 38(1), 38F.

56 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38(2)–(3).

57 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38A(1)–(2).

58 Before the parties enter into a parental responsibility contract, the Department must give the other parties a reasonable opportunity to obtain independent advice about the provisions of the contract: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38A(4).

59 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38E(4).

60 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38A(6).

61 Wood, above n 53, vol 2, 466.

62 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 43(1). The employee of the Department or a police officer can also remove a child from a public place without a warrant if they suspect on reasonable grounds that the child is in need of care and protection, is not subject to the supervision or control of a responsible adult and is living in or habitually frequenting a public place: s 43(2).

63 This can include an emergency care and protection order, pursuant to which the Court will place the child or young person in the care responsibility of the Director-General of the Department for 14 days if satisfied the child or young person is at risk of serious harm: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 46. ‘Care responsibility’ means fulfilling various functions listed in the Act: ss 3, 157.

64 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45(1).

65 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45(2).

66 This can be a magistrate (including a children’s magistrate), a registrar of a Local Court or an employee of the Attorney-General’s Department authorised by the Attorney-General as an authorised officer: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3.

67 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 223.

68 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 48.

69 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 53.

70 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 58.

Current Law and Practice in Other Australian Jurisdictions

COURT PROCESSES AND PROCEDURE

- 4.31 Under the NSW Act 1998, the Children's Court can make a care order if it is satisfied that a child or young person is in need of care and protection for any reason, including:
- (a) *there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,*
 - (b) *the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,*
 - (c) *the child or young person has been, or is likely to be, physically or sexually abused or ill-treated,*
 - (d) *subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers,*
 - (e) *the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,*
 - (f) *in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service.⁷¹*
- 4.32 After a care application is filed and served, a children's registrar will arrange and conduct a preliminary conference between the parties, unless the children's registrar believes that the conference should be deferred until a later time.⁷² All parties are entitled to be legally represented at the preliminary conference.⁷³ One of the preliminary conference's purposes is to determine whether the best way to resolve the issues in dispute is to refer the application to independent ADR and, if so, the Court can order that independent ADR take place.⁷⁴
- 4.33 Proceedings before the Children's Court are 'not to be conducted in an adversarial manner', should have as 'little formality and legal technicality and form' as possible, and the Court is not bound by the rules of evidence.⁷⁵ The Children's Court must ensure that the child or young person has the fullest opportunity practicable to be heard and to participate in the proceedings.⁷⁶
- 4.34 In all proceedings, the child or young person, his or her parents, the Department's Director-General and the Minister may appear in person or by legal representative.⁷⁷ The Court can appoint a legal representative for the child, or grant leave for one to appear, if it appears to the Court that the child or young person needs to be represented.⁷⁸ The Court also has the power to appoint a guardian *ad litem* for the child.⁷⁹ There are two models of representation for the child under the NSW Act 1998. The model of legal representation depends on whether the child is capable of giving proper instructions. The NSW Act 1998 contains a rebuttable presumption that a child under 12 is incapable, and a child 12 or older is capable, of giving such instructions.⁸⁰
- 4.35 A legal representative for a child or young person must act as a 'direct legal representative' if the child or young person is capable of giving proper instructions, and a guardian *ad litem* has not been appointed for the child or young person.⁸¹ The NSW Act 1998 provides that a direct legal representative's role includes ensuring that the child's views are placed before the Children's Court, ensuring that all relevant evidence is adduced and, where necessary, tested, and acting on the child's instructions.⁸²

4.36 A legal representative for a child or young person must act as an 'independent legal representative' if the child or young person is not capable of giving proper instructions, or if a guardian *ad litem* has been appointed for the child or young person.⁸³ The role of an independent legal representative under the NSW Act 1998 includes:

- acting on the guardian *ad litem*'s instructions if a guardian has been appointed for the child or young person
- explaining to the child or young person the independent legal representative's role
- presenting direct evidence to the Children's Court about the child or young person and matters relevant to his or her safety, welfare and wellbeing
- presenting evidence of the child's or young person's wishes
- ensuring that all relevant evidence is adduced and, where necessary, tested
- cross-examining the parties and their witnesses
- making applications and submissions to the Children's Court for orders, whether final or interim, considered appropriate in the child's or young person's interests
- lodging an appeal against an order of the Children's Court if considered appropriate.⁸⁴

4.37 The Court may appoint a guardian *ad litem* for the child, instead of or in addition to a legal representative, if there are 'special circumstances that warrant the appointment of a guardian *ad litem*', which may include that the child or young person has special needs because of age, disability or illness, or that the child or young person is, for any reason, incapable of giving proper instructions to a legal representative.⁸⁵ The NSW Act 1998 provides that the guardian *ad litem*'s functions are to safeguard and represent the child's interests, and to instruct the legal representative of the child or young person.⁸⁶ In certain circumstances, the Court may also appoint a guardian *ad litem* for a parent of the child.⁸⁷

4.38 One NSW lawyer has noted that '[n]either the Act, Regulations or any Rule of Court prescribe the class or group of people that may be appointed as a guardian *ad litem*'.⁸⁸ The NSW Attorney-General has set up a panel of persons who can be appointed as a guardian *ad litem*.⁸⁹

4.39 In *Re Oscar*,⁹⁰ a case in which the Children's Court had made an order that the Attorney-General's Department appoint a guardian *ad litem* for a child who was almost 12 years old, the NSW Supreme Court stated that:

*This order for a Guardian ad Litem is rarely made, it usually being deemed sufficient for the interests of the child to be protected by an order under Section 99 of the Act for legal representation of a child. The appointment of a Guardian ad Litem was, in my view, particularly indicated in this case because this is a situation where the child is of an age sufficient for the child's wishes to be a very relevant consideration but not yet of an age where they should be the governing consideration. In addition the history of the matter is particularly bitter and complicated. The Guardian ad Litem selected by the Attorney General's Department under the provisions of Section 100 of the Act appears to me to be eminently suitable, being a person with a long and quite distinguished career in Public Education in New South Wales with great experience of, and contact with, children and young people of various ages, and awareness of their problems.*⁹¹

71 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 71.*

72 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 65(1).* The children's registrar may dispense with the requirement for a preliminary conference if there has already been a defended hearing in relation to an application for an assessment order, interim care order or final care order, and the children's registrar 'considers that no useful purpose will be served by a preliminary conference', or if the parties consent to dispense with the conference: s 65(1A).

73 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 65(3).*

74 *Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 65(2)(c), 65A.*

75 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 93.*

76 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 95(3).*

77 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 98.*

78 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 99.*

79 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 100.*

80 *Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 99B–99C.* In the context of this detailed prescription of the role of children's representatives in NSW it is important to note that the Law Society of New South Wales offers specialist accreditation in 'Children's Law for legal practitioners.

81 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 99A(1).*

82 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 99D(a).*

83 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 99A(2).*

84 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 99D(b).*

85 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 100(1)–(2).*

86 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 100(3).*

87 *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 101.*

88 Robert McLachlan, 'Guardian ad Litem' (2002) 2(3) *Children's Court of New South Wales: Case Law News* 13, 15. Italics added.

89 Children's Court of New South Wales, 'The Guardian ad Litem Panel' (2002) 2(1) *Children's Court of New South Wales: Case Law News* 1.

90 (2002) NSWSC 453 (Unreported, Supreme Court of New South Wales Equity Division, Hamilton J, 21 May 2002).

91 *Re Oscar* (2002) NSWSC 453 (Unreported, Supreme Court of New South Wales Equity Division, Hamilton J, 21 May 2002) [7].

Current Law and Practice in Other Australian Jurisdictions

CARE ORDERS

- 4.40 A care order can be either a final or interim order.⁹² The Court can make an interim order after a care application is made and before the application is finally determined, if it is satisfied that it is appropriate to do so.⁹³ The Department must satisfy the Court that it is not in the best interests of the safety, welfare and wellbeing of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility pending finalisation of the case.⁹⁴ The Court should not make an interim care order unless it is satisfied that the order is necessary, in the child's interests, and is preferable to making a final order or an order dismissing the proceedings.⁹⁵
- 4.41 If the Court is satisfied that a child or young person is in need of care and protection, the Court can make a care order including:
- an order accepting an undertaking made by a person with parental responsibility for the child or young person, a birth parent or a person who is the primary caregiver of the child of young person⁹⁶
 - an order directing a person or organisation named in the order to provide support services for the child or young person for a fixed period not exceeding 12 months⁹⁷
 - an order requiring a child under 14 years of age who has exhibited sexually abusive behaviour to attend a therapeutic or treatment program⁹⁸
 - an order placing the child or young person in relation to whom a care application has been made under the supervision of the Department's Director-General for no longer than 12 months⁹⁹
 - an order allocating parental responsibility to one parent to the exclusion of the other parent, to one or both parents and the Minister jointly, to another suitable person or persons, or to the Minister¹⁰⁰—the Court cannot make this type of order unless the Department has presented a care plan to it¹⁰¹
 - an order stipulating the minimum contact requirements between the child or young person and his or her parents, relatives or other persons of significance, that contact with a person be supervised, and/or that contact with a person be denied.¹⁰²

NORTHERN TERRITORY

GENERAL OVERVIEW

- 4.42 The Northern Territory has recently overhauled its child protection legislation with the passage of the *Care and Protection of Children Act 2007* (NT) (NT Act 2007), which had a staged implementation throughout 2008. The introduction of the new Act was part of the Northern Territory 'Caring for our Children' child protection reform agenda, which began in 2004.¹⁰³
- 4.43 Under the NT Act 2007, the Families and Children branch of the Department of Health and Families (the Department) can apply for a care and protection order if it believes that a child is in need of care and protection. The Family Matters Court decides applications for care and protection orders. It is a division of the Northern Territory Local Court constituted by a single magistrate.¹⁰⁴

4.44 Some important features of the new Northern Territory child protection system are:

- Under regulations which have not yet come into operation,¹⁰⁵ the convenor appointed to convene a mediation conference will have the power to decide not to hold a mediation conference if he or she considers it inappropriate or not possible within a reasonable time.
- One of the grounds for making a care and protection application is that a child 'is not under the control of any person and is engaged in conduct that causes or is likely to cause harm to the child or other persons'.
- If a separate legal representative is appointed by the Court for the child, he or she must act in the child's best interests 'regardless of any instructions from the child'.

PRE-COURT ADR

4.45 The NT Act 2007 provides that the Department can arrange for a mediation conference if concerns about the child's wellbeing have been raised, the Department 'reasonably believes' the conference may address those concerns, and the parents are willing to participate in the conference.¹⁰⁶ The Department must appoint a convenor who is approved by the parents,¹⁰⁷ and the convenor may invite parents and other persons that the convenor considers appropriate to attend the conference.¹⁰⁸

4.46 The *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) (NT Regulations 2010) require that before a convenor convenes a mediation conference, he or she must, if the convenor considers it appropriate to do so, having regard to the child's maturity and understanding:

- explain the purpose of the conference to the child
- discuss with the child whether the child wants a person to be appointed to present, or assist the child to present, the wishes and views of the child at the conference
- discuss with the child whether the child wants a particular person to attend the conference to support the child.¹⁰⁹

92 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 62.

93 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 69(1)–(1A).

94 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 69(2).

95 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 70A.

96 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 73.

97 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 74.

98 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 75.

99 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 76–7.

100 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79.

101 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 80.

102 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 86.

103 Also, in August 2006 the Northern Territory established the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse. The Inquiry found that 'sexual abuse of Aboriginal children is common, widespread, and grossly under reported'. The Inquiry 'supported the review of child protection legislation and system reforms governing the function and administration of child protection systems in the NT as critical child protection measures': Department of Health and Families (NT), *Child Protection System Reform* <www.health.nt.gov.au/Children_Youth_and_Families/Child_Protection/Child_Protection_System_Reform/index.aspx> at 23 May 2010.

104 *Care and Protection of Children Act 2007* (NT) s 89.

105 The provisions of the NT Act that relate to mediation conferences, and the regulations made pursuant to those provisions (discussion below) have not, at the date of writing (23 May 2010), come into operation. They are expected to commence operation shortly.

106 *Care and Protection of Children Act 2007* (NT) s 49.

107 A person may be appointed as a convenor if the person is an accredited mediator under the Australian National Mediator Accreditation System, or 'has experience relevant to convening a mediation conference': *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 11.

108 *Care and Protection of Children Act 2007* (NT) s 49(5)–(6).

109 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 5(1)(a).

Current Law and Practice in Other Australian Jurisdictions

- 4.47 The convenor may also arrange for a person who has a similar cultural, ethnic or religious background to the child to assist the convenor to prepare for or conduct the mediation conference.¹¹⁰
- 4.48 Under the NT Regulations 2010, the convenor will have the power to decide not to convene a mediation conference if, following discussions with the child or a member of the child's family, he or she believes that a conference should not be convened, or if there has been an unsuccessful attempt to convene a conference and it does not appear a conference could be convened within a reasonable time.¹¹¹
- 4.49 If the convenor decides to convene a mediation conference, he or she is required, at the child's request, to appoint a suitable person¹¹² to present, or assist the child to present, the child's wishes and views at the conference, but only if the convenor considers it to be in the child's best interests.¹¹³ The NT Act 2007 and the NT Regulations 2010 are silent as to whether legal representatives for either the child or family members may attend a mediation conference, but it appears this could be possible.¹¹⁴
- 4.50 If an agreement is reached during the mediation conference about the best means of safeguarding the child's wellbeing, the convenor will be required to arrange that a written agreement is signed.¹¹⁵ After a mediation conference, the convenor will be required to provide a written report within 28 days to the participants and the Department's Chief Executive Officer. The report includes:
- a summary of the concerns raised at the conference
 - a summary of the child's views and wishes, but only if the child agrees for the summary to be included and the convenor considers it to be in the child's best interests
 - if an agreement was reached, a copy of that agreement, accompanied by a statement from the convenor as to whether or not he or she considers that the child's wellbeing will be safeguarded through the agreement.¹¹⁶

EMERGENCY REMOVAL POWERS AND ORDERS

- 4.51 If a Department employee reasonably believes a child is in need of protection and that provisional protection is 'urgently needed to safeguard the wellbeing of the child', the employee may take a child into provisional protection.¹¹⁷ The child may only be in the Department's provisional protection for 72 hours, after which the child must be returned to the family if no order has been made in relation to the child.¹¹⁸ Authorised officers have the power to move a child found outside of home to a safe place on a temporary basis if the authorised officer reasonably believes that there is a risk to the child's wellbeing if he or she is not removed.¹¹⁹
- 4.52 After a child has been taken into provisional protection, or instead of taking a child into provisional protection, the Department can apply for a temporary protection order, if the 'proposed order is urgently needed to safeguard the wellbeing of the child'.¹²⁰ The application can be made by phone, fax, or other electronic means, and can be decided in the absence of the parents.¹²¹ If the child has not already been taken into provisional protection, an authorised officer may remove the child pursuant to the temporary protection order.¹²² A temporary protection order lasts for 14 days, but consecutive temporary protection orders can be granted.¹²³

ASSESSMENT ORDERS

- 4.53 Assessment orders authorise the Department to carry out an assessment of a child which cannot be carried out without an order and can involve a medical or psychological examination of the child or the child's parent.¹²⁴ The Court will not make such an order unless satisfied that the Department took reasonable steps to obtain the parents' consent to the assessment.¹²⁵ Assessment orders have effect for 28 days.¹²⁶

COURT PROCESSES AND PROCEDURE

- 4.54 The NT Act 2007 provides that a child is in need of care and protection if:

- (a) *the child has suffered or is likely to suffer harm or exploitation because of an act or omission of a parent of the child; or*
- (b) *the child is abandoned and no family member of the child is willing and able to care for the child; or*
- (c) *the parents of the child are dead or unable or unwilling to care for the child and no other family member of the child is able and willing to do so; or*
- (d) *the child is not under the control of any person and is engaged in conduct that causes or is likely to cause harm to the child or other persons.*¹²⁷

- 4.55 Under the NT Act 2007, the child, the parents and the Department are parties to any application.¹²⁸ All parties to proceedings under the Act may be legally represented.¹²⁹ The Court may order that a child be separately legally represented if it considers that it would be in the child's best interests to do so.¹³⁰ The NT Act 2007 directs that the child's legal representative must act in the child's best interests 'regardless of any instructions from the child', and must present the child's views and wishes to the Court.¹³¹ In the best interests role, the child's legal representative may:

- (a) *interview the child; and*
- (b) *explain the role of the legal representative to the child; and*
- (c) *present evidence to the Court about the best interests, and the views and wishes, of the child; and*
- (d) *cross-examine other parties to the proceedings and their witnesses; and*
- (e) *make applications and submissions to the Court for the child; and*
- (f) *lodge an appeal against a decision of the Court for the child.*¹³²

- 4.56 Proceedings in the Family Matters Court 'must be conducted with as little formality and legal technicality as the circumstances permit', and the Court is not bound by the rules of evidence.¹³³

110 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 5(4).

111 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 7(1). If the convenor decides not to hold a mediation conference, he or she must, as soon as practicable, give the Department written notice of this decision, along with the grounds on which it is based: reg 7(2).

112 'Suitable person' is defined as 'any person the convenor considers will accurately and effectively present, or assist the child to present, the wishes and views of the child at the mediation conference, taking into account the cultural, ethnic and religious background of the child': *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 6(2).

113 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 6(1).

114 The NT Regulations 2010 make reference to a participant attending the conference 'in person or by other means': *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 8(3)(a)(iii).

115 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 8(3).

116 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 9.

117 *Care and Protection of Children Act 2007* (NT) s 51.

118 *Care and Protection of Children Act 2007* (NT) s 53.

119 *Care and Protection of Children Act 2007* (NT) s 56.

120 *Care and Protection of Children Act 2007* (NT) s 103.

121 *Care and Protection of Children Act 2007* (NT) s 105(5). The Act provides that as soon as practicable after the order is made, the Department must give a copy of the order to each parent of the child, inform the child about the order, and explain the effect of the order to the child: s 106.

122 *Care and Protection of Children Act 2007* (NT) s 108.

123 *Care and Protection of Children Act 2007* (NT) ss 107, 110.

124 *Care and Protection of Children Act 2007* (NT) s 111.

125 *Care and Protection of Children Act 2007* (NT) s 113.

126 *Care and Protection of Children Act 2007* (NT) s 117.

127 *Care and Protection of Children Act 2007* (NT) s 20.

128 *Care and Protection of Children Act 2007* (NT) s 94.

129 *Care and Protection of Children Act 2007* (NT) s 101.

130 *Care and Protection of Children Act 2007* (NT) s 146.

131 *Care and Protection of Children Act 2007* (NT) s 146(6).

132 *Care and Protection of Children Act 2007* (NT) s 146(7).

133 *Care and Protection of Children Act 2007* (NT) s 93.

Current Law and Practice in Other Australian Jurisdictions

- 4.57 Under the NT Act 2007, the Court and any other decision maker under the Act are bound by several principles, including treating the child with respect¹³⁴ and child participation.¹³⁵ Decisions involving a child should be made 'with the informed participation of the child, the child's family and other people who are significant in the child's life'.¹³⁶
- 4.58 Under the NT Act 2007, the Family Matters Court has the power to order the parties to attend a mediation conference prior to an application being determined.¹³⁷ The parties required to attend court-ordered mediation may be represented.¹³⁸

PROTECTION ORDERS

- 4.59 The Department can apply for a protection order if it reasonably believes that the child is in need of care and protection.¹³⁹ The application must contain a proposed protection order that must include one or more of the following directions:
- a supervision direction requiring that a person must do, or refrain from doing, a specified thing directly related to the child's protection, including refraining from having contact with the child; and/or that the Department's Chief Executive Officer must supervise the child's protection in relation to specified matters
 - a daily care and control direction giving daily care and control of the child to a specified person
 - a short-term parental responsibility direction giving parental responsibility for the child to a specified person for a specified period not exceeding two years
 - a long-term parental responsibility direction giving parental responsibility for the child to a specified person for a specified period that exceeds two years and ends before the child is 18 years of age.¹⁴⁰

QUEENSLAND

GENERAL OVERVIEW

- 4.60 The *Child Protection Act 1999* (Qld) (Qld Act 1999) governs the statutory child protection system in Queensland. The Qld Act 1999 is implemented by the Department of Child Safety, a division of the Department of Communities (the Department). The Department can make a child protection order if it believes that a child has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm, and does not have a parent able and willing to protect the child from the harm.
- 4.61 The Queensland child protection system has a 'two-tiered' Children's Court system, which includes an original and an appellate jurisdiction. Original jurisdiction in child protection matters is exercised by a children's magistrate, who is referred to as the 'Children's Court' when exercising this jurisdiction. The Children's Court has jurisdiction in relation to child protection applications.
- 4.62 Appellate jurisdiction in child protection matters is exercised by a District Court judge, who is referred to as the 'Children's Court of Queensland' (CCQ) when exercising this jurisdiction. The CCQ hears appeals from the Children's Court.¹⁴¹

4.63 Other key distinguishing features of the Queensland child protection system include:

- Following emergency removal of a child, the Department must be granted a court order within eight hours.
- The court order that the Department may be granted after emergency removal lasts for only three days and is called a temporary assessment order.
- The Children’s Court has the power to order the appointment of a separate representative for the child who must ‘act in the child’s best interests regardless of any instructions from the child’.
- The Children’s Court cannot make an order specifying the level of contact the Department’s Chief Executive must facilitate between the child and his or her parents, other than to exclude such contact entirely.

PRE-COURT ADR

4.64 Under the Qld Act 1999, the Department must convene a family group meeting (FGM) to develop or review a case plan for a child.¹⁴² As the Act prohibits the Court from making a child protection order unless an acceptable case plan for the child has been filed,¹⁴³ the Qld Act 1999 effectively requires the Department to convene an FGM in every case before a child protection order can be made.

4.65 The convenor of an FGM must give the child,¹⁴⁴ the child’s parents, a support person for the parents (who can be a legal representative), other members of the family group and any legal representative for the child, a reasonable opportunity to attend and participate in the FGM.¹⁴⁵ The Lawyers Practice Manual Queensland notes that it is common practice for solicitors to attend FGMs with their clients.¹⁴⁶ If a case plan is developed at an FGM, the Department must endorse the case plan, unless the plan is ‘clearly impracticable or not in the child’s best interests’.¹⁴⁷

EMERGENCY REMOVAL POWERS

4.66 If an authorised officer or police officer reasonably believes that a child is at risk of harm and the child is likely to suffer harm if the officer does not immediately remove the child, the officer may take the child into custody.¹⁴⁸ Within eight hours after the child is taken into custody, the Department must be granted a temporary assessment order (TAO) or must release the child.¹⁴⁹

4.67 An application for a TAO can be made directly to a Children’s Court magistrate—usually in chambers—by either an authorised officer or police officer,¹⁵⁰ and can be heard and determined on an *ex parte* basis if the magistrate decides this is appropriate.¹⁵¹ In urgent circumstances, an application for a TAO can be made after hours by phone or fax to magistrates who are on-call.¹⁵² These after-hours applications are made through the Child Safety After Hours Service Centre in Brisbane.

ASSESSMENT ORDERS

4.68 In order to grant a TAO, the Children’s Court magistrate must be satisfied that ‘an investigation is necessary to assess whether the child is in need of protection’, and that the investigation cannot be properly carried out unless the order is made.¹⁵³ In relation to the latter requirement for a TAO, the magistrate must be satisfied that reasonable steps have been taken to obtain consent to the Department’s desired assessment procedures from a least one of the child’s parents, or that it is ‘not practicable’ to take such steps.¹⁵⁴

134 *Care and Protection of Children Act 2007* (NT) s 9.

135 *Care and Protection of Children Act 2007* (NT) s 10.

136 *Care and Protection of Children Act 2007* (NT) s 9(2)(c).

137 *Care and Protection of Children Act 2007* (NT) s 127.

138 *Care and Protection of Children Act 2007* (NT) s 127(4).

139 *Care and Protection of Children Act 2007* (NT) s 121.

140 *Care and Protection of Children Act 2007* (NT) s 123.

141 See the definition of ‘appellate court’ in sch 3 of the *Child Protection Act 1999* (Qld).

142 *Child Protection Act 1999* (Qld) s 51H.

143 *Child Protection Act 1999* (Qld) s 59.

144 Unless it would be inappropriate because of the child’s age or ability to understand the meeting to invite the child: *Child Protection Act 1999* (Qld) s 51L(1)(e).

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

146 Caxton Legal Centre, *Lawyers Practice Manual Queensland (2009)* [31.265].

147 *Child Protection Act 1999* (Qld) ss 51Q–51R. If the Chief Executive is of the view that the case plan is not appropriate for those reasons, he or she can either reconvene the FGM, convene a new FGM, or amend the case plan and endorse it: s 51R(2).

148 *Child Protection Act 1999* (Qld) s 18(1)–(2). As in the Northern Territory, an authorised officer or police officer has the option of simply moving the child (if under 12) to a safe place on a temporary basis, if he or she reasonably believes that the child is at risk of harm, but does not consider it necessary to take the child into the Chief Executive’s care: s 21.

149 *Child Protection Act 1999* (Qld) s 18(7).

150 *Child Protection Act 1999* (Qld) s 25.

151 *Child Protection Act 1999* (Qld) s 26.

152 *Child Protection Act 1999* (Qld) s 30. TAOs applied for in this way are referred to as ‘special orders’.

153 *Child Protection Act 1999* (Qld) s 27.

154 *Child Protection Act 1999* (Qld) s 27(2).

Current Law and Practice in Other Australian Jurisdictions

- 4.69 The Children's Court magistrate can allow the authorised officer or police officer to take the child into—or keep the child in—custody for the duration of the order if the magistrate considers it 'is necessary to provide interim protection for the child while the investigation is carried out'.¹⁵⁵ A TAO can only last for a maximum of three days,¹⁵⁶ with the possibility of an extension of one further business day if the magistrate is satisfied that the Department intends to apply for a court assessment order or a child protection order.¹⁵⁷
- 4.70 Following a TAO, or as an initial action if emergency removal was not necessary, the Department will usually apply for a court assessment order (CAO). The test for a CAO is the same as for a TAO,¹⁵⁸ with the additional requirement that more than three days is necessary to complete the investigation and assessment. The Children's Court may hear and decide the application in the absence of the child's parents if they were given notice and failed to attend, or if it is satisfied it was not practicable for the parents to be given notice of the hearing.¹⁵⁹
- 4.71 A CAO can also provide the authority to take a child into care.¹⁶⁰ A CAO can be made for a maximum of four weeks,¹⁶¹ but it can be extended once for a further four weeks if the Court is satisfied that an extension would be in the child's best interests.¹⁶²

COURT PROCESSES AND PROCEDURE

- 4.72 Under the Qld Act 1999, a child is defined as 'in need of protection' for the purposes of a child protection application when he or she has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm, and does not have a parent able and willing to protect the child from the harm.¹⁶³ The Qld Act 1999 defines 'harm' as 'any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing'.¹⁶⁴ The Act further clarifies that, for the purposes of finding the child to be in need of protection, it is 'immaterial how the harm is caused', and that harm can be caused 'by physical, psychological or emotional abuse or neglect, or sexual abuse or exploitation'.¹⁶⁵
- 4.73 The Children's Court has the power to adjourn proceedings and order that the Department convene an FGM to develop or revise, and subsequently file in court, a case plan or to address 'another matter relating to the child's wellbeing and protection and care needs'.¹⁶⁶ The Court can also order that a conference be held between the parties before the proceeding continues 'to decide the matters in dispute or to try to resolve the matters'.¹⁶⁷
- 4.74 If the Court orders that a conference be convened, the Court registrar must appoint an independent chairperson and convene a conference as soon as practicable.¹⁶⁸ In practice, the chairperson of a court-ordered conference is an employee of the Department of Justice who has no other dealings with the proceedings.¹⁶⁹
- 4.75 All parties except the child are required to attend, and may be represented by legal representatives.¹⁷⁰ Although the child is not required to attend, arrangements can be made for the child to attend the conference if it is considered appropriate. If a separate representative has been appointed, he or she will also attend.¹⁷¹
- 4.76 The Lawyers Practice Manual Queensland advises that these court-ordered conferences

*are often a very useful opportunity for parties to discuss the type of order that should be made for the child, the time period of the order and most importantly what is to happen during the period of the order. This is especially the case prior to the finalisation of proceedings and with an independent chairperson present.*¹⁷²

- 4.77 Anything said at the conference is inadmissible in the proceedings, but the chairperson must report to the Court about the outcome of the conference.¹⁷³
- 4.78 The Children's Court is not bound by the rules of evidence,¹⁷⁴ it can appoint an expert to assist the Court,¹⁷⁵ and it can receive submissions from non-parties.¹⁷⁶ The child is a party to the proceedings,¹⁷⁷ and the child, the child's parents and the other parties have a right to appear in person or be represented by a lawyer.¹⁷⁸
- 4.79 The Lawyers Practice Manual Queensland advises that the lawyer representing a child pursuant to section 108
- would be a lawyer engaged by the child to act directly on the child's instructions in the proceedings. The usual solicitor/client relationship would exist between the child and the lawyer, and the lawyer would advocate in the proceedings on behalf of the child's instructions. There is no age limit requirement on this right in the legislation, however, it may be that any submissions made by this lawyer are considered by the court in the context of the child's age and ability to understand.*¹⁷⁹
- 4.80 However, if the Children's Court considers that it is necessary in the child's best interests for the child to have separate legal representation, the Court may order that a separate representative be appointed for the child.¹⁸⁰ Factors that the Court may take into account when deciding whether to order that a separate representative be appointed for the child include whether the application for the order is contested by the parents, and if the child opposes the orders.¹⁸¹ A separate representative for the child must 'act in the child's best interests regardless of any instructions from the child' and 'as far as possible, present the child's views and wishes to the court'.¹⁸²
- 4.81 The Lawyers Practice Manual Queensland explains that
- Separate representatives commonly are family lawyers also on the independent children's lawyers panel maintained by Legal Aid Queensland ...*
- In practice the separate representative will take part in all of the proceedings including mentions, conferences, family meetings and hearings. They may call and cross-examine witnesses and make final submissions.*
- To assist them to carry out their role the separate representative may engage an independent social worker, psychologist or psychiatrist to prepare a social assessment report. However, taking into consideration the often numerous assessments children involved in the child protection system have been subjected to, this may not be as a matter of course ... Information provided to the report writer may form part of their report and the separate representative has a duty to provide information relevant to the best interests of the child before the court.*¹⁸³

CHILD PROTECTION ORDERS

- 4.82 The Children's Court can only make a child protection order if satisfied that:
- the child is in need of protection and the order is 'appropriate and desirable for the child's protection'
 - a case plan has been developed that 'is appropriate and desirable for the child's assessed protection and care needs' and has been filed with the Court

- 155 *Child Protection Act 1999* (Qld) s 28.
 156 *Child Protection Act 1999* (Qld) s 29.
 157 *Child Protection Act 1999* (Qld) s 34.
 158 *Child Protection Act 1999* (Qld) s 44.
 159 *Child Protection Act 1999* (Qld) ss 41, 43.
 160 *Child Protection Act 1999* (Qld) s 45.
 161 *Child Protection Act 1999* (Qld) s 47.
 162 *Child Protection Act 1999* (Qld) s 49.
 163 *Child Protection Act 1999* (Qld) s 10.
 164 *Child Protection Act 1999* (Qld) s 9(1).
 165 *Child Protection Act 1999* (Qld) s 9(2)–(3).
 166 *Child Protection Act 1999* (Qld) s 68(1)(d).
 167 *Child Protection Act 1999* (Qld) s 68(1)(e).
 168 *Child Protection Act 1999* (Qld) s 69(1).
 169 Caxton Legal Centre, above n 146, [31.270].
 170 *Child Protection Act 1999* (Qld) s 70. If the child is Aboriginal or a Torres Strait Islander, a cultural representative may attend the conference: s 70(4).
 171 Caxton Legal Centre, above n 146, [31.270].
 172 *Ibid.*
 173 *Child Protection Act 1999* (Qld) ss 71, 72(1).
 174 *Child Protection Act 1999* (Qld) s 105.
 175 *Child Protection Act 1999* (Qld) s 107.
 176 *Child Protection Act 1999* (Qld) s 113.
 177 See the definition of 'party' in *Child Protection Act 1999* (Qld) sch 3.
 178 *Child Protection Act 1999* (Qld) s 108.
 179 Caxton Legal Centre, above n 146, [31.230].
 180 *Child Protection Act 1999* (Qld) s 110.
 181 *Child Protection Act 1999* (Qld) s 110(2).
 182 *Child Protection Act 1999* (Qld) s 110(3).
 183 Caxton Legal Centre, above n 146, [31.230].

Current Law and Practice in Other Australian Jurisdictions

- if the making of the application was contested, that reasonable attempts to hold a conference have been made
 - the child's wishes have been made known to the Court, and
 - the protection sought to be achieved by the order is unlikely to be achieved by an order on less intrusive terms.¹⁸⁴
- 4.83 The Qld Act 1999 also requires that before making a child protection order granting long-term guardianship of a child, the Court must be satisfied that there is no parent able and willing to protect the child within the foreseeable future, or that the child's need for emotional security will be best met in the long term by making the order.¹⁸⁵ The Court must not grant long-term guardianship to the Department's Chief Executive if the Court 'can properly grant guardianship to another suitable person'.¹⁸⁶
- 4.84 The Children's Court may make any of the following child protection orders it considers appropriate in the circumstances:
- an order directing a child's parent to do or refrain from doing something directly related to the child's protection
 - an order directing a parent not to have direct or indirect contact with the child, or to have only supervised contact with the child
 - an order requiring the Chief Executive to supervise the child's protection in relation to the matters stated in the order
 - an order granting custody of the child to a suitable person, other than a parent of the child, who is a member of the child's family, or the Chief Executive
 - an order granting short-term guardianship of the child to the Chief Executive
 - an order granting long-term guardianship of the child to a suitable person, other than a parent of the child, or to the Chief Executive.¹⁸⁷
- 4.85 In relation to the duration of these child protection orders, the Qld Act 1999 states that:
- if a order does not grant custody or guardianship of the child, the order ends after one year
 - if an order grants custody or short-term guardianship of the child, the order ends after two years
 - if an order grants long-term guardianship of the child, the order ends the day before the child turns 18.¹⁸⁸
- 4.86 The Children's Court cannot make an order requiring the Department's Chief Executive to facilitate a certain level of contact between the child and his or her parents or other family members. The Department makes these decisions administratively.¹⁸⁹ However, the Qld Act 1999 imposes an obligation on the Chief Executive to 'provide opportunity for contact between the child and the child's parents and appropriate members of the child's family as often as is appropriate in the circumstances'.¹⁹⁰ If the Chief Executive makes a decision to refuse, restrict or impose conditions on such contact, the person affected can apply to the Queensland Civil and Administrative Tribunal for review of that decision.¹⁹¹

SOUTH AUSTRALIA

GENERAL OVERVIEW

4.87 The *Children's Protection Act 1993* (SA) (SA Act 1993) governs the statutory child protection system in South Australia. Families SA, a division of the Department for Families and Communities (the Department), will file an application in the Youth Court of South Australia if an employee is of the opinion that a child is at risk and that an order should be made to secure the child's care and protection. The Youth Court is a specialist court constituted by two District Court judges, one of whom heads the Court as the Senior Judge, and two specialist magistrates. The Youth Court, located in Adelaide, hears and determines all child protection matters for the whole of the state.

- 4.88 Unique features of the South Australian child protection system include:
- The Care and Protection Unit, a body which is independent of the Department and attached to the Youth Court, is responsible for running family care meetings.
 - In child protection proceedings in the Youth Court, the Department is represented by lawyers from the Crown Solicitor's Office.
 - The child, who is always a party to child protection proceedings in the Youth Court, must be represented unless he or she has made an informed and independent decision not to be represented.

EMERGENCY REMOVAL POWERS

- 4.89 If a police officer, or an authorised Departmental officer, believes on reasonable grounds that a child is in serious danger and that it is necessary to remove the child from that situation in order to protect the child from harm or further harm, the officer may remove the child from any premises or place.¹⁹² However, a Department employee may only remove a child from the custody of a guardian with the Chief Executive's prior approval.¹⁹³
- 4.90 The officer who removes a child must, if possible, return the child to his or her home unless the officer is of the opinion that it would not be in the child's best interests to do so.¹⁹⁴ The interim custody of a child removed from a situation of danger will terminate at the end of the next working day following the day of removal, unless a Youth Court order—usually an investigation and assessment order—is obtained.¹⁹⁵

INVESTIGATION AND ASSESSMENT ORDERS

- 4.91 The Department's Chief Executive may apply to the Youth Court for an investigation and assessment order (I&AO) if he or she is of the opinion that:
- there is some information or evidence leading to a reasonable suspicion that a child is at risk
 - further investigation of the matter is warranted or a family care meeting (FCM) should be held, and
 - the investigation cannot properly proceed unless an order under this Division is made, or it is desirable that the child be protected while the matter is being investigated or a family care meeting is being held.¹⁹⁶

184 *Child Protection Act 1999* (Qld) s 59.

185 *Child Protection Act 1999* (Qld) s 59(4).

186 *Child Protection Act 1999* (Qld) s 59(5).

187 *Child Protection Act 1999* (Qld) s 61.

188 *Child Protection Act 1999* (Qld) s 62.

189 Caxton Legal Centre, above n 146, [31.295].

190 *Child Protection Act 1999* (Qld) s 87(1).

191 See ch 2A and s 247 of the *Child Protection Act 1999* (Qld), and the list of 'reviewable decisions' in sch 2 of the Act.

192 *Children's Protection Act 1993* (SA) s 16(1).

193 *Children's Protection Act 1993* (SA) s 16(2)(b).

194 *Children's Protection Act 1993* (SA) s 16(3)(b).

195 *Children's Protection Act 1993* (SA) s 16(5). As the period of emergency custody is limited to one *working* day, children removed on a Friday will therefore be kept in the Department's care until the Youth Court opens on Monday.

196 *Children's Protection Act 1993* (SA) s 20(1).

Current Law and Practice in Other Australian Jurisdictions

4.92 The Court can adjourn the hearing of an I&AO application once, for no more than seven days.¹⁹⁷ If the Court is satisfied that there are 'sufficient grounds' for making an I&AO, and that it would be in the child's best interests that such an order be made, the Court may order an examination and assessment of the child.¹⁹⁸ The Court can grant custody of the child to the Minister for the duration of the I&AO, which is limited to six weeks, with one possible extension—which can only be granted by the Senior Judge—of no more than four weeks.¹⁹⁹ An FCM is usually convened during the lifetime of an I&AO, before a care and protection application has been filed.

FAMILY CARE MEETINGS RUN BY THE CARE AND PROTECTION UNIT²⁰⁰

4.93 The SA Act 1993 directs the Minister to convene an FCM if the Minister believes that a child is at risk and that arrangements should be made to secure the child's care and protection.²⁰¹ The Minister cannot make an application for a care and protection order before an FCM has been held in respect of the child unless:

- it has not been possible to hold a meeting despite reasonable endeavours to do so
- an order should be made without delay
- the guardians of the child consent to the application
- there is other good reason to do so.²⁰²

4.94 FCMs are convened and conducted by coordinators in the Care and Protection Unit. The coordinators are appointed by the Senior Judge of the Youth Court, and have social science or psychology qualifications and previous experience working with children. There are currently five full-time coordinators in the Unit.

4.95 The SA Act 1993 gives the coordinator the power to determine who attends the FCM,²⁰³ and the coordinator consults with the child and his or her guardians as to who should be invited to attend, and when and where the meeting should be held.²⁰⁴ The coordinator must always appoint an advocate for the child who will attend the FCM, unless he or she is satisfied that the child has made an independent decision to waive his or her right to have a lay advocate.²⁰⁵ The coordinator will decide whether it would be in the child's best interests for the child to attend the FCM,²⁰⁶ but he or she is guided by the advocate's views. If the child does not attend, the coordinator must ascertain the child's views and relay those views to the FCM.²⁰⁷

4.96 No lawyers attend the FCM,²⁰⁸ but the child's parent may have a support person present.²⁰⁹ If the child is Aboriginal, a cultural representative must attend the FCM.²¹⁰

4.97 At an FCM, the Department presents its concerns about the child, and the parents or other guardians or relatives of the child are given the opportunity to develop a plan to meet those concerns, guided by the coordinator.²¹¹ If an agreement is reached at an FCM, the coordinator will not validate it unless he or she considers that it properly secures the child's care and protection.²¹² Once validated, the coordinator will draft the agreement, and the child, if appropriate, and his or her parents will sign it.²¹³

4.98 Although an FCM agreement cannot be registered with the Court and therefore cannot be legally enforced, it can be used in any subsequent Youth Court proceedings and considered by the Court when deciding what orders are appropriate.²¹⁴ An FCM arrangement can be reviewed at another FCM.²¹⁵ If no agreement is reached at the FCM, or if an agreement is not complied with, the Minister may apply for a care and protection order.²¹⁶

COURT PROCESSES AND PROCEDURE

4.99 The Minister may apply for an order if he or she believes that a child is at risk and that an order should be made for the child's care and protection.²¹⁷ A child is defined to be 'at risk' in a number of circumstances, including if:

- there is a significant risk that the child will suffer serious harm to his or her physical, psychological or emotional wellbeing, against which he or she should have, but does not have, proper protection
- the child has been, or is being, abused or neglected²¹⁸
- a person with whom the child resides, whether a guardian of the child or not, has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out; or has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person
- the guardians of the child are deceased, or unable or unwilling to care for and protect the child or exercise adequate supervision and control over the child, or have abandoned the child, or cannot be found.²¹⁹

4.100 Once a care and protection application has been filed, the Youth Court may order that a conference be convened to determine what matters are in dispute, or to resolve any matters in dispute.²²⁰ The conference is presided over by a judicial officer, other than the one who is hearing or will hear the proceedings, and legal representatives for the parties can attend.²²¹ The Court also has the power to adjourn the hearing of an application and refer the parties to the Care and Protection Unit for an FCM to resolve specific issues and report to the Court.²²²

197 *Children's Protection Act 1993* (SA) s 23(1)–(2). This adjournment might, for instance, be necessary to enable parents to obtain legal advice and/or representation. The Court can make orders concerning the custody of the child over this adjournment period: s 23(3)(a).

198 For the meaning of 'examination and assessment' see *Children's Protection Act 1993* (SA) s 26.

199 *Children's Protection Act 1993* (SA) s 21.

200 The Commission is grateful for the information provided by the coordinators of the Care and Protection Unit on its visit to the Adelaide Youth Court on 24 March 2010.

201 *Children's Protection Act 1993* (SA) s 27(1).

202 *Children's Protection Act 1993* (SA) s 27(2).

203 *Children's Protection Act 1993* (SA) s 30.

204 *Children's Protection Act 1993* (SA) s 29(3).

205 *Children's Protection Act 1993* (SA) s 29(2).

206 *Children's Protection Act 1993* (SA) s 30(2)(a).

207 *Children's Protection Act 1993* (SA) s 32(1).

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

209 *Children's Protection Act 1993* (SA) s 31(h).

210 *Children's Protection Act 1993* (SA) s 30(1)(e).

211 *Children's Protection Act 1993* (SA) s 32(2)–(3).

212 *Children's Protection Act 1993* (SA) s 32(6).

213 *Children's Protection Act 1993* (SA) s 32(7). Note that the agreement of the Department representative is not required.

214 The Youth Court can annex an FCM agreement to an order.

215 *Children's Protection Act 1993* (SA) s 33.

216 *Children's Protection Act 1993* (SA) s 35.

217 *Children's Protection Act 1993* (SA) s 37(1). There are also two other grounds for a care and protection application. One relates to drug abuse on the part of the child's guardians and the need for treatment of this. The other is if arrangements for the child already exist and the child would be likely to suffer significant psychological injury if those arrangements were disturbed, and it would be in the child's best interests for the arrangements to be made the subject of an order: s 37(1a), (2).

218 See *Children's Protection Act 1993* (SA) s 6(1) for the definition of 'abuse or neglect'.

219 *Children's Protection Act 1993* (SA) s 6(2).

220 *Children's Protection Act 1993* (SA) s 42(1).

221 *Children's Protection Act 1993* (SA) s 42(2)–(3).

222 *Children's Protection Act 1993* (SA) s 49.

Current Law and Practice in Other Australian Jurisdictions

4.101 The Youth Court is 'not bound by the rules of evidence but may inform itself as it thinks fit', and 'must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms'.²²³ The child is a party to proceedings under the SA Act 1993,²²⁴ and must be represented unless he or she has made an informed and independent decision not to be represented.²²⁵ If the child is to be represented but is not capable of properly instructing the legal practitioner, the legal practitioner 'must act, and make representations to the Court, according to his or her own view of the best interests of the child'.²²⁶

4.102 The child must always be given a reasonable opportunity to give the Court his or her own views unless the Court is satisfied that the child is not capable of doing so, or that it would 'give rise to an unacceptable risk to the child's wellbeing' to let him or her do so.²²⁷

CARE AND PROTECTION ORDERS

4.103 If the Youth Court is satisfied that a care and protection order should be made, the Court may make an order:

- requiring that a guardian of the child or the child enter into a written undertaking, for a specified period not exceeding 12 months, to do any specified thing, or to refrain from doing any specified thing and, if the Court thinks fit, requiring the child to be under the supervision of the Chief Executive or some other specified person or authority for the duration of the undertaking
 - granting custody of the child for a specified period not exceeding 12 months to a guardian of the child, a member of the child's family, the Minister, the Chief Executive of a licensed children's residential facility, or any other person that the Court thinks appropriate in the circumstances of the case
 - placing the child under the guardianship of the Minister, or such other person or two persons as the Court thinks appropriate in the circumstances of the case, for a specified period not exceeding 12 months, or until the child turns 18
 - directing a party to the application to cease or refrain from residing in the same premises as the child, or from coming within a specified distance of the child's residence, or from having any contact alone, or at all, with the child
 - making consequential or ancillary orders providing for access to the child; or dealing with matters relating to the care, protection, health, welfare or education of the child; or requiring a parent, or other guardian to undertake specified courses of instruction, or programmed activities, in order to increase his or her capacity to care for and protect the child; or dealing with any other matter.²²⁸
- 4.104 Before the Court can make an order giving custody or guardianship of a child to a person who is not the child's parent, it must be satisfied that there is no parent able, willing and available to provide adequate care and protection for the child and that the order is the best available solution to the child's need for care and protection, including consideration of the child's emotional security, and the child's age, developmental needs and emotional attachments.²²⁹

TASMANIA

GENERAL OVERVIEW

- 4.105 In Tasmania, statutory child protection is governed by the *Children, Young Persons and Their Families Act 1997* (Tas) (the Tas Act 1997). Under the Tas Act 1997, the Department of Health and Human Services (the Department) may apply for a care and protection order if it considers that a child is at risk, and that a care and protection order should be made to secure the care and protection of the child.
- 4.106 Tasmania no longer has a separate Children's Court.²³⁰ The Children's Division of the Tasmanian Magistrates' Court decides all child protection matters under the Tas Act 1997. A unique feature of the Tasmanian child protection system is that the Tas Act 1997 does not confer a power on either Department employees or police officers to remove a child without a warrant in emergencies. The Act does permit a magistrate, who is on-call after hours, to issue a warrant on an *ex parte* basis to remove a child for assessment. The application can be made over the phone in urgent cases.

FAMILY GROUP CONFERENCES

- 4.107 The Tas Act 1997 provides that the Secretary of the Department can convene an FGC in respect of a child if the Secretary believes that the child is at risk, and that arrangements should be made to secure the child's care and protection.²³¹
- 4.108 If the Secretary decides to convene an FGC, he or she must consult the child and the child's immediate family about the appointment of a facilitator, who is independent of the Department.²³² The facilitator must appoint an advocate for the child to attend the FGC, unless the facilitator is satisfied that the child has made an independent decision to waive his or her right to have an advocate.²³³ The facilitator must consult the child, the child's guardians and, in the case of an Aboriginal child, an appropriate recognised Aboriginal organisation, before deciding who should be invited to attend the FGC and the time and place of the meeting.²³⁴ The FGC must be held within three weeks of the Secretary's decision to convene the conference, if reasonably practicable.²³⁵
- 4.109 The facilitator must invite the child, the guardians of the child, the child's advocate and a Department employee to attend the FGC unless, in the case of guardians, this would contravene a restraint order or would not be in the child's best interests.²³⁶ The facilitator need not invite the child to attend if it would not be in the child's best interests, or the child is unable to understand or participate in the conference because of his or her age or for any other reason.²³⁷
- 4.110 The Tas Act 1997 neither expressly allows nor prohibits lawyers from attending FGCs, but it appears that a specific lawyer could be invited if the facilitator thought it would be appropriate.²³⁸ However, if a separate legal representative for the child has been appointed in court proceedings prior to or concurrent with the FGC, it appears that that representative does attend.²³⁹ The child and each guardian of the child is entitled to have a support person, approved by the facilitator, attend the FGC.²⁴⁰
- 4.111 An agreement reached at an FGC is reduced to writing by the facilitator and signed by the parties.²⁴¹ Once the Secretary receives notification of a decision about arrangements for the child reached at an FGC, he or she may approve those arrangements,²⁴² and the Tas Act 1997 imposes an obligation on the Secretary to 'take such action as is necessary to implement and maintain those arrangements'.²⁴³ Alternatively, if the Secretary does not consider the arrangements decided upon at an FGC suitable, he or she can reconvene the FGC to make other arrangements, or apply for a care and protection order in relation to the child.²⁴⁴

- 223 See *Children's Protection Act 1993* (SA) s 45(1).
- 224 See *Children's Protection Act 1993* (SA) s 46(1).
- 225 See *Children's Protection Act 1993* (SA) s 48(1).
- 226 See *Children's Protection Act 1993* (SA) s 48(2).
- 227 See *Children's Protection Act 1993* (SA) s 48(3).
- 228 *Children's Protection Act 1993* (SA) s 38(1).
- 229 *Children's Protection Act 1993* (SA) s 38(2).
- 230 The Children's Court, including all specialist children's magistrates, was abolished by s 7 of the *Children, Youth and Their Families (Transitional and Savings Provisions) Act 1998* (Tas).
- 231 *Children, Young Persons and Their Families Act 1997* (Tas) s 30(1). Also, the Secretary must cause an FGC to be convened if he or she has approved arrangements for the care of a child under s 37, or if arrangements have been implemented pursuant to a care and protection order, and the child, or two or more family members of the child, request an FGC to review those arrangements: *Children, Young Persons and Their Families Act 1997* (Tas) ss 39, 53.
- 232 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(1).
- 233 *Children, Young Persons and Their Families Act 1997* (Tas) ss 32(3), 35.
- 234 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(4).
- 235 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(5).
- 236 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(6)–(8).
- 237 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(8)–(9).
- 238 See *Children, Young Persons and Their Families Act 1997* (Tas) s 32(10)(e).
- 239 See *Children, Young Persons and Their Families Act 1997* (Tas) ss 34(5)(c), 35(1), 36(3)(b)(iii).
- 240 *Children, Young Persons and Their Families Act 1997* (Tas) s 33(2).
- 241 *Children, Young Persons and Their Families Act 1997* (Tas) s 36(1).
- 242 *Children, Young Persons and Their Families Act 1997* (Tas) s 37(1)(a).
- 243 *Children, Young Persons and Their Families Act 1997* (Tas) s 38.
- 244 *Children, Young Persons and Their Families Act 1997* (Tas) s 37(1)(b).

Current Law and Practice in Other Australian Jurisdictions

WARRANTS TO REMOVE CHILDREN FOR ASSESSMENT

- 4.112 Under the Tas Act 1997, there is no power to remove a child without judicial authorisation. The Act provides that an authorised officer can remove a child for the purposes of an assessment, either with the consent of the child's guardian or a person with whom the child is residing, or pursuant to a warrant issued by a magistrate.²⁴⁵ The authorised officer can apply for a warrant if a person fails or refuses to comply with a requirement to cause the child to attend a place specified by the authorised officer, or if the officer has reasonable grounds for believing that the person would fail or refuse to comply with such a requirement if one were made.²⁴⁶
- 4.113 In urgent circumstances, an application for a warrant to remove the child for assessment can be made on an *ex parte* basis by telephone to a magistrate.²⁴⁷ Magistrates are available on-call after hours to decide urgent applications.
- 4.114 Following the removal of a child by this procedure, the Secretary may retain custody of the child if he or she considers that:
- there is a reasonable likelihood that the child is at risk
 - further assessment of the matter is warranted
 - the assessment cannot properly proceed unless the child remains in the Secretary's custody, or it is desirable that the child be protected while the matter is being assessed.²⁴⁸
- 4.115 The Secretary's custody of the child ends 120 hours after the child came into the Secretary's care, unless the Secretary is granted custody of the child pursuant to an assessment order within that time.²⁴⁹

ASSESSMENT ORDERS AND RESTRAINT ORDERS

- 4.116 The Secretary may apply to the Children's Division of the Magistrates' Court for an assessment order, and the Court may grant such an order if it is satisfied that:
- there is a reasonable likelihood that a child is at risk
 - further assessment of the matter is warranted or an FGC should be held
 - the assessment cannot properly proceed unless an assessment order is made, or it is desirable that the child be protected while the matter is being assessed or an FGC is being convened and held, and
 - it would be in the child's best interests to make the order.²⁵⁰
- 4.117 An assessment order may authorise examination and assessment of the child, and may grant custody of the child to the Secretary for the duration of the order, which cannot exceed four weeks.²⁵¹ The Secretary can apply for one extension of an assessment order, for a period of eight weeks if the Secretary advises the Court that he or she intends to hold an FGC in respect of the child, or for a period of four weeks in any other case.²⁵²
- 4.118 On the filing of an application for an assessment order by the Secretary, in addition to or instead of making an assessment order, the Court may make a restraint order against a person under the *Justices Act 1959* (Tas).²⁵³

COURT PROCESSES AND PROCEDURE

4.119 The Secretary may apply to the Children’s Division of the Magistrates’ Court for a care and protection order, and the Court may grant this application if is satisfied that:

- a child is at risk, and that a care and protection order should be made to secure the child’s care and protection, or
- proper arrangements exist for the child’s care and protection, and the child would be likely to suffer significant psychological harm if the arrangements were to be disturbed; and it would be in the child’s best interests for the arrangements to be incorporated in a care and protection order.²⁵⁴

4.120 For the purposes of the Tas Act 1997, a child is defined as being ‘at risk’ if:

- the child has been, is being, or is likely to be, abused or neglected
- any person with whom the child resides or who has frequent contact with the child has threatened to kill, abuse or neglect the child and there is a reasonable likelihood of the threat being carried out, or 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
- the child is an affected child within the meaning of the *Family Violence Act 2004* (Tas)
- the child’s guardians are unable or unwilling to maintain the child, or exercise adequate supervision and control over the child, or to prevent the child from suffering abuse or neglect, or are deceased, have abandoned the child, or cannot be found after reasonable inquiry.²⁵⁵

4.121 The Tas Act 1997 defines ‘abuse or neglect’ as

*sexual abuse or physical or emotional injury or other abuse, or neglect, to the extent that the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person’s wellbeing, or the injured, abused or neglected person’s physical or psychological development is in jeopardy.*²⁵⁶

4.122 The Court may convene a conference between parties for the purpose of determining and/or resolving the matters in dispute.²⁵⁷ The conference is presided over by a magistrate or an officer of the Court nominated by the magistrate, and legal representatives for all parties to the proceedings are to be admitted.²⁵⁸ Evidence of anything said or done at the conference is inadmissible in the proceedings, unless all parties to the proceedings agree.²⁵⁹

4.123 In Tasmania, a practice has developed, in addition to or as an alternative to a court-ordered conference, for the child’s legal representative to ask for an adjournment in proceedings, and to initiate his or her own conference with the lawyer for the Department, the child’s parents and their legal representatives to clarify the issues in dispute.²⁶⁰ These conferences are productive and preferred by lawyers, especially in complex cases, as the child’s representative can and does act as an ‘honest broker’ between the Department and the parents, and their representatives.²⁶¹

245 *Children, Young Persons and Their Families Act 1997* (Tas) s 20.

246 *Children, Young Persons and Their Families Act 1997* (Tas) s 20(3).

247 *Children, Young Persons and Their Families Act 1997* (Tas) sch 4.

248 *Children, Young Persons and Their Families Act 1997* (Tas) s 21(1).

249 *Children, Young Persons and Their Families Act 1997* (Tas) s 21(2).

250 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(1)–(2).

251 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(3)–(4).

252 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(5).

253 *Children, Young Persons and Their Families Act 1997* (Tas) s 23.

254 *Children, Young Persons and Their Families Act 1997* (Tas) s 42(3)(a)–(b).

255 *Children, Young Persons and Their Families Act 1997* (Tas) s 4(1).

256 *Children, Young Persons and Their Families Act 1997* (Tas) s 3.

257 *Children, Young Persons and Their Families Act 1997* (Tas) s 52(1).

258 *Children, Young Persons and Their Families Act 1997* (Tas) s 52(2)–(3).

259 *Children, Young Persons and Their Families Act 1997* (Tas) s 52(4).

260 Telephone conversation with Andrew Mead, private legal practitioner in Tasmania, 21 April 2010.

261 *Ibid.*

Current Law and Practice in Other Australian Jurisdictions

- 4.124 The Court also has the power to order that a matter be referred to an FGC, in order for the parties to consider and report to the Court with recommendations on any matter relevant to the proceedings.²⁶²
- 4.125 The Tas Act 1997 provides that the Children's Division of the Magistrates' Court may
- determine that it is not bound by the rules of evidence in any proceedings if it is satisfied that it would not be in the best interests of the child to be bound by those rules.*²⁶³
- Where the Court does so, it 'may inform itself in any way it considers appropriate'.²⁶⁴
- 4.126 The child is a party to proceedings in the Children's Division²⁶⁵ and the Court must give a child an opportunity to express his or her wishes.²⁶⁶ The Court may inform itself of the wishes expressed by a child by having regard to: anything said by the child personally to the Court, anything contained in a report given to the Court, or by any other means the Court considers appropriate.²⁶⁷
- 4.127 All parties to proceedings in the Children's Division are entitled to legal representation.²⁶⁸ The Court must not hear an application unless:
- the child is represented in the proceedings by an Australian legal practitioner
 - the Court is satisfied that the child has made an informed and independent decision not to be so represented
 - the Court believes that it is in the child's best interests to proceed with the hearing in the absence of the child's representative.²⁶⁹
- 4.128 The Court has the power to order that a child be separately represented, whether or not a legal practitioner represents the child.²⁷⁰ While the Tas Act 1997 does not stipulate which model of representation the separate representative should adopt, the practice in Tasmania is for the separate representative to act on the best interests model of representation, including expressing the child's views and wishes to the Court.²⁷¹

CARE AND PROTECTION ORDERS

- 4.129 The Children's Division of the Magistrates' Court may make a care and protection order, including:
- an order requiring the child or a guardian of the child, for a specified period not exceeding 12 months, to do any specified thing or to refrain from doing any specified thing
 - an order granting custody of the child, for a specified period not exceeding 12 months, to a guardian of the child, a member of the child's family, the chief executive officer of a non-government organisation, the Secretary, or any other person that the Court considers appropriate in the circumstances
 - an order placing the child, for a specified period not exceeding 12 months, under the guardianship of the Secretary, or one or two other persons
 - an order placing the child, until the child attains 18 years of age, under the guardianship of the Secretary, or one or two other persons
 - an order providing for access to the child

- an order providing for the way in which a person who has custody or guardianship of the child under the Court's order is to deal with matters relating to the care, protection, health, welfare or education of the child
- any other order the Court considers appropriate.²⁷²

4.130 A care and protection order can also include conditions to be observed by the child, the child's guardian, a person with whom the child is living, the Secretary, a person who is to supervise or is granted custody of the child, or any other person who is involved with the child's care and protection.²⁷³

4.131 On an application for a care and protection order, the Court can, in addition to or instead of making a care and protection order, make a restraint order under the *Justices Act 1959* (Tas).²⁷⁴

4.132 In relation to the review of arrangements for the care and protection of a child implemented under a care and protection order, the Tas Act 1997 provides that an FGC must be convened to review such arrangements if:

- the order requires the Secretary to convene such a conference
- the Secretary has been requested by the child or any two or more members of the child's family to convene such a conference
- the Secretary considers it necessary or desirable to convene such a conference.²⁷⁵

WESTERN AUSTRALIA

GENERAL OVERVIEW

4.133 In Western Australia the *Children and Community Services Act 2004* (WA) (WA Act 2004) governs the statutory child protection system. The Department for Child Protection (the Department) is responsible for bringing an application for a protection order in respect of a child if it believes that a child is in need of protection. Generally, child protection proceedings are commenced in the Children's Court of Western Australia. The Children's Court comprises a President of the Court, who is a District Court judge, four full-time magistrates and one other magistrate.

4.134 In limited circumstances, the court that exercises family law jurisdiction in Western Australia can also hear and determine related child protection matters. Western Australia is the only state with a state family court—the Family Court of Western Australia—that is vested with federal family law jurisdiction. However, the Family Court of Western Australia can only exercise the powers of the Children's Court if a child who is the subject of family law proceedings appears to be in need of protection.²⁷⁶

4.135 Other unique features of the Western Australian child protection system include:

- The 'Signs of Safety' pilot is the trial of a mediation-based approach to resolving issues between the Department and families.
- The WA Act 2004 does not provide for the making of assessment orders.
- The Children's Court is required to conduct protection proceedings 'in a way that is sensitive to the child's level of understanding'.
- The WA Act 2004 prohibits the Court from making a protection order unless it is satisfied that making the order would be better for the child than making no order at all—the 'no-order' principle.

262 *Children, Young Persons and Their Families Act 1997* (Tas) s 62(1); see also s 30(2)–(3).

263 *Children, Young Persons and Their Families Act 1997* (Tas) s 63(2).

264 *Children, Young Persons and Their Families Act 1997* (Tas) s 63(3).

265 *Children, Young Persons and Their Families Act 1997* (Tas) s 64.

266 *Children, Young Persons and Their Families Act 1997* (Tas) s 56. The Act clarifies that this requirement does not permit the Court or any person to require the child to express his or her wishes in relation to any matter: s 58. However, the *Magistrates' Court (Children's Division) Act 1998* (Tas) s 7 also imposes a duty on the Court to 'consider the opinion of the child to whom proceedings before the Court relate.'

267 *Children, Young Persons and Their Families Act 1997* (Tas) s 57.

268 *Magistrates' Court (Children's Division) Act 1998* (Tas) s 14.

269 *Children, Young Persons and Their Families Act 1997* (Tas) s 59(1)–(2).

270 *Children, Young Persons and Their Families Act 1997* (Tas) s 59(4).

271 Legal Aid Commission of Tasmania, *Proposed Guidelines for Separate Representation of Children in Welfare (Care and Protection) Proceedings*, provided in an email from Patrick Fitzgerald, Legal Aid Tasmania, 20 April 2010.

272 *Children, Young Persons and Their Families Act 1997* (Tas) s 42(4).

273 *Children, Young Persons and Their Families Act 1997* (Tas) s 42(5).

274 *Children, Young Persons and Their Families Act 1997* (Tas) s 43.

275 *Children, Young Persons and Their Families Act 1997* (Tas) s 53.

276 *Family Court Act 1997* (WA) s 36(6). The Commission understands that the Attorney General of Western Australia has recently requested that a Reference Committee be set up by 1 July 2010 to examine the advantages and disadvantages of child protection matters being heard exclusively in the Family Court of Western Australia.

Current Law and Practice in Other Australian Jurisdictions

PRE-COURT ADR: THE SIGNS OF SAFETY PILOT

- 4.136 The WA Act 2004 does not require the Department to attend ADR with the parents of a child prior to filing protection proceedings in the Children's Court. Instead, a 'Signs of Safety' pilot program was commenced on 9 November 2009. The pilot was jointly developed and implemented by Legal Aid WA, the Department, the King Edward Memorial Hospital (KEMH) and the Perth Children's Court.²⁷⁷
- 4.137 The Signs of Safety pilot adopts a mediation-based approach to resolving issues between families and the Department by combining aspects of Legal Aid WA dispute resolution processes used in family law matters with the Signs of Safety child protection assessment framework.²⁷⁸ The pilot consists of both pre-court processes, in the form of Signs of Safety meetings involving pregnant mothers, their families and lawyers at KEMH, and Signs of Safety pre-hearing conferences for proceedings in the Perth Children's Court.²⁷⁹ For discussion of pre-hearing conferences generally, see below.
- 4.138 As part of the pilot, training was given to all facilitators and convenors of pre-court and court meetings and conferences, the lawyers representing the Department, parents, children, the judge and magistrates of the Perth Children's Court and social workers at KEMH.²⁸⁰ The focus of the pilot is on using a collaborative approach between the Department, health professionals, lawyers and families to address concerns or situations of child abuse.

EMERGENCY REMOVAL POWERS AND ORDERS

- 4.139 The WA Act 2004 provides that if an authorised officer 'determines that action should be taken to safeguard or promote a child's wellbeing' he or she has a number of options, including taking 'intervention action', which includes:
- making an application for a provisional protection and care warrant under section 35
 - taking the child into provisional protection and care under section 37
 - making a protection application.²⁸¹
- 4.140 An authorised officer may apply for a warrant to take a child into provisional protection and care if he or she believes that a child is in need of protection and:
- is unable to find the child
 - believes that leaving the child at the place where the child is living poses an unacceptable risk to the child's wellbeing, or
 - believes that if a parent of the child or other person becomes aware of a proposed protection application in respect of the child, the child will be moved from the place where the child is living and the officer will be unable to find the child.²⁸²
- 4.141 The judge or magistrate may issue a warrant for provisional protection and care if satisfied that there are reasonable grounds for the authorised officer to believe that the child is in need of protection, and that one of the above three grounds applies.²⁸³ If a child is taken into provisional protection and care pursuant to a warrant, the Department must file a protection application in relation to the child not more than two working days after removing the child, and the Children's Court must attempt to list the protection application not more than three working days after the application is made.²⁸⁴

4.142 However, if an authorised officer or police officer suspects on reasonable grounds that there is an immediate and substantial risk to the child's wellbeing, the officer can take the child into provisional protection and care without a warrant.²⁸⁵ After removal, the Department must make a protection application within two working days or release the child, and the Court must attempt to list the application not more than three working days after the application is filed.²⁸⁶

4.143 Authorised officers and police officers also have the power to move a child to a safe place without a warrant if a child is found away from home and the officer believes on reasonable grounds that the child is not under the immediate supervision of a parent or an adult capable of adequately supervising the child, and there is a risk to the child's wellbeing.²⁸⁷

COURT PROCESSES AND PROCEDURE

4.144 The WA Act 2004 provides that a child will be found to be 'in need of protection' if:

- the child has been abandoned by his or her parents and, after reasonable inquiries the parents, or any suitable adult relative or other suitable adult who is willing and able to care for the child, cannot be found
- the child's parents are deceased 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
- the child has suffered, or is likely to suffer, harm²⁸⁸ as a result of physical abuse, sexual abuse, emotional abuse, psychological abuse or neglect,²⁸⁹ 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
- the child has suffered, or is likely to suffer, harm as a result of the child's parents being unable to provide, or arrange the provision of, adequate care for the child, or the child's parents being unable to provide, or arrange the provision of, effective medical, therapeutic or other remedial treatment for the child.²⁹⁰

4.145 Under the WA Act 2004, the Children's Court has the power to order parties to protection proceedings to attend a conference to discuss, and reach agreement on, any matter relevant to the protection application.²⁹¹ The pre-hearing conference must be presided over by a judge or magistrate,²⁹² or a convenor appointed by the Court in accordance with the *Children and Community Services Regulations 2007* (WA).²⁹³ Any party to protection proceedings, including the child, unless the convenor otherwise directs, legal representatives for the parties, and any person that the convenor considers is significant in the child's life may attend the pre-hearing conference.²⁹⁴ At the conclusion of the conference, the person who presided over the conference must report to the Court on its outcome.²⁹⁵

4.146 The WA Act 2004 requires that the Children's Court conduct protection proceedings 'with as little formality and legal technicality as the circumstances of the case permit', and 'as expeditiously as possible in order to minimise the effect of the proceedings on the child and the child's family'.²⁹⁶ If the child is present in court, the Act also further directs the Court to conduct protection proceedings 'in a way that is sensitive to the child's level of understanding'.²⁹⁷

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

278 Ibid.

279 Ibid.

280 Ibid.

281 *Children and Community Services Act 2004* (WA) s 32.

282 *Children and Community Services Act 2004* (WA) s 35. In urgent circumstances, an application for a warrant can be made to a judge or magistrate by telephone, fax or email: *Children and Community Services Act 2004* (WA) s 120.

283 *Children and Community Services Act 2004* (WA) s 35(3).

284 *Children and Community Services Act 2004* (WA) s 36(2)–(3).

285 *Children and Community Services Act 2004* (WA) s 37(2).

286 *Children and Community Services Act 2004* (WA) s 38(4)–(5).

287 *Children and Community Services Act 2004* (WA) s 41.

288 'Harm' is defined as 'any detrimental effect of a significant nature on the child's wellbeing': *Children and Community Services Act 2004* (WA) s 28(1).

289 'Neglect' is defined to include 'failure by a child's parents to provide, arrange, or allow the provision of adequate care for the child, or effective medical, therapeutic or remedial treatment for the child': *Children and Community Services Act 2004* (WA) s 28(1).

290 *Children and Community Services Act 2004* (WA) s 28(2).

291 *Children and Community Services Act 2004* (WA) s 136(1)–(2).

292 *Children and Community Services Act 2004* (WA) s 136(5).

293 *Children and Community Services Act 2004* (WA) s 136(3). Under the *Children and Community Services Regulations 2007* (WA) reg 10, the President of the Children's Court may appoint as a convenor 'a person by virtue of the office or position held by the person in the Court' or 'a person who, in the opinion of the President, has appropriate qualifications and experience'.

294 *Children and Community Services Act 2004* (WA) s 136(6)(c); *Children and Community Services Regulations 2006* (WA) reg 14.

295 *Children and Community Services Act 2004* (WA) s 136(5).

296 *Children and Community Services Act 2004* (WA) s 145(1), (3).

297 *Children and Community Services Act 2004* (WA) s 145(2).

Current Law and Practice in Other Australian Jurisdictions

- 4.147 When hearing a protection application, the Court is not bound by the rules of evidence, but 'may inform itself on any matter in any manner it considers appropriate'.²⁹⁸ Specifically, the WA Act 2004 allows the Court to 'admit evidence of a representation about a matter that is relevant to the protection proceedings ... despite the rule against hearsay'.²⁹⁹
- 4.148 In Western Australia, the child is considered to be a party to proceedings in the Children's Court,³⁰⁰ and if it appears to the Court that the child 'ought to have separate legal representation', the Court may order that the child be separately represented by a legal practitioner.³⁰¹ The legal representative for the child must act on the child's instructions if the child has sufficient maturity and understanding to give instructions,³⁰² and wishes to give instructions.³⁰³ In any other case, the child's representative must act in the child's best interests.³⁰⁴
- 4.149 The WA Act 2004 provides that the child may be present in court in protection proceedings if the child so wishes, subject to certain exceptions.³⁰⁵ The Act imposes an obligation on the Department to ensure that the child is made aware of the child's right to be present in court, and is provided with any support services that the Department considers appropriate to enable the child to participate in the proceedings.³⁰⁶

PROTECTION ORDERS

- 4.150 If, after a protection application hearing, the Children's Court finds that the child is in need of protection, the Court may either make the protection order sought in respect of the child, or make another protection order in respect of the child.³⁰⁷ The Court must not make a protection order unless it is satisfied that making the order would be better for the child than making no order at all—the 'no-order' principle.³⁰⁸
- 4.151 Under the WA Act 2004 there are four types of protection orders available:
- a protection order (supervision)
 - a protection order (time-limited)
 - a protection order (until 18)
 - a protection order (enduring parental responsibility).³⁰⁹
- 4.152 A protection order (supervision) provides for the supervision of the child's wellbeing by the Department for a specified period which cannot exceed two years, and 'does not affect the parental responsibility of any person for the child except to the extent (if any) necessary to give effect to the order'.³¹⁰ A protection order (supervision) always includes a condition that a child's parent must keep the Department informed as to where the child is living, and can include conditions to be complied with by the child, a parent of the child, and/or an adult with whom the child is living.³¹¹ The WA Act 2004 also provides that while a protection order (supervision) is in force, the Department 'must ensure that the child and the child's parents are provided with any social services that the Chief Executive Officer considers appropriate'.³¹²
- 4.153 A protection order (time-limited) gives the Chief Executive Officer parental responsibility to the exclusion of any other person for a fixed period of time which is not longer than two years.³¹³

4.154 A protection order (until 18) gives the Chief Executive Officer parental responsibility to the exclusion of any other person until the child reaches 18 years of age.³¹⁴ The WA Act 2004 prohibits the Court from making this type of order unless it is satisfied that long-term arrangements should be made for the child's wellbeing.³¹⁵

4.155 Finally, a protection order (enduring parental responsibility) gives a natural person, or two persons jointly, parental responsibility for a child, to the exclusion of any other person, until the child reaches 18 years of age.³¹⁶ However, a protection order (enduring parental responsibility) cannot give parental responsibility to the child's parent or to the Chief Executive Officer.³¹⁷ Under the WA Act 2004, the Court must not make a protection order (enduring parental responsibility) in respect of a child unless the Court is satisfied that:

- long-term arrangements should be made for the child's wellbeing, and
- having regard to a written report that the Department must provide to the Court, the proposed carer or each proposed carer is a suitable person to provide long-term care for the child,³¹⁸ and is willing and able to provide such care.³¹⁹

4.156 A protection order (enduring parental responsibility) can include conditions about contact between the child and another person, but must not include any other conditions.³²⁰

AUSTRALIAN FAMILY LAW CHILDREN'S DISPUTES

FAMILY LAW IN THE AUSTRALIAN FEDERATION

4.157 Family law in Australia is primarily a federal matter, although neither Commonwealth nor state and territory governments have complete jurisdiction over the subject. This fragmentation has been described as 'fundamental',³²¹ providing scope for duplication of proceedings, forum shopping and systems abuse for children and their families.³²²

298 *Children and Community Services Act 2004* (WA) s 146(2).

299 *Children and Community Services Act 2004* (WA) s 146(3).

300 *Children and Community Services Act 2004* (WA) s 147(a).

301 *Children and Community Services Act 2004* (WA) s 148(2).

302 The Court determines any question of whether a child has sufficient maturity and understanding to give instructions: *Children and Community Services Act 2004* (WA) s 148(5).

303 *Children and Community Services Act 2004* (WA) s 148(4).

304 *Children and Community Services Act 2004* (WA) s 148(4).

305 *Children and Community Services Act 2004* (WA) s 149(1)–(2).

306 *Children and Community Services Act 2004* (WA) s 149(3). This is consistent with the 'principle of participation' set out in s 10 of the Act.

307 *Children and Community Services Act 2004* (WA) s 45.

308 *Children and Community Services Act 2004* (WA) s 46.

309 *Children and Community Services Act 2004* (WA) s 43.

310 *Children and Community Services Act 2004* (WA) ss 47–8.

311 *Children and Community Services Act 2004* (WA) s 51.

312 *Children and Community Services Act 2004* (WA) s 53.

313 *Children and Community Services Act 2004* (WA) ss 54–5.

314 *Children and Community Services Act 2004* (WA) s 57.

315 *Children and Community Services Act 2004* (WA) s 58.

316 *Children and Community Services Act 2004* (WA) s 60(1), (3).

317 *Children and Community Services Act 2004* (WA) s 60(2).

318 If the child is an Aboriginal or Torres Strait Islander child, the Court must, in assessing the suitability of the proposed carer, have regard to the Aboriginal and Torres Strait Islander child placement principle set out in s 12: *Children and Community Services Act 2004* (WA) s 60(4).

319 *Children and Community Services Act 2004* (WA) s 61(2)–(3).

320 *Children and Community Services Act 2004* (WA) s 63.

321 Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (2008) 18.

322 Fiona Kelly and Belinda Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law Policy and the Family* 38, 43.

Current Law and Practice in Other Australian Jurisdictions

- 4.158 The division of family law powers between the Commonwealth and state and territory governments is governed by complex arrangements under the Australian Constitution. Under sections 51(xxi) and 51(xxii) of the Constitution, the Commonwealth has the power to make laws for ‘marriage’ and ‘divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and Guardianship of infants’.
- 4.159 Judicial interpretation, combined with multiple referrals of state powers, has expanded Commonwealth jurisdiction to cover the following family law matters:
- marriage and divorce
 - disputes over care of children following separation or divorce, regardless of the marital status of the parents
 - property and financial proceedings following separation of both married and unmarried couples, including unmarried same-sex couples
 - child support and child maintenance, regardless of the marital status of the parents
 - determinations of rights, duties, privileges or liabilities regarding children’s welfare.³²³
- 4.160 Family law matters that remain with the state and territories include child protection and adoption, except for step-parent adoption. In addition, state and territory Supreme Courts have been given jurisdiction to hear and determine matrimonial causes under the *Family Law Act 1975* (Cth) (FLA 1975).³²⁴

DECISION-MAKING PRINCIPLES FOR CHILDREN

- 4.161 Under Part VII of the FLA 1975, decisions may be made about children whose parents have separated. These decisions may relate to allocation of parental responsibility, which involves longer-term decision making for children, or about who a child lives with, spends time with or communicates with following separation. Decisions about children can be made either through family courts in the form of parenting orders,³²⁵ by consent or following contested proceedings, or through parental agreement expressed in the form of a parenting plan—a non-binding written record, signed by the parties that outlines the matters settled on by the parents.³²⁶ An application for a parenting order may be brought by a child’s parent(s), grandparent(s) or the child him- or herself, or by any other person concerned with the child’s care, welfare or development.³²⁷
- 4.162 The paramount consideration which a court must consider when making a parenting order is the best interests of the child.³²⁸
- 4.163 The FLA 1975 provides a list of factors that a court must take into account when determining what is in the child’s best interests.³²⁹ Since 2006, that Act has divided the best interests factors into a list of primary and additional considerations. The intention behind this split was ‘to elevate the importance of the primary factors’.³³⁰ The primary considerations are:
- (a) *the benefit to the child of having a meaningful relationship with both of the child’s parents; and*
 - (b) *the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*³³¹

4.164 There are 13 additional considerations that the court must also take into account when determining the child's interests.³³² There is some uncertainty about how the two tiers of best interests factors should interact, including whether the additional considerations amplify the primary ones and whether there is actually a conflict between the primary and additional considerations.³³³ These questions have not been authoritatively determined by the High Court or the Family Court of Australia (FCA).

4.165 Under the FLA 1975, judges who approve consent orders are not required to consider the primary and additional factors relevant to determining the child's best interests. When judges make parenting orders with the consent of the parties, consideration of the best interest factors is optional, but not mandatory.³³⁴

4.166 There is no legislative requirement to consider the child's interests as paramount when parents are negotiating a parenting plan. When making a parenting plan, parents are 'encouraged' to consider the child's best interests as the paramount consideration.³³⁵ The best interests principle is reinforced through the advisers who help parents develop their parenting plan.³³⁶ Advisers are obliged to inform parents that the agreement they make in their parenting plan 'should be made in the best interests of the child'.³³⁷ Unlike judges in court, however, there is no requirement in the FLA 1975 for parents negotiating parenting plans to make agreements that are in the child's best interests.

Decision-making principles For Aboriginal children

4.167 Since 2006, the FLA 1975 has explicitly recognised the importance of cultural heritage for Aboriginal children who are the subject of family proceedings. The objects of the Act identify the importance of a child's right to enjoy his or her Aboriginal culture, which includes the right:

- (a) *to maintain a connection with that culture; and*
- (b) *to have the support, opportunity and encouragement necessary:*
 - (i) *to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and*
 - (ii) *to develop a positive appreciation of that culture.*³³⁸

4.168 In addition, when determining a child's best interests, a court must take into account an Aboriginal child's right to enjoy his or her culture, including the likely impact a proposed parenting order will have upon that child's cultural rights.³³⁹

ADR IN FAMILY LAW

General

4.169 At least 94 per cent of family law matters resolve through settlement.³⁴⁰ It is therefore important to consider the processes by which these settlements are reached. One such process is family dispute resolution (FDR). 'Family dispute resolution' is a term that was introduced in 2006, replacing the terms 'family and child mediation' and 'primary dispute resolution'.³⁴¹ The FLA 1975 defines FDR in broad, inclusive terms as

- a process (other than a judicial process)*
 - (a) *in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and*
 - (b) *in which the practitioner is independent of all the parties involved in the process.*³⁴²

323 See further, Anthony Dickey, *Family Law* (5th ed, 2007) 13–40; Lisa Young and Geoff Monahan, *Family Law in Australia* (7th ed, 2009) 62–113; Fehlberg and Behrens, above n 321, 17–54.

324 *Family Law Act 1975* (Cth) s 39.

325 *Family Law Act 1975* (Cth) ss 64C, 64B.

326 *Family Law Act 1975* (Cth) s 63C.

327 *Family Law Act 1975* (Cth) s 65C.

328 *Family Law Act 1975* (Cth) s 60CA.

329 *Family Law Act 1975* (Cth) s 60CC.

330 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 14.

331 *Family Law Act 1975* (Cth) s 60CC(2).

332 *Family Law Act 1975* (Cth) s 60CC(3). These additional considerations include: the views expressed by the child and factors that the court should take into account in determining the weight of those views; the nature of the child's relationship with her or his parents and carers; the effect of any changes in a child's circumstances; the practical difficulty and expense of a child spending time, and communicating, with his or her parents; family violence affecting the child or their family; and whether the order would be least likely to lead to further proceedings.

333 Patrick Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers' (2006) 20 *Australian Journal of Family Law* 179, 183; Richard Chisholm, 'Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *Australian Journal of Family Law* 143; Fehlberg and Behrens, above n 321, 275–6.

334 *Family Law Act 1975* (Cth) s 60CC(5). The Explanatory Memorandum for the Bill, which introduced the section, states that this provision 'allows the court to take these considerations into account and is consistent with the Government's policy of encouraging people to take responsibility for resolving disputes themselves, in a non-adversarial manner': Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 19.

335 *Family Law Act 1975* (Cth) s 63B(e).

336 Advisers include family dispute resolution practitioners, lawyers and counsellors.

337 *Family Law Act 1975* (Cth) s 63DA(2)(c).

338 *Family Law Act 1975* (Cth) s 60B(3).

339 *Family Law Act 1975* (Cth) s 60CC(3)(h).

340 House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) [1.23]. This was the figure for matters filed within the FCA in 2000–01.

341 Fehlberg and Behrens, above n 321, 333.

342 *Family Law Act 1975* (Cth) s 10F.

Current Law and Practice in Other Australian Jurisdictions

- 4.170 The definition includes various processes along the mediation–conciliation continuum.³⁴³ Mediation and conciliation both satisfy the definition of FDR under the FLA 1975.³⁴⁴ FDR may be closer to conciliation when the FDR practitioner encourages parties to reach child-centric agreements.
- 4.171 ‘Divorce mediation’ was historically a process facilitated by a mediator who ‘implicitly or explicitly assumed from the outset that parents were capable of representing their children and representing themselves’.³⁴⁵ Earlier models of mediation would not have been appropriate for many parents currently participating in FDR to resolve disputes over children.³⁴⁶ More sophisticated intake procedures that assess the readiness and capacity of parties to negotiate, as well as measures to formally address power imbalances, have enabled a larger proportion of separating families to access dispute resolution processes.³⁴⁷

The compulsory nature of family dispute resolution and exceptions

- 4.172 Unless an exception applies, parties to a dispute about children must attend FDR before applying for a parenting order in the family courts.³⁴⁸ At FDR, the parties must make a ‘genuine effort’ to resolve the dispute.³⁴⁹ Some exceptions to attending FDR before applying to the court include where:
- the parties agree and apply to the court for a consent order³⁵⁰
 - there has been family violence or child abuse³⁵¹
 - the application is made in circumstances of urgency.³⁵²
- 4.173 The FDR practitioner may give various certificates in relation to the FDR,³⁵³ which may state that:
- the parties attended FDR and made a genuine effort to resolve the issues
 - a party did not attend
 - a party did not make a genuine effort
 - the FDR practitioner considers that it would not be appropriate to undertake or continue with the FDR.³⁵⁴

The certificate will be filed with the application for a parenting order, and only then may the court hear the application.³⁵⁵

- 4.174 The appropriateness or otherwise of FDR will be determined by the FDR practitioner, having regard to the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) (the FDR Regulations). The practitioner must consider:
- the history of family violence, if any
 - the likely safety of the parties
 - the equality of bargaining power
 - the risk that a child may suffer abuse
 - the emotional, psychological and physical health of the parties
 - any other matter he or she considers relevant.³⁵⁶

If the FDR practitioner determines that FDR would be appropriate, he or she may provide it.³⁵⁷ The FDR practitioner must ensure that, as far as possible, the FDR process is suited to the parties’ needs.³⁵⁸ The practitioner must terminate the FDR if requested to do so by a party or if satisfied that it is no longer appropriate.³⁵⁹

Family dispute resolution providers

4.175 As noted previously, FDR practitioners are responsible for coordinating the FDR process under the FLA 1975. The FLA 1975 defines who is to be considered a FDR practitioner³⁶⁰ and the FDR Regulations specifically govern the accreditation and functions of these persons.³⁶¹ The accreditation criteria are any one of the following:

- completion of the full Vocational Graduate Diploma of Family Dispute Resolution or the higher education provider equivalent
- an appropriate qualification or accreditation under the National Mediation Accreditation Scheme and competency in the six compulsory units from the Vocational Graduate Diploma of Family Dispute Resolution or the higher education provider equivalent
- listing in the Family Dispute Resolution Register before 1 July 2009 and competency in the three specified units or higher education provider equivalent.³⁶²

4.176 Beyond formal qualifications, it is also required that the person:

- is not prohibited under state or territory law from working with children
- has complied with the laws for employment of persons working with children in the particular state or territory
- has access to a suitable complaints mechanism to which persons who use their services as a dispute resolution practitioner might have recourse
- is suitable to perform the functions and duties of an FDR practitioner
- is not disqualified from accreditation.³⁶³

343 'Mediation' is used here in its facilitative, problem-solving sense, where a mediator is 'expected to provide a process but not to intervene in the outcome or content of the dispute': Michael King et al, *Non-Adversarial Justice* (2009) 104.

'Conciliation' is used here to mean a more advisory process where the conciliator has a more active role in suggesting possible terms of settlement to the parties: at 106–7. See also National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) 1–7.

344 Mieke Brandon and Tom Stodulka, 'A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution in Australia: How Practitioners Practise across Both Processes' (2008) 8(1) *QUT Law and Justice Journal* 194, 196.

345 Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (2009) 94.

346 Ibid.

347 Ibid.

348 *Family Law Act 1975* (Cth) s 60(1), (7).

349 *Family Law Act 1975* (Cth) s 60(1).

350 *Family Law Act 1975* (Cth) s 60(9)(a).

351 *Family Law Act 1975* (Cth) s 60(9)(b).

352 *Family Law Act 1975* (Cth) s 60(9)(d).

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

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

355 Unless an exception applies: *Family Law Act 1975* (Cth) s 60(7).

356 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(2).

357 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(3).

358 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 29(a).

359 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 29(c).

360 *Family Law Act 1975* (Cth) s 10G(1).

361 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).

362 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 5, regs 9–10; Australian Government Attorney-General's Department, *Family Dispute Resolution Practitioner Accreditation* (2008) <www.ema.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverview_ofPrograms_ResearchandEvaluation_ForPotentialFamilyDisputeResolutionPractitioners> at 10 May 2010.

363 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 6(1). Persons are disqualified from accreditation if they have been convicted of an offence involving violence to a person or a sex-related offence: reg 6(2).

Current Law and Practice in Other Australian Jurisdictions

4.177 A person who wishes to become an accredited FDR practitioner must apply in writing to the Australian Attorney-General's Department.³⁶⁴ If accreditation is successful, the person will be subject to the legislative obligations placed upon FDR practitioners,³⁶⁵ including undertaking at least 24 hours of education, training or professional development in FDR every two years.³⁶⁶ While the Family Court Chief Executive can authorise an officer of the court or staff member to act as an FDR practitioner,³⁶⁷ the FLA 1975 says nothing about the qualifications required of these persons. The relevant Minister may also designate organisations to undertake FDR, and persons acting for these organisations will be considered FDR practitioners.³⁶⁸

Family Relationship Centres

4.178 The 2006 reforms to the FLA 1975 were accompanied by changes to the family relationship services delivery system, including the establishment of 65 Family Relationship Centres (FRCs) throughout Australia.³⁶⁹ They are federally-funded specialist services intended to reduce family court case lists and provide choices for separating families.³⁷⁰ A range of community organisations, such as Relationships Australia, Unifam, Interelate, Lifeline and Centacare, had previously provided family mediation services in parenting and property matters³⁷¹ and have continued to provide these services since the introduction of FRCs. Many of these organisations successfully tendered to become FRCs.³⁷² The *Operational Framework* for FRCs emphasises the need to keep separating parents out of court and focused on their child's needs.³⁷³

4.179 Some FDR practitioners practise within FRCs, while others work within private and community organisations.³⁷⁴ The establishment of FRCs was the alternative to establishing a 'Families Tribunal'—a single entry point to the family law system recommended by the *Every Picture* report.³⁷⁵ FRCs most commonly assist families who are separating and want to commence family law proceedings, but also have a broader role in providing information, assistance and referral.³⁷⁶

VICTORIA LEGAL AID: ROUNDTABLE DISPUTE MANAGEMENT

4.180 Victoria Legal Aid (VLA) also offers family dispute resolution through its Roundtable Dispute Management program (RDM). In order to access RDM, a person may have applied to VLA for a grant of assistance and either requested or been directed to RDM, or a person may be contacted by RDM and invited to use the service.³⁷⁷ RDM case managers and chairpersons work together with clients and their lawyers, if they have lawyers, and other professionals such as independent children's lawyers (ICLs) and child consultants.³⁷⁸ Chairpersons who run the sessions have significant experience in dispute resolution and will be registered as an FDR practitioner and qualified as a social worker, psychologist, barrister or solicitor.³⁷⁹

4.181 The program has a comprehensive screening and assessment process, which addresses issues of risk, urgency, safety and the capacity of parties to participate.³⁸⁰ The case manager is responsible for conducting an assessment, which involves speaking directly with the clients, lawyers, ICL, and DHS, if it is involved.³⁸¹ If a client does not have a lawyer, the case manager may refer them to one.³⁸² The safety of each person at RDM is the first priority, and some cases involving threats or family violence may be screened out.³⁸³

LEGAL REPRESENTATION IN FAMILY DISPUTE RESOLUTION

4.182 Until the 2004 amendments to the *Family Law Rules* (the Rules), family mediators—now called FDR practitioners—were required to direct parties to seek legal advice before and during mediation, and before any agreement became legally binding.³⁸⁴ The Rules are now silent on this issue,³⁸⁵ although the FDR Regulations require FDR practitioners to inform parties at the outset that it is not the practitioner’s role to provide legal advice, unless the FDR practitioner is also a legal practitioner.³⁸⁶ Even when the FDR practitioner is also a legal practitioner, he or she is not permitted to give legal advice except in relation to procedural matters.³⁸⁷

4.183 Family lawyers do not usually attend FDR sessions with their clients, although they may advise their clients before and after the process.³⁸⁸ Until July 2009, lawyers were prohibited from attending FRCs,³⁸⁹ although that exclusion has since been repealed in an attempt to move away from an adversarial approach to negotiating outcomes.³⁹⁰ A number of pilot programs that fund legal advice in conjunction with FDR are currently underway for cases involving allegations of family violence. Announcing the pilots in 2009, the federal Attorney-General said, ‘My view is that, in the right circumstances, lawyers can assist parties to resolve their disputes out of court, including in family matters’.³⁹¹

4.184 Legal advice around the dispute resolution process can be very important to assist vulnerable parties who are required to participate.³⁹² Lawyers may play a central role before, during and after dispute resolution, to help mitigate power imbalances between the parties and ensure that outcomes are not exploitative.³⁹³ A 2008 study of inter-professional collaboration in this field found that while some family lawyers and FDR practitioners enjoy positive collaborative relationships, many practitioners have little contact with members of the other profession and there are significant misunderstandings and tensions between the two groups.³⁹⁴ The study found that successful inter-professional collaborative relationships around family law ADR are characterised by what the authors called a

*complementary services approach to their relationship, in which each group saw themselves and the other profession as contributing different but equally valuable and complementary skills and expertise to the dispute resolution process.*³⁹⁵

4.185 The RDM process at VLA ‘supports the active involvement of lawyers at every stage of the family dispute resolution process’³⁹⁶ and emphasises the lawyer’s diverse and non-adversarial role as legal advisor, coach, problem solver, negotiator, professional support person and drafter of agreements.³⁹⁷ Prior to RDM, the lawyer has a role in helping the client understand that it is a non-adversarial process.³⁹⁸ Concerns relating to the perceived adversarial nature of lawyers’ conduct may be resolved by collaborative law.³⁹⁹ The RDM model has been presented as a successful example of collaborative inter-professional practice,

*involving a high degree of mutual understanding and respect for each profession’s roles and responsibilities ... where family dispute resolution practitioners and clients’ legal advisers worked together as a team in roundtable conferences.*⁴⁰⁰

364 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) regs 9–10; Australian Government Attorney-General’s Department, *Family Dispute Resolution Practitioner Accreditation*, above n 362.

365 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) pt 3.

366 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 14.

367 *Family Law Act 1975* (Cth) ss 10G(1)(c), 38BD.

368 *Family Law Act 1975* (Cth) s 10G(1)(b).

369 Kaspiew et al, above n 345, 35.

370 Brandon and Stodulka, above n 344, 196.

371 *Ibid.*

372 *Ibid.*

373 Australian Government Attorney-General’s Department, *Operational Framework for Family Relationship Centres* (2007) 1.

374 Fehlberg and Behrens, above n 321, 330.

375 House of Representatives Standing Committee on Family and Community Affairs, above n 340, [4.88].

376 Fehlberg and Behrens, above n 321, 331.

377 Victoria Legal Aid Roundtable Dispute Management, *Roundtable Dispute Management Practice Manual: A Resource Guide for Lawyers* (2009) 3.

378 *Ibid* 3, 7. The ICL must attend if there is a conference.

379 *Ibid* 7.

380 *Ibid* 4.

381 *Ibid.*

382 *Ibid.*

383 *Ibid* 13–14.

384 *Family Law Rules 1984* (Cth) O 25A, r 12 (now repealed); Becky Batagol, ‘Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution’ (2008) 8(1) *QUT Law and Justice Journal* 24, 26.

385 Batagol, above n 384, 26.

386 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 28(1)(a).

387 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 29(d).

388 Batagol, above n 384, 28.

389 Australian Government Attorney-General’s Department, *Operational Framework*, above n 373, 47.

390 *Ibid.*

391 Attorney-General Robert McClelland (Australian Government), ‘Speech’ (Speech delivered to the Albury-Wodonga Family Pathways Event, Albury-Wodonga, 24 July 2009).

392 King et al, above n 343, 134–5.

393 Batagol, above n 384, 43–4.

394 Helen Rhoades et al, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008) 49.

395 *Ibid.*

396 Victoria Legal Aid Roundtable Dispute Management, above n 377, 17.

397 *Ibid* 7.

398 *Ibid* 6.

399 This is discussed below under the heading ‘ADR practices other than family dispute resolution’. ‘Collaborative law’ means that parties to dispute resolution sign a contract to the effect that if the dispute proceeds to litigation, the existing lawyers must be replaced. This is intended to allow for negotiation without the threat of litigation.

400 Rhoades et al, above n 394, vi–vii.

Current Law and Practice in Other Australian Jurisdictions

Representation and involvement of children in family dispute resolution

- 4.186 Contemporary FDR practitioners attempt to maximise the autonomy of parents as well as actively representing children.⁴⁰¹ This can be done directly, by working with child consultants and engaging in child-inclusive practice, or indirectly, through child-focused practice.⁴⁰² Child-focused practice in facilitated dispute resolution involves 'finding the child's voice in the absence of the child',⁴⁰³ creating an environment in which parents are able to consider the needs of their children, and facilitating a parenting agreement that protects children from further conflict.⁴⁰⁴ Actively creating a child-focused environment in FDR is identified as the minimum standard for good practice.⁴⁰⁵ Child-inclusive practice involves a child consultant interviewing a child and reporting back on that interview to parents at FDR.⁴⁰⁶ As well as incorporating the objectives of child-focused practice, child-inclusive practice validates children's experiences by consulting them directly.⁴⁰⁷
- 4.187 RDM at VLA promotes a child focus by asking clients 'to commit to understanding what might be happening for their children and listening to what they have to say'.⁴⁰⁸ Information gathered by these child-focused practices is used to help make decisions.⁴⁰⁹ In order to facilitate a child focus, RDM offers Kid's Talk—a service that 'gives children a safe place where they have an opportunity to say what they think and feel'.⁴¹⁰ A client can request Kid's Talk, or RDM can recommend it.⁴¹¹ The child will be interviewed by a specially trained child-consultant who will provide feedback to the parents, who, in turn, can use the information to help them make decisions.⁴¹² Kid's Talk will be especially appropriate where the clients are open to hearing more from their children and willing to take their children's views into account when making decisions.⁴¹³

Status of agreements

- 4.188 Agreements reached through FDR may be implemented in two ways under the FLA 1975. The first is to make a parenting plan and the second is to seek a consent order.

Parenting plans

- 4.189 Parenting plans were first introduced in 1996, but were not widely used at that time.⁴¹⁴ As noted above, parenting plans are parental agreements outlining the settled matters in the form of a non-binding written record, and signed by the parties.⁴¹⁵ As is also noted above, parents are 'encouraged', but not legally required, to regard the child's interests as paramount when negotiating a parenting plan.⁴¹⁶
- 4.190 The parenting plan may deal with matters such as with whom the child is to live, the time the child is to spend with certain persons, and matters relating to the child's care, welfare or development.⁴¹⁷ The plan may be varied or revoked by further written agreement.⁴¹⁸ Parents are encouraged to reach an informal agreement about their children in the form of a parenting plan, but if they seek enforceable arrangements, they must obtain a court order by consent.⁴¹⁹ Since 2004, it has not been possible to register parenting plans with the family courts. Although the parenting plan is not strictly binding or enforceable, parenting orders may be subject to any terms of parenting plans and, when making an order, a court must consider the terms of the most recent parenting plan.⁴²⁰ Concern has been raised that parenting plans' lack of enforceability may confuse parties as to their possible legal effect if a parenting order is later made by the court.⁴²¹

Consent orders

4.191 To ensure the enforceability of agreements, consent orders need to be sought.⁴²² Consent orders can be sought even where there is no current case before the court. The family courts have devised specific forms for lodging an application for consent orders, in which the parties must set out the orders they wish the court to make.⁴²³ When the court is considering making a consent order, it may, but is not required to, consider the child's best interests factors set out in the FLA 1975.⁴²⁴

ADR practices other than family dispute resolution

- 4.192 The 2006 reforms have been described as 'rebadging' mediation as FDR.⁴²⁵ As noted above, the definition given for FDR in the FLA 1975 can be interpreted as encompassing various non-judicial processes on the mediation–conciliation continuum.⁴²⁶ The model to be adopted by FDR practitioners is not strictly regulated by the FLA 1975 or the accompanying FDR Regulations,⁴²⁷ but will certainly impact on the outcomes achieved for children and parents.⁴²⁸ Regardless of whether the particular FDR service is closer to mediation or conciliation, in neither instance should the FDR practitioner determine the outcome for the parties.⁴²⁹
- 4.193 As well as mediation and conciliation, the FLA 1975 also provides for arbitration, which is defined by the National Australian Dispute Resolution Advisory Council (NADRAC) as 'a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination'.⁴³⁰ Although arbitration could potentially fall within the definition of FDR as a non-judicial process by which an independent practitioner helps people to resolve some or all of their disputes,⁴³¹ it is limited by the FLA 1975 to property and financial disputes.⁴³² It has been contended by some, however, that the part of the FDR process that requires an FDR practitioner to make an assessment as to whether parties have made a 'genuine effort' could be considered an arbitral function.⁴³³
- 4.194 In addition to traditional conceptions of mediation and conciliation, collaborative practice has been gaining currency in the family law field over the past decade.⁴³⁴ It is usually a lawyer-led dispute resolution process that can involve a range of professionals, including lawyers, psychologists, child specialists and financial counsellors.⁴³⁵ The aim of this process is to negotiate without the threat of litigation by having parties sign a 'disqualification agreement'—an agreement that if the dispute proceeds to litigation, the existing lawyers will cease to act for the parties and new lawyers will have to be engaged.⁴³⁶ For collaborative law to operate successfully, trust and respect between family lawyers and other professionals is necessary.⁴³⁷

NATURE OF FAMILY COURT PROCEEDINGS

Courts exercising family law jurisdiction

4.195 A number of courts currently exercise jurisdiction under the FLA 1975. Those courts are the Family Court of Australia (FCA), the Family Court of Western Australia, the Federal Magistrates Court (FMC) and, with limited jurisdiction, state and territory magistrates' or local courts.⁴³⁸

- 401 Kaspiew et al, above n 345, 95.
- 402 Ibid; Lawrie Moloney and Jennifer McIntosh, 'Child-Responsive Practices in Australian Family Law' (2004) 10(1) *Journal of Family Studies* 71.
- 403 Moloney and McIntosh, above n 402, 72.
- 404 Ibid.
- 405 Ibid.
- 406 Ibid.
- 407 Ibid.
- 408 Victoria Legal Aid Roundtable Dispute Management, above n 377, 15.
- 409 Ibid.
- 410 Ibid 20.
- 411 Ibid.
- 412 Ibid.
- 413 Ibid.
- 414 Fehlbeg and Behrens, above n 321, 342.
- 415 *Family Law Act 1975* (Cth) s 63C.
- 416 *Family Law Act 1975* (Cth) s 63B(e).
- 417 *Family Law Act 1975* (Cth) s 63C(2).
- 418 *Family Law Act 1975* (Cth) s 63D.
- 419 *Family Law Act 1975* (Cth) note to s 63B.
- 420 *Family Law Act 1975* (Cth) ss 64D(2), 64DAB. Note that the court will only have regard to a parenting plan when making a parenting order if to do so would be in the best interests of the child: *Family Law Act 1975* (Cth) s 64DAB.
- 421 Fehlbeg and Behrens, above n 321, 343.
- 422 Ibid.
- 423 For the Family Court of Australia, see *Family Law Rules 2004* (Cth) r 10.15.
- 424 *Family Law Act 1975* (Cth) s 60CC(5).
- 425 Young and Monahan, above n 323, 54.
- 426 *Family Law Act 1975* (Cth) s 10F.
- 427 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).
- 428 Young and Monahan, above n 323, 55.
- 429 Brandon and Stodulka, above n 344, 195, 199.
- 430 National Alternative Dispute Resolution Advisory Council, above n 343, 4.
- 431 *Family Law Act 1975* (Cth) ss 10F, 10L(1).
- 432 *Family Law Act 1975* (Cth) s 10L(2).
- 433 *Family Law Act 1975* (Cth) s 60L(1); Donna Cooper and Rachael Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an "Independent Practitioner"' (2008) 8(1) *QUT Law and Justice Journal* 158, 172.
- 434 King et al, above n 343, 135.
- 435 Ibid.
- 436 Ibid.
- 437 Ibid. This will not be possible if stereotypes around lawyers and adversarialism persist. This is discussed above under the heading 'Legal representation in family dispute resolution'.
- 438 The Supreme Court of the Northern Territory retains some residual jurisdiction: *Family Law Act 1975* (Cth) s 39(5).

Current Law and Practice in Other Australian Jurisdictions

4.196 The first national specialist court to exercise family law jurisdiction in Australia was the FCA, which opened in 1976. The Family Court of Western Australia was also established in 1976, determining matters under the FLA 1975 for that state only. Both the federal and Western Australian courts are specialist family courts with a focus on both the legal and emotional consequences of relationship breakdown for families and their children. This approach was neatly encapsulated by the phrase 'helping courts', the term used by Prime Minister Whitlam to describe the new family courts in 1974.⁴³⁹ As a specialist family court, the FCA has been described as a

*court with an integrated court-attached counselling service, an emphasis on litigation as a step of last resort and a direction that its judges be appointed on the basis of their suitability (by reason of training, experience and personality) to deal with family law matters.*⁴⁴⁰

4.197 In 2000, the FMC was established to handle less complex matters in the areas of family law and general federal law.⁴⁴¹ Although not a specialist family court by design, the concentration of the Court's work in the area of family law⁴⁴² means that it is a de-facto specialist family court. The FMC now handles 81 per cent of national filings in the family law field.⁴⁴³ This leaves the FCA hearing fewer cases than it did before the establishment of the FMC. The cases the FCA does hear, however, are considered to be 'the more complex and intractable family law matters requiring substantial court time'.⁴⁴⁴

4.198 In May 2010, the federal Attorney-General announced the incorporation of the family law work of the FMC into the FCA so that the FCA will become the single federal court dealing with family law.⁴⁴⁵ Federal magistrates undertaking family law work will be offered judicial appointments to preside in a lower tier of the FCA, known as the 'General Division' of the Court. The administration of the two Courts was combined in 2009 and it is anticipated that the new Court structure will operate from late 2011.

4.199 Although they all operate under the common principles in the FLA 1975, the FCA, the Family Court of Western Australia and the FMC presently retain distinctive court processes.

Judge-managed proceedings in family courts

4.200 Family courts in Australia have been early and enthusiastic to adopt procedures that have moved away from traditional adversarial litigation processes. Many of these reforms have emphasised the role of the judge in controlling proceedings before the court. These reforms are part of an observable trend across many common law jurisdictions, away from traditional adversarial trials in disputes over care of children following separation.⁴⁴⁶

4.201 Arguably, there are two imperatives that have driven the trend towards non-adversarial processes in family law:⁴⁴⁷ the perceived inappropriateness of the adversarial system for determining family disputes, where there is often the need for an ongoing relationship, and the harm caused by adversarial processes to children. '[T]he unmodified adversarial system caters poorly for children, who are not parties to their parents' dispute and cannot present their own case.'⁴⁴⁸

4.202 The question of the degree to which FCA proceedings should be adversarial and inquisitorial has been important since the Court opened in 1976. One of the questions facing the early administrators and judges of the FCA was whether

*proceedings under the new Act should be conducted according to the traditional, adversary procedure of the common law, or whether proceedings under the Act should, or could, be conducted by way of an inquiry by the judge.*⁴⁴⁹

4.203 Since then, Australian family courts have tended to experiment with modifying various aspects of traditional adversary procedures to the extent allowed within anticipated constitutional bounds. Discussing a range of procedural reforms to family law, including, most radically, the introduction of the Division 12A trial process (see below), Margaret Harrison argues these reforms should be viewed as part of an inevitable convergence between adversarial and inquisitorial approaches:

*In one sense the new changes can be seen as a further movement along a previously identified spectrum of less adversarial procedures, although it far exceeds those in its scope and impacts to the point where it should be regarded as a new system.*⁴⁵⁰

4.204 There are many provisions in the FLA 1975 and its subordinate legislation that seek to modify ‘full-blooded’ adversarial processes. In particular, many of these provisions encourage active management of court processes by the judicial officer. An original provision of the 1975 Act is section 97(3), which states that ‘In proceedings under this Act, the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted’. Anthony Dickey describes the impact of this provision as less radical than it might have been, and as ‘little more than an exhortation to the courts to minimise formality where they can, and to ensure that proceedings are conducted as speedily as possible in the circumstances’.⁴⁵¹

4.205 Rule 1.04 of the *Family Law Rules 2004* (Cth) states that the main purpose of the Rules is ‘to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case’. Rule 1.06 then requires the court to be more active in pursuing that purpose than traditional adversarial processes would permit, including:

- helping and encouraging parties to consider non-trial based dispute resolution methods⁴⁵²
- identifying the issues in dispute early in the case and disposing of any issues that do not require trial at the early stage⁴⁵³
- matching types of cases to the most appropriate case management procedure at an early stage⁴⁵⁴
- setting case timetables and monitoring and actively controlling the progress of each case⁴⁵⁵
- dealing with as many aspects of the case as possible on the same occasion⁴⁵⁶
- minimising the need for parties and their lawyers to attend court, including by relying on documents if appropriate.⁴⁵⁷

4.206 Judicial officers in family courts are permitted to appoint ICLs to represent a child’s interests in proceedings.⁴⁵⁸ Family law judges are empowered on their own initiative to seek reports from court-based family consultants on whichever aspects of the care, welfare, development and views of children the judicial officer thinks is desirable.⁴⁵⁹ The judicially initiated report becomes part of court evidence.⁴⁶⁰ Judges in family courts can also call any witness in proceedings under the FLA 1975, as well as making any orders thought fit for examination and cross-examination of that witness.⁴⁶¹

439 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4322.

440 Margaret Harrison, ‘Australia’s Family Law Act: The First Twenty-Five Years’ (2002) 16 *International Journal of Law, Policy and the Family* 1, 1.

441 Federal Magistrates Court of Australia, *Annual Report 2008–09* (2009) 1.

442 In 2008–09, over 90 per cent of filings in the Federal Magistrates Court were in the family law area: *ibid* 9.

443 *Ibid* 10.

444 Diana Bryant, ‘Chief Justice’s Column’ (2007) 1 *Family Court Bulletin* 1, 1.

445 Attorney-General Robert McClelland and Minister for Defence Senator John Faulkner (Australian Government), ‘Military Court of Australia’ (Joint Press Conference, Parliament House, Canberra, 24 May 2010) 2–3.

446 Bryant, above n 444, 1.

447 King et al, above n 343, 124–5.

448 *Ibid* 125.

449 Dickey, above n 323, 83.

450 Margaret Harrison, *Finding a Better Way: A Bold Departure Away From the Traditional Common Law Approach to the Conduct of Legal Proceedings* (2007) 9.

451 Dickey, above n 323, 84.

452 *Family Law Rules 2004* (Cth) r 1.06(a).

453 *Family Law Rules 2004* (Cth) r 1.06(c).

454 *Family Law Rules 2004* (Cth) r 1.06(d).

455 *Family Law Rules 2004* (Cth) r 1.06(e).

456 *Family Law Rules 2004* (Cth) r 1.06(h).

457 *Family Law Rules 2004* (Cth) r 1.06(i).

458 *Family Law Act 1975* (Cth) s 68L. See ‘Representation of children in family court processes’ below.

459 *Family Law Act 1975* (Cth) s 62G(2).

460 *Family Law Act 1975* (Cth) s 62G(8).

461 *Family Law Rules 2004* (Cth) r 15.71.

Current Law and Practice in Other Australian Jurisdictions

Case-management and individual docket systems

- 4.207 Both the FCA and the FMC employ individual docket systems for judicial officers to manage a list of their own cases through the trial process. In an individual docket system, each judicial officer is responsible for the smooth passage of their own cases from commencement until the matter's finalisation. Individual docket systems aim to 'promote more active and effective judicial case management in order to streamline processing, encourage early settlement and, overall, dispose of cases more efficiently'.⁴⁶²
- 4.208 The docket system in the FCA was fully implemented in all registries by 2009. Prior to this date, a docket system had been selectively used in the Court for Magellan cases, the Children's Cases Pilot (both discussed below), and in less adversarial trials (LATs) in children's cases and other specialist lists. Under the Court's docket system, registrars and case coordinators assist judges in their management of cases.⁴⁶³
- 4.209 In 2008–09, the FCA finalised 4883 applications for final orders using the docket system.⁴⁶⁴ That number was greater than projected, which the Court attributed mainly to the success of its docket system.⁴⁶⁵
- 4.210 The FMC has employed a docket system since its establishment in 2000. The Court combines this case management system with a high volume of matters heard: in 2008–09, the Court heard a total of 85 984 applications across all registries.⁴⁶⁶ At this time, 61 federal magistrates shared the load of managing these cases across the registries in the areas of family and general law.⁴⁶⁷
- 4.211 As of 2008, each federal magistrate had an average of 74 new family law matters added to her or his docket every month and managed approximately 400 matters at any given time.⁴⁶⁸ The FMC also operates its docket system in conjunction with an extensive judicial circuit system to 38 regional areas. The Court has noted that this occasionally means another federal magistrate will be involved at the intermediate stage of a matter.⁴⁶⁹ The docket system has resulted in fewer formal directions and a reduction in the number of court appearances.⁴⁷⁰ Federal Magistrate Michael Baumann, the National Coordinator of Case Management in the Court, has described the benefits of this system as including that:
- parties, who are often first-time litigants, know who will hear their case and do not need to re-tell their story as many times
 - parties are provided with multiple opportunities to resolve the issues without trial or at least narrow the compass of the dispute
 - judicial management of individual cases means that process does not overwhelm common sense
 - self-represented litigants are more comfortable when they can talk directly to the person who is making a decision for them.⁴⁷¹

Magellan and Columbus case management programs

- 4.212 The Magellan and Columbus case management programs were designed to deal with the challenging issues involving sexual abuse and serious physical abuse in the FCA (Magellan)⁴⁷² and the Family Court of Western Australia (Columbus).⁴⁷³

- 4.213 Magellan is an interagency model of case management.⁴⁷⁴ The focus in Magellan is on inter-agency cooperation, including from the courts, police, legal aid, private lawyers, the statutory child protection department, hospitals, private psychologists, community health centres or other counselling agencies, to ensure all the necessary information is gathered to process cases through the Court more quickly.⁴⁷⁵ The Magellan 'model' has a number of key features, including a specialist team within the court registry that comprises one or two specialist judicial officers and dedicated staff.⁴⁷⁶ Another feature of the model is a steering committee comprised of key interagency stakeholders,⁴⁷⁷ chaired by the Magellan judge.
- 4.214 Reviews of Magellan have been positive compared to similar cases in non-Magellan jurisdictions.⁴⁷⁸ The key benefits are the length of time to resolve matters, greater inter-agency involvement and a more streamlined approach. Use of Magellan has reduced disposition times, led to fewer court events, and used fewer judicial officers for each case in the FCA.⁴⁷⁹ It may also have led to lower levels of distress amongst the children involved.⁴⁸⁰ The Australian Institute of Family Studies (AIFS) submission argued that Magellan provides an especially good example of how various agencies can cooperate to provide timely information to judicial decision makers in cases where there is a question over the safety of children concerned.⁴⁸¹
- 4.215 However, as noted by AIFS, Magellan is unable to overcome the gaps in federal and state jurisdiction in combined family and child protection matters. Moreover, Magellan does not incorporate other aspects of the LAT process, such as a relaxation on the rules of evidence, and other collaborative decision-making processes, such as FGCs. It is also limited to sexual and physical abuse cases.
- 4.216 The Columbus pilot was established in the Family Court of Western Australia. As noted by Higgins and Pike, Columbus was introduced
- with the objectives of assisting, enabling, and encouraging separated parents to acknowledge the debilitating effects of continuing conflict, violence, or abusive behaviour on their children, and to encourage such parents to resolve their differences without resorting to prolonged litigation in the family court.*⁴⁸²

462 Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (2002) 1.

463 Family Court of Australia, 'Judicial Docket System' (2007) 1 *Family Court Bulletin* 3. Chief Justice Diana Bryant described some of the benefits of an individual docket system in her Court as assisting 'in reducing the widespread and entrenched culture of non-compliance' in the Court—'[i]ncreased confidence in the system, by both the legal profession and litigants, due to a Judge having familiarity with the litigation history and issues in a particular case'; and also a '[r]eduction in court time in the hearing of trials due to more active case management and pre-trial procedures': Diana Bryant, 'State of the Nation' (Paper presented at the 12th National Family Law Conference, Perth, 23 October 2006) 8–9.

464 Family Court of Australia, *Annual Report 2008-2009* (2009) 36.

465 Ibid.

466 Federal Magistrates Court of Australia, above n 441, 16.

467 Ibid 5.

468 Federal Magistrates Court of Australia, *Annual Report 2007-08* (2008) 24.

469 Federal Magistrates Service, *Annual Report 2000-01* (2001) 17.

470 Federal Magistrates Court of Australia, above n 441, 16.

471 Michael Baumann, 'Working Together' (Speech delivered to the National Access to Justice and Pro Bono Conference, Sydney, 14 November 2008).

472 Magellan was introduced to the FCA as a pilot in 1998. For further reading see Thea Brown 'Magellan's Discoveries: An Evaluation of a Program for Managing Family Court Parenting Disputes Involving Child Abuse Allegations' (2002) 40(3) *Family Court Review* 320.

473 Columbus was introduced into the Family Court of WA as a pilot in 2001 by the Chief Judge.

474 Submission 40 (AIFS).

475 Daryl Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (2007) 77.

476 This includes the manager of child dispute services, who arranges a family consultant, a registrar and a client services officer or case coordinator who is dedicated solely to Magellan matters.

477 This includes representatives from the Magellan team as described above, legal aid representatives, practitioners from the family law section of the law society and bar, the police and the Department.

478 See Higgins, above n 475.

479 Ibid; Submission 40 (AIFS).

480 Brown, above n 472, 325.

481 AIFS stated in its submission that, '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)': Submission 40 (AIFS).

482 Lisbeth Pike and Paul Murphy, 'The Columbus Pilot in the Family Court of Western Australia' (2006) 44(2) *Family Law Review* 270.

Current Law and Practice in Other Australian Jurisdictions

4.217 Columbus is very similar to the Magellan model, but there are some differences. Where Magellan focused exclusively on matters of child abuse and child sexual abuse, Columbus had a broader, multi-disciplinary approach to 'addressing allegations of child abuse and family violence with child protection implications'.⁴⁸³

The Division 12A reforms

4.218 Probably the most comprehensive shift towards active judicial control of family law proceedings has been the introduction of Division 12A of Part VII, FLA 1975. Since July 2006, the FCA and FMC have used the principles outlined in this division to conduct all child-related proceedings, as well as other FLA 1975 disputes with the parties' consent, such as disputes over property division.⁴⁸⁴ Division 12A contains a legislative basis for processes developed by the FCA in a pilot project—the Children's Cases Project, which ran from 2004 at the Sydney and Parramatta registries. Division 12A is provided in Appendix O.

4.219 The five principles for conducting child-related proceedings in Division 12A are outlined in section 69ZN of the FLA 1975:

Principle 1

(3) *The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.*

Principle 2

(4) *The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.*

Principle 3

(5) *The third principle is that the proceedings are to be conducted in a way that will safeguard:*

- (a) *the child concerned against family violence, child abuse and child neglect; and*
- (b) *the parties to the proceedings against family violence.*

Principle 4

(6) *The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.*

Principle 5

(7) *The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.*

4.220 Under Division 12A, the provisions of the *Evidence Act 1995* (Cth) do not apply to child-related proceedings.⁴⁸⁵ In pursuit of the five principles, the provisions in Division 12A permit the court to take the following actions on its own initiative:⁴⁸⁶

- give weight as it thinks fit to evidence admitted in the absence of the *Evidence Act 1995* (Cth)⁴⁸⁷
- designate a court-employed family consultant as the family consultant in relation to the proceedings and take into account the opinion of the consultant where the opinion is given as sworn evidence⁴⁸⁸

- give directions or make orders about who is to give evidence, the matters on which the parties should present evidence, how evidence is to be given and about the nature of expert evidence and the number of expert witnesses⁴⁸⁹
- ask questions of and seek evidence or the production of documents from witnesses and experts on matters relevant to proceedings⁴⁹⁰
- give directions about whether particular steps are to be taken in proceedings and the timing of particular steps⁴⁹¹
- if the court considers it appropriate, encourage parties to use FDR and family counselling⁴⁹²
- deal with as many aspects of the matters as it can on a single occasion and, where appropriate, without requiring the parties, physical presence⁴⁹³
- interview a child directly and act on that information.⁴⁹⁴

4.221 The FCA has implemented the Division 12A provisions through the LAT process. The LAT process is a child-focused individual docket case-management system. The aim of the process is to

*achieve better outcomes for children by promoting a less adversarial approach to disputes about children and by encouraging parents to focus on their children's needs both in the immediate and longer term.*⁴⁹⁵

A secondary aim is to reduce case finalisation time and expense to the parties.

- 4.222 A single judge hears the same case from commencement until resolution. There is some variation in practice between judicial officers in their conduct of LAT trials. Matters proceed to the first day of a trial only after all other attempts at resolution have been exhausted and the parties have completed a child-focused questionnaire that elicits similar information to a traditional affidavit. On the first day of the trial, the parties sit at the bar table with their lawyers and the ICL.
- 4.223 The role of the parties' lawyers is usually less prominent in a LAT trial than in traditional hearings, although the role of the ICL is enhanced. A court-employed family consultant is in attendance on the first day and she or he may sit at the bar table or in the witness box, depending upon the judge's preference. The consultant has usually spoken to the family before the first trial date. The judge then introduces her- or himself, explains the LAT process to the parties and gives a summary of their understanding of the case. The parties are sworn in at the bar table and told that everything they say will become evidence in the trial.
- 4.224 Each party then speaks directly to the judge and explains, briefly, what he or she is seeking before the Court. The parties' lawyers do not usually speak for their clients.⁴⁹⁶ After the parties have spoken, the ICL will ordinarily present any of the child's views she or he has obtained from a prior interview with the child and outline any significant issues relating to the child. The family consultant will then usually offer comment on the case, including any principles of child development relevant to the case.
- 4.225 The information provided by the family consultant is central; it is designed to assist parents, lawyers, and judges to reach outcomes that are safe and developmentally appropriate for children.⁴⁹⁷ The parties and the judge then discuss what issues are in dispute, settlement opportunities and how the case will be managed from that point onwards.

483 According to Pike and Murphy, other distinctive features of Columbus were: cases being individually managed (not just fast-tracked) through a series of family conferences; referrals to and integration of therapeutic services and education programs as part of the process; confidential proceedings; the presiding Columbus conference registrar being disqualified from involvement in a matter that was subsequently referred back to the family court process; and there being no limit to the number of conferences available to a couple: *ibid* 271.

484 *Family Law Act 1975* (Cth) s 69ZM.

485 *Family Law Act 1975* (Cth) s 69ZT(1).

486 *Family Law Act 1975* (Cth) s 69ZP.

487 *Family Law Act 1975* (Cth) s 69ZT(2).

488 *Family Law Act 1975* (Cth) ss 69ZS, 69ZU.

489 *Family Law Act 1975* (Cth) s 69ZX(1).

490 *Family Law Act 1975* (Cth) s 69ZX(1)(e).

491 *Family Law Act 1975* (Cth) s 69ZQ(1)(c)-(d).

492 *Family Law Act 1975* (Cth) s 69ZQ(1)(f).

493 *Family Law Act 1975* (Cth) s 69ZQ(1)(g)-(h).

494 *Family Law Rules 2004* (Cth) r 15.02. For more detail see Harrison, *Finding a Better Way*, above n 450, 50.

495 Deborah Fry, 'The Role of the Family Consultant in the Less Adversarial Trial' (2007) 21 *Australian Journal of Family Law* 113, 114. Much of the description of the LAT process in the following paragraphs is based upon this article. Deborah Fry is the manager of the child dispute section at the Sydney registry of the Family Court.

496 Fry describes the process of direct communication between judicial officer and parties on the first day of the trial as enhancing a child-focused approach: 'One might expect that parties would find it difficult to stay within the 10 minute limit or to maintain the focus on the children but this has proven to not be the case. On the contrary, many parties make the most of this opportunity to metaphorically bring their children into the court room. The atmosphere while this occurs seems to shift and become less formal and it is even more clear that everyone's focus is on these children rather than, as is often the case in traditional hearings, on grievances between the parties': *ibid* 116.

497 *Ibid* 117.

Current Law and Practice in Other Australian Jurisdictions

- 4.226 The evaluation of the 2006 family law reforms conducted by AIFS suggests a division of views between participating professionals on the efficacy of the LAT process. Between 58 and 60 per cent of respondents—family consultants, family lawyers and judges—agreed that the implementation of the LAT process was a positive development.⁴⁹⁸
- 4.227 However, family judges were more likely than other professionals to be positive about the new procedures, arguing that the greater flexibility of process engendered a sharper focus on the child's interests.⁴⁹⁹ In particular, judges singled out the first day procedure of LAT as enabling an early assessment of key issues. Family consultants were largely positive about the LAT process because it influenced the identification and framing of issues in a child-centred manner.⁵⁰⁰
- 4.228 Legal practitioners welcomed the active judicial case management, the child focus and the ability of clients to be heard in the process, but were more critical of the inconsistency in practices under the LAT system between judicial officers.⁵⁰¹ Lawyers argued that it was difficult to prepare cases and advise clients in the shadow of this inconsistency. Some lawyers thought that their clients appreciated the chance to speak directly to the judge while other lawyers felt that inarticulate, nervous or uneducated clients were not able to use effectively the opportunity to speak to the judge and would have been better off with a court advocate.⁵⁰²
- 4.229 The FMC also operates under Division 12A, although it does not employ the same LAT process as the FCA. The FMC did not change its docket case-management model after Division 12A was introduced into legislation in 2006.⁵⁰³ The AIFS evaluation of the 2006 reforms showed that family lawyers who worked in the FMC predominantly believed that little had changed in practice within the Court since the introduction of Division 12A, and that, in essence, it remained a traditional, adversarial legal forum.⁵⁰⁴

Other evaluations of Division 12A

- 4.230 In addition to the AIFS review of Division 12A, two additional evaluations were conducted of the LAT precursor—the Children's Cases Pilot Program (CCPP).⁵⁰⁵
- 4.231 The CCPP, run in the Sydney and Parramatta Registries of the FCA in 2004–06 was the template for the LATs under Division 12A and was the first of the FCA's major initiatives.⁵⁰⁶ The reviews of the CCPP commented positively on better outcomes for children and the new roles played by judges and practitioners within the new model.⁵⁰⁷ Further, the pilot was identified as assisting the early identification of issues and reducing adversarialism.⁵⁰⁸
- 4.232 The second of the major initiatives, the Child Responsive Program (CRP), ran in Melbourne and Dandenong Registries in 2006 and 2007. This program was designed as a stand-alone or integrated intervention, to assist pre-court settlement and to complement the in-court work of LAT.⁵⁰⁹ The evaluation's findings again demonstrated more positive outcomes for parents and children, reduced acrimony, reduced conflict and greater cooperation.⁵¹⁰

THE INVOLVEMENT OF CHILDREN IN FAMILY LAW PROCESSES

General

- 4.233 The involvement of children and weight given to their views are important considerations both at FDR⁵¹¹ and in family court proceedings. The child is not a party to family law proceedings,⁵¹² but the child's views must be put before the court.⁵¹³ This is consistent with article 12 of the *United Nations Convention on the Rights of the Child*, which provides that the child has a right to express his or her views freely in all matters affecting him or her, and to have the opportunity to be heard, either directly or through a representative.⁵¹⁴

4.234 Children's views are made known to the court through the evidence of parents, the reports and evidence of family consultants, and through evidence obtained from other sources such as school teachers, counsellors, other professionals and lay people. Much independent evidence regarding a child's views, level of maturity and understanding will be gathered by an ICL, if one is appointed. Children do not directly participate in proceedings. There is legislative prohibition against a child giving evidence by affidavit or being called as a witness in the absence of a court order.⁵¹⁵

4.235 'Any views expressed by the child' and any factors that are relevant to the weight the court should give to the child's views, such as maturity or level of understanding, are to be considered in determining what is in the child's best interests.⁵¹⁶ It is possible that the child's best interests and his or her views may sometimes conflict, and it is the shared responsibility of the family, FDR practitioner, family consultant and ICL, where appointed, and the court to balance these potentially competing considerations.

'Gillick competence' and children's views

4.236 As noted previously, the child's best interests are to be the paramount consideration when making a parenting order.⁵¹⁷ Although this principle does not specify whether or how children are to participate in proceedings,⁵¹⁸ it is clear that the child's views are a factor in determining the child's best interests⁵¹⁹ and the ICL, where appointed, is required to put the child's views before the court.⁵²⁰ Elsewhere in family law, most particularly with regard to the exercise of parental responsibility, it is recognised that parental rights of control are not absolute, but exist only insofar as they are necessary to protect the child.⁵²¹ That is, 'as children become more mature and develop the capacity to make their own decisions, the scope of parental authority and control diminishes accordingly'.⁵²²

4.237 This notion is termed 'Gillick competence'⁵²³ and means, in essence, that children acquire competence to make decisions for themselves as they attain maturity, and that the question of competence is to be determined on a case-by-case basis.⁵²⁴ In this sense, *Gillick* competence is consistent with the evolving conception of autonomy that applies to children.⁵²⁵

498 Kaspiew et al, above n 345, 327.

499 Ibid 328.

500 Ibid 327–8.

501 Ibid 329.

502 Ibid 330.

503 Ibid 321.

504 Ibid 327.

505 For further information see Rosemary Hunter, 'Child Related Proceedings under Part VII, Division 12A of the *Family Law Act*: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227; Jennifer McIntosh, *The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-being* (2006).

506 Hunter, above n 505, 227.

507 McIntosh, above n 505.

508 Hunter, above n 505, 234.

509 Jennifer McIntosh and Caroline Young, *The Child Responsive Program Operating within the Less Adversarial Trial: A Follow-up Study of Parent and Child Outcome* (2007) 6–7.

510 Ibid 6.

511 See the discussion relating to child-focused and child-inclusive practices previously in this chapter under the heading 'Representation and involvement of children in family dispute resolution'.

512 *Family Law Rules 2004* (Cth) r 6.02.

513 *Family Law Act 1975* (Cth) s 60CC(3).

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

515 *Family Law Act 1975* (Cth) s 100B.

516 *Family Law Act 1975* (Cth) s 60CC(3)(a).

517 This is discussed above in this chapter under the heading 'Decision-making principles for children'.

518 Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 1, 4.

519 *Family Law Act 1975* (Cth), s 60CC(3)(a).

520 *Family Law Act 1975* (Cth), s 68LA(5)(b). This is consistent with article 12 of CROC, which provides that the child has a right to express his or her views freely in all matters affecting him or her, and to have the opportunity to be heard, either directly or through a representative: *United Nations Convention on the Rights of the Child*, above n 514.

521 Young and Monahan, above n 323, 267.

522 Ibid.

523 This is because the principle comes from the English House of Lords case *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1986] AC 112. This judgment was referred to with approval by the High Court in *Secretary, Department of Health and Community Services v JWB and SMB ('Re Marion')* (1992) 175 CLR 218.

524 Fehlberg and Behrens, above n 321, 260.

525 The notion of evolving autonomy is raised, for example, by John Tobin, 'The Development of Children's Rights' in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 23, 29.

Current Law and Practice in Other Australian Jurisdictions

4.238 Although most commonly considered in medical cases involving children,⁵²⁶ the concept of *Gillick* competence is also relevant to making parenting orders under the FLA 1975, as the child's views are to be put before the court by the ICL and given such weight as is appropriate in light of the child's maturity and level of understanding.⁵²⁷ It is important that any assessment of the child's maturity and level of understanding be made independently of an evaluation of the child's opinion, otherwise there is a danger that immaturity of the child will be inferred simply by reason of disagreement with the child's view.⁵²⁸

REPRESENTATION OF CHILDREN IN FAMILY COURT PROCESSES⁵²⁹

4.239 The role of the ICL is unique and involves representing and promoting the child's best interests in family law proceedings.⁵³⁰ This appointment enables the child to be involved in the decision-making process.⁵³¹ However, the level of the child's involvement will depend on the extent to which the child wishes to be involved and the extent to which it is appropriate for the child to be involved, having regard to the child's age, developmental level, cognitive abilities, emotional state and views.⁵³²

Appointment of an independent children's lawyer

4.240 Where the child's best interests or welfare is the paramount or a relevant consideration in proceedings, the court may order that the child's interests in the proceedings are to be independently represented by an ICL.⁵³³ It should be noted that as an ICL can only be appointed by the court, the ICL will not take part in FDR unless court proceedings have already commenced. The court may make an order for the appointment of an ICL on its own initiative or on the application of the child, an organisation concerned with the welfare of children or any other person.⁵³⁴ In determining whether an ICL ought to be appointed in a particular case, the court has regard to a non-exhaustive list of factors set out in the case of *Re K*.⁵³⁵

4.241 An ICL will only be appointed if funding is granted from the relevant state legal aid body. Since February 2008, VLA has applied a quota-based limitation on the funding of ICLs. Generally, funding for ICLs is limited to 10 per week in the FMC and up to 33 per month in the FCA.

4.242 VLA has in-house ICL practitioners and an ICL panel, membership of which entitles a practitioner to act as an ICL in family law matters.⁵³⁶ Appointment to this panel is for a term of three years and in order to be considered for appointment lawyers must:

- be admitted as practitioners of the Supreme Court of Victoria, have signed the High Court Roll and hold a current practising certificate under the *Legal Profession Act 2004 (Vic)*, and
- have previously acted as an ICL in cases arising under the FLA 1975, or
- have at least five years experience in cases arising under the FLA 1975 and involving ICLs, and
- have undertaken the National Independent Children's Lawyer Training Course or be enrolled to do so.⁵³⁷

The grounds and procedure for being removed from this VLA panel are clearly set out in the Independent Children's Lawyer Practitioner Manual.⁵³⁸

4.243 The ICL is not a party to proceedings, but parties must conduct the case as if the ICL was a party.⁵³⁹ The court may also make such other orders as it considers necessary to ensure the independent representation of the child's interests.⁵⁴⁰ This includes making an order for the purpose of allowing the ICL to find out the child's views on the matters to which the proceedings relate.⁵⁴¹

Role and duties of the independent children's lawyer

4.244 If an ICL is appointed, he or she must:

- form an independent view of what is in the child's best interests based on the evidence available⁵⁴²
- act in relation to the proceedings in what he or she believes to be the child's best interests⁵⁴³
- make a submission to the court suggesting a particular course of action if satisfied that that particular course of action is in the child's best interests⁵⁴⁴
- act impartially in dealings with parties to the proceedings⁵⁴⁵
- ensure that any views expressed by the child in relation to the proceedings are put fully before the court⁵⁴⁶
- analyse any report or document relating to the child that is to be used in proceedings to identify matters significant to determining what is in the child's best interests and ensure that those matters are brought to the court's attention⁵⁴⁷
- endeavour to minimise the trauma to the child associated with the proceedings⁵⁴⁸
- facilitate an agreed resolution of matters at issue in the proceedings to the extent that doing so is in the child's best interests⁵⁴⁹
- collate expert evidence and ensure that all relevant is before the court⁵⁵⁰
- test, by cross-examination, the evidence of the parties and their witnesses.⁵⁵¹

Best interests model of representation for children in family law

4.245 The model of representation of children in family law has been continually refined as a 'best interests' model through legislative change, jurisprudence and practice directions.⁵⁵² The best interests nature of the ICL's role is reflected in various provisions of the FLA 1975. The ICL is not the child's legal representative and is not obliged to act on the child's instructions in relation to the proceedings.⁵⁵³

4.246 Although the ICL is not under an obligation to disclose to the court any information that the child communicates, and nor can the ICL be required to disclose this information to the court,⁵⁵⁴ the ICL may disclose any information communicated by the child if satisfied that it is in the child's best interests.⁵⁵⁵ This is the case even if such disclosure is made against the child's wishes.⁵⁵⁶ The ICL is also under an obligation to make a report to the appropriate state or territory department responsible for child welfare, if he or she has a suspicion on reasonable grounds that a child has been abused or is at risk of being abused, unless the ICL knows that the department has already been notified about that abuse or risk.⁵⁵⁷

526 Fehlberg and Behrens, above n 321, 281.

527 *Family Law Act 1975* (Cth), s 60CC(3)(a).

528 David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 *International Journal of Children's Rights* 1, 10.

529 Referred to as 'family court processes' as the ICL can only be appointed by the court. Note, however, that the ICL will play a role outside of the courtroom in informal negotiations and family dispute resolution.

530 Family Court of Australia, *Guidelines for Independent Children's Lawyers*, endorsed by the Chief Justice of the Family Court of Australia and by the Federal Magistrates Court of Australia (2007) 1.

531 *Ibid* 2.

532 *Ibid*.

533 *Family Law Act 1975* (Cth), s 68L(1)–(2).

534 *Family Law Act 1975* (Cth) s 68L(4).

535 *Re K* (1994) 17 Fam LR 537.

536 Victoria Legal Aid, *Independent Children's Lawyer* <www.legalaid.vic.gov.au/813.htm> at 11 May 2010.

537 *Ibid*.

538 Victoria Legal Aid, *Section 29A Panel: Independent Children's Lawyer Practitioner Manual* (2009) 9–14.

539 *Family Law Rules 2004* (Cth) rr 6.02, 8.02.

540 *Family Law Act 1975* (Cth) s 68L(2)(b).

541 *Family Law Act 1975* (Cth) s 68L(5).

This does not apply if it would be inappropriate because of the child's age or maturity, or some other special circumstance: *Family Law Act 1975* (Cth) s 68L(6).

542 *Family Law Act 1975* (Cth) s 68LA(2)(a).

543 *Family Law Act 1975* (Cth) s 68LA(2)(b).

544 *Family Law Act 1975* (Cth) s 68LA(3).

545 *Family Law Act 1975* (Cth) s 68LA(5)(a).

546 *Family Law Act 1975* (Cth) s 68LA(5)(b).

547 *Family Law Act 1975* (Cth) s 68LA(5)(c).

548 *Family Law Act 1975* (Cth) s 68LA(5)(d).

549 *Family Law Act 1975* (Cth) s 68LA(5)(e).

550 *P and P* (1995) 19 Fam LR 1, 33. This role of the ICL was reinforced in *DS v DS* (2003) 32 Fam LR 352, where it was held that the ICL must gather evidence and confer with the child rather than just relying on expert reports: at 360.

551 *P and P* (1995) 19 Fam LR 1, 33; *B & R and the Separate Representative* (1995) FLC 92–636. Rules relating to cross-examination are set out in the *Family Law Rules 2004* (Cth).

552 Young and Monahan, above n 323, 552.

553 *Family Law Act 1975* (Cth) s 68LA(4).

554 *Family Law Act 1975* (Cth) s 68LA(6)–(7).

555 *Family Law Act 1975* (Cth) s 68LA(7).

556 *Family Law Act 1975* (Cth) s 68LA(8).

557 *Family Law Act 1975* (Cth), s 67ZA.

Current Law and Practice in Other Australian Jurisdictions

LEGAL REPRESENTATION IN FAMILY LAW

4.247 Since the implementation of the FLA 1975, a transformation has taken place in the nature of family legal practice. While family law practice once had a predominantly adversarial nature, the majority of current family lawyers do not practise in this manner.

4.248 Studies have demonstrated that most family lawyers attempt to defuse conflict between parents and regularly encourage their clients to settle. One study of family law practice in the late 1990s showed that a key element of family legal practice was managing client expectations about attainable outcomes.⁵⁵⁸

4.249 Many family lawyers also demonstrate a sophisticated approach to balancing their parent-clients' interests against the child's interests. One recent study of 42 family lawyers practising in Queensland found that around 80 per cent of lawyers interviewed were child-focused in their approach to their practice.⁵⁵⁹ Half of the lawyers interviewed believed that even when acting for parents, their ethical duties to the child were equal to their duty to the court and their client.⁵⁶⁰ Many of these lawyers occasionally or often experienced a conflict between their perceived duty to the child and their other ethical duties and, in these circumstances, the lawyers demonstrated thoughtful responses to these situations.⁵⁶¹

Accreditation for family lawyers

4.250 Law societies in the Australian states and territories provide for specialist accreditation of family lawyers. In Victoria, the Law Institute of Victoria's system of specialist accreditation of family lawyers requires that accredited specialists must have at least five years full-time practice experience or equivalent, including a substantial involvement in the family law field in the past three years and engagement in continuing professional development.⁵⁶² Accreditation schemes are designed to encourage high quality legal services in specific areas of practice.

4.251 In 2004, the Family Law Council, together with the Family Law Section of the Law Council of Australia, developed best-practice guidelines for family lawyers with the aim of setting out the principles that all family lawyers should follow in family law proceedings and improving the legal practice standards in Australian family law.⁵⁶³ The guidelines promote a less adversarial approach to legal practice.⁵⁶⁴

558 John Dewar and Stephen Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 1, 16–17.

559 Cate Banks, 'Being a Family Lawyer and Being Child Focused—A Question of Priorities?' (2007) 21 *Australian Journal of Family Law* 37, 46–7.

560 *Ibid* 47.

561 These child-focused family lawyers were clearly not mere adversarial advocates for their parent-clients. Banks notes that, 'the child-focused lawyers in the study demonstrated a level of self reflection that, to a great extent, overrode convention of adversarial advocate and responsible lawyer in their pursuit of child-focused outcomes ... Child focused lawyers took a holistic approach to lawyering, built a relationship with the client and were committed to a caring approach to the matrix of relationships associated with the family dynamic, always mindful that the child must remain the central point of decision making': Banks, above n 559, 47.

562 Law Institute of Victoria, *Specialisation Scheme Rules* (2010).

563 Family Law Council, *Best Practice Guidelines for Lawyers Doing Family Law Work* (2004) v.

564 They state that best practice in family law is characterised by a number of aspects including: 'a constructive and conciliatory approach to the resolution of family disputes', 'having regard to the interests and protection of children and encouraging long term family relationships', 'the narrowing of the issues in dispute and the effective and timely resolution of disputes', and 'ensuring that costs are not unreasonably incurred': *ibid* 1.

Chapter 5

Current International Law and Practice

CONTENTS

- 170 New Zealand
- 180 Scotland
- 190 England and Wales



5.1 This chapter examines the current law and practice in child protection matters in a number of international jurisdictions which have similar legal systems to Australia.

NEW ZEALAND

GENERAL

5.2 The *Children, Young Persons and Their Families Act 1989* (NZ) (CYPF Act 1989) governs child protection in New Zealand and is administered by the Ministry of Social Welfare (the Ministry). The CYPF Act 1989 places great emphasis on family participation in decisions affecting children and young people.¹ The CYPF Act 1989 was strongly influenced by Maori culture, but applies to all children referred to Child, Youth and Family Services (CYF)² because of protection concerns.³

5.3 The core tenets of the CYPF Act 1989 are that the child's welfare and interests are paramount in all matters relating to the administration and application of the Act,⁴ and that the family is the carer for and protector of the child, supported by the state in its role.⁵

5.4 The CYPF Act 1989 provides the following principles relating specifically to the care and protection of children and young people: they must be protected from harm, have their rights upheld and have their welfare promoted.⁶ The principles also provide that it is desirable for a child or young person to live with his or her family and family group where possible.⁷

5.5 Two notable features of the New Zealand system are that:

- authorisation is required before a child can be involuntarily removed from his or her family by child protection workers, even in emergency circumstances⁸
- family group conferencing (FGC) is ordinarily mandatory before commencing court proceedings in relation to the care and protection of a child or young person.⁹

COMMENCEMENT OF A CARE AND PROTECTION MATTER

Notification and investigation

5.6 A care and protection matter commences when a report is made to a social worker or police officer that a child has been, or is likely to be, harmed physically, emotionally or sexually, ill-treated, neglected or deprived.¹⁰ Although New Zealand does not have mandatory reporting,¹¹ reports may be made by individuals, bodies or organisations concerned with the welfare of children and young people, or by a court following any proceedings where it is believed that a child is in need of care and protection.¹² The matter will be investigated by the social worker or police officer to whom the report was made,¹³ then referred to a care and protection coordinator (coordinator) if it is believed that the child is in need of care and protection.¹⁴ The coordinator is responsible for convening an FGC.¹⁵

5.7 It is at the coordinator's discretion whether it is necessary to convene an FGC.¹⁶ An FGC will only be convened where it is reasonably believed that a child is in need of care and protection.¹⁷ This will be determined by reference to the grounds set out in the CYPF Act 1989.

Grounds for determining that a child is in need of care and protection

- 5.8 Many of the grounds for determining that a child is in need of care and protection under the CYPF Act 1989 are similar to those set out in the *Children, Youth and Families Act 2005* (Vic). The CYPF Act 1989 provides that a child or young person is in need of care and protection if he or she is being, or is likely to be, harmed, ill-treated, abused or seriously deprived.¹⁸ Harm can be physical, emotional or sexual.¹⁹ The New Zealand grounds relating to 'harm' are similar to Victorian grounds. Both Acts also provide for circumstances in which the child or young person has been abandoned or the child or young person's parents are deceased or incapacitated.²⁰
- 5.9 The New Zealand grounds diverge from the Victorian grounds where 'no fault' characteristics have been included. While the Victorian grounds focus on parents not protecting or being unlikely to protect the child from harm, the New Zealand grounds include reference to parents being 'unable' to care for the child or young person.²¹ This inability is not limited, as it is in the CYF Act 2005, to parents who are incapacitated.²² There is also a ground in the CYPF Act 1989 which deals with situations in which behaviour of a child or young person is likely to be harmful to the wellbeing of that child or young person or others, and the young person's parents or guardians are unable or unwilling to control that behaviour.²³

FAMILY GROUP CONFERENCING

- 5.10 FGC plays a central role in New Zealand's child protection system, as it is ordinarily the mandatory first step before court proceedings can commence. It is 'a core part of the machinery of government, the engine-room of decision-making for child welfare and youth justice'.²⁴ In this report, the Commission considers the child welfare role of the FGC.
- 5.11 Decisions will be made at the FGC regarding whether the child is in need of care and protection and what steps are to be taken. It is a process that brings the family and professionals together in a 'family-led decision-making forum'.²⁵ The model used in New Zealand has been described as being at the 'cutting edge of family-centred practice'.²⁶

- 1 Marie Connolly, 'An Act of Empowerment: The Children, Young Persons and their Families Act (1989)' (1994) 24 *British Journal of Social Work* 87, 89.
- 2 Child, Youth and Family Services is a government agency within the Ministry of Social Development and has legal powers to intervene and help children who are being abused or neglected or are exhibiting problem behaviour: Ministry of Social Development (NZ), *Service Delivery Cluster* <www.msd.govt.nz/about-msd-and-our-work/about-msd/our-structure/service-delivery-cluster.html> at 19 May 2010.
- 3 Connolly, 'An Act of Empowerment', above n 1. The *Children, Young Persons and Their Families Act 1989* (NZ) has jurisdiction over persons who are under 17 years of age, with the exclusion of those who have been married or in a civil union: s 2.
- 4 *Children, Young Persons and their Families Act 1989* (NZ) s 6.
- 5 *Children, Young Persons and their Families Act 1989* (NZ) ss 5, 13; Connolly, 'An Act of Empowerment', above n 1, 90.
- 6 *Children, Young Persons and their Families Act 1989* (NZ) s 13(a).
- 7 *Children, Young Persons and their Families Act 1989* (NZ) s 13(b)-(c).
- 8 That is, in New Zealand there is no equivalent of the Victorian power for a 'protective intervener' to take a child into safe custody without a warrant.
- 9 *Children, Young Persons and their Families Act 1989* (NZ) s 70.
- 10 *Children, Young Persons and their Families Act 1989* (NZ) s 15.
- 11 *Children, Young Persons and their Families Act 1989* (NZ) s 15. The Act provides that any person 'may' report, rather than listing persons who 'must' report.
- 12 *Children, Young Persons and their Families Act 1989* (NZ) s 19.
- 13 *Children, Young Persons and their Families Act 1989* (NZ) s 17(1).
- 14 *Children, Young Persons and their Families Act 1989* (NZ) s 17(1). At this investigation stage, the social worker or police officer will consult with a care and protection resource panel—an advisory panel appointed by the Chief Executive from occupations and organisations concerned with the care and protection of young persons: s 428. If the report is made by a body, organisation or court then the matter can be referred to a coordinator directly and the investigation stage may not be necessary: s 19.
- 15 *Children, Young Persons and their Families Act 1989* (NZ) ss 18(1), 20 if referred by a social worker or police officer, or s 19(2)-(3) if referred by a body, organisation or court.
- 16 *Children, Young Persons and their Families Act 1989* (NZ) s 19(3).
- 17 *Children, Young Persons and their Families Act 1989* (NZ) ss 18(1), 19(1).
- 18 *Children, Young Persons and their Families Act 1989* (NZ) s 14(1)(a).
- 19 *Children, Young Persons and their Families Act 1989* (NZ) s 14(1)(a).
- 20 *Children, Young Persons and their Families Act 1989* (NZ) s 14(f)-(g); *Children, Youth and Families Act 2005* (Vic) s 162(1)(a)-(b).
- 21 *Children, Young Persons and their Families Act 1989* (NZ) s 14(f).
- 22 *Children, Youth and Families Act 2005* (Vic) s 162(1)(b).
- 23 *Children, Young Persons and their Families Act 1989* (NZ) s 14(d).
- 24 Stewart Bartlett, 'Family Decision Making Now and in the Future' (2007) 36 *Social Work Now* 15, 16.
- 25 Marie Connolly, 'Fifteen Years of Family Group Conferencing: Co-ordinators Talk About their Experiences in Aotearoa New Zealand' (2006) 36 *British Journal of Social Work* 523, 524.
- 26 Marie Connolly, 'Learning from the Past and Repositioning the Future' (2007) 36 *Social Work Now: The Practice Journal of Child, Youth and Family* 8, 14.

Convenors

- 5.12 Coordinators responsible for convening FGCs are appointed by the Chief Executive of the Ministry (Chief Executive) and are employed by CYF.²⁷ A coordinator must be suitably qualified by reason of his or her personality, training and experience.²⁸ However, no specific training requirements are set out in the CYPF Act 1989. It is the responsibility of the Chief Executive to ensure that those performing functions under the CYPF Act 1989 receive adequate training and comply with appropriate standards.²⁹ The coordinator has the power to delegate any function under the CYPF Act 1989 to a social worker.³⁰ There are no exemptions to this power of delegation, so it is possible that one social worker could be involved in the FGC and another social worker could be convening the FGC. This could have implications for the perceived independence of the FGC convenor.

Procedure and functions of the FGC

- 5.13 It is the coordinator's responsibility to convene the FGC.³¹ Before convening an FGC, the coordinator must consult with a care and protection resource panel.³²

- 5.14 The overall functions of the FGC are to:

- consider matters relating to the care and protection of the child in relation to whom the FGC was convened
- make decisions and recommendations and formulate plans when the FGC determines that the child or young person is in need of care and protection, in accordance with the overarching principles of the CYPF Act 1989
- review from time to time the decisions, recommendations and plans of the FGC and then implement any such decisions, recommendations and plans.³³

CYF must provide the FGC with administrative services to enable it to discharge these functions.³⁴

- 5.15 There are ordinarily three phases to the FGC:

- information sharing
- private family deliberation
- the coordinator seeking agreement to the conference's decisions.³⁵

At the first stage, the coordinator is responsible for making all relevant information available to the family group.³⁶ This information is often provided by the referring social worker and other professionals.³⁷ During the second stage, non-family members withdraw from the process, leaving the family alone to begin decision making.³⁸ Even the representative for the child must withdraw from deliberations at this stage, unless members of the family request that the representative is present.³⁹ At the third stage, the coordinator seeks agreement from the family group and then from the referral source.⁴⁰ The conference decides together whether the child is in need of care and protection and, if so, decides on an appropriate course of action.⁴¹ The FGC's process is self-regulated and does not operate under strict procedural requirements.⁴²

5.16 FGC proceedings are privileged and are not to be published.⁴³ Information, statements or admissions made or disclosed in the course of the FGC are inadmissible before any court or any person acting judicially.⁴⁴ The only information admissible before a court is the record of decisions and recommendations made and plans formulated by the FGC.⁴⁵ The privilege that operates in relation to FGC admissions or disclosures is absolute and cannot be waived, but this does not preclude concerns being raised with police.⁴⁶

Attendees and legal representation

5.17 Those entitled to attend the FGC are listed in the CYPF Act 1989 and include:

- the child or young person, unless it would not be in his or her best interests or he or she would be unable to understand proceedings
- every parent, guardian, person having care of the child or young person and member of the family or family group of the young person, unless a person's attendance would not be in the best interests of the child or young person or would be otherwise undesirable⁴⁷
- the care and protection coordinator
- the social worker or police officer who referred the matter to the coordinator
- a representative of the body or organisation which referred the matter to the coordinator
- any barrister, solicitor or lay advocate representing the child or young person.⁴⁸

5.18 Several other interested parties are also listed and, in addition to this list, any person may attend in accordance with the wishes of the family or family group of the child or young person.⁴⁹ Those wishes will have been made known during consultation with the coordinator prior to the FGC.⁵⁰ When discussion between family members or the wider family group is taking place, any members outside of the family group must not be present unless family members request otherwise.⁵¹

27 *Children, Young Persons and their Families Act 1989* (NZ) ss 18–25, 423(1); Nathan Harris, National Child Protection Clearinghouse, Australian Institute of Family Studies, 'Family Group Conferencing in Australia 15 Years On', *Child Abuse Prevention Issues* (2008) No 27, 3.

28 *Children, Young Persons and their Families Act 1989* (NZ) ss 18–25, 423(2).

29 *Children, Young Persons and Their Families Act 1989* (NZ) s 7(2)(f).

30 *Children, Young Persons and their Families Act 1989* (NZ) s 427(1).

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

32 *Children, Young Persons and their Families Act 1989* (NZ) s 21(a). Care and protection resource panels are advisory committees established by the Chief Executive, and they also advise social workers and constables in relation to investigations: ss 17(1), 428. The coordinator of an FGC is also to consult a care and protection resource panel if no agreement is reached at the FGC, see below.

33 *Children, Young Persons and their Families Act 1989* (NZ) s 28.

34 *Children, Young Persons and their Families Act 1989* (NZ) s 27.

35 Connolly, 'An Act of Empowerment', above n 1, 92–3.

36 *Ibid* 92.

37 *Ibid*.

38 *Ibid* 92–3.

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

40 Connolly, 'An Act of Empowerment', above n 1, 93.

41 *Ibid*.

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

43 *Children, Young Persons and Their Families Act 1989* (NZ) ss 37–8.

44 *Children, Young Persons and Their Families Act 1989* (NZ) s 37(1).

45 *Children, Young Persons and Their Families Act 1989* (NZ) ss 37(2), 29(3).

46 Email from Stewart Bartlett, New Zealand Ministry of Social Development, 12 April 2010. Stewart Bartlett is Principal Analyst for Child, Family and Community Services in the New Zealand Ministry of Social Development. He was previously Manager of FGC Service Development within Child, Youth and Family in the Ministry of Social Development: Bartlett, 'Family Decision Making Now and in the Future', above n 24, 16.

47 This also includes the attendance of foster carers: *SH v KM WM RT TM CYFS FC CYFS FAM 2006-009-002310* 11 August 2006. In that case, a child of nine months had been placed outside of the family and the FGC was to determine the child's long-term care arrangements. It was held that the foster parents should have been invited, as they were clearly people having care of the child under s 22(1)(b)(i), as well as being part of the 'family group' as defined in s 2 as 'a person with whom the child has a significant psychological attachment': Judge Peter Boshier, Principal Family Court Judge, 'Safeguarding Children's Rights in Child Protection: The Use of Family Group Conferencing in the Family Court' (Paper presented to 5th World Congress on Family Law and Children's Rights, Nova Scotia, 24 August 2009) 6.

48 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1).

49 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1)(i).

50 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1)(i).

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

5.19 The parents and family members, the coordinator and a referring social worker from CYF will be entitled members of the FGC,⁵² which means that they have ‘voting rights’ in FGC decisions.⁵³ Counsel for the child will be an entitled member if care and protection proceedings have already commenced in the Family Court.⁵⁴ Alternatively, as provided for in the CYPF Act 1989, the child or young person may be represented by a lay advocate.⁵⁵ The parties’ lawyers are not usually present and will not be entitled members, unless all members of the conference agree.⁵⁶

Agreements and enforceability

5.20 If the FGC reaches agreement, it may formulate a plan for the care and protection of the child or young person.⁵⁷ The decision, recommendation or plan of the FGC must be communicated to the referring social worker, police officer, court or organisation⁵⁸ and—with exception of referring courts—their agreement must be sought.⁵⁹ The Chief Executive must give effect to the FGC’s decisions, recommendations and plans, unless the referring social worker does not agree or the decision, recommendation or plan is clearly impracticable or inconsistent with the principles of the CYPF Act 1989.⁶⁰ It is the coordinator’s duty to ensure that any decision, recommendation or plan of an FGC is reviewed regularly.⁶¹

5.21 It is possible for a plan to be implemented solely by way of FGC agreement, and all parties are required to adhere to that agreement. However, if obligations under the plan are not carried out, the Court may be required to implement the plan through orders.⁶² Judges will place reliance on FGC outcomes in all but rare cases.⁶³ The decisions of an FGC are not registrable in court and the Court, unlike the Chief Executive, is under no obligation to give effect to the decisions of an FGC.⁶⁴ However, care and protection proceedings—that is, proceedings for a declaration that a child is in need of care and protection⁶⁵—cannot generally be commenced in the Family Court unless an FGC has taken place.⁶⁶

5.22 Even in circumstances where an exception applies and an FGC has not taken place before the application for a declaration,⁶⁷ an FGC must still take place before the Family Court will make a declaration.⁶⁸ It is this mandatory nature of FGC that strengthens agreements made at the conferencing stage. This has been referred to as the ‘jurisdictional quality’ of FGCs,⁶⁹ where the FGC is the necessary first step that precedes court involvement.

5.23 If the members of the FGC or the referring person or body cannot agree on an outcome, the coordinator is to consult a care and protection resource panel and report the failure to reach agreement to the referring social worker or police officer.⁷⁰ The police officer or social worker may then take action under the CYPF Act 1989 as he or she considers appropriate.⁷¹ In these instances, if the concerns were serious enough, it is likely that court proceedings would be initiated.⁷²

EMERGENCY REMOVAL POWERS

Comparison of New Zealand and Victoria

5.24 In all but rare cases, care and protection matters will be dealt with in the first instance by an FGC. However, there are circumstances in which it will not be possible or practicable to convene an FGC to resolve urgent care and protection issues. The power to remove a child in emergency circumstances is one way in which New Zealand differs greatly from Victoria. In New Zealand, authorisation is required before a child can be removed and, in the absence of judicial authorisation, only police have removal power. In Victoria, child protection workers may take a child into safe custody without authorisation.⁷³

5.25 The New Zealand warrant system requires a social worker or police officer to apply in writing and on oath for a ‘place of safety warrant’ if removal of the child is believed to be necessary.⁷⁴ Applications are made to a District Court judge, or, if no District Court judge is available, any justice or community magistrate, or any registrar other than a police officer.⁷⁵ For such a warrant to be granted, the judge or other officer of the court must be satisfied that there are reasonable grounds to believe that a child or young person is suffering, or is likely to suffer, ill-treatment, neglect, deprivation, abuse, or harm.⁷⁶ This warrant authorises any police officer or social worker to enter and search premises and remove or detain the child or young person, by force if necessary.⁷⁷

5.26 In New Zealand only police, and not child protection workers, have the power to remove a child without a warrant.⁷⁸ Any officer who believes on reasonable grounds that it is necessary to protect a child or young person from injury or death is able to enter and search premises and remove a child or young person without a warrant.⁷⁹ The New Zealand threshold for exercising this police power is also substantially higher than that in Victoria, requiring that removal is ‘critically necessary to protect a child or young person from injury or death’.⁸⁰ In Victoria, all that is required to remove a child without judicial authorisation is that the child is believed to be in need of protection, as determined by reference to the grounds.⁸¹

5.27 If a child or young person is found unaccompanied in circumstances which are likely to impair the child or young person’s mental or physical health, the New Zealand legislation also allows a police officer to deliver the child or young person to a parent or guardian, or a social worker if that is not possible.⁸² This measure will only be temporary if it does not appear that the child is in need of care and protection; it is not the same as an emergency removal power.

52 Email from Stewart Bartlett, New Zealand Ministry of Social Development, 18 March 2010.

53 Ibid.

54 Ibid.

55 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1)(h).

56 Bartlett, Email 18 March 2010, above n 52.

57 *Children, Young Persons and Their Families Act 1989* (NZ) s 29(1).

58 *Children, Young Persons and Their Families Act 1989* (NZ) s 30(1).

59 *Children, Young Persons and Their Families Act 1989* (NZ) s 30(1).

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

61 *Children, Young Persons and Their Families Act 1989* (NZ) s 424(f).

62 Judge Boshier, above n 47, 10.

63 Ibid 12.

64 Bartlett, Email 18 March 2010, above n 52.

65 *Children, Young Persons and Their Families Act 1989* (NZ) s 67.

66 *Children, Young Persons and Their Families Act 1989* (NZ) s 70.

67 *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2). Exceptions include circumstances in which a custody order or restraining order are required as a matter of urgency, and in these exceptional circumstances the Court is obliged to adjourn proceedings in order for an FGC to take place: ss 70(2), 72(3).

68 *Children, Young Persons and Their Families Act 1989* (NZ) s 72.

69 Bartlett, Email 18 March 2010, above n 52.

70 *Children, Young Persons and Their Families Act 1989* (NZ) s 31(1)(c), (e). Note that where a referring person, body or organisation will not agree to a plan or decision made by an FGC, the FGC can reconvene to reconsider its plan or decision: s 30(3).

71 *Children, Young Persons and Their Families Act 1989* (NZ) s 31(2).

72 Email from Allan Cooke, Barrister, New Zealand, 13 April 2010.

73 A ‘protective intervener’ may take a child into safe custody without a warrant: *Children, Youth and Families Act 2005* (Vic) ss 240–1. A ‘protective intervener’ in Victoria includes all members of the police force and the Secretary of the Department of Human Services, and the Secretary has delegated this power to various departmental employees: ss 17(1), 181.

74 *Children, Young Persons and Their Families Act 1989* (NZ) s 39(1). A similar warrant is available after court proceedings have commenced, but it is not called a ‘place of safety warrant’: s 40.

75 *Children, Young Persons and Their Families Act 1989* (NZ) s 39(1).

76 *Children, Young Persons and Their Families Act 1989* (NZ) s 39(1).

77 *Children, Young Persons and Their Families Act 1989* (NZ) s 39(3).

78 *Children, Young Persons and Their Families Act 1989* (NZ) s 42.

79 *Children, Young Persons and Their Families Act 1989* (NZ) s 42(1).

80 *Children, Young Persons and Their Families Act 1989* (NZ) s 42(1).

81 *Children, Youth and Families Act 2005* (Vic) ss 240–1.

82 *Children, Young Persons and Their Families Act 1989* (NZ) s 48(1).

New Zealand process following removal

5.28 Once a child or young person has been removed, either with or without a warrant, he or she is placed in the custody of the Chief Executive.⁸³ The matter may come before the Court when a parent or guardian applies for the release of or access to the child or young person while he or she is in the Chief Executive's custody.⁸⁴ The child or young person will otherwise be brought before the Court within five days, if not sooner released.⁸⁵ In these cases, the Court has power to make one of several orders:

- directing that the child be released from custody⁸⁶
- directing any person the Court sees fit to provide for the day-to-day care of the child⁸⁷
- granting the parent or guardian of the child or young person access to that child or young person.⁸⁸

5.29 This first court appearance does not necessitate the commencement of proceedings for a declaration that a child is in need of care and protection. Investigation will have taken place during the five-day period before the child or young person is brought before the Court, and it is possible that a referral to an FGC will satisfy concerns held about the child or young person.⁸⁹

5.30 Alternatively, the parents or guardians of the child or young person and the Chief Executive may have reached a temporary care agreement, whereby the child or young person remains in the custody of the Chief Executive while the parents or guardians access support services, for example.⁹⁰ Removal of the child is used in emergency situations only, and not as an alternative to FGC as the first stage.

COURT PROCEDURE AND PROCESSES**Commencement**

5.31 The Family Court of New Zealand hears care and protection proceedings for children and young people. In New Zealand, proceedings are commenced by bringing an application for a declaration that a child or young person is in need of care and protection.⁹¹ Ordinarily proceedings cannot commence until the matter has been to an FGC, but there are some exceptions.⁹² An application for a declaration can be made prior to an FGC taking place when:

- the child or young person has been removed on a place of safety warrant or removed by police without a warrant⁹³
- an interim restraining order needs to be granted as a matter of urgency⁹⁴
- an application for a custody order pending final determination, made at the same time as the application, needs to be granted as a matter of urgency⁹⁵
- the application is made on the ground that the child has been abandoned and no family group members are able to be found.⁹⁶

5.32 The Court may make a declaration if it is satisfied that a child is in need of care and protection based on any of the specified grounds.⁹⁷ However, in most circumstances, the Court must refer the matter to an FGC before it can make a declaration.⁹⁸

Court-annexed mediation

5.33 Where an application has been made to the Court for a declaration that a child or young person is in need of care and protection, the Court, the child or young person, parties to the application or legal representatives of those persons may request that a mediation conference be convened.⁹⁹ The purpose of the mediation conference is to identify the problem and attempt to reach agreement.¹⁰⁰ Every mediation conference is presided over by a Family Court judge,¹⁰¹ and, if appropriate, that same judge may hear any Family Court proceedings that eventuate.¹⁰² The child or young person, parties and legal representatives may attend.¹⁰³ The presiding judge has the power to make consent orders at the mediation conference.¹⁰⁴

Representation and participation of the child or young person in proceedings

5.34 Where the child is not already represented, the Court or court registrar must appoint a barrister or solicitor to act for the child in the proceedings and for any other purpose considered desirable.¹⁰⁵

5.35 The lawyer is to provide independent representation and advice to the child and has a duty to put the child's views before the Court.¹⁰⁶ The lawyer should not, however, require the child to express a view if the child does not want to, and the lawyer will not be required to put before the Court any views expressed in confidence to him or her by the child.¹⁰⁷ In cases where a conflict arises between a child's views and information relevant to the welfare and best interests of the child, the lawyer will:

- discuss the issues and the lawyer's obligations with the child
- attempt to resolve the conflict with the child
- advise the Court of the lawyer's position and, if the conflict cannot be resolved and as a matter of professional judgment the lawyer can only advocate the child's views, invite the Court to appoint a separate lawyer in respect of welfare and best interests.¹⁰⁸

83 *Children, Young Persons and Their Families Act 1989* (NZ) ss 39(3)(b)(i), 40(4)(b)(i), 42(1)(b).

84 *Children, Young Persons and Their Families Act 1989* (NZ) s 44(1).

85 *Children, Young Persons and Their Families Act 1989* (NZ) s 45.

86 *Children, Young Persons and Their Families Act 1989* (NZ) s 46(a)(i).

87 *Children, Young Persons and Their Families Act 1989* (NZ) s 46(a)(ii).

88 *Children, Young Persons and Their Families Act 1989* (NZ) ss 46(c), 121.

89 However, it should be noted that an application can be made without first attending an FGC where the child or young person has been removed: *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2)(a).

90 *Children, Young Persons and Their Families Act 1989* (NZ) s 139. This agreement can be made for up to 28 days and extended for another 28 days if the parents are not able to resume care of the child or young person at the end of the initial period: ss 139(1)(b), (2).

91 *Children, Young Persons and Their Families Act 1989* (NZ) s 67.

92 As noted above, it is likely that proceedings will be commenced where the FGC has been unable to reach an agreement.

93 *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2)(a).

94 *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2)(b).

95 *Children, Young Persons and Their Families Act 1989* (NZ) ss 70(2)(c), 78. An FGC must be convened within 28 days of a custody order pending final determination being granted: *Draft Interim Custody Minute*, proposed final as at 30 November 2009, received via email from Judge Peter Boshier, Principal Family Court Judge, New Zealand, 5 March 2010.

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

97 *Children, Young Persons and Their Families Act 1989* (NZ) ss 14(1), 67.

Grounds are discussed above. Note that the Court may make a declaration in the absence of proof of responsibility for neglect or ill-treatment of a child or young person: s 71.

98 *Children, Young Persons and Their Families Act 1989* (NZ) s 72. The exception to this is where the child or young person has been abandoned: ss 14(1)(g), 70(2)(c), 72(2).

99 *Children, Young Persons and Their Families Act 1989* (NZ) s 170(1).

100 *Children, Young Persons and Their Families Act 1989* (NZ) s 171.

101 *Children, Young Persons and Their Families Act 1989* (NZ) s 172(1).

102 *Children, Young Persons and Their Families Act 1989* (NZ) s 177.

103 *Children, Young Persons and Their Families Act 1989* (NZ) s 172(2). Note, however, that attendance of legal representatives for participants other than the child or young person is at the discretion of the presiding Family Court judge: s 172(2)(d)(i).

104 *Children, Young Persons and Their Families Act 1989* (NZ) s 174.

105 *Children, Young Persons and Their Families Act 1989* (NZ) s 159(1). So far as possible, this barrister or solicitor should be suitably qualified by reason of his or her personality, training, cultural background and experience to represent the child or young person: s 159(3).

106 Judge Peter Boshier, Principal Family Court Judge, *Family Court Professional Services Practice Note: Lawyer for the Child Code of Conduct* (2007) 2. This practice note is guided by the *United Nations Convention on the Rights of the Child*.

107 *Ibid.*

108 *Ibid.*

- 5.36 If, because of age, maturity or a disability, a child is unable to express a view or guide representation in any way, the lawyer is to represent the child in accordance with the child's welfare and best interests and put all factors that impact on the child's welfare and best interests before the Court.¹⁰⁹
- 5.37 At any stage in proceedings, the Court may also appoint a lay advocate for the child, even if the child already has a legal representative.¹¹⁰ Representations may be made to the Court on behalf of the child or young person by the child or young person, a barrister or solicitor, a lay advocate or, with the leave of the Court, any other person.¹¹¹ Representations may also be made to the Court by or on behalf of a parent, guardian or other person having care of the child.¹¹²
- 5.38 It appears that the child is not formally a party to proceedings, as persons with the right to appeal a Family Court decision are listed as: any party to the proceedings, the child or young person to whom the proceedings relate, and any other person prejudicially affected by the decision.¹¹³ Listing the child separately from 'party to the proceedings' in this manner suggests that the child is not a party. With regard to participation in proceedings, children over the age of 12 are to be given notice that there has been an application for a declaration that they are in need of care and protection.¹¹⁴ As noted, the child may make representations to the Court him- or herself.¹¹⁵

Court procedure

- 5.39 The CYPF Act 1989 provides for certain specialised court procedures in care and protection proceedings. These include the following:
- Some matters of urgency do not have to be heard by the Family Court but can be heard by a District Court.¹¹⁶
 - Certain applications may be heard together where they relate to the same child or young person. For example, an application for a declaration that a child is in need of care and protection may be heard at the same time as domestic violence proceedings.¹¹⁷
 - Care and protection proceedings are not open to the public and the CYPF Act 1989 provides an exhaustive list of persons who may attend (although this includes accredited news media reporters).¹¹⁸
 - The judge may require any person to leave while the child or young person gives evidence, or may confer with the child or young person in private.¹¹⁹

FINAL ORDERS

Types of orders

- 5.40 The Court has the power to make various orders if it declares that the child or young person is in need of care and protection.¹²⁰ It may:
- discharge the child or young person, or any parent, guardian or person having the care of the child or young person, from proceedings without further order¹²¹
 - order that the child or young person, or any parent, guardian or person having the care of the child or young person, come before the Court at any time within two years, if called¹²²
 - order that certain persons receive counselling¹²³

- make a services order, directing the Chief Executive or any other named person or organisation to provide specified services and assistance to the child or young person, parent, guardian or other person having care of the child or young person¹²⁴
- make a support order, directing the Chief Executive or any other named person or organisation to provide support to the child or young person for up to 12 months.¹²⁵ Unlike a services order, a support order creates a duty for the Chief Executive or other person or organisation to monitor the standard of care provided and to provide or coordinate the provision of services and resources that will ensure appropriate care¹²⁶
- make a restraining order, restraining any named person from doing certain things, including residing with the child or young person and using or threatening violence¹²⁷
- make a custody order, placing the child or young person in the custody of the Chief Executive, a social service, the director of a child and family support service, or any other person for a specified period¹²⁸
- make a guardianship order, appointing the Chief Executive, a social service, the director of a family support service, or any other person to be the child's guardian.¹²⁹

5.41 Services orders, restraining orders, support orders and custody orders may also be made on an interim basis pending the determination of an application for a declaration that a child is in need of care and protection.¹³⁰ Where the Court proposes to make a services, support, custody or guardianship order, it must first obtain and consider a plan for the child or young person.¹³¹

109 Ibid 3.

110 *Children, Young Persons and Their Families Act 1989* (NZ) s 163. The role of the lay advocate is to ensure that the Court is made aware of relevant cultural matters and to represent the interests of the child or young person's *whānau* (extended family) *hapu* (a *hapu* is made of extended family groups) and *iwi* (tribe) to the extent that those interests are not otherwise represented in the proceedings: s 164.

111 *Children, Young Persons and Their Families Act 1989* (NZ) s 169(1).

112 *Children, Young Persons and Their Families Act 1989* (NZ) s 169(2).

113 *Children, Young Persons and Their Families Act 1989* (NZ) s 341(2).

114 *Children, Young Persons and Their Families Act 1989* (NZ) s 153.

115 *Children, Young Persons and Their Families Act 1989* (NZ) s 169(1).

116 *Children, Young Persons and Their Families Act 1989* (NZ) s 151. Urgent matters that can be heard in a District Court rather than the Family Court are: applications by parents or guardians for release of or access to the child or young person; proceedings following the removal of the child or young person; applications for custody pending final determination; and applications for interim restraining orders: s 152.

117 *Children, Young Persons and Their Families Act 1989* (NZ) s 158.

118 *Children, Young Persons and Their Families Act 1989* (NZ) s 166.

119 *Children, Young Persons and Their Families Act 1989* (NZ) s 167.

120 *Children, Young Persons and Their Families Act 1989* (NZ) s 83.

121 *Children, Young Persons and Their Families Act 1989* (NZ) s 83(1)(a).

122 *Children, Young Persons and Their Families Act 1989* (NZ) s 83(1)(b).

123 *Children, Young Persons and Their Families Act 1989* (NZ) s 83(1)(c).

124 *Children, Young Persons and Their Families Act 1989* (NZ) ss 83(1)(d), 86. The Chief Executive or the person or organisation that is to provide the services must be given notice of the Court's intention to make such an order and must be given an opportunity to be heard. An order directing the Chief Executive to provide services can be made without the consent of the Chief Executive: s 86(2)–(3).

125 *Children, Young Persons and Their Families Act 1989* (NZ) ss 83(1)(f), 91. As with a services order, the Chief Executive or the person or organisation that is to provide the services must be given notice of the Court's intention to make such an order and must be given an opportunity to be heard. An order directing the Chief Executive to provide services can be made without the consent of the Chief Executive: ss 91(2)–(3).

126 *Children, Young Persons and Their Families Act 1989* (NZ) s 93.

127 *Children, Young Persons and Their Families Act 1989* (NZ) ss 83(1)(e), 87.

128 *Children, Young Persons and Their Families Act 1989* (NZ) ss 83(1)(g), 101. Other than the Chief Executive, the person in whose custody the child or young person is placed must consent to such placement: s 101(3). A custody order expires when the child or young person turns 17, the young person marries or enters a civil union, or the child or young person is adopted by someone other than their parent: s 108.

129 *Children, Young Persons and Their Families Act 1989* (NZ) s 110. Other than the Chief Executive, the person appointed to be a guardian of the child or young person must consent to it: s 111. A guardianship order ceases to have effect when the young person reaches the age of 20 or marries or enters a civil union: s 117(1).

130 *Children, Young Persons and Their Families Act 1989* (NZ) ss 86A, 88, 92, 102.

131 *Children, Young Persons and Their Families Act 1989* (NZ) s 128. The Court directs who is to provide this plan and it is possible for the plan of an FGC, if one has been formulated, to be used for this purpose: ss 128(4), 129.

Review of orders

- 5.42 Various people listed in the CYPF Act 1989 may apply for an order to be varied or discharged.¹³² Applications may also be made to have support orders suspended.¹³³ The child or young person, a parent or guardian of the child or young person, a barrister or solicitor of the child or young person, and various other parties can make such an application.¹³⁴ The Court can vary or discharge the order, discharge a condition of the order or impose further conditions on the order.¹³⁵ Alternatively, the Court may refer an application for variation, discharge or suspension of an order to an FGC.¹³⁶

APPEALS FROM DECISIONS OF THE FAMILY COURT

- 5.43 If the Family Court decides to make or refuses to make an order to dismiss or otherwise finally determine the proceedings, a party to the proceedings, the child or young person to whom the proceedings relate or any other person prejudicially affected by the decision may appeal to the High Court against the decision.¹³⁷ For interlocutory or interim orders, a party to the proceedings, a child or young person to whom the proceedings relate, or any other person prejudicially affected by the order may appeal to the High Court with the leave of the Family Court.¹³⁸
- 5.44 Further appeals from decisions of the High Court are to the Court of Appeal, with leave of the Court of Appeal.¹³⁹

SCOTLAND**GENERAL**

- 5.45 Child protection in Scotland is governed by the *Children (Scotland) Act 1995*¹⁴⁰ (CS Act 1995) and its related rules.¹⁴¹ The CS Act 1995 provides the legislative basis for the children's hearings system,¹⁴² including the processes relating to referral and investigation of matters, and the Sheriff's Court. Of the principles that underpin the CS Act 1995 and guide the actions of the children's hearings, panels and courts, the welfare of the child is the paramount consideration.¹⁴³
- 5.46 Some distinguishing features of the Scottish child protection system are:
- Most matters are dealt with by children's hearings, which are conducted by tribunals of lay volunteers from the community.
 - The children's hearing system deals with juvenile justice matters and child protection matters together.
 - There is a principle that no order or supervision requirement can be made by a court or a children's hearing, unless it is determined that it would be better for the child than none being made at all.¹⁴⁴

Terminology within the Act

- 5.47 'Child' is defined in different ways throughout the CS Act 1995. For provisions relating to the children's hearing system, a child is generally defined as someone under the age of 16 years.¹⁴⁵ The term 'relevant person' is used repeatedly throughout the CS Act 1995 in relation to both children's hearings and Sheriff's Court proceedings; it means a person who enjoys or is vested with parental responsibilities and rights.¹⁴⁶

NOTIFICATION AND INVESTIGATION OF PROTECTION CONCERNS

The role of the local authority

- 5.48 Local authorities¹⁴⁷ (LAs), which are central to the provision of children's services in Scotland, play a significant role in child protection and the children's hearing system. They have a general responsibility to provide services to promote and safeguard the welfare of 'children in need',¹⁴⁸ and they have specific responsibilities to children 'looked after by them', including children under supervision requirements.¹⁴⁹
- 5.49 Following notification, LAs must undertake inquiries when a child might require compulsory supervision¹⁵⁰ Social workers play a key role in the initial inquiries and investigation of matters referred to the LA.¹⁵¹ Appropriate matters are referred to the Children's Reporter.¹⁵²

The role of the children's reporter

- 5.50 In addition to LAs, anybody, including the child, may refer a matter to a reporter where they believe a child may require compulsory measures of supervision.¹⁵³ Only LAs and the police are obliged to refer such matters.¹⁵⁴ Most referrals are from police, but referrals are also made by social workers and health and education agencies.¹⁵⁵ Courts can also refer matters to a reporter.¹⁵⁶
- 5.51 Reporters are the gatekeepers to the children's hearings system, receiving and investigating referrals and ultimately deciding whether there are grounds for particular matters to go to a hearing. They are trained officers of an independent statutory agency—the Scottish Children's Reporter Administration¹⁵⁷—and usually have legal training or social work backgrounds.¹⁵⁸
- 5.52 Once a referral is received, the reporter undertakes an initial investigation, usually obtaining the LA's report about the child and information from other relevant persons.¹⁵⁹ The reporter may then decide to:
- take no further action
 - refer the child to an appropriate LA
 - decide a children's hearing is required and arrange one.¹⁶⁰

The reporter can only refer the matter to a hearing if satisfied that compulsory measures of supervision are necessary and that at least one of the grounds listed in the CS Act 1995 is established.¹⁶¹ The majority of referrals to the reporter do not proceed to a hearing.¹⁶²

- 132 *Children, Young Persons and Their Families Act 1989* (NZ) ss 125–6.
- 133 *Children, Young Persons and Their Families Act 1989* (NZ) s 125(2).
- 134 *Children, Young Persons and Their Families Act 1989* (NZ) ss 125–6. Any person may make such an application with the leave of the Court: s 126(o).
- 135 *Children, Young Persons and Their Families Act 1989* (NZ) s 127.
- 136 *Children, Young Persons and Their Families Act 1989* (NZ) s 126A.
- 137 *Children, Young Persons and Their Families Act 1989* (NZ) s 341(1)–(2).
- 138 *Children, Young Persons and Their Families Act 1989* (NZ) s 341(3).
- 139 *Children, Young Persons and Their Families Act 1989* (NZ) s 347.
- 140 *Children (Scotland) Act 1995* (Scot).
- 141 *Children's Hearings (Scotland) Rules 1996* (Scot); *Children's Hearings (Legal Representation)(Scotland) Rules 2002* (Scot); *Children's Hearings (Legal Representation)(Scotland) Amendment Rules 2009* (Scot); *The Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001* (Scot).
- 142 Established in *Social Work (Scotland) Act 1968* (Scot), then incorporated into the current Act.
- 143 *Children (Scotland) Act 1995* (Scot) s 16(1). The s 16(5) paramountcy principle can be rebutted as a matter of public safety.
- 144 *Children (Scotland) Act 1995* (Scot) s 16(3).
- 145 *Children (Scotland) Act 1995* (Scot) s 93(2).
- 146 *Children (Scotland) Act 1995* (Scot) s 93.
- 147 Local authorities are councils established under the *Local Government etc. (Scotland) Act 1994* (Scot). Scotland has 32 local authority areas.
- 148 *Children (Scotland) Act 1995* (Scot) s 22. This includes, as far as is consistent with this duty, promoting the upbringing of such children by their families.
- 149 *Children (Scotland) Act 1995* (Scot) s 17. Supervision requirements are measures imposed by children's hearings and are discussed below.
- 150 *Children (Scotland) Act 1995* (Scot) s 53.
- 151 Edinburgh, Lothian and Borders Executive Group, *Edinburgh and Lothians Inter-Agency Child Protection Procedures* (2007) [4.1].
- 152 *Children (Scotland) Act 1995* (Scot) s 53. The Children's Reporter is referred to under the *Children (Scotland) Act 1995* (Scot) as the 'Principal Reporter' and delegates functions to reporters in the Scottish Children's Reporter Administration. These delegates of the Principal Reporter are referred to here as 'reporters'.
- 153 *Children (Scotland) Act 1995* (Scot) s 53(2). In 2008–09, 47 178 children were referred to the reporter: Scottish Children's Reporter Administration, *Online Statistics 2008/2009* (2009). As some children are referred multiple times, the overall number of referrals was 83 742.
- 154 *Children (Scotland) Act 1995* (Scot) s 53. LAs must report where they receive information which 'suggests' compulsory measures are required: s 53(1). Police officers must report where they have 'reasonable cause' to believe compulsory measures are required: s 53(2).
- 155 Scottish Children's Reporter Administration, *Online Statistical Dashboard* <www.scra.gov.uk/cms_resources/SCRA%20online%20statistical%20dashboard.swf> at 27 April 2010.
- 156 *Children (Scotland) Act 1995* (Scot) s 54. This can occur when a matter relating to a child which satisfies one of the grounds listed in s 52 of the Act arises during particular proceedings, including proceedings relating to parental responsibilities. Under this provision, acceptance of a ground by the child or relevant person is not required.
- 157 Formed under the *Local Government etc. (Scotland) Act 1994* (Scot).
- 158 Scottish Children's Reporter Administration, *A Day in the Life of a Children's Reporter* <www.scra.gov.uk/recruitment/a_day_in_the_life.cfm> at 27 April 2010. There are approximately 220 reporters in Scotland.
- 159 Note that the LA is under an obligation to provide information and reports on the child as required: *Children (Scotland) Act 1995* (Scot) s 56(2), (7).
- 160 *Children (Scotland) Act 1995* (Scot) s 56 (4)–(6).
- 161 *Children (Scotland) Act 1995* (Scot) ss 65, 52.
- 162 Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (2001) 210.

Grounds for determining that measures of supervision are necessary

- 5.53 In order for compulsory measures of supervision to be considered necessary, and for referral of the matter for a children's hearing, one of the grounds listed in the CS Act 1995 must be satisfied. These grounds include that the child:
- is beyond the control of any relevant person
 - is falling into bad associations or is exposed to moral danger
 - is likely to suffer unnecessarily or be impaired seriously in his or her health or development due to a lack of parental care
 - has failed to attend school regularly without reasonable excuse
 - has committed an offence
 - has misused alcohol, drugs or volatile substances
 - is the victim of particular offences, including physical injury or sexual abuse
 - in certain circumstances, behaves in such a way that special measures are necessary in the interest of the child or others.¹⁶³

PRE-HEARING PROCESSES

- 5.54 The CS Act 1995 does not mandate any specific pre-hearing ADR processes. However, a policy and practice emphasis on child protection and service delivery has responded to concerns about the hearing system, including the 'ever increasing' number of referrals.¹⁶⁴ There is now a focus is on improving and encouraging all children's access to the services they need, ensuring that only appropriate cases are referred into the hearing system and promoting multi-agency coordination and cooperation.¹⁶⁵ Child protection case conferences (CPCs) seek to fulfil these aims.
- 5.55 CPCs are a feature of LA pre-hearing processes where initial investigation has raised concerns.¹⁶⁶ A CPC is 'a formal multi agency meeting that shares agencies' assessments ... and identifies necessary actions to protect a child', and will usually involve the child and family.¹⁶⁷ A CPC can decide to refer the matter to the reporter, apply for exclusion or child protection orders, and place the child on the Child Protection Register.¹⁶⁸ If a CPC results in a matter being referred to the reporter, it may subsequently be referred for a children's hearing.
- 5.56 Before a children's hearing occurs, the reporter may meet members of the children's panel who will hear the matter.¹⁶⁹ This is referred to as a 'business meeting' and will determine procedural and other matters, as well as defining the reporter's role in the hearing.¹⁷⁰ The child and any relevant person will have the opportunity to have their views presented through the reporter.¹⁷¹

HEARING OF PROTECTION MATTERS: THE CHILDREN'S HEARING**General**

- 5.57 The children's hearing system is a central component of the Scottish child protection jurisdiction. Tribunals comprised of unpaid laypeople from within the community run children's hearings.¹⁷² These tribunals are responsible for decision making in most matters relating to the welfare of children, whether they are referred because of 'child maltreatment or of offending behaviour'.¹⁷³ A protection matter can be determined in two primary ways: the general children's hearing procedure or, in certain circumstances, referral to the Sheriff's Court.¹⁷⁴

- 5.58 The 1964 Kilbrandon Report¹⁷⁵ led to the development of the hearing system. The report was triggered by concerns about how children ‘at risk’ or ‘in trouble’ were being dealt with.¹⁷⁶ In part, the report found that child offenders and children in need of care and protection faced common issues, namely ‘a failure in the normal experiences of upbringing’.¹⁷⁷ The report also recommended that another system would be preferable to court as a forum for making decisions about child welfare.¹⁷⁸
- 5.59 The children’s hearing system is seen as welfare and child focused.¹⁷⁹ It is a decision-making system that ‘puts the child at the centre and involves local people in deciding what is the right thing to do in the best interests of children’.¹⁸⁰ The emphasis of the children’s hearing is ‘on the social and environmental aspects of children’s problems rather than on legal problems’.¹⁸¹ Two significant features, essentially developed from the Kilbrandon Report findings and principles, underpin the children’s hearing system:
- It a single system for dealing with all children in trouble and at risk. Consequently, grounds for referral of a matter to a children’s hearing include that a child is ‘uncontrollable’, has offended, or is at risk of harm.¹⁸²
 - There is a ‘separation between the establishment of issues of disputed fact and decisions on the treatment of the child’.¹⁸³ A children’s hearing undertakes the second function but can only make final decisions on grounds accepted by the child and relevant person.¹⁸⁴ Where grounds are disputed, the Sheriff’s Court must find them established on the facts before the matter can be remitted to a children’s hearing.¹⁸⁵

- 163 *Children (Scotland) Act 1995* (Scot) s 52(2).
- 164 Scottish Children’s Reporter Administration, *Interim Report on the Monitoring of Non-Offence Pre-Referral Activity to the Reporter* (2008) 1.
- 165 For further information see Scottish Government, *Getting it Right for Every Child: Overview* <www.scotland.gov.uk/Topics/People/Young-People/childrenservices/girfec/programme-overview> at 22 June 2010.
- 166 Edinburgh, Lothian and Borders Executive Group, above n 151. CPCCs are convened on behalf of child protection committees—bodies consisting of representatives from agencies such as the local authority, police, health and children’s services, which oversee child protection processes and services in their area and are a point of inter-agency communication and liaison. Note, however, that CPCCs are not legislatively mandated.
- 167 *Ibid* [11.1].
- 168 *Ibid* [11.11]. The CPCC may also decide that no further action is required, or the child or family are referred voluntarily to support agencies or services.
- 169 *Children (Scotland) Act 1995* (Scot) s 64(1).
- 170 *Children (Scotland) Act 1995* (Scot) s 64(3).
- 171 *Children (Scotland) Act 1995* (Scot) s 64(2), (4).
- 172 Sheehan, above n 162, 207.
- 173 *Ibid*. Note that the focus of the Commission’s discussion is on applications made on care and protection grounds, pursuant to our terms of reference. Provisions relating to child offenders may be somewhat different from or additional to those covered here.
- 174 One such circumstance involves making an emergency application to the Court where there is fear of significant harm to the child. The general children’s hearing procedure is discussed immediately below, while the emergency route is detailed under ‘Court and associated processes’, as it is generally initiated by application to the Court for an order.
- 175 Scottish Home and Health Department, *Children and Young Persons Scotland* (1964). The Kilbrandon Report was largely focused on child offenders. There has been a significant shift, with welfare grounds the dominant grounds for referral today.
- 176 Scottish Government, *Children’s Hearings: The Foundation of the Children’s Hearings System* <www.chscotland.gov.uk/background.asp> at 27 April 2010.
- 177 Scottish Home and Health Department, *Children and Young Persons Scotland* (1964), reprinted as *Kilbrandon Report* (1995) 9.
- 178 *Ibid* 26–7. Court was, however, considered to be an ideal forum for determining questions of fact.
- 179 Scottish Government, *Children’s Hearings* <www.chscotland.gov.uk/> at 27 April 2010.
- 180 Scottish Executive, *United Nations Convention on the Rights of the Child: A Report on Implementation of the UN Convention on the Rights of the Child in Scotland 1999-2007* (2007) 41.
- 181 Sheehan, above n 162, 211–12.
- 182 *Children (Scotland) Act 1995* (Scot) s 52.
- 183 Scottish Home and Health Department, above n 175, vii.
- 184 *Children (Scotland) Act 1995* (Scot) s 65.
- 185 *Children (Scotland) Act 1995* (Scot) s 65.

Children's hearings panels

- 5.60 Each LA area is required to have a panel of members available to sit at children's hearings.¹⁸⁶ The members are trained lay volunteers from the local community, sitting on a rota basis.¹⁸⁷ Initially, members are appointed for three years, and appointments may be extended.¹⁸⁸ Each local area has a Children's Panel Advisory Committee that nominates members for the panel, who are then appointed by the State Secretary.¹⁸⁹
- 5.61 Each children's hearing is conducted before a tribunal of three members.¹⁹⁰ The tribunal must not be solely comprised of men or women¹⁹¹ and the aim is to have a mix of backgrounds and ages represented by the sitting members.¹⁹²
- 5.62 A children's hearing will ultimately decide whether a child requires compulsory measures of supervision (also referred to as supervision requirements), and, if so, which measures.¹⁹³ Compulsory measures can be for the protection, guidance, treatment or control of the child, and will include where the child is to reside, including secure accommodation.¹⁹⁴ There may be conditions on the compulsory measures regulating contact with the child.¹⁹⁵

Procedure and processes of children's hearings

- 5.63 The first sitting of a children's hearing establishes whether the child and the relevant person¹⁹⁶ accept or dispute the grounds of referral to the hearing.¹⁹⁷ As noted previously, if the grounds are disputed the matter will be referred to the Sheriff's Court to determine whether the grounds are established on the facts.¹⁹⁸ If the grounds are made out on the facts, the matter will be remitted to the children's hearing.¹⁹⁹ In circumstances where the grounds are accepted by both the child and the relevant person, there is no need for referral to the Sheriff's Court.
- 5.64 A children's hearing is 'informal, non-adversarial, direct and participatory'.²⁰⁰ In order to make a determination, a children's hearing will consider the LA's report, any other relevant information, and the views of the child, the relevant person and, if present, the safeguarder²⁰¹ and any representatives.²⁰²
- 5.65 Although present at hearings, the reporter has no part in decision making; their role during a hearing is to ensure fair processes are followed.²⁰³ There is no legislative requirement for continuity of either the reporter or the children's hearing members.
- 5.66 The children's hearing discusses the circumstances of the child fully with the parents, the child or young person and any representatives, the social worker and the teacher, if present. As the hearing is concerned with the wider picture and the long-term wellbeing of the child, the measures implemented will be based on the welfare of the child. They may not appear to relate directly to the reasons that were the immediate cause of the child's appearance at the hearing.²⁰⁴

Representation and participation in children's hearings

- 5.67 Children have a right to attend the hearing and in general must attend. The relevant person is legally required to attend.²⁰⁵ Both are considered central participants.²⁰⁶ As far as is practicable, a child should have the right to express his or her views and have these views considered.²⁰⁷ The child's views cannot be given to the hearing confidentially, although the members have the power to exclude the relevant person for a period and later explain the substance of what happened in the person's absence.²⁰⁸

- 5.68 One of the determinations that a children's hearing makes is whether to appoint either or both a legal representative or a safeguarder. A safeguarder is appointed if the members determine that this is necessary to safeguard the interests of the child in the proceedings.²⁰⁹ Safeguarders are often appointed when there are conflicting views, either between the child and relevant person, or between either of these parties and the social worker.²¹⁰ There is some evidence that safeguarders are appointed in approximately 10 per cent of cases.²¹¹
- 5.69 The role of the safeguarder is to make recommendations on the child's best interests, producing a report for the children's hearing.²¹² The safeguarder is appointed from a panel maintained by the LA, which can include legally-qualified safeguarders.²¹³
- 5.70 Since 2002, free legal representation at hearings has been available for children, either when it is required to ensure effective participation, or when the hearing is considering or reviewing placement of a child in secure accommodation.²¹⁴ Since 2009, state-funded legal representation has also been available for relevant persons in children's hearings where it is necessary to ensure effective participation.²¹⁵
- 5.71 Members decide whether to appoint a legal representative at a hearing or during a pre-hearing business meeting.²¹⁶ Children's legal representatives are qualified legal practitioners appointed from specialist panels maintained by LAs, and 'are expected to be sensitive to the atmosphere and ethos of the children's hearing'.²¹⁷ These legal representatives must be members of either the panel of safeguarders or *curator ad litem*,²¹⁸ which the LA maintains.²¹⁹
- 5.72 The 'regulations do not specify the role that the legal representative is to play',²²⁰ although there is a clear distinction between the role of legal representatives and safeguarders:

*A safeguarder safeguards the interests of the child, takes account of his/her views and interests and makes a recommendation on what is in the child's best interest. A legal representative will protect the child's rights, and if the child is able to instruct the solicitor, will act on the child's wishes. The legal representative need not consider the child's interests.*²²¹

- 186 *Children (Scotland) Act 1995* (Scot) s 39. There are approximately 2500 children's panel members working in Scotland: Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.
- 187 Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.
- 188 *Ibid.*
- 189 *Children (Scotland) Act 1995* (Scot) sch 1.
- 190 *Children (Scotland) Act 1995* (Scot) s 39(5).
- 191 *Children (Scotland) Act 1995* (Scot) s 39(5).
- 192 Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.
- 193 *Children (Scotland) Act 1995* (Scot) s 70.
- 194 *Children (Scotland) Act 1995* (Scot) s 70.
- 195 *Children (Scotland) Act 1995* (Scot) s 70(5)(b).
- 196 As noted previously, a 'relevant person' is someone vested with parental rights and responsibilities: *Children (Scotland) Act 1995* (Scot) s 93.
- 197 *Children (Scotland) Act 1995* (Scot) s 65. Matters will also be referred to the sheriff for a finding if the hearing is satisfied that the child will be incapable of understanding the grounds or the hearing if, for example, the child is too young.
- 198 *Children (Scotland) Act 1995* (Scot) s 65. The grounds are set out above.
- 199 This is discussed further under 'Court and associated processes' below. The hearing can also discharge the grounds if this is considered more appropriate.
- 200 Sheehan, above n 162, 211.
- 201 The safeguarder makes recommendations on the child's best interests and produces a report for the hearing. This is discussed below in this chapter.
- 202 *Children's Hearings (Scotland) Rules 1996* (Scot) r 20.
- 203 Scottish Children's Reporter Administration, *The Children's Hearings System: How it Works* <www.scr.gov.uk/children_s_hearings_system/index.cfm> at 27 April 2010.
- 204 *Ibid.*
- 205 *Children (Scotland) Act 1995* (Scot) s 45.
- 206 Scottish Children's Reporter Administration, *The Children's Hearings System: How it Works*, above n 203.
- 207 *Children (Scotland) Act 1995* (Scot) s 16(2).
- 208 *Children (Scotland) Act 1995* (Scot) s 46.
- 209 *Children (Scotland) Act 1995* (Scot) s 41.
- 210 Scottish Executive, *Scotland's Children Research Findings No1: The Role of Safeguarders in Scotland* (2002) 3. A safeguarder may also be appointed when the views of the child are difficult to obtain, or when there are gaps in the information put before the hearing. The appointment of a specific safeguarder is usually left to the reporter.
- 211 *Ibid.* The report suggests that there are discrepancies between different data sources.
- 212 *Children's Hearings (Scotland) Rules 1996* (Scot) r 14.
- 213 *The Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001* (Scot).
- 214 *Children's Hearings (Legal Representation) (Scotland) Rules 2002* (Scot) r 3. See also, Rachel Ormston and Louise Marryat, *Review of the Children's Legal Representation Grant Scheme: Research Report* (2009) 4.
- 215 *Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009* (Scot). This amends *Children's Hearings (Legal Representation) (Scotland) Rules 2002* (Scot), inserting r 3A.
- 216 The business meeting is discussed above under 'Pre-hearing processes'.
- 217 Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.
- 218 A *curator ad litem* is a 'legal representative' appointed where 'the court believes that the person lacks the mental capacity to make decisions for themselves': Ormston and Marryat, above n 214, 4.
- 219 *Children's Hearings (Scotland) Rules 1996* (Scot) r 5.
- 220 Kenneth Norrie, *Hearing and Speaking* (2010) The Journal Online <www.journalonline.co.uk/Magazine/55-1/1007435.aspx> at 18 January 2010.
- 221 Scottish Executive, *Advice to Panel Members: The Children's Hearings (Legal Representation) (Scotland) Rules 2001* (2002) as cited in Ormston and Marryat, above n 214, 33. It has been suggested that the distinction between safeguarder and legal representative can be confusing: Ormston and Marryat, above n 214, 33.

Outcomes of children's hearings

5.73 As noted above, the primary function of children's hearings is to determine whether a child requires compulsory measures of supervision. A children's hearing has significant powers and can decide to:

- make a supervision requirement
- continue to a subsequent hearing because the tribunal determines further investigation is needed to make a determination
- discharge the referral
- grant a warrant to find or remove the child, or move the child to a place of safety, and require the child to submit to medical or other treatment.²²²

5.74 The CS Act 1995 provides that the children's hearing should not put a supervision requirement in place unless it would be better for the child than no supervision requirement at all.²²³ Most children subject to supervision requirements will remain at home with supervision by a social worker.²²⁴ Less commonly, a hearing will decide that a child should reside with kinship or foster carers or in a residence managed by the LA or other organisation, which includes secure accommodation facilities.²²⁵ The duration of a supervision requirement is guided by the underlying principle that any such order should be in place only as long as it is 'necessary in the interest of promoting or safeguarding' the child's welfare.²²⁶ Without continuation or variation, a supervision order does not continue for longer than one year.²²⁷

5.75 Where a supervision requirement is ordered by a children's hearing, the relevant LA is required to give effect to that supervision requirement.²²⁸ Where an LA breaches this obligation, the reporter may enforce it. Where the child's place of residence is part of the supervision requirement, the LA is obliged to investigate whether the conditions of the supervision requirement are being fulfilled.²²⁹

5.76 The LA can refer a breach of a supervision requirement or its attached conditions to the reporter,²³⁰ and can take other measures, of which the LA must inform the reporter, including applying to a court for a parental responsibility order.²³¹

5.77 A review hearing is required to determine whether a supervision requirement should continue or be varied.²³² Prior to expiry or when, for example, the LA refers a case for consideration of variation, breach or termination, the reporter arranges a review of the supervision requirement by a children's hearing.²³³ At this point, the supervision requirement can be further investigated, continued, varied or terminated.²³⁴ Three months after an initial supervision requirement or a review decision as above has been made, a child or relevant person may require a review by a children's hearing panel.²³⁵

Appeals against children's hearings findings

5.78 The child or relevant person can appeal a decision of a children's hearing. The appeal must be made to the Sheriff's Court within three weeks of the hearing's decision²³⁶ and the sheriff is able to confirm or substitute a decision by a children's hearing.²³⁷

COURT AND ASSOCIATED PROCESSES

5.79 Although children's hearings are the main decision-making forum for children who are 'in trouble' or 'at risk', there are a number of reasons why matters involving such children may come before the Sheriff's Court.

5.80 The Sheriff's Court is the mechanism by which emergency child protection orders may be sought,²³⁸ the forum in which disputes over grounds of referral to a hearing are resolved,²³⁹ and the appeal body for children's hearing decisions.²⁴⁰ Additionally, there are a number of orders relating to children and their families which can only be made by the Court.²⁴¹

5.81 Legal aid is available in particular circumstances²⁴² for proceedings relating to child protection orders, child assessment orders and appeals from a children's hearing decision, including the decision to grant a warrant.²⁴³ If necessary, the sheriff may appoint a safeguarder to safeguard the child's interests in a proceeding before the Court.²⁴⁴

Emergency protection: child protection orders

5.82 Where the emergency protection of a child is sought, an application is made to the Sheriff's Court for a child protection order (CPO).²⁴⁵ Anybody, including an LA, can apply for a CPO.²⁴⁶ In order to grant a CPO, the sheriff must be satisfied:

- that there are reasonable grounds to believe that the child is being treated or neglected in such a way as to be suffering significant harm, or will suffer significant harm if not removed or retained at a place of safety, and
- that the order is necessary to protect the child.²⁴⁷

5.83 In certain circumstances, the LA may also apply for a CPO where it has reasonable grounds to believe that a child is suffering, or will suffer, significant harm due to the manner in which he or she is being treated or neglected, and is seeking to make inquiries to determine whether action needs to be taken.²⁴⁸ If access to the child is being unreasonably denied, the inquiries of the LA are being frustrated, and access to the child is required as a matter of urgency, the LA may apply for a CPO.²⁴⁹ In an emergency where a sheriff is unavailable, applications are made to a justice of the peace.²⁵⁰

222 *Children (Scotland) Act 1995* (Scot) s 69. Warrants are for up to 22 days and in the case of safe or secure accommodation placement a hearing may extend a warrant twice to a maximum of 66 days. For any further extension the reporter must apply to the sheriff under s 67.

223 *Children (Scotland) Act 1995* (Scot) s 16(3). In 2008–09, 4463 supervision requirements were made by children's hearings, with 13 523 in place overall: Scottish Children's Reporter Administration, *Online Statistics 2008/2009*, above n 153.

224 Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.

225 *Ibid.*

226 *Children (Scotland) Act 1995* (Scot) s 73(1).

227 *Children (Scotland) Act 1995* (Scot) s 73. Note that a supervision requirement ceases once the child attains 18.

228 *Children (Scotland) Act 1995* (Scot) s 71(1).

229 *Children (Scotland) Act 1995* (Scot) s 71(2).

230 *Children (Scotland) Act 1995* (Scot) s 73(4).

231 *Children (Scotland) Act 1995* (Scot) s 71(2).

232 *Children (Scotland) Act 1995* (Scot) s 73(9). All provisions relating to review hearings are in s 73.

233 *Children (Scotland) Act 1995* (Scot) s 73(8).

234 *Children (Scotland) Act 1995* (Scot) s 73(9).

235 *Children (Scotland) Act 1995* (Scot) s 73(6).

236 *Children (Scotland) Act 1995* (Scot) s 51.

237 *Children (Scotland) Act 1995* (Scot) s 51.

238 *Children (Scotland) Act 1995* (Scot) s 57, see below for further detail.

239 *Children (Scotland) Act 1995* (Scot) s 68, see below for further detail.

240 *Children (Scotland) Act 1995* (Scot) s 51. The appeal must be made within three weeks of the hearing's decision. Appeals are discussed above.

241 Child assessment orders, exclusion orders and parental responsibility orders are all discussed below. The Court also has the power to issue various warrants.

242 For appeals against warrants issued by a hearing, legal aid is granted on application without inquiry into the resources of the applicant: *Children (Scotland) Act 1995* (Scot) s 92. For other appeals, grants of legal aid are dependent on consideration by the sheriff of the interests of the child and financial circumstances.

243 *Children (Scotland) Act 1995* (Scot) s 92 (substituted for s 29 of the *Legal Aid (Scotland) Act 1986* (Scot)).

244 *Children (Scotland) Act 1995* (Scot) s 41. The Court may also appoint a *curator ad litem*.

245 *Children (Scotland) Act 1995* (Scot) s 57.

246 *Children (Scotland) Act 1995* (Scot) s 57.

247 *Children (Scotland) Act 1995* (Scot) s 57(1).

248 *Children (Scotland) Act 1995* (Scot) s 57(2).

249 *Children (Scotland) Act 1995* (Scot) s 57(2).

250 The justice of the peace must be satisfied that the conditions required for a CPO exist and that it is not practicable for such an order to be made by a sheriff: *Children (Scotland) Act 1995* (Scot) s 61.

- 5.84 When a CPO is made, the LA and the reporter must be informed,²⁵¹ and the reporter must arrange an initial children's hearing on the second working day after the order was implemented.²⁵² A CPO will cease to have effect if it is not acted upon within 24 hours.²⁵³ If the hearing determines that the CPO should be continued, the reporter must arrange a children's hearing on the eighth working day after the order was implemented.²⁵⁴ This hearing will take place in the manner described above.
- 5.85 The only power under the CS Act 1995 for the removal of a child without a CPO or approval of a justice of the peace lies with the police.²⁵⁵ A police officer can remove a child to a place of safety²⁵⁶ when the police officer has reasonable cause to believe the conditions for making a CPO are satisfied but it is not practicable in the circumstances to make that application.²⁵⁷ This power only allows for the child to be removed for 24 hours, and ceases if a CPO is applied for.²⁵⁸

Referral from a children's hearing on the basis of disputed grounds

- 5.86 Where a child and relevant person dispute a ground of referral to a hearing, or where, for example, the child is too young to be able to accept the grounds of referral, the children's hearing may direct the reporter to apply to the Sheriff's Court for a finding.²⁵⁹ A sheriff hears the application within 28 days of it being lodged.²⁶⁰ The child has a right to attend, and generally must attend.²⁶¹ The sheriff makes a determination based on the evidence provided to the Court by the reporter.
- 5.87 If the sheriff determines that the grounds are not established, the application is dismissed and the referral to the hearing is discharged.²⁶² Where the sheriff determines that a ground is established, it is remitted back to a hearing.²⁶³

Sheriff's court orders

- 5.88 In addition to CPOs, the Sheriff's Court can make other orders related to children and their families. These include child assessment orders, exclusion orders and parental responsibility orders. The Sheriff's Court must be satisfied when making an order that doing so would be better for the child than making no order at all.²⁶⁴
- 5.89 The Sheriff's Court has discretion to grant child assessment orders sought by an LA. The Court may grant a child assessment order if satisfied that:
- the authority has reasonable cause to believe a child is being treated so that she or he is or is likely to suffer significant harm
 - the assessment is needed to establish this, and
 - such assessment is unlikely to be carried out satisfactorily if such an order is not made.²⁶⁵
- 5.90 An LA can apply for an exclusion order, which, if granted, excludes any person named in the order from the child's home. The Court can grant the exclusion order if satisfied that:
- the child is suffering from significant harm as a result of any conduct by a named person
 - such an order is necessary for the child's protection, and
 - an exclusion order would better safeguard the child's welfare than removal of the child from the family home.²⁶⁶

The person the sheriff is considering excluding must have an opportunity to be heard before a final determination can be made, but an interim order can be granted.²⁶⁷

- 5.91 Parental responsibility orders may be sought by LAs to transfer appropriate parental rights and responsibilities of a child to them.²⁶⁸ These orders can be made where each relevant person either consents, or is in some way incapacitated or failing in their parental responsibilities.²⁶⁹

REFORM PROGRAM

- 5.92 The Scottish system has undergone significant review and reform. As noted previously, much of this reform has led to initiatives directed to improving all children's access to services as and when they need them, ensuring that only appropriate cases are referred into the hearing system, and promoting multi-agency coordination and cooperation.
- 5.93 The Children's Hearings (Scotland) Bill (Scot), introduced in 2010, contains additional proposed reforms.²⁷⁰ Overall, the reforms uphold the Kilbrandon philosophy and the children's hearing system.²⁷¹ The Scottish Government has described the reforms as necessary to modernise the system and provide appropriate support to practitioners and volunteers.²⁷²
- 5.94 Some notable recommendations include a move towards better national uniformity in the children's hearing system, including children's hearing panel recruitment and training.²⁷³ Recruitment and training of panel members would be managed by a newly established 'National Convenor', to be supported by the new body 'Children's Hearing Scotland', and localised support teams.²⁷⁴
- 5.95 Further, state-funded legal representation would be provided through the general civil route as administered by the Scottish Legal Aid Board (SLAB).²⁷⁵ Legal representation would be automatically available in some circumstances, including where the children's hearing considers it might be necessary to make a 'compulsory supervision order'.²⁷⁶ Where the SLAB is satisfied particular conditions are met, including that it is in the child's best interests, representation would also be available for proceedings before the Sheriff's Court, including appeals.²⁷⁷
- 5.96 The reforms would also require the SLAB to maintain a register of solicitors and firms eligible to provide children's legal assistance,²⁷⁸ and to draft a code of practice in relation to registered solicitors carrying out their provision of such assistance.²⁷⁹ Under the Bill, the Minister would be empowered to make regulations about qualifications required by registered solicitors.²⁸⁰
- 5.97 Under the Children's Hearings (Scotland) Bill (Scot), the role of the reporter would largely remain the same, but with the Ministers having power to make regulations changing the functions of the reporter.²⁸¹ LA accountability would be strengthened by empowering a hearing to be able to direct the National Convenor to take an LA to court when there are concerns about the LA implementing a hearing's decisions.²⁸²
- 5.98 The Bill was at the initial 'Inquiry and Report' stage at the time of writing, and has been referred to a committee of the Scottish Parliament for consideration. The committee is due to report by July 2010.²⁸³

- 251 *Children (Scotland) Act 1995* (Scot) s 57(5).
- 252 *Children (Scotland) Act 1995* (Scot) s 59(3).
- 253 *Children (Scotland) Act 1995* (Scot) s 60.
- 254 *Children (Scotland) Act 1995* (Scot) s 65(2).
- 255 *Children (Scotland) Act 1995* (Scot) s 61(5).
- 256 *Children (Scotland) Act 1995* (Scot) s 93(1) defines place of safety to include an LA-run residence, a community home, a police station, a hospital or other suitable place.
- 257 *Children (Scotland) Act 1995* (Scot) s 61(5).
- 258 *Children (Scotland) Act 1995* (Scot) s 61(5)–(7).
- 259 *Children (Scotland) Act 1995* (Scot) s 65(7)–(9). In the alternative, the hearing is able to discharge grounds.
- 260 *Children (Scotland) Act 1995* (Scot) s 68(2).
- 261 *Children (Scotland) Act 1995* (Scot) s 68(4).
- 262 *Children (Scotland) Act 1995* (Scot) s 68(8).
- 263 *Children (Scotland) Act 1995* (Scot) s 68(10).
- 264 *Children (Scotland) Act 1995* (Scot) s 16(3).
- 265 *Children (Scotland) Act 1995* (Scot) s 55.
- 266 *Children (Scotland) Act 1995* (Scot) s 76(1)–(2).
- 267 *Children (Scotland) Act 1995* (Scot) s 76.
- 268 *Children (Scotland) Act 1995* (Scot) s 86–8.
- 269 *Children (Scotland) Act 1995* (Scot) s 86.
- 270 Scottish Government, *Children's Hearings System Reform* <www.scotland.gov.uk/Topics/People/Young-People/c-h-bill> at 27 April 2010.
- 271 *Ibid.*
- 272 Scottish Government, *News Release: Children's Hearings Bill* (24 February 2010) <www.scotland.gov.uk/News/Releases/2010/02/24093143> at 21 June 2010.
- 273 Explanatory Notes, *Children's Hearings (Scotland) Bill* (Scot) 2.
- 274 *Ibid.*
- 275 *Ibid.* 53.
- 276 *Ibid.* 52. 'Compulsory supervision orders' would be equivalent to the current 'supervision requirements'.
- 277 *Ibid.* 53.
- 278 *Ibid.* 55–56.
- 279 *Ibid.* 57.
- 280 *Ibid.* 56.
- 281 *Ibid.* 3–5. It should be noted that any advice to a hearing, including on fair hearing processes, becomes the responsibility of the National Convenor.
- 282 *Ibid.* 39.
- 283 The Scottish Parliament, *Children's Hearings (Scotland) Bill* (SP Bill 41) <www.scottish.parliament.uk/s3/bills/41-ChildrensHearing/index.htm> at 27 April 2010.

ENGLAND AND WALES

GENERAL

5.99 *The Children Act 1989* (UK) (CA 1989) governs child protection in England and Wales. It came into force on 14 October 1991 and was considered to be ‘the most comprehensive and far-reaching reform of child law which [had] come before parliament in living memory’.²⁸⁴ Some distinguishing features of the child protection system in England and Wales are:

- Only police have the power to remove a child from his or her accommodation without judicial authorisation.²⁸⁵
- Lay magistrates sit in the Family Proceedings Court²⁸⁶—one of the courts with jurisdiction to deal with child protection proceedings.
- There is a statutory requirement for the Court to appoint a guardian *ad litem* for specified proceedings,²⁸⁷ who then appoints a solicitor for the child.²⁸⁸ This results in a tandem representation model.
- A child is automatically a party to proceedings.²⁸⁹
- There is a ‘no order’ principle, meaning that before making an order, the Court must be satisfied that making the order would be better for the child than making no order at all.²⁹⁰

5.100 The CA 1989 consolidated earlier legislation, which was considered complex and fragmented, and responded to criticism of existing child protection practice.²⁹¹ The legislative framework is based on a best interests model, emphasising the preference for keeping the family unit together and the child at home.²⁹²

5.101 The CA 1989 was supplemented by the *Children Act 2004* (UK) (CA 2004).²⁹³ The CA 2004 enhances the child protection system in England and Wales by establishing a Children’s Commissioner and bodies responsible for inter-agency collaboration and provision of services,²⁹⁴ as well as setting up databases to hold information on all children.²⁹⁵ The rationale for enacting the CA 2004 was to

*encourage integrated planning, commissioning and delivery of services as well as improve multi-disciplinary working, remove duplication, increase accountability and improve the coordination of individual and joint inspections in local authorities.*²⁹⁶

5.102 The family justice system in England and Wales, including child welfare,²⁹⁷ is currently under review by the Ministry of Justice.²⁹⁸ The terms of reference direct an expert panel to consider the use of mediation as a way to avoid undue adversarialism in proceedings.²⁹⁹ Preserving the best interests of the child is the focus of the reference.³⁰⁰

KEY BODIES RESPONSIBLE FOR CHILD PROTECTION

5.103 **Local authorities (LAs):** are responsible for child protection matters under the CA 1989. They are the government structures responsible for social services, including children’s services, education and other services in each region. They are required to provide services to safeguard and promote the welfare of children within their area³⁰¹ and, by extension, promote the upbringing of such children.

5.104 **Department of Education (DE):** formerly the Department for Children, Schools and Families,³⁰² is responsible for the CA 1989 and for producing statutory and non-statutory guidelines for LAs.³⁰³

5.105 **Local Safeguarding Children Boards (LSCBs):** are statutory mechanisms ‘for agreeing how the relevant organisations in each local area will cooperate to safeguard and promote the welfare of children’.³⁰⁴ Their role is to foster inter-agency collaboration in the provision of services. LAs are responsible for establishing an LSCB in their area.³⁰⁵

5.106 **The Children and Family Court Advisory and Support Service (CAFCASS):** is a non-departmental public body that reports to the Secretary of State for Education, in what is now called the Department of Education.³⁰⁶ It brought together functions previously provided by three agencies, namely: the Family Court Welfare Service, the *Guardian Ad Litem* and Reporting Service, and the Children’s Division of the Official Solicitor’s Office.³⁰⁷

COMMENCEMENT OF A CHILD PROTECTION MATTER

Notification and investigation

5.107 Although there are no mandatory reporting laws in England or Wales, guidelines issued by professional bodies and LSCBs emphasise the need to make a referral where there is a ‘reasonable belief that a child is at risk of significant harm’.³⁰⁸

5.108 Where an LA is informed or has reasonable cause to believe that a child is suffering or likely to suffer significant harm, the LA shall make such inquiries as it considers necessary to decide whether to take any action to safeguard the child’s welfare.³⁰⁹ If, in the course of inquiries, access to the child is being refused or the child’s whereabouts is being concealed, the LA is to apply for an order in respect of the child unless it is satisfied that the child’s welfare can be safeguarded without an order.³¹⁰

5.109 The LA child protection team must decide what action to take within one working day of receiving a referral.³¹¹ The LA must investigate concerns about any child who is physically present in its area.³¹² This includes a child who is the subject of an emergency protection order, is in police protection, or who is likely to suffer significant harm.³¹³

284 United Kingdom, *Parliamentary Debates*, House of Lords, vol 502, col 488 (Lord Chancellor Mackay).

285 *Children Act 1989* (UK) s 46.

286 Judiciary of England and Wales, *About the Judiciary: Family Justice* <www.judiciary.gov.uk/about_judiciary/roles_types_jurisdiction/family_justice/index.htm#5> at 29 April 2010.

287 *Children Act 1989* (UK) s 41.

288 *Children Act 1989* (UK) s 41(3). The roles of the guardian *ad litem* and child solicitor are discussed below.

289 *Children Act 1989* (UK) s 41. The party status of the child in ‘specified proceedings’ is implied from the appointment of a guardian *ad litem*: Jane Fortin, *Children’s Rights and the Developing Law* (3rd ed, 2009) 211.

290 *Children Act 1989* (UK) s 1(5). The no order principle means that when the Court is making a decision about the child’s welfare, it must first consider whether making the order is better for the child’s welfare than making no order at all.

291 See, for example, Elizabeth Butler-Sloss, *Report of the Inquiry into Child Abuse in Cleveland 1987* (1988) Cm 412, 244–54; Louis Blom-Cooper et al, *A Child in Trust: The Report of the Panel of Enquiry into the Circumstances Surrounding the Death of Jasmine Beckford* (1985); London Borough of Greenwich, *A Child in Mind: Report of the Commission of Inquiry into the Circumstances Surrounding the Death of Kimberley Carlile* (1987); Department of Health and Social Security (UK), *Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party* (1985).

292 Stephen Brown, ‘The Implementation of the Children Act 1989’ (1994) 16(1) *Liverpool Law Review* 3, 4.

293 Both the *Children Act 1989* (UK) and the *Children Act 2004* (UK) are currently in operation. The *Children Act 2004* (UK) did not repeal provisions of the *Children Act 1989* (UK) but contains additional provisions in relation to child protection in England and Wales.

294 *Children Act 2004* (UK) ss 1(1), 13. The UK Children’s Commissioner is discussed further in Option 5.

295 *Children Act 2004* (UK) s 12.

296 Department for Children, Schools and Families (UK), *The Children Act and Reports: The Children Act 2004* <www.dcsf.gov.uk/childrenactreport/> at 19 May 2010.

297 Family Justice Council, *The Aims of the Family Justice System* <www.family-justice-council.org.uk/system_aims.htm> at 19 May 2010.

298 Ministry of Justice (UK), *Family Justice System Review: Terms of Reference* (2010) <www.justice.gov.uk/news/docs/family-justice-review-terms-reference.pdf> at April 29 2010.

299 *Ibid.* There is a perception that court hearings are adversarial in nature due to the requirement for evidence to be thoroughly tested in order to satisfy the threshold criteria: Law Society, *Good Practice in Child Care Cases: A Guide for Solicitors Acting in Public Law Children Act Proceedings Including Involving Adoption* (2004) 9.

300 Ministry of Justice (UK), *Family Justice System Review*, above n 298.

301 A child is deemed to be ‘in need’ if she or he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for her or him of services by an LA; her or his health or development is likely to be significantly impaired, or further impaired, without the provision for her or him of such services; or she or he is disabled: *Children Act 1989* (UK) s 17.

302 The Department of Education was the Department of Children, Schools and Families until 12 May 2010.

303 Department for Education and Skills (UK), *Every Child Matters: Change for Children* (2006); Department for Children Schools and Families (UK), *Working Together to Safeguard Children: A Guide to Inter-Agency Working to Safeguard and Promote the Welfare of Children* (2010).

304 Department for Children, Schools and Families (UK), *Local Safeguarding Children Boards (LSCBs)* <www.dcsf.gov.uk/everychildmatters/safeguardingandsocialcare/safeguardingchildren/localsafeguardingchildrenboards/lscb/> at 24 May 2010.

305 *Ibid.*

306 Children and Family Court Advisory and Support Service (CAFCASS), *About CAFCASS* <www.cafcass.gov.uk/about_cafcass.aspx> at 24 May 2010.

307 The Official Solicitor’s Office formerly acted for children requiring separate representation, the guardian *ad litem* and Reporting Service represented children in public law proceedings, and the Court Welfare Service prepared ‘welfare reports’ for the courts if requested to do so: Fortin, above n 289, 247.

308 National Society for the Prevention of Cruelty to Children (NSPCC), *Child Protection Fact Sheet: The Child Protection System in the UK* (2010) 12. ‘Harm’ is defined as ‘ill treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another’: *Children Act 1989* (UK) s 31(9); definition added to by *Adoption and Children Act 2002* (UK) s 121.

309 *Children Act 1989* (UK) s 47(1). Investigation may also be the result of the LA learning that a child is the subject of an emergency protection order or in police custody.

310 *Children Act 1989* (UK) s 47(6).

311 Department for Children Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 144.

312 *Children Act 1989* (UK) s 47.

313 *Children Act 1989* (UK) s 47.

5.110 The LA may decide that no further action is necessary if the child is deemed to be at no risk of harm.³¹⁴ In all other circumstances, the child protection team operating within the LA will proceed with an initial assessment within ten working days of receiving the referral.³¹⁵ If it becomes evident that a child is at risk of significant harm, the LA can apply for an emergency protection order (EPO).³¹⁶

Child assessment orders

5.111 To enable an investigation to take place, an LA or authorised person³¹⁷ may apply to the Court for a child assessment order.³¹⁸ The Court may only grant such an order if:

- there is reasonable cause to believe that the child is suffering, or is likely to suffer, significant harm
- an assessment of the child's health, development, or the way in which he or she has been treated is necessary to determine whether the child is suffering harm, and
- it is unlikely that such an assessment could be satisfactorily made in the absence of a child assessment order.³¹⁹

5.112 A child assessment order lasts up to seven days³²⁰ and there is provision for the child to be kept away from home if it is necessary to conduct the assessment.³²¹ Child assessment orders are used very rarely.³²²

PRE-COURT PROCESSES

5.113 The CA 1989 and accompanying guidance encourages greater cooperation between those responsible for children and statutory or voluntary agencies.³²³ The purpose of this is to divert child protection matters away from court and legal processes and instead use the child welfare guidance of the Court to settle matters.³²⁴ Even after proceedings have been commenced, the Court can encourage and facilitate alternative dispute resolution at any stage, if it is safe and in the best interests of the child.³²⁵

5.114 Child protection procedures, including the conduct of the child protection conferences (CPCs), are the responsibility of LAs, acting in accordance with guidance from the relevant governmental department.³²⁶

Child protection conferences

5.115 A CPC is a multi-disciplinary meeting to discuss the case of a particular child.³²⁷ It is the responsibility of the LA to convene a child protection conference.³²⁸ This conference is chaired by an LA officer who is not responsible for managing the child's case.³²⁹ The purpose of a CPC is to assess all relevant information and agree on a child protection plan in order to best safeguard and promote the welfare of that child.³³⁰

5.116 The LA solicitor may attend a CPC to advise the chair on issues relating to the management of the meeting, but may not give advice on the child protection plan or the case.³³¹ Other parties who may attend the CPC are family members and any professional that is involved with the child and his or her family.³³² A child may attend in circumstances where it is deemed appropriate.³³³ Although family members may attend, the professionals are responsible for drawing up the plan.³³⁴

Family group conference

5.117 An FGC is a decision-making forum, increasingly used to establish communication between the relevant parties. Although FGCs are not currently mandated by legislation, they are becoming more widely used as a method to integrate support from the wider family group with professional support services.³³⁵ The Court may direct parties to an FGC at any stage of proceedings, where appropriate.³³⁶ An FGC is convened by an independent coordinator, whose appointment is regulated by the LA.³³⁷ The independent coordinator will ordinarily be a professional recruited from local statutory and voluntary service communities.³³⁸ Like New Zealand, families in an FGC have an opportunity for private family time.³³⁹

Differences between CPCs and FGCs

5.118 The key difference between a CPC and an FGC is that the latter provides a chance for the *wider family* to meet and discuss the welfare of the child based on the information provided by the relevant professionals.³⁴⁰ The aim of this is to encourage the wider family to make a decision about how best to safeguard and promote the child's welfare based on the needs of the child.³⁴¹ FGCs do not replace CPCs, but may be run alongside them to give the wider family group greater input into the child protection plan than they would have at a CPC.³⁴²

EMERGENCY REMOVAL POWERS

5.119 In England and Wales, only the police have the power to remove a child from his or her family without judicial authorisation.³⁴³ Emergency removal is treated quite separately from care and supervision proceedings. Although emergency removal will often lead to care and supervision proceedings,³⁴⁴ it is not part of, or a prelude to, these proceedings.

Emergency removal of a child without judicial authorisation

5.120 Only police have the power to remove a child from his or her accommodation in emergency circumstances.³⁴⁵ A child may be taken into police protection for 72 hours without the Court first making an order.³⁴⁶ To exercise this power, the police officer must be satisfied that there is reasonable cause to believe the child would be likely to suffer significant harm if not removed.³⁴⁷ This police power may be exercised either at the request of the LA or at a police officer's own discretion.³⁴⁸

314 NSPCC, *Child Protection Fact Sheet*, above n 308, 14.

315 Ibid 13.

316 *Children Act 1989* (UK) s 44. See below for detailed discussion of EPOs.

317 An 'authorised person' for these purposes includes the NSPCC and its officers, and any person authorised by order of the Secretary of State to bring proceedings, as well as any officer of a body so authorised: *Children Act 1989* (UK) s 43(13).

318 *Children Act 1989* (UK) s 43(1).

319 *Children Act 1989* (UK) s 43(1).

320 *Children Act 1989* (UK) s 43(5).

321 *Children Act 1989* (UK) s 43(9).

322 Judith Masson et al, *Protecting Powers: Emergency Intervention for Children's Protection* (2007) 42.

323 *Children Act 1989* (UK) s 27; Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303.

324 The welfare guidance of the Court is set out in the *Children Act 1989* (UK) s 1(3). The 'welfare checklist' requires the Court to have regard to: the wishes of the child; the physical, emotional and educational needs of the child; the likely effect on the child of any change in circumstances; the child's age, sex, background and characteristics the Court considers relevant; any harm which he or she has suffered or is likely to suffer; how capable each of the child's parents is of meeting the child's needs; the range of powers available to the Court.

325 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline Practice Direction: Public Law Proceedings Guide to Case Management* (2010) 22.

326 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 132–185. The relevant department was previously the Department for Children, Schools and Families, now the Department of Education.

327 Family Justice Council, *Glossary of Common Terms in Family Proceedings* (2010) 3.

328 This is required by Department of Health (UK), *Framework for the Assessment of Children in Need and Their Families* (2000).

329 Family Justice Council, *Glossary of Common Terms*, above n 327, 3.

330 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 161.

331 Law Society, *Good Practice in Child Care Cases*, above n 299, 19.

332 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 162.

333 Ibid 161.

334 NSPCC Safeguarding Information Service, *Family Group Conferences in the Child Protection Process* (2009) <www.nspcc.org.uk/Inform/research/questions/family_group_conferences_in_the_child_protection_process_wda68725.html#The_difference_between_a_child_protection_case_conference_and_a_family_group_conference> at 19 May 2010.

335 Family Justice Council, *Using Family Group Conferences for Children Who Are, or May Become, Subject to Public Law Proceedings* (2008).

336 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 38.

337 Family Rights Group, *What Is a Family Group Conference?* <www.frg.org.uk/> at 19 May 2010.

338 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 164.

339 Family Justice Council, *Using Family Group Conferences*, above n 335, 7.

340 Law Society, *Good Practice in Child Care Cases*, above n 299, 20.

341 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 167–9.

342 NSPCC, *Family Group Conferences*, above n 334.

343 *Children Act 1989* (UK) s 46(1).

344 Masson et al, *Protecting Powers*, above n 322, 188.

345 *Children Act 1989* (UK) s 46(1).

346 *Children Act 1989* (UK) s 46(1).

347 *Children Act 1989* (UK) s 46(1)(a)(b).

348 Masson et al, *Protecting Powers*, above n 322, 89.

5.121 As soon as reasonably practicable after removing a child from his or her accommodation, the police must inform all relevant parties of steps that have been taken and the reasons for removal.³⁴⁹ Relevant parties to be informed include:

- the child, if he or she appears capable of understanding
- the child's parents or carers
- the LA.³⁵⁰

On removal, the police are to ensure that the child is placed in accommodation provided by or on behalf of the LA, or in a refuge.³⁵¹ Despite the preference for making placement arrangements for the child prior to removal, it seems that many children are taken to police stations.³⁵²

5.122 Following removal, the police officer responsible for removing the child must take reasonable steps to ascertain the wishes and feelings of the child and ensure that a designated officer enquires into the case.³⁵³ When that inquiry is complete, the designated officer must release the child from police protection unless he or she considers that there is still reasonable cause to believe the child would suffer significant harm if released.³⁵⁴ If it is determined that it is not appropriate to release the child, the designated officer may apply for an EPO.³⁵⁵

5.123 When a child is in police protection, neither the officer who removed the child nor the designated officer has parental responsibility for the child.³⁵⁶ While a child is in police protection, the designated officer must allow certain persons, including the child's parents, to have contact with the child if the officer considers it to be both reasonable and in the child's best interests.³⁵⁷

5.124 Research has shown that the extent to which police exercise their powers in these matters varies greatly between forces.³⁵⁸ There are Child Abuse Investigation Units within the police force that are responsible for these types of cases,³⁵⁹ although these units are not always able to respond to all cases where police protection is required.³⁶⁰ Social workers from an LA sought police assistance

*where the risk of violence or refusal of entry necessitated the use of police presence and powers, or where action was needed in an emergency and it was not possible to obtain a court order for a child's removal immediately.*³⁶¹

Emergency removal of the child with judicial authorisation

5.125 Under the CA 1989, if the LA³⁶² has reason to believe that the child is likely to suffer, or is suffering, significant harm it may apply to the Court for an EPO.³⁶³ Similarly, if the LA³⁶⁴ is unreasonably denied access while trying to undertake an investigation in relation to a child, it may apply for an EPO.³⁶⁵ In cases of the LA applying for an EPO, the child is most likely known to the LA and on the child protection register.³⁶⁶ An EPO authorises the removal of the child to accommodation provided by or on behalf of the applicant, or prevents the child's removal from a hospital or other place.³⁶⁷ The EPO gives the applicant parental responsibility for the child.³⁶⁸

5.126 While in force, the EPO requires any person in a position to do so to comply with a request to produce the child to the applicant.³⁶⁹ It is an offence to obstruct or prevent the removal of a child under an EPO.³⁷⁰ A recommendation by the Law Commission resulted in the addition of an exclusion requirement in the *Family Law Act 1996* (UK) to operate alongside an EPO, so that it is possible for the child to remain at home while the perpetrator of abuse is excluded.³⁷¹

- 5.127 EPO applications are heard in the Family Proceedings Court (FP Court) unless the child is involved in separate proceedings in the County Court or High Court.³⁷² The usual period of notice for an EPO application is one day, but the application can be heard *ex parte*.³⁷³ Where the Court refuses to hear the application *ex parte*, it is usually prepared to allow it to be heard on short notice.³⁷⁴ Short notice typically means that the application is approved at the beginning of a working day, served on the parents during the morning and heard at 2pm.³⁷⁵
- 5.128 For the Court to grant an EPO, it must be satisfied that the child is suffering or likely to suffer significant harm if not removed from their accommodation.³⁷⁶ The 'no order' principle also applies to EPOs, meaning that the Court must be satisfied that making the order would be better for the child than making no order at all.³⁷⁷
- 5.129 An EPO can last for up to eight days and may be extended once for a period of no longer than seven days.³⁷⁸ The CA 1989 specifies that no application for the discharge of an EPO should be made until 72 hours after the EPO is made.³⁷⁹ Even then, persons cannot apply for the discharge of the EPO if they were given notice and were present at the hearing of the application.³⁸⁰ There can be no appeal made against the making of or refusal to make an EPO by the Court.³⁸¹
- 5.130 The LA or other applicant must return the child once it appears that it is safe to do so.³⁸² The child is to be returned to the person from whose care he or she was removed, or to another appropriate person if this is not reasonably practicable.³⁸³ While many EPO applications will ultimately lead to care and supervision proceedings, this will not necessarily be the case.

CARE AND SUPERVISION PROCEEDINGS

- 5.131 Care and supervision proceedings are dealt with separately from EPOs under the CA 1989.³⁸⁴ They are treated as a separate type of proceeding, giving rise to different procedural considerations and different orders. Care and supervision proceedings are commenced when an LA or authorised person³⁸⁵ applies for an order placing the child in the care or under the supervision of a designated LA.³⁸⁶

- 349 *Children Act 1989* (UK) s 46(3)(a), (c), (4).
- 350 *Children Act 1989* (UK) s 46(3), (4).
- 351 *Children Act 1989* (UK) s 46(3)(f). Refuges are voluntary homes or registered children's homes that have been issued a certificate by the Secretary of State. Foster homes may also be issued with such certificates: s 51.
- 352 Masson et al, *Protecting Powers*, above n 322, 75.
- 353 *Children Act 1989* (UK) s 46(3)(d)–(e). 'Designated officer' means an officer designated by the chief officer of the relevant police area: s 46(3)(e). This officer is responsible for investigating the case, allowing certain persons to have contact with the child and potentially applying for an emergency protection order.
- 354 *Children Act 1989* (UK) s 46(5).
- 355 *Children Act 1989* (UK) s 46(7).
- 356 *Children Act 1989* (UK) s 46(9).
- 357 *Children Act 1989* (UK) s 46(10). This will be the responsibility of the 'appropriate authority' and not the police if the child is being accommodated by or on behalf of that 'appropriate authority': s 46(11).
- 358 Masson et al, *Protecting Powers*, above n 322, 63.
- 359 *Ibid* 64.
- 360 *Ibid* 81.
- 361 *Ibid* 89.
- 362 Note that the NSPCC or any person authorised by order of the Secretary of State to bring proceedings may also apply for an EPO: *Children Act 1989* (UK) ss 44(1)(c), 44(2), 31(9). A police officer may also apply for an EPO as discussed above, and in that instance the maximum length of eight days for an EPO is counted from the time the child is taken into police protection: ss 46(7), 45(3).
- 363 *Children Act 1989* (UK) s 44(1).
- 364 Or other applicant as provided for under *Children Act 1989* (UK) s 44(1)(c).
- 365 *Children Act 1989* (UK) ss 44(1)(b), 47(6). Alternatively, the LA may apply for a child assessment order, discussed above, or a care or supervision order, discussed below. The LA's duty to investigate is discussed above in relation to child assessment orders.
- 366 Fortin, above n 289, 572. The child protection register is a central record maintained by an LA of all children in their area for whom support is being provided via inter-agency planning: Judicial Studies Board, *Family Proceedings Court Bench Book* (2009) 213.
- 367 *Children Act 1989* (UK) s 44(4)(b).
- 368 *Children Act 1989* (UK) s 44(4)(c).
- 369 *Children Act 1989* (UK) s 44(4)(a).
- 370 *Children Act 1989* (UK) s 44(15).
- 371 Judith Masson et al, *Emergency Protection Orders: Court Orders for Child Protection Crises* (2004) 5; United Kingdom Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home*, Law Com Report No 207 (1992) [6.19]. An exclusion order may also be attached to an interim care order made under the *Children Act 1989* (UK) s 38(1)(a). Note that this is similar to the safety notice system for family violence in Victoria.
- 372 *Children Act (Allocation of Proceedings) Order 1991* reg 3(1)–(3).
- 373 *Family Proceedings Courts (Children Act 1989) Rules 1991* rr 2(5)(a), 4(4); *Children Act 1989* (UK) s 44(1). Without notice applications to a single magistrate have been described as like applications for a warrant or 'place of safety warrant' which the EPO replaced: Masson et al, *Emergency Protection Orders*, above n 371, 9.
- 374 Masson et al, *Emergency Protection Orders*, above n 371, 162.
- 375 *Ibid*.
- 376 *Children Act 1989* (UK) s 44(1).
- 377 *Children Act 1989* (UK) s 1(5).
- 378 *Children Act 1989* (UK) s 45(1), (5)–(6).
- 379 *Children Act 1989* (UK) s 45(9).
- 380 *Children Act 1989* (UK) s 45(11).
- 381 *Children Act 1989* (UK) s 45(10).
- 382 *Children Act 1989* (UK) s 44(10). Or allow the child to be removed from the hospital or other place, as the case may be.
- 383 *Children Act 1989* (UK) s 44(10).
- 384 Part IV of the *Children Act 1989* (UK) deals with 'care and supervision' and pt V deals with 'protection of children'. Emergency protective provisions, such as EPOs and police emergency powers, are contained within pt V. While some matters, such as courts' jurisdiction, will be applicable to both kinds of proceedings, they are largely separate and an application for an EPO will not necessarily lead to care and supervision proceedings.
- 385 An 'authorised person' for these purposes includes the NSPCC and its officers, and any person authorised by order of the Secretary of State to bring proceedings and any officer of a body so authorised: *Children Act 1989* (UK) s 31(9).
- 386 *Children Act 1989* (UK) s 31(1).

Courts with jurisdiction to hear care and supervision proceedings

5.132 Proceedings in relation to the care and supervision of children and young people are dealt with by various courts in England and Wales. The CA 1989 created a combined jurisdiction for all courts dealing with family proceedings, encompassing both public law and private law matters.³⁸⁷ This means that in private law matters, such as divorce proceedings, a court may direct an investigation into a child's circumstances if it appears that a care or supervision order may be appropriate.³⁸⁸ This combined jurisdiction is established by giving certain courts powers to make 'orders with respect to children in family proceedings'.³⁸⁹ 'Family proceedings' include proceedings under:

- parts of the CA 1989
- the *Matrimonial Causes Act 1973* (UK)
- the *Domestic Violence and Matrimonial Proceedings Act 1976* (UK)
- the *Adoption Act 1976* (UK).

5.133 The CA 1989 gives this combined jurisdiction to the three levels of courts that hear all matters relating to the care, supervision and protection of children: the FP Courts, the County Courts, and the High Court. These courts have equivalent powers under the CA 1989.³⁹⁰ The Act includes the provision for the commencement of proceedings in and the transfer of proceedings to:

- a specified level of court
- a court which falls within a specified class of court
- a particular court determined in accordance with, or specified in, the order.³⁹¹

This provision allows for the transfer of complex cases to the relevant level of court.³⁹²

Family Proceedings Court

5.134 The FP Court, which usually hears care and protection proceedings, is a court of first instance in England and Wales.³⁹³ Its jurisdiction is derived from the Magistrates' Court.³⁹⁴ A bench of three lay magistrates, chosen from the family panel, constitute the FP Court.³⁹⁵ These lay magistrates are also referred to as justices of the peace.³⁹⁶ A legally-qualified clerk supports the bench and advises the magistrates on the law.³⁹⁷

5.135 Magistrates come from a range of backgrounds, are not usually legally qualified, and do not receive payment for their services. They can claim for expenses and loss of income.³⁹⁸ Magistrates receive supervised training by the Judicial Studies Board and must be appointed by the Lord Chancellor as a member of a FP Court.³⁹⁹ A legally qualified District Court judge may also hear matters in the FP Court.⁴⁰⁰

Case management in care and supervision proceedings

5.136 The Judiciary for England and Wales and the Ministry of Justice provide a practice direction relating to case management that applies to all care and supervision proceedings.⁴⁰¹ This practice direction is published jointly by the President of the Family Division and the Ministry of Justice and is referred to as the Public Law Outline (PLO).⁴⁰² The PLO provides that its overriding objective is to enable the Court to 'deal with matters justly, having regard to the welfare issues involved'.⁴⁰³

5.137 Both the PLO and the *Family Proceedings Court Bench Book* provide case management measures in support of this overarching objective.⁴⁰⁴ These measures include:

- identifying the appropriate court to hear the matter and referring it there as soon as possible⁴⁰⁵
- identifying at an early stage who should be a party to proceedings⁴⁰⁶
- drawing up a timetable to avoid delay likely to be prejudicial to the child⁴⁰⁷
- dealing with as many aspects of the case as possible on one occasion⁴⁰⁸
- fixing dates for all appointments and hearings⁴⁰⁹
- having no more than two magistrates or judges responsible for hearing proceedings in each case⁴¹⁰
- encouraging parties to cooperate with each other during the conduct of the proceedings.⁴¹¹

Representation and participation of the child

The guardian *ad litem*

5.138 The CA 1989 introduced the statutory appointment of a guardian *ad litem* for a child in specified proceedings, including care and supervision proceedings.⁴¹² Although children have had the right to full party status in all public law proceedings since 1975,⁴¹³ Her Majesty's Inspectorate found in 2005 that 'court staff, the judiciary and CAFCASS, both explicitly and formally' do not encourage children to attend court.⁴¹⁴

5.139 The guardian is an independent professional appointed in accordance with the rules of court to safeguard the interests of a child.⁴¹⁵ The Court is to appoint a guardian for the child concerned unless satisfied that it is not necessary to do so to protect the child's best interests.⁴¹⁶ In the event that a guardian is deemed necessary, the Children and Family Court Advisory and Support Service (CAFCASS) assists the Court in appointing a guardian.⁴¹⁷ CAFCASS provides the name of an available guardian to the Court, usually a CAFCASS officer,⁴¹⁸ and the Court then makes an order appointing that guardian, by name, for the individual child.

387 *Children Act 1989* (UK) s 37; Brown, above n 292, 6–7. Public law proceedings include care and supervision proceedings in which the State is a party, and private law proceedings include divorce and custody proceedings, for example, in which the parties are private individuals.

388 *Children Act 1989* (UK) s 37; Brown, above n 292, 6–7.

389 *Children Act 1989* (UK) pt II.

390 *Children Act 1989* (UK) s 92(7)

391 *Children Act 1989* (UK) sch 11(1)–(2).

392 Judiciary of England and Wales, above n 286. In 1991, the *Family Proceedings Rules 1991* (UK) established procedures which to be adopted in all levels of courts dealing with family matters.

393 *Children (Allocation of Proceedings) Order 1991* (UK) O 3.

394 *Children Act 1989* (UK) s 92(2).

395 The family panel is made up of magistrates authorised by the Training and Development Committee on the basis of aptitude and personal suitability: Judicial Studies Board, above n 366, 12.

396 Her Majesty's Courts Service (UK), *Magistrates and Magistrates' Courts* <www.hmcourts-service.gov.uk/infoabout/magistrates/index.htm> at 25 April. There are approximately 30 000 lay magistrates in England and Wales.

397 *Ibid.*

398 Judiciary of England and Wales, above n 286.

399 *Courts Act 2003* (UK) s 49(1)(3)(b).

400 Judiciary of England and Wales, above n 286.

401 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325.

402 *Ibid.*

403 *Ibid* 1.

404 *Ibid* 2; Judicial Studies Board, above n 366, 39.

405 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 5.

406 Judicial Studies Board, above n 366, 39.

407 *Ibid* 41; President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 2.

408 Judicial Studies Board, above n 366, 39.

409 *Ibid*; President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 2.

410 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 2.

411 Judicial Studies Board, above n 366, 39.

412 *Children Act 1989* (UK) s 41(1), (6). Note that the guardian *ad litem* is also referred to as the 'children's guardian' and 'Family Court advisor': Committee on the Lord Chancellor's Department, House of Commons, *Children and Family Court Advisory and Support Service: Third Report of Session 2002–03*, vol 1 (23 July 2003) 9; Fortin, above n 289, 247.

413 Fortin, above n 289, 274.

414 *Ibid* 276.

415 *Children Act 1989* (UK) ss 5, 41(2).

416 *Children Act 1989* (UK) s 41(1).

417 Fortin, above n 289, 247.

418 *Ibid.*

5.140 The primary functions of the guardian are:

- to appoint a solicitor for the child, unless this has already been done by the Court
- to give advice to the child as is appropriate to his or her understanding
- to instruct the solicitor on matters relevant to the child's interests, unless the child is judged to be of sufficient age and maturity to directly instruct his or her solicitor⁴¹⁹
- to advise the Court about the management of proceedings and prepare a report advising the Court on the child's interests.⁴²⁰

5.141 In order to perform his or her functions, the guardian has direct contact with the child, interviews members of the child's family and makes a professional assessment of the child's welfare, sometimes with expert assistance.⁴²¹

The child solicitor

5.142 Child solicitors are selected from the family practice register—the Children Panel Accreditation Scheme—set up by the Law Society Child Care Panel.⁴²² The register includes lawyers who have experience and an interest in family proceedings matters.⁴²³ Having both a guardian and a solicitor—the 'tandem' model of representation⁴²⁴—combines the qualifications of a lawyer and a social worker, providing synthesis to court proceedings. If a guardian is not available to represent the child, the Court will appoint a solicitor for the child and the solicitor will represent the best interests of the child until a guardian is appointed.⁴²⁵ Thereafter, the solicitor will be instructed by the guardian.⁴²⁶ It is desirable that the guardian and solicitor remain with the child throughout proceedings.

5.143 In cases where the child or young person expresses a wish to instruct the solicitor him- or herself, is deemed competent to do so and wishes to give instructions that conflict with those of the guardian, the solicitor will act on the child's instructions.⁴²⁷ The *Practice Guidance for Guardians* provides that 'if the child is competent and wishes to instruct the solicitor directly it is likely that the guardian will separate from the child's solicitor'.⁴²⁸ In this instance, the solicitor will no longer be acting on the guardian's instructions and there is provision for the guardian to obtain separate legal representation.⁴²⁹

Stages of care and supervision proceedings

5.144 The PLO sets out five stages for care and supervision proceedings.⁴³⁰

1. Issue of proceedings

5.145 At this initial stage, the Court ensures that pre-proceedings requirements have been complied with, allocates or transfers proceedings to a particular court and obtains the information that will be necessary at the first appointment.⁴³¹ Within three days of the issue of proceedings, CAFCASS allocates the case to a guardian *ad litem*.⁴³² A solicitor for the child is also appointed.⁴³³ Upon issue of proceedings, the Court lists a date for the first appointment for within six days.⁴³⁴

2. First appointment

5.146 During this stage, the Court confirms the allocation of proceedings and gives initial case management directions.⁴³⁵ This may involve identifying additional parties and determining whether the case is appropriate for an early final hearing.⁴³⁶ The Court scrutinises a care plan provided by the LA regarding future care of the child⁴³⁷ and lists the case management conference (CMC) for within 45 days of the issue of proceedings.⁴³⁸

3. Case management conference

- 5.147 Two days before the CMC, an advocates' meeting is held with the main purpose of drafting a case management order for the Court's approval.⁴³⁹ The aim of this meeting is to avoid 'discussions at the courtroom door'.⁴⁴⁰ Where the advocates are unable to agree on the terms of the draft order, they specify where they agree and where they disagree.⁴⁴¹ The advocates also try to agree on any questions to be put to experts.⁴⁴²
- 5.148 The CMC is the main hearing at which the Court manages the case.⁴⁴³ At the CMC, the primary objectives are to identify key issues and give full case management directions.⁴⁴⁴ The Court issues the approved case management order and sets a date for the issues resolution hearing (IRH).⁴⁴⁵

4. Issues resolution hearing

- 5.149 There may also be an advocates' meeting between two and seven days before the IRH to draft or update the case management order. The IRH takes place between 16 and 25 weeks after the issue of proceedings.⁴⁴⁶ At this stage, the Court identifies any key issues that are yet to be resolved and narrows the issues, if possible.⁴⁴⁷ The Court also issues the approved case management order if this was not done at the CMC stage, or if it has been updated since then.⁴⁴⁸ The Court undertakes any final case management and sets a date for the final hearing.⁴⁴⁹

5. Final hearing

- 5.150 The purpose of the final hearing is to determine any issues that could not be agreed upon at the IRH.⁴⁵⁰ There is opportunity for oral evidence to be heard and challenged.⁴⁵¹
- 5.151 It is important to note that interim steps can be bypassed if the issues are clear and the case proceeds to an early final hearing.⁴⁵² An early final hearing is appropriate where all the necessary information to determine issues of fact or welfare is immediately or shortly available to be filed.⁴⁵³ The PLO is flexible and provides that the Court can cancel or repeat a particular hearing, or give certain directions without a hearing.⁴⁵⁴

Grounds and orders in care and protection proceedings

- 5.152 Under the CA 1989, the grounds to be proved are closely linked to the order sought. Proceedings are not brought to determine whether the child is in need of protection, but rather to determine whether the grounds for making an order are made out.
- 5.153 The CA 1989 gives the Court power to make care and supervision orders.⁴⁵⁵ It establishes that a care or supervision order will only be granted if:
- the child is currently suffering or likely to suffer significant harm, and
 - the harm is attributable to the care given to the child, or likely to be given to the child, or attributable to the fact that the child is beyond parental control.⁴⁵⁶

'Harm' means ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing the ill-treatment of another person.⁴⁵⁷

419 CAF/CASS, *Practice Guidance for Guardians Appointing a Solicitor for the Child* (2006) 3. It should be noted that the child solicitor is a separate representative from the guardian *ad litem*.

420 House of Commons, above n 412, 9–10.

421 *Ibid.* 10.

422 CAF/CASS, *Practice Guidance*, above n 419, 2–3.

423 Law Society, *Children Law* <www.lawsociety.org.uk/areasoflaw/view=areasoflawdetails.law?AREAOFLAW=Children%20law&AREAOFLAWID=9> at 25 May 2010.

424 CAF/CASS, *Practice Guidance*, above n 419, 1.

425 *Children Act 1989* (UK) s 41(3).

426 *Children Act 1989* (UK) s 41(3).

427 *Family Proceedings Rules 1991* (UK) r 4.12(1)(a).

428 CAF/CASS, *Practice Guidance*, above n 419, 5.

429 *Ibid.*; *Family Proceedings Rules 1991* (UK) r 4.11(3)(iii).

430 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 11.

431 *Ibid.*

432 *Ibid.*

433 *Ibid.*

434 *Ibid.*

435 *Ibid.*

436 *Ibid.* An early final hearing would involve bypassing some of the interim stages.

437 *Ibid.* A care plan is to be produced in accordance with *Children Act 1989* (UK) s 31A. This section was inserted into the *Children Act 1989* (UK) by the *Adoption and Children Act 2002* (UK) s 121.

438 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 11. Note that this is not to be confused with the pre-court child protection conference (CPC), discussed above.

439 *Ibid.* 18.

440 *Ibid.*

441 *Ibid.* 19.

442 *Ibid.*

443 *Ibid.*

444 *Ibid.*

445 *Ibid.* 20.

446 *Ibid.* 13.

447 *Ibid.*

448 *Ibid.*

449 *Ibid.*

450 *Ibid.* 21.

451 *Ibid.*

452 *Ibid.* 11.

453 *Ibid.* 18.

454 *Ibid.* 22. For example, the Court may set a date for final hearing without conducting a hearing or order an early final hearing where appropriate.

455 *Children Act 1989* (UK) s 31(1).

456 *Children Act 1989* (UK) s 31(2).

457 *Children Act 1989* (UK) s 31(9); *Adoption and Children Act 2002* (UK) s 121.

- 5.154 Before making a care or supervision order, the Court must consider the 'no order' principle in the CA 1989⁴⁵⁸ and certain aspects of the child's welfare.⁴⁵⁹ A child must be under 17 years old, or 16 years old if married, at the time an order is made.⁴⁶⁰
- 5.155 The concept of parental responsibility is central to understanding the orders that can be made as a result of care and supervision proceedings. The CA 1989 defines parental responsibility as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.⁴⁶¹

Care orders

- 5.156 A care order places the child in the care of a designated LA.⁴⁶² It remains in force until the child is 18 and effectively gives the LA parental responsibility for the child and the right to decide the extent to which parents can meet their own responsibilities to the child.⁴⁶³ While the care order is in force, the LA will allow the child to have reasonable contact with persons including his or her parents.⁴⁶⁴
- 5.157 The Court may make an order relating to contact with particular persons, whether or not such an order has been applied for.⁴⁶⁵ Before making a care order, the Court is to consider the arrangements that the LA has made or proposed to make regarding contact of certain persons with the child.⁴⁶⁶ The Court may grant an order to authorise the LA to refuse contact with certain persons, including the child's parents.⁴⁶⁷ The Court may vary or discharge an order in relation to parental contact on the application of the LA, the child or the person named in the order.⁴⁶⁸
- 5.158 The Court may order that a child under the care of an LA be placed in secure accommodation if he or she is likely to abscond and would suffer significant harm in doing so.⁴⁶⁹

Supervision orders

- 5.159 If a supervision order is granted, parental responsibility remains with the child's parents.⁴⁷⁰ The LA will assign the child a supervisor from its social services department,⁴⁷¹ and it will be the role of the supervisor to advise, assist and befriend the supervised child.⁴⁷² Under the CA 1989, a child and those persons with parental responsibility for him or her may be subject to a supervision order for 12 months,⁴⁷³ but this can be extended by the Court for up to three years.⁴⁷⁴
- 5.160 A supervision order may require that persons having parental responsibility for the child keep the supervisor informed of their address,⁴⁷⁵ or ensure that the child is made available for medical or psychiatric assessments or treatment.⁴⁷⁶
- 5.161 If a supervision order is not complied with or the supervisor considers that the order may no longer be necessary, the supervisor is to consider whether to apply to the Court for variation or discharge of the order.⁴⁷⁷

Interim care and supervision orders

- 5.162 Where proceedings for a care order or supervision order have been adjourned, or the Court has directed an appropriate authority to undertake investigation into whether a care or supervision order is needed,⁴⁷⁸ the Court may make an interim care or supervision order.⁴⁷⁹ The first interim order may last up to eight weeks, and any subsequent orders can only last for periods of up to four weeks at a time.⁴⁸⁰
- 5.163 To grant an interim care or supervision order, the Court must still be satisfied that the criteria for an ordinary care or supervision order are made out.⁴⁸¹

Residence, contact and other orders in care and supervision proceedings

5.164 The CA 1989 also provides that in care and supervision proceedings,⁴⁸² the Court may make:

- **a contact order:** which requires the person with whom the child lives, or is to live, to allow the child to visit or stay with a named person, or for that person and the child to otherwise have contact
- **a prohibited steps order:** which provides that no step that could be taken by a parent exercising parental responsibility for a child shall be taken by a person without the consent of the Court
- **a residence order:** which settles the arrangements to be made as to the person with whom a child is to live
- **a specific issue order:** which gives directions for the purpose of determining a specific question in relation to the parental responsibility for a child.⁴⁸³

APPEALS

5.165 No appeal can be made against the making of or refusal to make an EPO, or against any direction given by the Court in connection with such an order.⁴⁸⁴

5.166 There is a general right of appeal from the FP Court to the High Court.⁴⁸⁵

458 Meaning that before making an order, the Court must be satisfied that making the order would be better for the child than making no order at all: *Children Act 1989* (UK) s 1(5).

459 *Children Act 1989* (UK) s 1(3). The welfare checklist is referred to above.

460 *Children Act 1989* (UK) s 31(3).

461 *Children Act 1989* (UK) s 3(1).

462 *Children Act 1989* (UK) s 33(1).

463 *Children Act 1989* (UK) s 33(3).

464 *Children Act 1989* (UK) s 34(1).

465 *Children Act 1989* (UK) ss 34(2), (5).

466 *Children Act 1989* (UK) s 34(11).

467 *Children Act 1989* (UK) s 34(4).

468 *Children Act 1989* (UK) s 34(9).

469 *Children Act 1989* (UK) s 25(1).

470 *Children Act 1989* (UK) s 35(1), sch 3 pt I.

471 *Children Act 1989* (UK) sch 3 pt II.

472 *Children Act 1989* (UK) s 35(1).

473 *Children Act 1989* (UK) sch 3 pt II [6].

474 *Children Act 1989* (UK) sch 3 pt II [6].

475 *Children Act 1989* (UK) sch 3 pt I [3].

476 *Children Act 1989* (UK) sch 3 pt I [4]–[5].

477 *Children Act 1989* (UK) s 35(1).

478 *Children Act 1989* (UK) s 37(1).

479 *Children Act 1989* (UK) s 38(1).

480 *Children Act 1989* (UK) s 38(4)–(5).

481 *Children Act 1989* (UK) ss 31(2), 38(2).

482 *Children Act 1989* (UK) s 8(1), (4), pt IV.

483 *Children Act 1989* (UK) s 8(1).

484 *Children Act 1989* (UK) s 45(10).

485 *Children Act 1989* (UK) s 94(1).

Chapter 6

Reform Options

CONTENTS

- 204 Introduction
- 206 The relevant interests
- 209 New processes for child protection matters
- 210 Options for reform

INTRODUCTION

- 6.1 The Attorney-General has asked the Commission to review the processes followed in the Family Division of the Children's Court and to identify reform options that may minimise disputation while maintaining a focus on the best interests of children. The terms of reference also asked the Commission to consider practices followed elsewhere that 'take a more administrative case management approach to child protection issues'.
- 6.2 The formal legal rules that determine the processes followed in the Family Division of the Children's Court are set out in Chapters 4 and 7 of the *Children, Youth and Families Act 2005* (Vic) (CYF Act 2005). This scheme is designed for use in a predominantly adversarial system of litigation. In broad terms, those parts of the CYF Act 2005 that deal with matters of Children's Court procedure are similar to the relevant legislation in many other Australian jurisdictions.
- 6.3 The relevant statutory provisions in the CYF Act 2005 and the practices followed in the Family Division of the Children's Court are discussed at some length in Chapter 3 of this report. As revealed in Chapter 2, the formal processes followed in the Family Division of the Children's Court have evolved since the mid-19th century, when the first Victorian child welfare legislation, the *Neglected and Criminal Children Act 1864* (Vic), permitted police to apprehend and charge children with being a 'neglected child' and courts to order that they be detained in an industrial school.¹ The procedures in that early legislation mirrored those used in summary criminal matters.
- 6.4 Even though child protection laws have changed significantly over the past 146 years, the link with summary criminal law procedure remains strong. The current processes in the Family Division of the Children's Court are similar to the procedures used in criminal matters in the Magistrates' Court. The language used by legal practitioners who work in the field of child protection emphasises the connection with criminal procedure. During consultations, DHS was often referred to as 'the prosecution', the Victorian Bar described the child protection jurisdiction as 'quasi-criminal',² and Family Division proceedings concerning interim placement were described as being similar to bail applications.³
- 6.5 Family Division processes reflect key elements of our justice system. The adversary—or adversarial—system is one of those elements. That term describes a system of justice in which the judge is a neutral umpire whose role is 'to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large'.⁴ As the Children's Court points out in its submission, in an adversarial system, 'the parties, and not the judicial officer, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward'.⁵ Although this approach to the delivery of justice promotes the likelihood that the decision maker is impartial, and is seen to be so, it is not the only means of achieving these important goals.
- 6.6 Our legal system is moving away from a strict adherence to the adversarial system and new models of justice are emerging. A number of different, but overlapping, mechanisms are responsible for this change. They include practices and approaches that have attracted the shorthand terms of 'appropriate (or alternative) dispute resolution', 'problem-oriented' courts, 'case management', 'restorative justice' and 'therapeutic jurisprudence'.⁶ Together, these and other mechanisms have been characterised as 'non-adversarial justice'⁷ and 'the comprehensive law movement'.⁸ At the same time, some courts have shown a strong interest in using more inquisitorial procedures and governments have legislated to encourage this development.⁹

- 6.7 In the civil justice system, it is now commonplace to use mechanisms which actively promote a range of strategies that assist the parties to reach agreement rather than rely upon an adjudicated outcome. Agreement is facilitated by the use of structured processes, rather than as a by-product of preparing a case for hearing. These mechanisms also emphasise greater judicial control of cases, both prior to and during contested hearings when adjudication is necessary.
- 6.8 While these new processes are being adopted at different speeds and in different ways throughout the legal system, they are producing profound and lasting changes. They are attracting support at the highest levels of the judiciary. Former High Court Chief Justice, Murray Gleeson, recently said:
- The adversarial process, with a climactic trial as its final stage, is not the only procedure by which courts can resolve disputes fairly and efficiently. It is likely that, in the future, courts will continue to seek ways, consistently with the interests of justice, to modify their dependence on the trial process as a form of dispute resolution.*¹⁰
- 6.9 Civil procedure is experiencing rapid change, as demonstrated by the Civil Procedure Bill 2010 (Vic), which was developed in close consultation with the judiciary. The Attorney-General said that the proposed reforms sought 'to build a culture in which litigants were empowered to resolve their disputes without going to court, and would encourage the use of appropriate dispute resolution (ADR)'.¹¹
- 6.10 In criminal trials, which are often seen as the 'high point' of the adversary system, the courts are playing a much stronger role in directing the course of proceedings and in assisting the ultimate decision maker, the jury, to reach a verdict that is fair and just. Victoria's new *Criminal Procedure Act 2009* (Vic) contains many provisions that promote judicial case management and encourage greater judicial control over trials.¹² Problem-oriented courts such as Victoria's Neighbourhood Justice Centre and the Koori Court seek to use the authority of the court to address not only offender behaviour, but also the societal problems that lead to crime.
- 6.11 Many of the Child Protection Proceedings Taskforce's¹³ recommendations involve new ways of resolving child protection matters without using adversarial processes. The Taskforce recommended that three matters be referred to the Commission for consideration as part of this report. They are:
- Whether the CYF Act 2005 should be amended to enable the Children's Court to conduct less adversarial trials.
 - Whether any subsequent amendments to the CYF Act 2005 are needed to reflect the new approach to resolution conferences.
 - Whether it is in the best interests of an apprehended child that section 242(3) of the CYF Act 2005 be amended to extend the period within which DHS must bring a safe custody application from 24 hours to 72 hours.¹⁴
- 6.12 The first and third matters are considered at some length in Chapter 8. The second matter is considered within the discussion of family decision-making processes in Chapter 7. Many of the proposals within Chapters 7 and 8 may require amendments to the CYF Act 2005. The Commission has not listed these amendments individually, but has dealt with the matter by outlining the principles that should be taken into consideration when amendments are drafted.

- 1 *Neglected and Criminal Children Act 1864* (Vic) ss 13–15.
- 2 Submission 48 (The Victorian Bar).
- 3 Springvale Legal Service, *Lawyers Practice Manual Victoria* (2009) [6.2.403].
- 4 *Jones v National Coal Board* [1957] 2 KB 55 at 63–5 (Lord Denning).
- 5 Submission 46 (Children's Court of Victoria) 28.
- 6 These practices and related approaches are described and discussed in Michael King et al, *Non-Adversarial Justice* (2009).
- 7 *Ibid.*
- 8 Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1.
- 9 The 'less adversarial trial' (LAT) process in federal family matters is discussed in detail in Chapter 4.
- 10 Murray Gleeson, 'The Judicial Method: Essentials and Inessentials', (Paper presented at the District and County Court Judges' Conference, Sydney, 25 June 2009) 8.
- 11 Rob Hulls, Deputy Premier and Attorney-General (Victoria), 'Landmark Civil Justice Reforms to Change Court Culture' (Media Release, 21 June 2010).
- 12 See, for example, *Criminal Procedure Act 2009* (Vic) ss 179, 181–3, 222–5.
- 13 Child Protection Proceedings Taskforce, *Report of the Child Protection Proceedings Taskforce* (2010).
- 14 *Ibid.* 13.

THE RELEVANT INTERESTS

- 6.13 The terms of reference ask the Commission to ‘consider models that take a more administrative case management approach to child protection issues’. Before addressing this point, it is important to identify the interests at stake in child protection matters because the procedures that are used when legal rights and responsibilities may be altered are often determined, at least in part, by the nature of the interests in question.
- 6.14 As discussed in Chapter 3, child protection proceedings are neither criminal nor civil in nature. The Family Division of the Children’s Court exercises a unique jurisdiction dealing with at least three different, overlapping interests that are sometimes not easily reconciled. The three interests that arise in most cases are:
- the family’s interest to live as it chooses without external interference
 - the state’s interest in protecting its vulnerable members, such as children, and in promoting their human rights
 - the child’s interest in being treated as an independent person who has rights of his or her own which sometimes may differ from those of the family and the state, especially when that child’s future wellbeing is being determined.
- 6.15 In many cases, additional interests must be considered, such as those of other family members who may have a close relationship with the child and those of other people who are carers of the child.
- 6.16 The content of these various interests is prone to change as ideas about the relationships between children and their parents, and the state and its members evolve. It is difficult, for example, to define with any clarity the point at which the parents’ authority to raise their children according to their own dictates ceases and the state’s capacity to assume some or all of the parents’ responsibilities commences. It is also just as difficult to determine the point at which a child’s interest in remaining with his or her family, even in circumstances that are less than ideal, must give way to the state’s responsibility to protect its vulnerable members from abuse or neglect.
- 6.17 While the CYF Act 2005 provides that ‘the best interests of the child must always be paramount’ and contains a number of principles to guide decision makers, it does not seek to define the various interests involved in child protection proceedings or direct how they interact. The ‘best interests’ principle seeks to promote discretionary decision making by identifying important values that can be used to respond to the varying needs of each child.
- 6.18 Some critics of the ‘best interests’ principle suggest that it is too indeterminate and subjective to be of use in particular cases.¹⁵ The statement of the ‘best interests’ principle in section 10 of the Act is expressed in such broad terms that former Supreme Court justice Tim Smith reported in his submission that he had become ‘confused, mentally exhausted and had lost sight of what is the ultimate question’ when attempting to apply the section.¹⁶

- 6.19 The child protection jurisdiction has been characterised by two important but sometimes clashing approaches to the child's best interests. These approaches have been called the 'welfare' and the 'justice' views of child protection.¹⁷ Under the welfare view, the child's best interests are defined by the behaviour of the child and parents, individual and environmental influences, and the child's needs. In the justice view, the child's best interests are defined by statutory standards and determined by legally admissible evidence. Human rights considerations, especially the more recent acceptance of children's rights, have been incorporated into the justice view of child protection so that there is a strong emphasis on children and parents' rights to family life.¹⁸
- 6.20 The statement of best interests principles in section 10 of the CYF Act 2005 does little to address the differences between the welfare and justice approaches. While there appears to be widespread support for the paramountcy of the best interests principle, key participants in child protection matters do not always appear to have a shared view of how the principle should be applied in individual cases. Different parts of section 10 may be relied upon for an outcome that supports either a welfare or a justice view of child protection. Beyond sharing a commitment to children's best interests, there appears to be only limited debate among the major participants in the child protection system about the specific values behind the best interests principle and those that are most important in particular cases. There would be great value in establishing processes that encouraged ongoing discussion about this central issue.

ADMINISTRATIVE CASE MANAGEMENT

- 6.21 The capacity to take a more administrative case management approach to child protection issues is influenced by natural justice entitlements. The common law, the *Charter of Human Rights and Responsibilities 2006* (Vic) (the Charter) and international human rights instruments all require that an impartial decision maker give the primary interest holders in child protection matters—the parents and the child—a fair hearing before any decision that interferes with their interests is made. While these natural justice, or procedural fairness, obligations can be overridden by statute, it is highly unlikely that the Victorian Parliament would wish to do so.

Common law principles

- 6.22 Parents have complex common law rights and responsibilities. Those rights and responsibilities are also recognised in the Charter and in international human rights instruments. Children also have rights recognised by the common law, the Charter and in international human rights instruments, most notably the *Convention on the Rights of the Child* (CROC).¹⁹
- 6.23 In *J v Lieschke*, two members of the High Court sought to characterise some of the common law rights and responsibilities when considering the right of parents to be heard in child protection proceedings.²⁰ Both Justices Brennan²¹ and Deane²² suggested that a parent's rights and authority are similar to those of a trustee, because they must be exercised for the benefit of the child and because they can be overridden by the courts, either in the exercise of a statutory child protection jurisdiction or by use of the *parens patriae* power.²³ Justice Brennan also referred to a child's right to be nurtured, controlled and protected by his or her parents,²⁴ while Justice Deane referred to 'the right of both parent and child to the integrity of family life'.²⁵

15 See, for example, Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (4th ed, 2009) 633–40; Anthony Dickey, *Family Law* (5th ed, 2007) 290–4.

16 Submission 9 (Tim Smith).

17 Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (2001) 58, 63.

18 Human rights considerations in the context of child protection are discussed at length in Chapter 3.

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

20 (1987) 162 CLR 447.

21 *Ibid* 458.

22 *Ibid* 463.

23 This is a power exercised by the courts, originally delegated from the sovereign, to care for children in need as the 'parent of the country'.

24 *J v Lieschke* (1987) 162 CLR 447, 458.

25 *Ibid* 463.

6.24 The entire Court concluded that parents have a common law right to be heard in child protection proceedings. After referring to the fact that parental rights have ‘deep roots in the common law’, Justice Deane said:

*In the absence of an unmistakable legislative intent to the contrary, they cannot properly be modified or extinguished by the exercise of administrative or judicial powers otherwise than in accordance with the basic requirements of natural justice.*²⁶

6.25 This issue is significant when considering models that take a more administrative case management approach to child protection issues. While many state decisions are made by administrative means, and while ‘a trial is not necessarily the best, or the fairest, or the most efficient, and it is usually not the most economical, way of making a decision’, judicial processes are important in determining significant interests because of the messages conveyed to the community ‘about process as well as outcome’.²⁷ As former Chief Justice Murray Gleeson has pointed out, the messages conveyed when the decision maker is a judge, a tribunal or a court are ‘independence, impartiality, certain standards of fairness and openness in the process, and apolitical decision-making’.²⁸

6.26 Any attempt to move toward a more administrative case management approach to child protection issues would need to address the common law rights of parents as well the human rights of children, parents and families as recognised in the Charter and CROC. Any legislation that interferes with fundamental common law rights, such as those of parents, would be measured against what has been referred to as the principle of legality and the clear statement principle.²⁹ In broad terms, this means that parliaments must legislate clearly and specifically if they want the courts to interpret legislation in a way that interferes with fundamental common law rights.³⁰

6.27 As pointed out in Chapter 3, the Charter contains the right to a fair and public hearing by a competent, independent and impartial court or tribunal when a person is charged with a criminal offence or is party to civil proceedings.³¹ Despite the unique nature of the child protection jurisdiction—it is neither truly civil nor criminal—the Charter right to a fair hearing clearly applies in these cases. Article 12 of CROC also provides that states parties shall allow a child to express views freely in all matters affecting him or her.³² This article requires that a child be provided with an opportunity to be heard in any proceedings affecting him or her, either directly or through a representative.³³ These Charter and CROC rights would need to be considered before an administrative case management approach was adopted in this jurisdiction.

6.28 Given the significance of the interests at stake in child protection proceedings, the Commission believes it is important that a decision maker with the attributes described by Chief Justice Gleeson, rather than an administrative body, should determine rights and responsibilities when parties are unable to reach agreement. Currently, in most child protection cases agreement is reached, albeit after a number of court events. The processes used in reaching those agreements, and in some cases the content of those agreements, generate concern among critics of the current system.

NEW PROCESSES FOR CHILD PROTECTION MATTERS

- 6.29 The Commission believes that Victoria should move away from child protection procedures that closely resemble those used in summary criminal prosecutions. The processes used in child protection matters should be designed specially for this unique jurisdiction. Much can be drawn from experiences elsewhere in the legal system to guide procedural changes that may minimise disputation while maintaining a focus on the best interests of children.
- 6.30 New procedures should reflect the fact that most child protection cases will be resolved by agreement. This is clearly a desirable outcome in proceedings of this nature when the parties will usually have important ongoing relationships. As the Children’s Court said in its own submission:

*The Court accepts that the Court should be an option of last resort. It is, therefore, supportive of the establishment of best practice ADR being conducted prior to applications being lodged in court, where appropriate.*³⁴

- 6.31 At present, there is a substantial gap between the design of the Court’s processes and the realities of most cases. Current procedures are based on the assumption that most child protection applications will proceed to hearing. The procedures do not reflect the fact that most matters will be resolved by agreement, yet more than 97 per cent of cases are settled.³⁵ These agreements are often reached informally and without external assistance or systematic protections as part of the process of moving towards a contested hearing through a mention process.
- 6.32 The mention process can be long and difficult. Research indicates that during 2008–09 protection applications commenced by way of safe custody at the Melbourne Children’s Court required an average of 4.9 mentions before they were resolved. Protection applications commenced by way of notice required an average of 3.4 mentions.³⁶
- 6.33 Procedures specially designed for use in child protection matters can draw upon the non-adversarial mechanisms used in other parts of the legal system to assist people to reach agreement rather than rely upon an adjudicated outcome. The Children’s Court acknowledged the significance of these mechanisms in its submission:

*The Court is of the strong view that child protection hearings should be able to be conducted in a less adversarial way and that this can best be achieved in three ways. First, by strengthening its ADR processes. This is likely to result in cases being resolved more expeditiously and may also result in a reduction in contested hearings. Second, by adopting most of the legislative provisions which underpin the Less Adversarial Trial initiative of the federal jurisdiction in relation to children. Third, by adopting innovative ‘problem solving’ approaches in the Family Division.*³⁷

AN OVERARCHING OBJECTIVE

- 6.34 The Commission believes that it is useful to identify an overarching objective for new procedures that are specially designed for use in child protection matters. That objective is:

The processes for determining the outcome of protection applications should emphasise supported child-centred agreements and should rely upon adjudication by inquisitorial means only when proceeding by way of supported agreement is not achievable or not appropriate in the circumstances.

- 6.35 This objective is reflected in the five options for reform that are identified in this chapter and which are developed later in this report.

26 Ibid 447, 463–4.

27 Gleeson, above n 10, 12.

28 Ibid 13.

29 James Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769.

30 Ibid.

31 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1). This right is modelled on article 14(1) of the ICCPR: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14(1) (entered into force 23 March 1976); Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 18.

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

33 Ibid art 12(1).

34 Submission 46 (Children’s Court of Victoria) 42.

35 Ibid 23.

36 *Boston Consulting Group, Child Protection Proceedings Taskforce: Children’s Court Data* (2010) 11.

37 Submission 46 (Children’s Court of Victoria) 30.

PRINCIPLES THAT HAVE GUIDED THE DEVELOPMENT OF THE OPTIONS

6.36 Sections 8–14 of the CYF Act 2005 contain the general principles that underpin the entire legislative scheme. These principles were discussed at length in Chapter 3. Some of the principles that are of particular relevance when considering matters of process are:

- The child’s best interests should inform all decision making in relation to both process and outcomes.
- Children’s rights should be protected, children should be protected from harm and they should be given opportunities to develop.
- The central role of the family should be promoted and children should be removed from their family as a last resort only.
- The views of Aboriginal communities should govern decisions about Aboriginal children whenever possible.

6.37 The Commission believes that it is useful to devise principles to govern the processes used when determining whether a child is in need of protection. The principles are:

- The processes should actively encourage early resolution by agreement whenever appropriate.
- The processes should be child-centred.
- The processes should actively encourage inter-professional collaboration so that decision makers have access to the best information on child development and wellbeing.
- The processes should actively promote outcomes that involve the least amount of compulsory intervention in the life of a family as required by the circumstances.
- When an agreed outcome is not possible, a court should determine whether a child is in need of protection and the intervention that is required in order to promote the child’s wellbeing.
- The Court should be an inquisitorial and problem-oriented decision maker.

OPTIONS FOR REFORM

6.38 The Commission has devised five options for reforming the processes used in child protection matters. These options reflect the general principles that govern the entire legislative scheme concerning the protection of children. They have also been guided by the specific principles devised by the Commission concerning the processes used for determining the outcome of protection applications.

6.39 The options are:

- **Option 1—A New System: Processes for achieving appropriate child-centred agreements**

This option includes the development of a graduated range of supported, structured and child-centred agreement-making processes which should become the principal means of determining the outcome of child protection applications, where appropriate.

- **Option 2—A New System: Enhanced court practices and processes**

This option includes new processes for the manner in which protection applications are commenced and proceed through the Children’s Court, including new ways of conducting contested proceedings, new emergency procedures, a new approach to the representation of children, new grounds and an ‘agreement’ provision, and new powers for the Court.

- **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**

In this option, the Commission proposes that a new independent statutory commissioner be created to represent and promote the best interests of children at all stages of the child protection process.

- **Option 4—Representing the Department of Human Services: A role for the VGSO in protection matters**

In this option, the Commission proposes a new system for conducting cases on behalf of the protective interveners in the Children’s Court.

- **Option 5—Broadening the Role of the Child Safety Commissioner**

This option includes giving additional functions to the Child Safety Commissioner, and strengthening the Commissioner’s independence.

6.40 These options are discussed in detail in Chapters 7 to 11 of the report. The Commission has advanced a number of proposals within each option. The reasons for each proposal are also fully explained in these chapters.

HOW THE OPTIONS INTERACT

6.41 Although all five options could be adopted, they are not presented as a single integrated scheme. Some, all, or parts of the options may be chosen to bring about a new system for dealing with child protection matters.

6.42 The options are designed to change the processes associated with protection applications with the aim of minimising disputation while maintaining a focus on the best interests of children.

6.43 Options 1 and 2 involve no changes to the overarching structure of the current system. They do involve significant change to the way in which protection applications are conducted in the Children’s Court and to the steps that should usually occur before an application is commenced. Option 2 contains a number of separate, but connected proposals for change. Options 1 and 2 overlap and are preferably adopted together.

6.44 Option 3 involves a significant change to the overarching structure of the current system. If this option is chosen, as well as all or part of Options 1 and 2, the proposals that fall within Options 1 and 2 will need to be modified slightly in order to operate within the new framework. Some of the important new roles and functions that are proposed in Options 1 and 2 could be performed by the Office of the Children and Youth Advocate.

6.45 Option 4 involves change to the way in which protection applications are conducted on behalf of the Secretary of DHS. Option 5 involves change to the functions and powers of the Child Safety Commissioner.

38 Victorian Law Reform Commission, *Review of Child Protection Legislative Arrangements Information Paper* (2010).

39 Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 2, 239.

WHERE THE COMMISSION'S FINAL OPTIONS DEPART FROM THE INFORMATION PAPER

6.46 In February 2010, the Commission published an Information Paper describing the background to the reference and containing a number of questions concerning possible reform options. The Commission noted that

We have identified four areas where reform may be possible. Identification of these areas does not represent any final thinking on the part of the Commission.

No doubt, there are different ways of characterising the many components of our child protection system and different aspects of that system that may benefit from reform other than those identified in this paper.³⁸

6.47 The Commission also noted that within the short period allocated to the reference we would consult as broadly as possible and encourage submissions from all Victorians with an interest in child protection legislative arrangements.

6.48 We have now had time to consider the many views advanced in submissions and during consultations. As a result, the Commission has chosen not to pursue one of the options identified in the Information Paper. A second option has been refined following further research and consultation.

Options not being pursued

6.49 In the Information Paper, the Commission asked whether it would be advisable to change the membership of the ultimate decision maker in child protection matters so that it includes both judicial and non-judicial members. The Carney Committee originally advanced this proposal in 1984.³⁹

6.50 The Commission has not pursued this alternative for two reasons. First, it proved to be a highly controversial option that threatened to place too much emphasis upon adjudicated outcomes and draw attention away from the widespread support for processes that emphasise supported child-centred agreements whenever possible. Secondly, this option raised a number of constitutional complexities because of the interaction between Commonwealth family law and Victorian child protection laws. It seemed unwise to imperil the operation of a new procedural scheme by including proposals which could have been open to the uncertainties and delay associated with a constitutional challenge.

6.51 The Commission also asked whether some of the functions currently performed by the Secretary of DHS should be given to an independent statutory commissioner. One of the functions identified was the carriage of child protection proceedings on behalf of the state before the Children's Court. The Commission has not pursued this alternative for two reasons. First, the Commission concluded that this option, with its parallels to the Director of Public Prosecutions' process for criminal proceedings, had the potential to maintain historical, but unhelpful, connections between child protection applications and criminal prosecutions. Secondly, the Commission has developed a simpler alternative proposal in Option 4 that an existing body with professional separation from DHS should conduct child protection proceedings on behalf of the state.

Chapter 7

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

CONTENTS

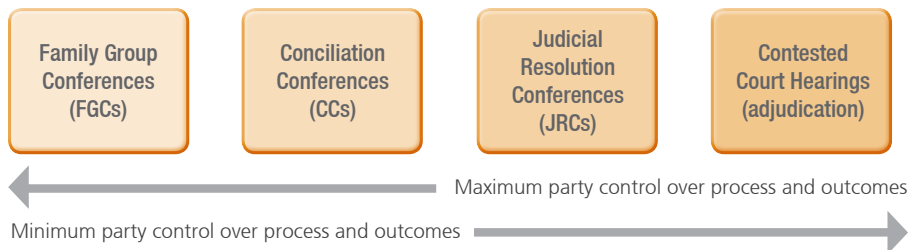
- 214 Appropriate dispute resolution and family decision making
- 214 A process continuum
- 216 Is ADR suitable for the child protection jurisdiction?
- 218 Qualifications and training of convenors
- 222 Legal representation and advice in family decision-making processes
- 233 Inter-professional collaboration and training
- 236 Family group conferences
- 248 Family group conferences and commencement of primary applications
- 253 Court-ordered family group conferencing following emergency intervention
- 255 Secondary applications and family group conferences
- 256 The proposed model of family group conferencing
- 266 Court referral to a range of family decision-making processes
- 267 Court-based conciliation conferences
- 279 Judicial resolution conferences
- 285 Evaluation and review of new decision-making processes

APPROPRIATE DISPUTE RESOLUTION AND FAMILY DECISION MAKING

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

A PROCESS CONTINUUM

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IS ADR SUITABLE FOR THE CHILD PROTECTION JURISDICTION?

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

ARGUMENTS AGAINST USE OF ADR PROCESSES

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

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

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

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

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

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

ARGUMENTS FOR USE OF ADR PROCESSES

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

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

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

THE COMMISSION'S RESPONSE AND PROPOSAL

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

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

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

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

QUALIFICATIONS AND TRAINING OF CONVENORS

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

ACCREDITATION

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

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

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

Advantages and disadvantages of accreditation

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

7.26 The disadvantages of accreditation include:

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

Use of the National Mediator Accreditation Scheme

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

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

26 Training in general is discussed in Chapter 8.

27 King et al, above n 11, 121.

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

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

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

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

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

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

34 Ibid 25–6.

35 Ibid 27–8.

36 Ibid 73.

37 Ibid.

38 Ibid 65.

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

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

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

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

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

Qualifications and specialist areas of knowledge for child protection convenors

7.30 The Commission believes that in addition to general accreditation under NMAS, child protection convenors will need knowledge and perhaps qualifications in specific areas. These areas of specialist knowledge and qualifications will vary between the convenors of FGCs and CCs, and the judicial officers who will conduct JRCs.

7.31 As there is no specific accreditation scheme for child protection family decision-making convenors in Australia, the Commission has referred to accreditation schemes in other jurisdictions to help identify the principal areas of knowledge and qualifications that might be expected of child protection convenors in Victoria. These areas of knowledge and qualifications could be set out in regulations under the *CYF Act 2005* (Vic). They could be required as a condition of accreditation as a family decision-making convenor, or as part of an ongoing training requirement. Provision will need to be made for existing practitioners within any new accreditation scheme.

7.32 Child protection matters are often 'emotionally intense and complex and may include violence, fear and severe power imbalance'.⁴⁵ This may require convenors to be equipped with additional areas of knowledge and skills. The Commission received submissions and comments on this issue in consultations. In consultation with current dispute resolution conference (DRC) convenors, participants agreed that child protection convenors required additional areas of specialist knowledge, which constituted a 'layer of specialisation above ADR training'.⁴⁶

7.33 The core competencies suggested include:

- suitable qualifications and experience in ADR and family decision-making processes⁴⁷
- significant knowledge of the child protection system and legislative framework⁴⁸
- demonstrated understanding of family dynamics, child development⁴⁹ (including attachment and trauma) and child protection issues⁵⁰
- cultural competency in relation to Aboriginal⁵¹ and culturally and linguistically diverse (CALD) communities⁵²
- demonstrated understanding of risk assessment
- communication skills and the ability to encourage open discussion.⁵³

7.34 Current Children's Court DRC convenors are appointed by the Governor in Council and must have 'appropriate qualifications and experience'. In the Melbourne Children's Court, the four sessional convenors currently have qualifications in social work and or law.⁵⁴ At Moorabbin and at rural courts, court registrars currently convene DRCs. JRCs are currently conducted by a magistrate or by the President of the Court.⁵⁵ There are no current requirements about ADR accreditation for judicial officers who conduct JRCs.

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

A COMPLAINTS PROCESS FOR FAMILY GROUP CONFERENCE AND CONCILIATION CONFERENCE CONVENORS

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

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

LEGAL REPRESENTATION AND ADVICE IN FAMILY DECISION-MAKING PROCESSES

INTRODUCTION

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

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

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

ARGUMENTS SUPPORTING LAWYERS' INVOLVEMENT IN FAMILY DECISION-MAKING PROCESSES

Vulnerable participants⁷³

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

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

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

7.45 A number of submissions highlighted the need for legal advice at an early stage of child protection matters for disadvantaged families, particularly when negotiating voluntary child-care agreements.⁸¹ These submissions expressed concern about the problems experienced by families who do not have access to legal advice at an early stage of a child protection matter.⁸²

7.46 Aboriginal agencies and organisations expressed concern about the vulnerability of Aboriginal people in family decision-making processes.⁸³ According to the Victorian Aboriginal Legal Service:

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

Legal advice and support for children and young people

7.47 Some submissions highlighted lawyers' roles in providing legal advice and supporting children and young people in family decision-making processes.⁸⁵ In a joint submission, the Victorian Council of Social Services and the Youth Affairs Council of Victoria advocated for the introduction of well-resourced FGC and stated that 'it is vital that all parties, including both the children and their families are adequately supported to participate'.⁸⁶ In its submission, Youthlaw expressed concern that 'children are not often heard in the separation and placement processes and other administrative and judicial proceedings'.⁸⁷

7.48 Previous reviews of this area have also commented on the level of children's involvement in family conferences and found that legal advice should be provided before the child decides whether to participate in the conference.⁸⁸ In a report by the CREATE Foundation, children and young people also expressed this view, saying that they wanted greater explanation and to be involved more directly in decisions that affect them.⁸⁹

Access to justice

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

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

Legal advice as a procedural safeguard

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

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

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

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

Lawyers enable clients’ participation

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

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

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

ARGUMENTS AGAINST LAWYERS’ INVOLVEMENT IN FAMILY DECISION-MAKING PROCESSES

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

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

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

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

Lawyers thwart client participation in family decision-making

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

FAMILY DECISION-MAKING PROCESSES IN OTHER JURISDICTIONS

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

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

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

Legal representation in family dispute resolution

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

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

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

REPRESENTATION OF DHS WITHIN FAMILY DECISION-MAKING PROCESSES

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

- 105 Consultations 22 (DHS CP Workers Southern), 25 (DHS CP Workers East & Nth West).
- 106 Consultations 22 (DHS CP Workers Southern), 25 (DHS CP Workers East & Nth West), 3 (CAU).
- 107 Submission 1 (Anonymous).
- 108 See King et al, above n 11, 119. Two particular aspects of lawyers' professional mindset have been argued to limit their engagement with ADR processes: one is lawyers' assumption that disputants are adversaries and the second is the belief that the application of legal principles will resolve all disputes. Leonard L. Riskin, 'Mediation and Lawyers' (1982) 43 *Ohio State Law Journal* 29, 44. Further, there is concern that lawyers will adopt mediation processes as 'another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage'. Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"' (1991-1992) 19 *Florida State University Law Review* 1, 3.
- 109 Child Protection Proceedings Taskforce, above n 40, 19–20.
- 110 Consultation 22 (DHS CP Workers Southern).
- 111 Submission 22 (Anchor).
- 112 *Child Protection Act 1999* (Qld) s 51L(1)–(2).
- 113 Material provided to the Victorian Law Reform Commission by WA Legal Aid on 4 February 2010.
- 114 Submission 46 (Children's Court of Victoria) 47.
- 115 *Children's Protection Act 1999* (SA) s 29(2).
- 116 There is a limited exception in cases where a lawyer has already been appointed for the child by the Youth Court in concurrent court proceedings, in which case that lawyer will attend the FCM, but as a lay advocate for the child, not as a legal representative.
- 117 *Children's Protection Act 1999* (SA) s 31(h).
- 118 *Children's Protection Act 1999* (SA) s 30(1)(e).
- 119 *Children and Young People Act 2008* (ACT) s 83(4)–(5).
- 120 *Children and Young People Act 2008* (ACT) s 85(3).
- 121 *Children and Young People Act 2008* (ACT) s 85(3).
- 122 Becky Batagol, 'Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution' (2008) 8(1) *QUT Law and Justice Journal* 24, 26.
- 123 Attorney-General's Department (Australian Government), 'Appendix C: Guidelines for Referrals to Legal Advice by Staff in Family Relationship Centres', *Operational Framework for Family Relationship Centres* (2007) 47.
- 124 Robert McClelland (Australian Attorney-General), 'Speech' (Speech to the Albury-Wodonga Family Pathways Network Event, Albury, 24 July 2009).
- 125 Batagol, above n 122, 28.
- 126 The Family Court may order that the child or young person's interests be represented by an ICL where the child or young person's best interests or welfare is the paramount or a relevant consideration in proceedings. *Family Law Act 1975* (Cth) s 68L(1)–(2).
- 127 Submission 37 (OCSC).
- 128 Ibid.
- 129 Ibid.
- 130 Children's Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 5.
- 131 Ibid 2.

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

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

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

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

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

LEGAL REPRESENTATION OF PARENTS IN FAMILY DECISION MAKING

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

- 132 Submissions 17 (CCC), 45 (FCLC), 31 (Gatehouse Centre), 28 (Anonymously), 48 (Victorian Bar); consultations 9 (Barristers), 7 (Legal Practitioners 2).
- 133 Submission 45 (FCLC).
- 134 Child Protection Proceedings Taskforce, above n 40, 20.
- 135 Ibid.
- 136 Children's Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 5.
- 137 Maughan and Daglis, above n 96, 52–3. See Appendix D for further information about the report.
- 138 Ibid, 53.
- 139 In September 2008, the Wallis group conducted a survey of convenors and Departmental workers attending DRCs at the Melbourne Children's Court. Wallis Consulting Group, *Survey of Participants and Convenors in Dispute Resolution Conferences at Melbourne's Children's Court Report* (2008). In all, 117 interviews were conducted from 61 DRCs that were held in the period – at i.
- 140 Ibid 16 – in 61 per cent of cases Departmental workers did not request the assistance of CAU.
- 141 Ibid ii, 16.
- 142 Ibid ii, 17–18.
- 143 Ibid iv.
- 144 Ibid ii.
- 145 Ibid iii.
- 146 *Children, Youth and Families Act 2005* (Vic) s 222(4).
- 147 *Children, Youth and Families Act 2005* (Vic) s 222(5).
- 148 Children's Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 2.
- 149 Submission 43 (VCOSS & YACVic).
- 150 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990). That article provides that where a child is capable of forming his or her own views, States parties shall allow the child to express those views freely in all matters affecting him or her.
- 151 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1). With some narrow exceptions, the representative for the child is the only representative listed as an attendee.

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

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

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

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

Model for involvement of parents' lawyers in conciliation conferencing sessions

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

Current practice: dispute resolution conferences

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

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

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

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

153 Ibid 92.

154 Ibid 92–3.

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

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

157 Ibid.

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

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

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

161 Ibid 36.

162 Ibid 23–4.

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

164 Ibid.

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

Models for involvement of parents' lawyers in judicial resolution conferences

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

THE COMMISSION'S PROPOSAL

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

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

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

INTER-PROFESSIONAL COLLABORATION AND TRAINING

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

THE DIFFICULTIES OF COLLABORATION AROUND FAMILY DECISION-MAKING PROCESSES

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

165 Ibid 2.

166 Ibid 5.

167 Ibid.

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

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

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

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

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

173 Ibid 189.

174 Ibid.

175 Ibid 190.

176 King et al, above n 11, 118.

177 Ibid.

178 Ibid 119.

179 Macfarlane, above n 171, 241–2.

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

WHY INTER-PROFESSIONAL COLLABORATION?

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

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

- 7.107 VLA's submission provided that the

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

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

Inter-professional training

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

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

Joint training has the potential to overcome these tensions.

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

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

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

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

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

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

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

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

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

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

181 *Ibid* 58.

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

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

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

185 *Ibid*.

186 Submission 11 (VLA).

187 Giovannucci and Largent, above n 64, 40.

188 *Ibid* 41.

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

190 Submission 11 (VLA).

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

192 *Ibid* 7.

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

194 *Ibid*.

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

196 *Ibid*.

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

Joint development and review of new processes

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

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

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

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

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

FAMILY GROUP CONFERENCES

FAMILY GROUP CONFERENCES AND THEIR USE IN CHILD PROTECTION

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

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

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

7.122 A key tenet of FGC is the participation of children and families in important decisions that affect them.²⁰⁵ Crampton maintains that FGC recognises that 'families have the most information about themselves to make well-informed decisions and that individuals can find security and a sense of belonging within their families'.²⁰⁶

7.123 FGC draws from both the restorative justice and ADR movements. FGC has some features in common with other ADR processes used in the field, such as child protection mediation, which attempt to bring families together and to engage them more fully in decision making.²⁰⁷ However, FGC differs from other family decision-making processes in that the 'underlying assumption' of FGC is that families should lead the decision-making process and the professionals should follow. In child protection mediation, parents and child protection professionals are expected to work together as a team in arriving at outcomes.²⁰⁸ Bernie Mayer describes this difference as an attempt to create a process through FGC which facilitates family responsibility for the care of children:

*By putting the family at the center [sic] of decision making and not assigning them peripheral roles as support figures, advisors or potential placement alternatives, the hope is to completely change the dynamic of accountability and responsibility for the care of children.*²⁰⁹

7.124 FGC also has links to restorative justice. It has been used extensively in relation to juvenile justice.²¹⁰ Restorative justice, usually thought of in the criminal context, is 'a method of bringing together all stakeholders in an undominated dialogue about the consequences of an injustice and what is to be done to put them right'.²¹¹ In child protection jurisdictions, FGC still incorporates restorative values. In its submission to the Commission, the Victorian Aboriginal Legal Service (VALS) stated that FGC can be seen as

*aligning with a restorative justice movement that fosters wellbeing and empowerment, shared interests and the strengths of children, young people, families and their communities. A restorative reform is theoretically linked to a broader shift in approaches to governance from the centralised, formal, top-down state regulation regime to a more pluralistic, informal, participatory, bottom-up decentralised regime.*²¹²

7.125 FGC originated in New Zealand where it was introduced in 1989 for both child protection and youth justice cases. It has been strongly influenced by Maori family and community structures and values.²¹³ In New Zealand, an FGC is ordinarily mandatory before commencing court proceedings in child protection matters. The introduction of mandatory FGC significantly transformed child protection processes in that country; in the first year of operation, approximately 2000 conferences were convened with agreements reached in all but a small percentage of cases.²¹⁴ It was a sudden change in practice, as described by Marie Connolly, Chief Social Worker in the Department of Child, Youth and Family Services:

*From November 1, 1989, New Zealand law required that all children assessed as being in need of care and/or protection be referred to an FGC. Overnight practice changed to include this formal legal process and coordinators were expected to manage the dynamics, whatever they were.*²¹⁵

197 Department for Victorian Communities, above n 59, 25.

198 Ibid.

199 M. Jerry McHale, Irene Robertson, and Andrea Clarke, 'Building a Child Protection Mediation Program in British Columbia' (2009) 47(1) *Family Law Court Review* 86, 89.

200 Ibid.

201 Ibid 90.

202 Ibid.

203 See David Crampton, 'Research Review: Family Group Decision-Making: A Promising Practice in Need of More Program Theory and Research' (2007) 12 *Child and Family Social Work* 202.

204 Leone Huntsman, *Family Group Conferencing in a Child Welfare Context* (2006) 1.

205 Joe Hudson et al, 'Introduction' in Hudson et al (eds), *Family Group Conferences: Perspectives Policy and Practice* (1996) 1, 2.

206 Crampton, 'Research Review', above n 203, 203.

207 Bernie Mayer, 'Reflection on the State of Consensus-Based Decision-Making in Child Welfare' (2009) 47 *Family Court Review* 10, 13.

208 Ibid.

209 Ibid.

210 John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 25.

211 Ibid 12.

212 Submission 38 (VALS).

213 Nathan Harris, National Child Protection Clearinghouse, Australian Institute of Family Studies, 'Family Group Conferencing in Australia 15 Years On', *Child Abuse Prevention Issues* (2008) No 27, 2.

214 Ibid 3.

215 Marie Connolly, 'Fifteen Years of Family Group Conferencing: Co-ordinators Talk About their Experiences in Aotearoa New Zealand' (2006) 36 *British Journal of Social Work* 523, 528.

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

USE OF FAMILY GROUP CONFERENCING IN VICTORIA

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

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

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

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

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

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

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

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

216 Ibid 537.

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

218 Harris, above n 213, 13–14.

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

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

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

222 Harris, above n 213, 9.

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

224 Consultation 11 (FCLC).

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

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

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

228 Submission 38 (VALS).

229 Harris, above n 213, 9.

230 Submission 26 (FVPLS Victoria).

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

232 Ibid 299.

233 Ibid 300.

234 Ibid 317.

235 Ibid 301.

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

237 Ibid 84.

238 Ibid (2003) 59 (citations omitted).

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

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

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

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

SUBMISSIONS ON FAMILY GROUP CONFERENCING

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

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

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

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

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

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

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

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

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

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

MODELS OF FAMILY GROUP CONFERENCING

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

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

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

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

240 Ibid 38.

241 Ibid.

242 Ibid 42.

243 Ibid 39.

244 Submission 40 (AIFS).

245 Ibid.

246 Submission 26 (FVPLS Victoria).

247 Ibid.

248 Submission 37 (OCSC).

249 Ibid.

250 Submission 30 (CECFW).

251 Submission 36 (FLS).

252 Submission 38 (VALS).

253 Ibid.

254 Submission 43 (VCOSS & YACVic).

255 Submission 24 (WHCLS).

256 Harris, above n 213, 6–7.

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

7.147 At the first stage, the coordinator is responsible for making all relevant information available to the family group. The referring social worker and other professionals often provide this information.²⁵⁸ During the second stage, non-family members withdraw from the process, leaving the family alone to begin decision-making.²⁵⁹ The third stage involves the coordinator seeking the family group's agreement and then that of the referral source.²⁶⁰ The conference decides together whether the child is in need of care and protection and, if so, decides on an appropriate course of action.²⁶¹ The procedure of the family group conference will be regulated by the conference participants and does not operate under strict procedural requirements.²⁶²

7.148 In his review of FGC in Australian jurisdictions, Nathan Harris stated that

*Programs in Australia, as a whole, also place less emphasis than New Zealand on using conferencing as a means to change the way in which problems are solved in mainstream, child protection cases.*²⁶³

7.149 Harris questioned whether the New Zealand model has been implemented in Australia at all.²⁶⁴ This means that FGC plays an entirely different role in the Australian jurisdictions than it does across the Tasman: 'it would seem that Australian jurisdictions have implemented conferencing in ways that fall short of the systematic empowerment of families that is envisaged in the New Zealand model'.²⁶⁵

7.150 Submissions received by the Commission supported not just the introduction of FGC into Victoria's child protection system, but the use of an appropriate model of FGC. West Heidelberg Community Legal Service submitted that the model of FGC implemented in Victoria should require approaches that 'empower families, children and immediate communities to be involved in decision making rather than continuing their exclusion from decision making'.²⁶⁶

7.151 In its submission, the Federation of Community Legal Centres supported greater use of FGC in Victoria provided that families are granted private time during the course of conferences.²⁶⁷

7.152 Properly convened FGCs require more time for preparation than they do to hold the conference. During the preparation phase, the convenors speak to the parties including the child protection workers and their representatives, determine who should attend, conduct a thorough intake and risk assessment and establish the issues at stake, as well as making arrangements for the conference. Crampton argued that providing funding and time for adequate preparation is essential to the success of any FGC program:

*One way to attempt to ensure programme integrity is by insisting that FGDM [family group conferencing] must include quality preparation time, which is described as 20–25 hours on average per case.*²⁶⁸

7.153 Another important aspect of FGC modelling is the decision about who should attend conferences. The Commission believes this issue should be given close attention when developing a Victorian process. VALS, after noting that their list was resource intensive, suggested that attendees at FGC should be the

*nuclear family; extended family; relevant community member(s) (including a community Elder or Respected Person if appropriate or other person that could potentially be in a position of future guardianship); generalist and specialist service representatives (relevant to the case determined through a pre-conference planning mechanism); DHS Child Protection representative; child or young person (if appropriate); child or young person legal representation (if applicable); legal representative to the parent(s); and Aboriginal and Torres Strait Islander or non-Aboriginal and Torres Strait Islander facilitator.*²⁶⁹

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

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

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

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

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

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

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

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

258 Ibid 92.

259 Ibid 92–3.

260 Ibid 93.

261 Ibid.

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

263 Harris, above n 213, 16.

264 Ibid 13.

265 Ibid 14.

266 Submission 24 (WHCLS).

267 Submission 45 (FCLC).

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

269 Submission 38 (VALS).

270 Submission 26 (FVPLS Victoria).

271 Submission 43 (VCOSS & YACVic).

272 Submission 21 (Grandparents Victoria Inc).

273 Submission 26 (FVPLS Victoria).

274 Harris, above n 213, 5.

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

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

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

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

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

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

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

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

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

7.164 The Children’s Court stated in its submission that

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

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

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

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

Aboriginal family decision making

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

283 See Submission 38 (VALS).

284 Ibid.

285 Ibid.

286 Harris, above n 213, 15–16.

287 Submission 26 (FVPLS Victoria).

288 Ibid.

289 Ibid.

290 Submission 39 (VACCA).

291 Consultation 11 (FCLC).

292 Submission 26 (FVPLS Victoria).

293 Ibid.

294 Ibid.

295 Submission 38 (VALS).

296 Submission 26 (FVPLS Victoria).

297 Ibid.

298 Consultation 4 (DHS Managers).

299 Submission 26 (FVPLS Victoria).

300 Ibid (emphasis in original).

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

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

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

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

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

FAMILY GROUP CONFERENCES AND COMMENCEMENT OF PRIMARY APPLICATIONS

A NEW COMMENCEMENT PROCEDURE FOR PROTECTION APPLICATIONS

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

THE NEED FOR LEGISLATIVE REFORM

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

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

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

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

7.191 The Commission agrees with these views.

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

LEGISLATIVE SCHEMES FOR FAMILY GROUP CONFERENCING IN OTHER JURISDICTIONS

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

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

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

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

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

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

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

305 Submission 40 (AIFS).

306 Ibid.

307 Submission 45 (FCLC).

308 Submission 26 (FVPLS Victoria).

309 Harris, above n 213, 8.

310 Ibid 13–14.

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

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

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

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

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

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

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

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

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

PRIMARY APPLICATIONS OTHER THAN PROTECTION APPLICATIONS

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

ATTENDANCE AT FAMILY GROUP CONFERENCES

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

EXCEPTIONAL CIRCUMSTANCES

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

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

Circumstances where family group conferencing is inappropriate

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

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

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

Family group conferencing practice standards to guide risk assessment

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

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

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

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

Urgent and emergency cases

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

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

COURT-ORDERED FAMILY GROUP CONFERENCING FOLLOWING EMERGENCY INTERVENTION

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

333 Submission 38 (VALS).

334 Ibid.

335 Meyer, above n 60, 284.

336 Ibid 286.

337 Submission 45 (FCLC).

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

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

340 Department for Victorian Communities, above n 59.

341 Ibid 13.

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

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

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

SECONDARY APPLICATIONS AND FAMILY GROUP CONFERENCES

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

SECONDARY APPLICATIONS THAT SHOULD GO STRAIGHT TO COURT

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

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

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

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

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

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

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

THE PROPOSED MODEL OF FAMILY GROUP CONFERENCING

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

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

THE INDEPENDENCE OF THE FAMILY GROUP CONFERENCE CONVENOR

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

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

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

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

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

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

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

LOCATION OF FAMILY GROUP CONFERENCES

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

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

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

PRACTICE STANDARDS FOR FAMILY GROUP CONFERENCING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PARTICIPATION OF CHILDREN AND YOUNG PEOPLE IN FAMILY GROUP CONFERENCES

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

Views on children's participation in family group conferencing

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

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

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

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

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

369 Rhoades et al, above n 182, 9.

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

371 *Ibid.*

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

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

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

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

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

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

The Commission's response and proposal

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

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

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

CONFIDENTIALITY OF FAMILY GROUP CONFERENCING

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

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

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

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

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

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

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

372 Submission 33 (Youthlaw).

373 CREATE Foundation, above n 89, 8.

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

375 *Ibid* 109.

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

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

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

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

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

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

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

383 Submission 26 (FVPLS Victoria).

384 Submission 38 (VALS).

385 *Ibid*.

386 *Ibid*.

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

FORMALISATION OF FAMILY GROUP CONFRENCING AGREEMENTS

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

Why have enforceable agreements with family group conferences?

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

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

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

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

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

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

391 Harris, above n 213, 4.

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

393 Harris, above n 213, 14.

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

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

396 Harris, above n 213, 13–14.

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

398 Harris, above n 213, 14.

399 Submission 31 (Gatehouse Centre).

400 Submission 38 (VALS).

401 Submission 26 (FVPLS Victoria).

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

Consent orders

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

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

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

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

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

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

Care plans

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

Proposal 1.9: A family group conference should be:

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

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

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

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

405 Parenting plans are discussed in detail in Chapter 4.

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

COURT REFERRAL TO A RANGE OF FAMILY DECISION-MAKING PROCESSES

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

A multi-door courthouse offers

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

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

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

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

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

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

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

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

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

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

COURT-BASED CONCILIATION CONFERENCES

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

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

CONCILIATION

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

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

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

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

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

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

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

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

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

VIEWS PRESENTED IN SUBMISSIONS AND CONSULTATIONS

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

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

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

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

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

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

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

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

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

418 *Ibid* 5.

419 *Ibid* 7.

420 *Ibid* 4.

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

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

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

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

425 Submission 39 (VACCA).

426 Submission 28 (Anonymous).

427 Consultation 6 (Private Practitioners 1).

428 Submission 48 (Victorian Bar).

429 Consultation 23 (DRC).

430 Submission 26 (FVPLS Victoria).

431 Consultation 22 (DHS CP Workers Southern).

432 Consultation 13 (DHS CP Workers Hume).

433 Consultation 18 (DHS CP Workers Gippsland).

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

DISPUTE RESOLUTION CONFERENCES

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

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

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

THE TASKFORCE REPORT AND NEW MODEL CONFERENCES

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

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

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

THE PROPOSED MODEL OF CONCILIATION CONFERENCES

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

The independence of the conciliation conference convenor

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

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

The location of conciliation conferences

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

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

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

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

Practice standards for conciliation conferences

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

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

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

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

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

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

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

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

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

468 Ibid 22.

469 Ibid 20.

470 Ibid 19.

471 Ibid 20.

472 Ibid 19.

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

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

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

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

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

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

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

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

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

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

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

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

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

486 Submission 17 (CCC).

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

Each of these issues is discussed below.

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

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

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

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

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

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

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

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

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

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

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

489 Astor, above n 414, 2.

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

491 See above at the heading 'Exceptional circumstances'.

492 See above at the heading 'Exceptional circumstances'.

493 Submission 26 (FVPLS Victoria).

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

495 *Ibid* 6.

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

497 *Ibid*.

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

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

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

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

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

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

Confidentiality of conciliation conferences

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

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

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

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

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

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

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

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

The status of agreements made in conciliation conferences

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

CONCILIATION CONFERENCES AND THEIR RELATIONSHIP TO NEW MODEL CONFERENCES

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

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

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

505 See Appendix Q: Convenor’s Report.

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

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

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

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

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

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

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

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

514 Submission 27 (CPS).

515 *Ibid.*

516 Submission 48 (Victorian Bar).

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

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

519 See above at the heading ‘Consent orders’.

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

Distinguishing features of new model conferences and conciliation conferences

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

Proposal 1.11: A conciliation conference should be:

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

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

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

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

524 *Ibid* 9.

525 *Ibid* 6.

526 *Ibid* 3.

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

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

529 *Ibid* 256.

JUDICIAL RESOLUTION CONFERENCES

JUDICIAL RESOLUTION CONFERENCES AND THEIR USE IN VICTORIA

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

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

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

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

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

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

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

RESPONSE AND PROPOSALS IN RELATION TO JUDICIAL RESOLUTION CONFERENCES

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

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

Recusal

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

Location of judicial resolution conferences

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

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

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

Practice standards/directions for judicial resolution conferences

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

7.397 JRC practice standards should contain the following information:

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

Each of these issues is discussed below.

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

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

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

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

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

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

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

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

547 Ibid 382–3.

548 Ibid 384–5.

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

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

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

552 Ibid 393.

553 Ibid 395–7.

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

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

556 CREATE Foundation, above n 89, 5.

Confidentiality of judicial resolution conferences

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

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

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

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

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

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

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

Formalisation of agreements made in judicial resolution conferences

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

Proposal 1.12: A judicial resolution conference should be:

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

EVALUATION AND REVIEW OF NEW DECISION-MAKING PROCESSES

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

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

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

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

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

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

558 Submission 45 (FCLC).

559 Submission 31 (Gatehouse Centre).

560 Submission 48 (Victorian Bar).

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

562 Astor and Chinkin, above n 11, 178.

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

564 Astor, above n 414, 37.

Chapter 8

Option 2—A New System: Enhancing Court Practices and Processes

CONTENTS

288	Introduction
288	Commencement of proceedings
307	Introduction of new case management, inquisitorial and problem-oriented processes
317	Models of representation for children
333	New grounds for intervention and agreement provision
340	Findings of fact on the balance of probabilities
342	Review of case plan decisions
344	Increasing the jurisdictional age limit of the Family Division of the Children's Court
346	Cross-jurisdictional issues
353	Built environment of the Children's Court
358	Court administration
361	Training

INTRODUCTION

- 8.1 This chapter examines new processes for the manner in which protection applications commence and proceed through the Children’s Court, including new ways of conducting contested proceedings. It also explores the introduction of new emergency procedures, a new approach to the representation of children, new grounds for protection applications, and jurisdictional issues.
- 8.2 In Chapter 6, the Commission suggested that the procedures used in protection applications in the Children’s Court should be specially designed for this unique jurisdiction. This chapter forms part of that process. It draws upon procedures used successfully in child protection matters in other jurisdictions. The proposals in this chapter should be read in conjunction with those in Chapter 7 concerning the introduction of a graduated range of supported, structured and child-centred agreement-making processes in child protection matters.
- 8.3 The chapter contains discussion and proposals about the following issues:
- new ways of commencing protection applications
 - the introduction of more case management, inquisitorial and problem-oriented approaches in the Family Division of the Children’s Court
 - the status of children in protection applications and models of representation
 - new grounds for protection applications and an ‘agreement’ provision
 - the standard of proof for findings of fact
 - mechanisms for the review of case plans
 - increasing the age limit for the Family Division’s protection jurisdiction
 - addressing cross-jurisdictional issues
 - improving the built environment and administration of the Children’s Court
 - improving the training of child protection workers, lawyers and Children’s Court judiciary.

COMMENCEMENT OF PROCEEDINGS**INTRODUCTION**

- 8.4 In this section, the Commission assesses the way in which protection proceedings commence in Victoria. In doing so, the Commission has been mindful of the issue referred to it by the Child Protection Proceedings Taskforce (the Taskforce):

Whether it is in the best interests of an apprehended child that section 242(3) of the Children, Youth and Families Act 2005 be amended to extend the period within which DHS must bring a safe custody application from 24 hours to 72 hours.¹

- 8.5 Section 242(3) of the *Children, Youth and Families Act 2005* (Vic) (CYF Act 2005) requires DHS to bring a child before the Children’s Court or a bail justice within 24 hours of taking a child into safe custody. Children other than those ‘of tender years’² are physically taken to court or to police stations where bail justice hearings are usually conducted.

8.6 After taking into account stakeholder views on this topic, the practices followed in other jurisdictions, and human rights considerations, the Commission proposes a new process for commencing proceedings in the Family Division of the Children's Court.

BACKGROUND

8.7 The Commission asked two questions about this issue in its Information Paper. They were:

- Should the present time requirement that protection applications commenced by taking the child into safe custody be brought to court (or before a bail justice) within 24 hours be retained?
- If not, what period of time should apply before Children's Court authorisation of this state intervention is required?

8.8 These questions, and the question referred by the Taskforce, are based on the premise that judicial oversight of a child protection practitioner's decision to remove a child from the care of his or her parents should occur *after* removal of the child. Stakeholders tended to accept this premise and addressed the advantages and disadvantages of various time periods in which the case should be heard following the child's removal.

8.9 After considering the many problems associated with applications by safe custody, human rights issues and the practices followed in some other jurisdictions, the Commission concluded that it should formulate proposals that require child protection practitioners to obtain judicial authorisation *before* removing a child unless this step is not feasible. The way in which most cases currently enter the court system creates significant difficulties for children, parents, child protection workers and the Court.

CURRENT COMMENCEMENT OF PROCEEDINGS

8.10 As discussed in Chapter 3, protection application proceedings currently commence either by way of notice (where a child is not involuntarily removed from parents) or by way of safe custody (where a child is involuntarily removed from parents). Over the past seven years, the proportion of protection applications commenced by safe custody has grown from 58 per cent to 78 per cent in Melbourne and from 16 per cent to 48 per cent in regional areas.³

8.11 Because more than three out of every four protection applications in Melbourne commence in circumstances where a child is removed from his or her parents' care, the atmosphere at the Children's Court in Melbourne is very stressful when the parties attend court within hours of the child's removal. It is also difficult for the Court to manage its lists because it has no forewarning of how many new protection applications will come before it each day. In an attempt to exercise some control over court listings and to avoid having to sit into the evening to hear protection applications without notice, the Court has issued a Practice Note, which requires all applications by safe custody to be filed at Melbourne Children's Court before 2 pm.⁴

- 1 Child Protection Proceedings Taskforce, *Report of the Child Protection Proceedings Taskforce* (2010) 9.
- 2 *Children, Youth and Families Act 2005* (Vic) s 242(4). In practice, children under 6 are regarded as being children of tender years: Springvale Legal Service, *Lawyers Practice Manual Victoria* (2009) [6.2.205]. Note, however, that Judge Coate, the former President of the Children's Court of Victoria, 'has expressed the view that it meant a child of less than 5 years of age': Children's Court of Victoria, *Research Materials* (2009) [4.9.1].
- 3 Boston Consulting Group, *Child Protection Proceedings Taskforce: Children's Court Data* (2010) 2. While the present discussion primarily focuses on the commencement of the initial protection application, any proposal relating to the method by which a child is involuntarily removed from their parent or parents should apply to the commencement of all applications, whether primary or secondary. Secondary applications (such as applications for breach, variation or new interim accommodation order; or breach of a protection order) may also be brought to court following the removal of a child by safe custody.
- 4 Children's Court of Victoria, *Practice Note No 1 of 2008: Applications by Apprehension*, 29 May 2008.

- 8.12 Parents, children and the child protection practitioners involved in applications by safe custody arrive at the Melbourne and Moorabbin Children's Courts at various times from 9:30 am. Victoria Legal Aid (VLA) assigns a duty lawyer to parents and children requiring representation. Urgent discussion between the lawyers and their clients, interspersed with bouts of vigorous negotiation between the lawyers, usually follows. During this process, the parties may be called into a courtroom over the loudspeaker to explain the case's status and advise whether court time will be required for a submissions contest about an interim accommodation order (IAO). A protection worker usually brings the child concerned, who has only recently been separated from their parents, to the Court.
- 8.13 The CYF Act 2005 sets a very low threshold for the involuntary removal of a child without judicial approval. The Act provides that a child protection worker may commence proceedings by first removing a child if it is 'inappropriate' to commence by notice.⁵ For certain secondary applications, the Act stipulates that a protective intervener may make an application by safe custody if there is 'good reason' not to proceed by notice.⁶

Early and later stage safe custody removal

- 8.14 During consultations, the Commission heard that a protection application by safe custody may be considered necessary at the time of the first visit with a family. This would occur at the end of the intake phase of the child protection process (normally between two to 14 days).⁷ The Boston Consulting Group (BCG) reported that in 2008–09, 47 per cent of applications by safe custody occurred 0 to 9 days from intake.⁸
- 8.15 Consultations with child protection workers indicated that applications by safe custody also occurred during the protective intervention phase of their work.⁹ Current practice guidelines require child protection workers to assess whether to issue a protection application by the end of this phase (which is generally 90 days from the date of initial report)¹⁰. BCG reported that in 2008–09, 38 per cent of applications by safe custody occurred after 30 days from intake.¹¹ In 25 per cent of these cases, Child Protection had been working with the family for more than 70 days.¹²
- 8.16 Many child protection practitioners believe that an application by safe custody provides benefits that are not so readily available with an application by notice. Some child protection practitioners informed the Commission that they would initiate a protection application by safe custody, following a precipitating event, in order to protect a child by having conditions attached to an IAO. The following comments were made:
- A PA [protection application] by safe custody is the only means of obtaining an Order immediately.*
- A crisis is the only way to get an interim order otherwise the court will not make an IAO.*
- If 'by notice applications' could be dealt with in a different way, the number of PAs [protection applications] by safe custody would be reduced.¹³*
- 8.17 If an application is brought by notice, a Court 'may' make an IAO,¹⁴ but is very unlikely to do so on the first day if there is no agreement between the parties because the Court is very busy hearing cases brought by safe custody. Compared to a safe custody application, a protection application by notice is a relatively slow and less certain way for a child protection worker to secure a court order with protective conditions.

VIEWS IN CONSULTATIONS AND SUBMISSIONS

- 8.18 The Commission received submissions for and against the retention of the 24-hour time limit in which to bring a matter to court following safe custody removal of a child. A number of people and organisations supported the retention of the existing 24-hour rule.¹⁵ However, only a few of the child protection practitioners consulted supported the retention of the 24-hour timeframe,¹⁶ with many more favouring a longer period—generally 72 hours.¹⁷ One private legal practitioner supported a 72-hour timeframe for safe custody hearings ‘if DHS provided detailed, accurate affidavits’ during that time.¹⁸ In its submission, the Office of the Child Safety Commissioner (OCSC) suggested 72 hours or two working days should be the maximum timeframe for applications by safe custody.¹⁹
- 8.19 In discussing the timeframe for the commencement of protection applications by safe custody, stakeholders acknowledged that children sometimes needed to be removed from their families for their protection, but that the decision to do this should be independently reviewed within a limited period. The Carney Committee recognised the tensions involved in removing children by ‘safe custody’ when recommending this power in 1984.²⁰

Lack of preparation time

- 8.20 Many child protection practitioners expressed concern about the lack of time to prepare for a hearing within 24 hours.²¹ Child protection workers reported that they had many tasks following the removal of a child, including talking to children about what was happening to them, organising clothes and toys and talking to the parents.²² Child protection workers in regional Victoria discussed logistical difficulties in attending a hearing within 24 hours after arranging a placement for a child several hours distance from the place of hearing.²³ Some child protection practitioners expressed concern about the ability of families to absorb the legal process in less than 24 hours and access legal advice.²⁴ OCSC expressed concern about the lack of opportunity for court preparation, especially following after hours removals:

*Protection Applications are often presented at the Children’s Court by After Hours staff, who may have had little sleep due to the actions being undertaken during the course of the night.*²⁵

- 5 *Children, Youth and Families Act 2005* (Vic) s 241(1).
- 6 *Children, Youth and Families Act 2005* (Vic) ss 314(1)(a), 269(4), 270(6).
- 7 On initial assessment protective workers may consider that urgent removal of the child is necessary and so an application by safe custody is filed and the child is brought before the Children’s Court or bail justice (if the Court is not sitting) within 24 hours of removing the child from the care of his or her parents.
- 8 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 25.
- 9 This is the period following the intake and investigation in which a child practitioner has substantiated concerns of harm to the child’s safety, stability and development. During this phase, the child protection practitioner has developed a best interests plan and is working intensively with the family while assessing the needs and future risk of the child. For more detail, see Chapter 3.
- 10 This period may be extended to 150 days with unit manager approval. See Chapter 3 for more detail.
- 11 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 25.
- 12 Ibid.
- 13 Consultation 25 (DHS CP Workers East & Nth West).
- 14 *Children, Youth and Families Act 2005* (Vic) s 262(1)(b).
- 15 Submissions 11 (VLA), 15 (Connections), 17 (CCC), 22 (Anchor), 26 (FVPLS Victoria), 28 (Anonymous), 31 (Gatehouse Centre), 38 (VALS), 45 (FCLC), 46 (Children’s Court of Victoria) 52, 48 (Victorian Bar).
- 16 Consultations 18 (DHS CP Workers Gippsland), 25 (DHS CP Workers East & Nth West).
- 17 Consultations 4 (DHS Managers), 13 (DHS CP Workers Hume), 20 (DHS Community Care Managers), 22 (DHS CP Workers Southern), 25 (DHS CP Workers East & Nth West).
- 18 Consultation 6 (Private Practitioners 1).
- 19 Submission 37 (OCSC).
- 20 The ‘safe custody power’ was provided in s 69 of the *Children and Young Person’s Act 1989* (Vic). See Chapter 2 for discussion of the introduction of the power to remove by safe custody to replace bail proceedings. As discussed in Chapter 2, the Carney Committee stated: ‘Safe custody is a drastic option and should be reserved for the protection of the child who is at immediate risk. It should not be allowed to become a routine or de facto placement option, usurping the rights of the family’: Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 2, 227 (citation omitted).
- 21 Consultations 4 (DHS Managers), 13 (DHS CP Workers Hume), 25 (DHS CP Workers East & Nth West).
- 22 Consultation 13 (DHS CP Workers Hume).
- 23 Ibid.
- 24 Consultations 4 (DHS Managers), 20 (DHS Community Care Managers).
- 25 Submission 37 (OCSC).

8.21 OCSC emphasised the need for authorisation of state intervention 'in as short a timeframe as possible', but said that this should not be 'at the cost of appropriate arrangements being made for the child's care and support ... Consideration could be given to specifying 72 hours or a maximum of two working days'.²⁶ Other respondents suggested that short periods of time lead to poor decision making or an inability to undertake an appropriate investigation.²⁷

Children's attendance at court

8.22 The Commission received a number of submissions about the requirement for children to attend court.²⁸ Although some respondents stated that children might wish to attend court,²⁹ or that it provided them with an opportunity to see their family,³⁰ many felt that attending court could be a distressing experience for children.³¹ The Gatehouse Centre submitted that for children, court is 'highly emotional and stressful at times'.³² Many stakeholders expressed concern about court facilities for children, particularly the lack of childcare.

Bail justice hearings

8.23 If Court is not sitting within 24 hours after removal of a child, a bail justice must hear an IAO application before the case proceeds to the Children's Court. Some stakeholders expressed concerns both about children needing to attend police stations for bail justice hearings and about bail justices' comprehension of children's issues.³³ Some child protection managers considered that bail justices lacked appropriate training.³⁴ Further, child protection practitioners in regional Victoria reported that children and workers sometimes waited many hours for a bail justice to attend a hearing.³⁵

Extension of time limit

8.24 The Commission heard different views about extending the 24-hour time limit within which to receive court or bail justice authorisation for a child's removal. Many people were concerned about the magnitude of the decision to remove a child from their family involuntarily and the resulting need to ensure timely independent oversight.³⁶

8.25 The Children's Court opposed any extension of the 24-hour timeframe for three reasons:

1. Children are often returned home when applications by safe custody first come before the Court.
2. There is a lack of identifiable concern about current decision making by the Court.
3. there are concerns about the psychological impact of separation on a child.³⁷

Other stakeholders concluded that an extension of the timeframe beyond 24 hours before a hearing would be contrary to a child's best interests.³⁸

8.26 The Children's Court estimates that 50 per cent of children removed by safe custody are returned home on an IAO when the matter first comes before the Court.³⁹ The Court states that this occurs where the risk of harm 'could be ameliorated and rendered acceptable by court-imposed conditions', and that children should not be separated from their parents for more than 24 hours in these circumstances.⁴⁰ For children placed in out-of-home care, the Court states it usually will include in the order 'conditions in relation to access and counselling which will moderate the psychological effects of separation'.⁴¹

8.27 The Children’s Court Clinic asserted that the current time requirement ‘emphasises the importance and profound nature of such an intervention and is there to protect the child and the family from unnecessary, prolonged separation’.⁴² Some lawyers for parents and children considered that increasing the time requirement to 72 hours would only increase the trauma experienced by children, and viewed it as a regressive step for the sake of better paperwork.⁴³ A child protection practitioner shared a similar view in consultations, suggesting that if the time period for bringing safe custody cases to court was increased to 48 hours, the child would be traumatised for two days instead of one day.⁴⁴

INVOLUNTARY REMOVAL OF A CHILD IN THE CONTEXT OF THE VICTORIAN CHARTER

8.28 As discussed in Chapter 3, any new Victorian laws must be consistent, as far as possible, with the rights in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).⁴⁵ The rights of direct relevance to the question of a child’s removal from his or her family include:

- the right of the family to protection⁴⁶
- the right of the child to protection⁴⁷ and to life⁴⁸
- the right of a person ‘not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with’.⁴⁹

8.29 It is clear that the involuntary removal of a child from his or her family without judicial oversight interferes with the family’s right to protection as the fundamental group unit of society and limits the Charter’s right concerning interference with the family and home. It is clear, however, that the family’s right to protection may need to be limited at times in order to protect the child from harm.⁵⁰ As discussed in Chapter 3, the Charter only permits human rights to be subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors’.⁵¹

26 Submission 37 (OCSC).
 27 Submissions 18 (SECASA), 34 (Victoria Police). Similar concerns were also expressed in submission 1 (Anonymous) and consultation 22 (DHS CP Workers Southern).
 28 This matter is discussed in Chapter 3.
 29 Submissions 15 (Connections), 31 (Gatehouse Centre), 45 (FCLC); see section on participation of children for greater discussion on the general issue of children’s attendance at court below.
 30 Consultation 11 (FCLC).
 31 Consultation 2 (CCC); submissions 22 (Anchor), 26 (FVPLS Victoria), 31 (Gatehouse Centre).
 32 Submission 31 (Gatehouse Centre).
 33 Consultation 17 (Victoria Police).
 34 Consultation 4 (DHS Managers).
 35 Consultations 18 (DHS CP Workers Gippsland), 13 (DHS CP Workers Hume).
 36 Submissions 37 (OCSC), 24 (WHCLS), 17 (CCC), 46 (Children’s Court of Victoria) 52.
 37 Submission 46 (Children’s Court of Victoria) 52–6.
 38 Submission 22 (Anchor).
 39 Submission 46 (Children’s Court of Victoria) 53.
 40 Ibid.
 41 Ibid.
 42 Submission 17 (CCC).
 43 Consultation 16 (VLA).
 44 Consultation 25 (DHS CP Workers East & Nth West).
 45 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28. This section requires that a statement of compatibility with the Charter is tabled in Parliament with every new Bill. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(2) reinforces the importance of consistency with the Charter. For a detailed discussion of the Charter rights as they generally relate to child protection legislation, see Chapter 3 under ‘Charter of Human Rights and Responsibilities and international rights instruments’.

46 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1).
 47 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).
 48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9.
 49 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a). For brevity, the right in s 13(a) is referred to in the following discussion as the Charter right ‘prohibiting interference’. For a discussion of these rights, see Chapter 3 under ‘Charter of Human Rights and Responsibilities and international rights instruments’.
 50 Department of Human Services (Victoria), *Protecting Victoria’s Children: Child Protection Practice Manual*, ‘Human Rights and Child Protection’, Advice No 1568 (31 December 2007), from CD-ROM provided at 23 March 2010, 40. This is discussed in Chapter 3 in both ‘Balancing the protection of the child in his or her best interests and protection of the family’ and ‘Separation of children from their families’.
 51 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

- 8.30 There are two important issues to consider in relation to the justification for the limitation of rights caused by the length of time for safe custody prior to a court order. The first is the relationship between the limitation and its purposes:⁵² there must be a rational connection between the removal of the child and the protection of the child from harm. The second is the 'proportionality principle': a limitation must not extend further than is reasonably necessary to achieve its purpose, and may not be reasonable if there are other means of achieving the purpose which require less imposition on a right.⁵³
- 8.31 The clear purpose of emergency removal without judicial authorisation is to ensure the immediate protection of the child. There will always be emergencies that require some limitation of the family's rights to protection⁵⁴ and to be free from interference⁵⁵ in order to protect a child from harm. Any legislative provisions designed to achieve this end must do so with as little interference with these family rights as possible. Provisions for emergency removal must not extend beyond what is needed to protect the child from harm, and there must not be any less restrictive means reasonably available.

TIMEFRAMES FOR JUDICIAL AUTHORISATION OF INVOLUNTARY REMOVAL OF CHILDREN IN OTHER AUSTRALIAN JURISDICTIONS

- 8.32 All Australian states and territories have legislation giving child protection practitioners, or the police, powers to remove children from their parents in emergencies.⁵⁶ The jurisdictions vary in the timeframes they impose on child protection practitioners to seek judicial authorisation for a child's removal. Victoria does not have the shortest timeframe. In Queensland, child protection practitioners and police officers have eight hours to obtain a temporary assessment order or release the child.⁵⁷ In Tasmania, child protection practitioners cannot involuntarily remove a child without a warrant from a magistrate.⁵⁸ South Australia has a similar timeframe to Victoria, with a court hearing on 'the next working day', although there are no bail justice hearings so applications lodged on Friday after a child's removal are heard on the following Monday.⁵⁹ The ACT allows two working days, or if over the weekend, until the next sitting day. NSW has a 72-hour timeframe for filing applications following emergency removal.⁶⁰ The Northern Territory allows child protection practitioners 72 hours to obtain a temporary protection order from the Court.⁶¹ Western Australia has the longest timeframe of the eight states and territories, with a court hearing usually five days after a child is removed.⁶²

Distinguishing between time of filing application and time of first hearing application

- 8.33 Western Australian legislation explicitly distinguishes between the time for filing an application (two days from removal) and the time period for having the case first heard (usually three days from filing).⁶³ In practice, parents and children in Western Australia are rarely able to contest the application and associated placement issues on the first court date.⁶⁴ It is usually necessary to seek hearing time on an adjourned date to contest the Child Protection Service's decision to remove a child.⁶⁵ Similarly, the Commission heard that in parts of regional Victoria, cases are often adjourned for contest by submission. At the Children's Courts in Melbourne and Moorabbin, parents and children have an opportunity to be legally represented and to challenge DHS's decision to remove a child within one working day of the child's removal.

Judicial authorisation prior to involuntary removal of a child and temporary assessment

- 8.34 In the Australian jurisdictions that require judicial authorisation for the involuntary removal of a child either before removal (Tasmania) or within eight hours of removal (Queensland), a court order may be obtained by a child protection practitioner on an *ex parte* basis—that is, in the absence of the parents and child.⁶⁶ Both of those states then provide for the Court to make short-term orders to enable interim protection for the child while Child Protection Services carry out an investigation.⁶⁷
- 8.35 In Queensland, an initial temporary assessment order may be made for up to four days,⁶⁸ and then if necessary a court assessment order may be ordered for four weeks, with one extension of four weeks.⁶⁹ The grounds upon which the Court makes these orders concern the child's immediate protection and are different to the grounds of any subsequent application for a protection order.⁷⁰ Similarly, in Tasmania, the initial order that may be obtained *ex parte* may last 120 hours,⁷¹ after which a temporary assessment order may be made for four weeks, with one extension of either four weeks or eight weeks, depending on whether a family group conference (FGC) will be held.⁷² Again, the requirements for obtaining a temporary assessment order are different to the grounds for making a care and protection order.⁷³
- 8.36 In Victoria, temporary assessment orders were introduced with the CYF Act 2005 and came into effect on 1 October 2007. However, this order is seldom used within the Victorian child protection system. A temporary assessment order may be made in the absence of parents and children, but initially lasts only ten days. Temporary assessment orders may not extend beyond 21 days.⁷⁴ To obtain this order, child protection practitioners must have a 'reasonable suspicion that a child is in need of protection' and satisfy other grounds that relate to the need to undertake further investigation.⁷⁵

52 Kylie Evans and Alistair Pound, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 74.

53 The 'nub' of the 'proportionality principle' originates from the relevant considerations in s 7(2)(c), (e) of the Charter, that is the nature and extent of the limitation and whether there is a less restrictive way to achieve the purpose of the limitation: *ibid.*

54 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1).

55 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

56 For a comparison, see Appendix N.

57 *Child Protection Act 1999* (Qld) s 18(7).

58 *Children, Young Persons and Their Families Act 1997* (Tas) s 20; see also Chapter 2.

59 *Children's Protection Act 1993* (SA) s 16.

60 *Children and Young People Act 2008* (ACT) s 410; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45.

61 *Care and Protection of Children Act 2007* (NT) s 105(5). The Act provides that as soon as practicable after the order is made, the CEO must give a copy of the order to each parent of the child, inform the child about the order, and explain the effect of the order to the child: s 106.

62 In WA, an application must be made not more than two working days after a child is removed and the Court must try to list the application in three days: *Children and Community Services Act 2004* (WA) s 38.

63 *Children and Community Services Act 2004* (WA) s 38.

64 Email from Julie Jackson, Solicitor in Charge, Family Court Services and Children's Court (Protection) Services, Legal Aid Western Australia, 18 June 2010.

65 *Ibid.*

66 *Children, Young Persons and Their Families Act 1997* (Tas) s 20; *Child Protection Act 1999* (Qld) s 26.

67 *Children, Young Persons and Their Families Act 1997* (Tas) s 21, 22; *Child Protection Act 1999* (Qld) ss 28, 29.

68 The initial order is for three days only with the possibility of extension for an additional day: *Child Protection Act 1999* (Qld) ss 28–9, 34; see also Chapter 4 for detailed discussion of these points.

69 *Child Protection Act 1999* (Qld) s 47, 49.

70 See a summary of the Queensland child protection system in Chapter 4.

71 *Children, Young Persons and Their Families Act 1997* (Tas) s 21.

72 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(5).

73 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(1)–(2) compared with s 42(3)(a)–(b).

74 *Children, Youth and Families Act 2005* (Vic) s 236.

75 *Children, Youth and Families Act 2005* (Vic) s 228(1).

- 8.37 Child protection practitioners have rarely applied for this order and in 2008–09 the Children’s Court did not make any temporary assessment orders.⁷⁶ The Commission notes that the threshold for applying for a protection order (being ‘satisfied on reasonable grounds that a child is in need of protection’) is not much higher than the threshold for applying for a temporary assessment order (having ‘reasonable suspicion that a child is in need of protection’). If a protective intervener makes a protection application by safe custody (removal of the child), the Court may make a 21-day IAO within one working day and in most circumstances, this order may be continually extended.⁷⁷

EMERGENCY INVOLUNTARY REMOVAL AND COMMENCEMENT IN NEW ZEALAND

- 8.38 In New Zealand, child protection practitioners require judicial authority (‘a place of safety warrant’) prior to involuntarily removing a child from his or her parents. In the absence of judicial authority, only police have removal power.⁷⁸ This process is described in Chapter 5. When a child is removed on a place of safety warrant or by police, the first court appearance should occur within five days of the child being removed and does not necessitate the commencement of proceedings for a declaration that a child is in need of care and protection.⁷⁹ The Court has power, in the absence of the Child Protection Service filing an application for a declaration, to make orders concerning a child’s placement and orders relating to access.⁸⁰ Alternatively, the child protection agency may have entered into a temporary care agreement with the parents and child, or returned the child. Following a child’s emergency removal, an FGC must first be attempted before the Court can declare that the child is in need of protection, unless the child has been abandoned.⁸¹

DISTINGUISHING BETWEEN THE DECISION TO REMOVE A CHILD AND THE DECISION TO FILE A PROTECTION APPLICATION

- 8.39 In its review of child welfare laws in 1981, the Australian Law Reform Commission (ALRC) recognised the need for a power to take a child into safe custody immediately, but stated:

*A decision to take action of this kind should, however, be quite separate from a decision to initiate care proceedings. Placing a child in custody should not inevitably lead to the initiation of care proceedings.*⁸²

- 8.40 In Victoria, the decision by a child protection practitioner to remove a child from the care of his or her parents or guardian requires the initiation of protection proceedings. A protection application must be filed at court ‘as soon as possible’ after taking a child into safe custody, with copies of the application provided to parents and children over 12 years.⁸³
- 8.41 The Commission believes that the decision to obtain an urgent order to protect a child from immediate risk should be separated from the decision to initiate a protection application. Immediate concerns for a child’s wellbeing ought to be addressed by an urgent interim court order. There should then be an opportunity, in most cases, for parents, children, child protection and other relevant people or agencies to seek to address future concerns for a child through a supported and structured agreement-making process as described in Chapter 7 (Option 1). If this process is inappropriate or fails to produce agreement and child protection practitioners have ongoing concerns for a child’s wellbeing, it should then be possible to commence protection proceedings.

ADDRESSING FAMILY VIOLENCE PREVENTION OPTIONS BEFORE REMOVING A CHILD

- 8.42 In NSW, a child protection practitioner or police officer may remove a child without warrant if the child is at immediate risk of significant harm and making an apprehended violence order would be insufficient to protect the child from risk.⁸⁴ The legislation requires authorities to consider whether it is appropriate to obtain an order to exclude the alleged perpetrator of violence from the home before taking steps to remove a child. Similarly, in England and Wales, an exclusion order may be attached to an emergency removal order or an interim care order so that the child can remain at home and the alleged abuser is excluded from the home.⁸⁵
- 8.43 The Commission considers that provisions such as these seek to minimise further trauma to parents and children affected by family violence, and actively promote outcomes that involve the least amount of compulsory intervention in the family's life as is required.

ADDRESSING THE SERIOUSNESS OF REMOVING A CHILD SUDDENLY

- 8.44 In NSW, if a child protection practitioner removes a child considered at 'immediate risk of serious harm' from the care of parents without a warrant, on the first hearing date the practitioner must explain to the Court why removal without a warrant was necessary in the circumstances.⁸⁶
- 8.45 In Victoria, a child protection practitioner is not required to explain to the Court why they considered an application by notice 'inappropriate'⁸⁷ when deciding to take a child into safe custody. Once the child is taken into safe custody, the Court must consider whether there would be 'an unacceptable risk of harm to the child' if not removed from the care of his or her parents at the time of the court hearing.⁸⁸ The original decision to take a child into safe custody is not formally examined.

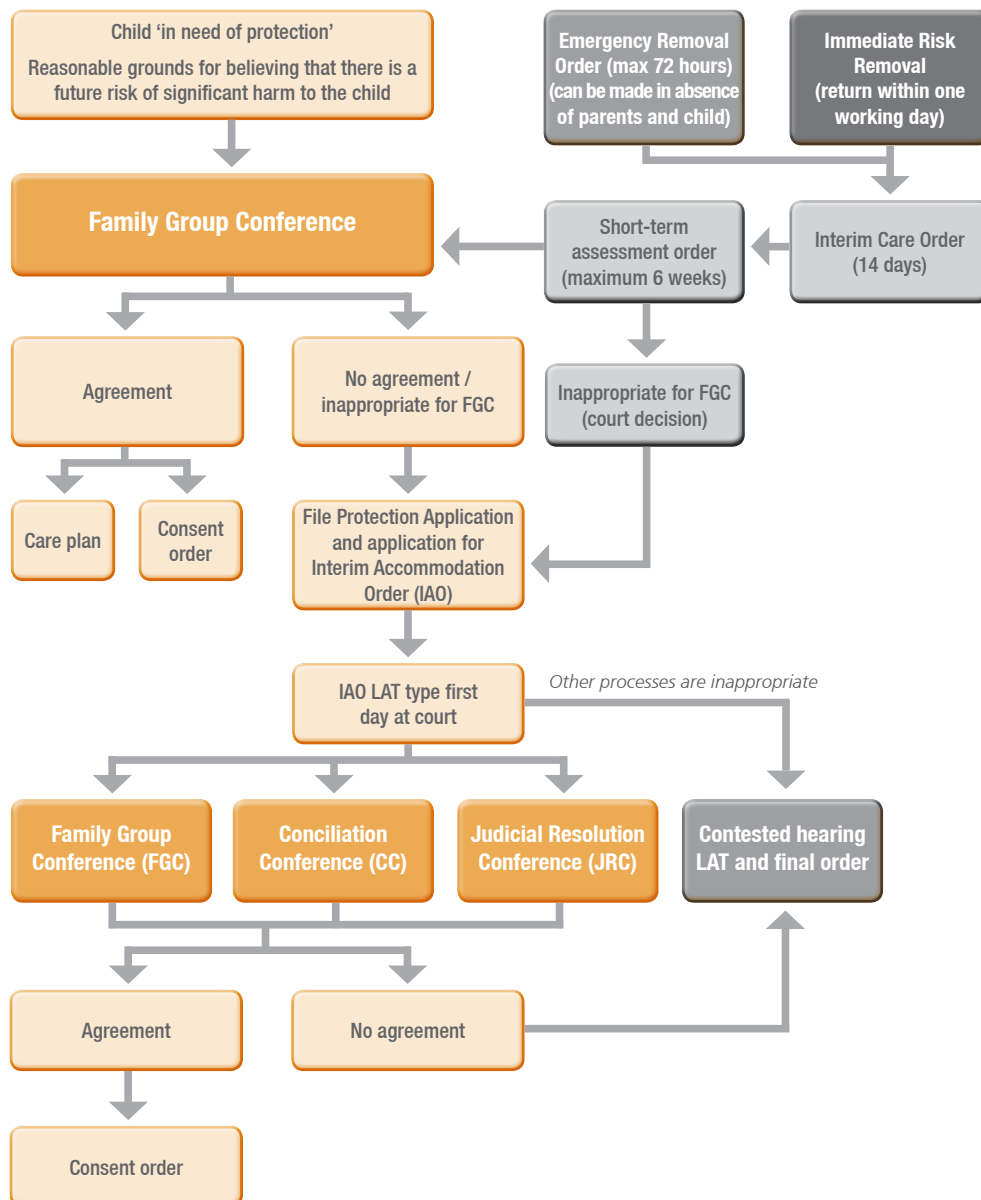
THE COMMISSION'S VIEWS IN RELATION TO COMMENCEMENT

- 8.46 The Commission proposes a new process for commencing proceedings in the Family Division of the Children's Court that has the following main features:
- All protection applications should commence by notice.
 - An FGC should be conducted prior to filing a protection application by notice, unless exceptional circumstances exist.
 - If emergency removal of a child is required, a child protection practitioner should first obtain an emergency removal order (which may be obtained in the absence of parents and child), unless there is immediate risk, and insufficient time to apply for this order, and a safety notice or intervention order would not be sufficient to protect the child. On making an emergency removal order, a judicial officer should also order that the matter return to court at a time and date (at the judicial officer's discretion) up to 72 hours from the likely time of the child's involuntary removal.
 - If a child is involuntarily removed without an emergency removal order, the protective intervener should apply to the Court for a hearing of an interim care order application within one working day of the child's removal.

- 76 Children's Court of Victoria, *Annual Report 2007–2008* (2008) 19.
- 77 *Children, Youth and Families Act 2005* (Vic) s 267(2); see also discussion in Chapter 3 regarding periods of extensions and limitation of extension for an IAO to secure welfare.
- 78 *Children, Young Persons and Their Families Act 1989* (NZ) ss 39(1), 42.
- 79 However, an application can be made without first attending FGC where the child or young person has been removed: *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2)(a).
- 80 *Children, Young Persons and Their Families Act 1989* (NZ) s 46.
- 81 *Children, Young Persons and Their Families Act 1989* (NZ) ss 14(1)(g), 70(2)(c), 72(2).
- 82 (Australian) Law Reform Commission, *Child Welfare*, Report No 18 (1981) 232.
- 83 *Children, Youth and Families Act 2005* (Vic) s 240(3).
- 84 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 43(1).
- 85 *Children Act 1989* (UK) s 44(a). An exclusion order may also be attached to an interim care order made under s 38(1)(a).
- 86 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 43, 45(2).
- 87 *Children, Youth and Families Act 2005* (Vic) s 241(1).
- 88 *Children, Youth and Families Act 2005* (Vic) s 10(3)(g); see also discussion in Chapter 3.

- Following a child's removal, the Court should be permitted to make a 14-day interim care order if satisfied that a child is at unacceptable risk of harm. Prior to the conclusion of an interim care order, the Court should be permitted to make a short-term assessment order for a maximum period of six weeks to enable the parties to attend an FGC, or if exceptional circumstances exist, to enable a protection application to be filed.
 - A protective intervener should file an application for an IAO with any protection application if an FGC has failed to produce an agreement (or an FGC was unsuitable) and an interim order is required to protect a child from risk of significant harm.
 - Once a protection application is filed, the Court should direct that a conciliation conference (CC), a judicial resolution conference (JRC) or another FGC (whichever is most appropriate) takes place, unless exceptional circumstances exist.
- 8.47 The Commission acknowledges that some emergencies are inevitable and that there must be a framework for dealing with them that is compatible with the rights in the Charter. In some instances, the child's right to protection must take priority over other relevant rights. In the rare instances where an emergency removal order, safety notice or intervention order is not appropriate, it should be possible to remove a child from his or her family without judicial oversight. Even when a child is removed in this way, the proposed new commencement process seeks to ensure the child's protection by limiting this step to the minimum duration necessary. To achieve this end, the proposed model requires the matter to be brought before the Court within one working day.
- 8.48 Under the proposed model, a child protection worker would generally need to obtain an emergency removal order *before* removing a child from his or her family. The protection worker would only be permitted to remove a child without an order if there is an immediate risk to the child or insufficient time to apply for an emergency removal order, and a safety notice or intervention order would not ensure the child's protection. In this instance, the protective intervener would be required to apply to the Court for a hearing of an interim care order application within one working day of the child's removal.
- 8.49 Requiring a child protection worker to obtain an emergency removal order would provide judicial oversight of decisions now made solely by the Department. Judicial authorisation of a decision to remove a child is desirable when considering the extent of this intervention into family life. Further, safety notices and intervention orders would have to be considered as possible means by which the child could remain at home and have his or her safety ensured. Although a safety notice or intervention order still involves family intervention, it enables the child to remain at home with a parent, grandparents or other family members while the party creating the risk of harm is removed from the home.

PROCESS MAP FOR A NEW SYSTEM



All protection applications to commence by notice

8.50 The Commission proposes that if a child is considered by a child protection practitioner to be 'in need of protection' (as defined in the CYF Act 2005), and the child is assessed as being at risk of future harm, then a child protection practitioner should refer the case to an FGC. Emergencies requiring the prompt removal of a child from his or her parents should be dealt with quite separately from protection applications. The procedures proposed for use in emergencies are discussed in detail below.

- 8.51 The reasons for requiring a case to be referred to an FGC before a protection application can be commenced are discussed at length in Chapter 7 (Option 1). The current child protection policy is to initiate court action only if there is a 'risk of future harm' to the child, rather than simply relying on past harm alone.⁸⁹ This is a helpful policy that should apply to the decision to initiate a referral to an FGC under the proposed new commencement process.
- 8.52 Under the proposed new process, a child protection practitioner would commence formal action by requesting an FGC rather than filing a protection application in the Court. As suggested in Option 1, the relevant agency to arrange an FGC could be VLA. If Option 3 were adopted, child protection practitioners would notify the Office of the Children and Youth Advocate (OCYA) to request an FGC. The procedure relating to assessment of suitability for an FGC—including whether exceptional circumstances exist to exclude an FGC—is outlined in Option 1 (Chapter 7).
- 8.53 If an FGC proceeds and an agreement is reached, parties could either produce a 'care plan' or file an application for consent orders with the Court. In this circumstance, a protection application would not be filed. If, however, an FGC fails to result in an agreement or if an FGC convener decides that an FGC should not take place because of exceptional circumstances, then a child protection practitioner could file an application by notice in the Children's Court.

Proposal 2.1: All protection applications should commence by notice.

Proposal 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.

PROCESS AND DISCLOSURE FOLLOWING FILING OF PROTECTION APPLICATION

- 8.54 When protection applications are filed at court, they should be given an early return date, with most matters generally being set down for an initial hearing within seven days. If a protection application is accompanied by an application for an IAO, or the Court grants leave for the filing of a protection application when making a short-term assessment order (see the section below), then it should be possible for a case to be listed within a shorter period of time at the discretion of the Court. In certain situations, this could be within 24 hours.
- 8.55 The protection application should contain the orders sought by the protective intervener and should be filed with a summary that sets out the specific concerns and available relevant material that support the application.⁹⁰ The Department of Human Services (the Department/DHS) should not be confined to relying on this summary alone in future hearings.
- 8.56 This proposal for a summary is aligned with the Taskforce's recommendation for 'earlier and succinct disclosure from DHS regarding their main concerns and their recommendations for the future'.⁹¹ The Commission is aware that VLA and DHS are currently developing an appropriate early disclosure document to improve the current practice relating to protection applications by safe custody.⁹²
- 8.57 If, pending the determination of the protection application, an IAO is necessary to ensure a child is protected from harm, then a protective intervener should file a separate IAO application. In this circumstance, the summary that accompanies the protection application should contain material in support of any IAO conditions sought. Details of the proposed placement should be included in the summary.

Proposal 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.

FIRST RETURN DATE AFTER FILING PROTECTION APPLICATION

8.58 In the following section, the Commission describes how cases could proceed through the Court if its proposals for a new mode of commencing protection applications and new emergency procedures are adopted.

8.59 Prior to the first return date, a protection application should be allocated to a particular judicial officer who would deal with the case, wherever possible, until it is finalised.⁹³

8.60 The judicial officer should deal with the matter on the first return date by adopting an inquisitorial approach.⁹⁴ As discussed below, the Children's Court could use a court-appointed expert as part of this more inquisitorial approach. In addition, a best interests representative for the child could assist the Court in ensuring relevant evidence is available.⁹⁵ The judicial officer should be encouraged to hear directly from, and speak directly to, the parties who attend, even though the parties would continue to be represented.⁹⁶

Application for an interim accommodation order heard on first return date

8.61 The judicial officer would determine any application for an IAO on the first return date and the duration of this order would depend on the minimum time required to enable the next court-ordered process to occur. The Commission supports the Taskforce's recommendation to remove the 21-day time limit for IAOs, except that the strict time requirements for orders in relation to secure welfare placement should remain.⁹⁷ The Taskforce suggests that the 21-day limitation for IAOs 'would seem to have been intended to give the Court a monitoring role'.⁹⁸ While the Commission considers that it is important to monitor interim orders, appropriate monitoring can be achieved through more active judicial case management, which is discussed below.

Proposal 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.

8.62 As well as dealing with IAOs on the first return date of a protection application, the judicial officer should also consider the most appropriate forum for trying to resolve outstanding issues. The Court should consider the appropriateness of another FGC, or a CC or JRC (as described in Option 1).

89 A child may be found to be 'in need of protection' on the basis of not being protected from past significant harm alone: *Children, Youth and Families Act 2005* (Vic) s 162(1)(c)–(f).

90 The Commission notes that protection reports and disposition reports are often filed with, or shortly after the filing of, protection applications by notice, but this is not required under the *Children, Youth and Families Act 2005* (Vic). See Chapter 3 for further discussion on protection reports and disposition reports.

91 Child Protection Proceedings Taskforce, above n 1, 6.

92 The Commission is aware of a proposal to introduce to the Melbourne Children's Court the 'statement of grounds' form that is in use at Moorabbin Children's Court for protection applications by safe custody. This form is discussed in Chapter 3.

93 The advantages of a docket system, and the Commission's views as to the desirability of the Children's Court adopting such a system, are discussed below in the section entitled 'Introduction of new case management, inquisitorial and problem-oriented processes'.

94 See discussion below under the heading 'The introduction of more inquisitorial approaches'.

95 See discussion below under the heading 'Models of representation for children'.

96 See the discussion of children's representation and participation at court under 'Models of representation for children' below.

97 Child Protection Proceedings Taskforce, above n 1, 30–1, recommendation 12; *Children, Youth and Families Act 2005* (Vic) ss 264(2), (4), 267(2)(c).

98 Child Protection Proceedings Taskforce, above n 1, 12, 30.

- 8.63 If a matter is appropriate for some type of family decision-making process, the IAO should be made for a period that enables the appropriate conference to take place. The case could also be given a final hearing date which could be vacated if an agreement is reached following the family decision-making process. Following the family decision-making process, the judicial officer responsible for the case may wish to hold a directions hearing to determine whether a case still requires a contested hearing and whether an IAO should be extended. A telephone mention⁹⁹ could be held at this point. If any party seeks to vary an IAO, the application should be supported by a short summary document and it should be listed before the judicial officer docketed to the case.
- 8.64 The combination of a single magistrate or judge managing individual applications with greater use of family decision-making processes should result in fewer court events for each case. While most cases in the Children's Court are finalised within a comparatively short timeframe,¹⁰⁰ there is a relatively high average number of court events. In the 2008–09 year, 41 per cent of primary protection applications¹⁰¹ that resolved prior to hearing required an average of 5.6 mentions.¹⁰² The current average number of court events should reduce with active judicial management of cases.

LISTING THE CASE FOR A CONTESTED HEARING AND OBLIGATIONS OF PARTIES TO NARROW ISSUES IN DISPUTE

- 8.65 The considerations that should apply when assessing whether exceptional circumstances should prevent a case from being directed to one or more of the family decision-making processes have been discussed in Chapter 7.¹⁰³ If the Court determines that exceptional circumstances exist and the matter cannot proceed to further FGC, a CC or a JRC, then the case should be listed for contested hearing, with any IAO extended to that contested hearing date.

Proposal 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.

- 8.66 In order to facilitate resolution and reduce costs and delays, the parties should be obliged to disclose and narrow the issues in a case.¹⁰⁴ Consequently, any party who opposes the protection application or the orders sought by the protective intervener should be required to file a document prior to a contested hearing in which they identify their opposition and set out a short statement in support of that position. Disclosure obligations now apply throughout the legal system, even in criminal trials.¹⁰⁵

Proposal 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.

EMERGENCIES REQUIRING PROMPT REMOVAL OF A CHILD FROM CARE OF PARENTS

General

8.67 The Commission proposes that judicial authorisation should be obtained prior to removing a child from the care of his or her parents unless this step is not feasible in the circumstances. There will be cases in which the risk of harm to a child is so immediate that a child protection worker should have the power to remove a child before seeking a court order. When this power is used, the child protection worker should later be required to inform the Court why it was not feasible to apply for judicial authorisation prior to taking the child into safe custody.

Emergency removal order

8.68 In most circumstances that require prompt removal of a child from his or her family, a protective intervener should apply for an emergency removal order *prior* to removing the child. In order for this proposed system to operate effectively, the Children's Court would require assistance from the Magistrates' Court of Victoria's After Hours Service. Attendance at court would be unnecessary, as it should be possible to transmit the documents in support of an application for an emergency removal by email or facsimile. Additional evidence, if required, could be taken over the telephone.

8.69 An emergency removal order should be sought if a child protection practitioner believes, on reasonable grounds, that:

- a child is at risk of significant harm
- the risk is of such magnitude that an interim order should be made
- a safety notice or intervention order (or variation of an existing order) would not be sufficient to protect the child from the risk.

8.70 A child protection practitioner, or delegate with appropriate expertise, should make an application for an emergency removal order by providing a precise summary of the reasons for the application. The summary would need to:

- identify the nature of the risk to the child and explain how an order could protect the child from the risk
- contain details of the accommodation proposed for the child in the immediate future
- include reasons why, in the circumstances of the particular case, the child's protection could not adequately be secured through either a safety notice or family violence intervention order (FVIO) (if the protective concerns do not relate to concerns about family violence then a statement to this effect should suffice).

This information should be provided on affidavit, but could be supplemented with evidence given over the telephone, and recorded, if necessary.

8.71 Whenever family violence may be a relevant issue, the child protection worker should ascertain before making the application, whenever practicable, if there is an existing safety notice or FVIO in relation to the family in question. If so, the worker should advise the Court why the existing notice or order is not sufficient to protect the child from risk of significant harm.

99 Telephone mentions, not requiring the physical presence of parties, are utilised in the Family Court and Federal Magistrates Court for case management purposes: see *Family Law Act 1975* (Cth) s 69ZQ(e), (h).

100 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 12. This data on the Children's Court indicates that 59 per cent of primary protection applications for which final orders were made in 2008-09 were finalised in less than 2.5 months, with the other 41 per cent finalised on average within 4.8 months. In comparison, in 2008-09 in the Federal Magistrates Court, 83.96 per cent of applications were completed within six months and 95.07 per cent were completed within 12 months: Federal Magistrates Court of Australia, *Annual Report 2008-2009* (2009) 15.

101 Excluding applications for siblings who are the subject of the same hearing: Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 12.

102 *Ibid.*

103 See 'Exceptional Circumstances' in Chapter 7.

104 This is consistent with recommendations made in relation to civil proceedings in Victorian Law Reform Commission, *Civil Justice Review: Report*, Report No 14 (2008) ch 3. Also, the Commission notes that the Civil Procedure Bill 2010 (Vic), introduced into the Victorian Legislative Assembly on 22 June 2010, sets out overarching obligations on the parties to 'narrow the issues in dispute' and disclose the existence of documents, and includes more specific 'pre-litigation requirements': cls 23, 26, 34.

105 *Criminal Procedure Act 2009* (Vic) s 183.

- 8.72 In cases of this nature, the protective worker should also ascertain, whenever practicable, whether the affected family member (adult or child) is willing and able to make an FVIO application to protect themselves. If the affected family member is a child, the parent (or other such person as designated within section 45 of the *Family Violence Protection Act 2008* (Vic)) may make an application on behalf of the child.¹⁰⁶ If this step is not possible, the child protection worker should give reasons for their belief that an application by an affected family member for an FVIO would not be sufficient to protect the child from risk of significant harm.

Proposal 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.
- 8.73 A judicial officer would need to be available at any time of the day to hear applications for an emergency removal order. It would be desirable to have a judicial officer on duty in Melbourne, available to deal with all applications for emergency removal orders in chambers, for the whole of Victoria.
- 8.74 The judicial officer should be permitted to make an emergency removal order in the absence of the parents and the child, and set a return date for the matter, which should be no later than 72 hours after the time at which the Court believes that its order will be executed. A discretionary power to list the case for return to Court up to the 72-hour limit would permit the judicial officer to make orders tailored to the case's circumstances.

Proposal 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.
- 8.75 Once an emergency removal order is made, parents and children (above the age of 12 years) should be served with relevant documents, including the order itself, which would contain details of the venue, time and date for the case's return to court. During the time between the child's removal and the return date, the child protection worker should provide their legal representative with all relevant documents. In addition, the child protection practitioner should be required to provide VLA¹⁰⁷ with the following information:
- a copy of the emergency removal order and application
 - a precise summary of the information upon which the application is made

- the orders sought
- names and birth dates of the parties and children.

8.76 Early advice would permit VLA to undertake conflict checks and lawyer allocation before the case returns to court. Lawyers with access to the Department’s protective concerns would be in a better position to obtain instructions from clients prior to the first court listing. This process should allow time for a lawyer to meet the child prior to the first court hearing in order to find out the child’s wishes, if any, and to determine the basis upon which the child should be represented.¹⁰⁸ This step should eliminate the need for children who are removed from their families by emergency order to attend court, except for those children who actually wish to participate in or observe the proceedings.

Interim care order (following emergency removal order)

8.77 On the return of an emergency removal order, if satisfied that there is an unacceptable risk of harm to the child, the Court should be permitted to make an interim care order for a period not exceeding 14 days. The interim care order might include an order about where and with whom the child must live, an order requiring a parent, guardian or carer to accept supervision by the Secretary and any other order the Court thinks fit in order to protect the child from the risk of harm. The purpose of the interim care order should be to protect the child from significant risk of harm while all parties are given time to assess the child’s circumstances.

8.78 The Court should be permitted to order an FGC when making an interim care order if it is appropriate to do so in the circumstances.¹⁰⁹ The matter should be required to return to court upon the expiry of the 14-day interim care order, at which time a short-term assessment order could be made.¹¹⁰

Proposal 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.

Emergency intervention without judicial authorisation: immediate risk

8.79 It is highly likely that there will always be circumstances in which the risk of significant harm to a child is so immediate that a child protection worker will have no opportunity to seek judicial authorisation to remove the child. While the law should continue to permit child protection workers and police officers to take a child at immediate risk of significant harm into safe custody, there should be additional safeguards to ensure that the power is used only when necessary. The Commission proposes that this power should be available for use only when there is insufficient time to apply for an emergency removal order, and a safety notice or intervention order would not be sufficient to protect a child from the immediate and significant risk of harm.

106 *Family Violence Protection Act 2008* (Vic) s 45(d).

107 If Option 3 is adopted, this information should also be given to the Office of the Child and Youth Advocate.

108 For discussion of this, see below in this chapter under ‘Models of representation for children’.

109 This links to proposals in Option 1: see Chapter 7.

110 Short-term assessment orders are discussed below.

Proposal 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.

Interim care order (following immediate risk removal)

- 8.80 If a protective intervener removes a child from the care of his or her parents without judicial authorisation and by use of these emergency powers, he or she should be required to apply to the Court for an interim care order within one working day, unless the child has been returned to the care of a parent or guardian. The Commission proposes that only the Children's Court, and not bail justices, should be permitted to hear applications for interim care orders. It is no longer appropriate for orders of this magnitude to be made by any body other than a court.
- 8.81 If satisfied that there is an unacceptable risk of harm to the child, the Court should be permitted to make an interim care order for a period not exceeding 14 days.¹¹¹ Unless exceptional circumstances exist, the Court should seek to determine the application on the day it is made.
- 8.82 If a child is returned to the care of a parent or guardian within one working day of removal, the protective intervener should be required to file a document with the Court that explains why the child was involuntarily removed from the care of his or her parents. Following a child's removal, if the protective intervener proceeds with an application for an interim care order, he or she must explain to the Court why it was necessary to remove the child without first seeking an emergency removal order.¹¹² This information could be included in the summary that is provided in support of the application.

Proposal 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.

Short-term assessment orders

- 8.83 Prior to the expiry of an interim care order made following an emergency removal order by a judicial officer or the involuntary removal of a child by a protective intervener, the Children's Court should be permitted to make a short-term assessment order for up to six weeks.
- 8.84 The Court should be permitted to make a short-term assessment order to protect a child while the parties attempt to reach agreement through an FGC. If the Court believes there are exceptional circumstances that exclude the case from being referred to an FGC, it should be permitted to grant the Secretary leave to file a protection application.

Proposal 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.

INTRODUCTION OF NEW CASE MANAGEMENT, INQUISITORIAL AND PROBLEM-ORIENTED PROCESSES

INTRODUCTION

8.85 The Commission proposes that the Children’s Court should:

- be encouraged to make greater use of various case management practices used successfully in other courts
- be given a range of powers that permit it to take a more inquisitorial approach when dealing with child protection matters
- adopt some problem-oriented processes.

CASE MANAGEMENT AND DOCKET SYSTEMS

8.86 The term ‘case management’ is used with different meanings. In a legal context, ‘case management’ refers to the role of a court in actively managing the progress of a case from the time it commences until finalisation¹¹³ in order to ensure that is conducted efficiently.¹¹⁴ In a clinical context, ‘case management’ usually means management of the details of a particular case. The term is sometimes used in this clinical sense when referring to some of the child protection management decisions made by the Secretary of the Department about assisting children and families, investigating whether a child is in need of protection, and acting as the custodian or guardian of children found to be in need of protection.¹¹⁵ The Commission does not use the term ‘case management’ in that sense.

8.87 Case management involves the ‘deliberate transfer of some of the initiative in case preparation from the parties to the court’.¹¹⁶ In 2008, the Commission observed that many Australian courts are moving towards a ‘second generation’ of case management, having embraced the view that ‘court-developed case management systems have to date produced cost effective and timely resolution of cases through judicial supervision of cases’.¹¹⁷ Case-flow management can be implemented either through a docket system (or individual list) in which a judicial officer is assigned a case at the time of filing and is responsible for supervising the progress of that case until finalisation, or through a master list system, where cases are controlled by the court registry and then assigned to judicial officers.¹¹⁸

8.88 For almost two decades, there have been many suggestions that Australian courts should move towards greater use of case-management techniques in controlling the unmanaged adversarial litigation process. In 2008, the Commission emphasised the desirability of more active judicial case management within Victorian courts and recommended the introduction of an explicit active case management statutory provision.¹¹⁹ This recommendation has been adopted in the Civil Procedure Bill 2010 (Vic), which includes specific provisions for case management in the Supreme, County and Magistrates’ Courts.¹²⁰

111 Further detail about interim care orders is set out in Proposal 2.9.

112 A similar provision is found in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45(2).

113 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [6.3].

114 For detailed discussion of of case management, see Victorian Law Reform Commission, *Civil Justice Review*, above n 104, ch 5.

115 See for example Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care* (2010) 98.

116 Australian Law Reform Commission, *Managing Justice*, above n 113, [9.12].

117 Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 291.

118 Australian Law Reform Commission, *Managing Justice*, above n 113, [9.14].

119 Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 303.

120 Civil Procedure Bill 2010 (Vic) pt 4.2.

- 8.89 There have been a number of previous calls for more case management in Victorian child protection matters.¹²¹ In 1997, the Human Rights and Equal Opportunity and the Australian Law Reform Commissions suggested, when proposing national standards for child protection proceedings, that case management processes ought to be adopted by state and territory child protection courts in order to reduce delays:

*The national care and protection standards should specify that children's court magistrates and judges should be active and managerial in their approach to care and protection cases and that the same magistrate or judge should manage a case from first listing, on an individual case management or single docket model.*¹²²

Individual docket systems

- 8.90 Individual docket systems aim to 'promote more active and effective judicial case management in order to streamline processing, encourage early settlement and, overall, dispose of cases more efficiently'.¹²³ Docket systems involve the allocated judicial officer, who remains with the case from commencement until disposition, formulating orders about how the case should be managed and prepared for trial. Referrals to appropriate dispute resolution (ADR) or other settlement processes can be made. The judicial officer supervises compliance with directions, ensures that hearing dates are maintained and deals with any interlocutory issues.¹²⁴ All of the federal trial courts use docket systems: the Federal Court of Australia since 1997, the Federal Magistrates Court (FMC) since it opened in 2000, and the Family Court of Australia (FCA) since 2009.¹²⁵ In Victoria, there are a number of judge-managed specialist lists in the Supreme Court (such as the Commercial List) and the County Court.¹²⁶
- 8.91 In 2008, the Commission recommended the introduction of an expanded docket system for civil matters in the Supreme and County Courts and for more complex, higher value claims in the Magistrates' Court of Victoria.¹²⁷ The Commission suggested that expanded or new docket systems for Victorian courts 'would have many benefits, including savings in time and costs resulting from greater judicial familiarity with cases before trial'.¹²⁸
- 8.92 In 2008, the Wood Commission recommended a trial of a docket system for care and protection matters in NSW's Parramatta Children's Court.¹²⁹ The NSW Children's Court has supported this proposal, arguing that the benefits of a docket system

*include greater time efficiencies resulting from the judicial officer responsible for a particular case having a close knowledge of the case and the relevant issues in the case. It is also recognised that a docket system, whereby the same judicial officer manages the case from the first time the proceedings come before the court, may result in greater understanding of and satisfaction in the ultimate result by the parties.*¹³⁰

- 8.93 The 12-month pilot of the docket system at the Parramatta Children's Court commenced in February 2010. As far as possible, the Court is allocating its Monday and Friday case lists to the same judicial officer, who will

*manage all the matters in their list and, should the matter require to be listed for a hearing, that judicial officer will list the matter for hearing before himself or herself at a time convenient to the court and, as far as is reasonably possible, to the parties.*¹³¹

Response in submissions

- 8.94 Some submissions, such as that made by Connections (part of UnitingCare), addressed the issue of whether the Children’s Court should adopt a more active role in managing cases ‘to ensure consistency and thorough knowledge of the case [by the magistrate] as it proceeds’.¹³² The Federation of Community Legal Centres supported an individual docket system,¹³³ as did several others.¹³⁴ The Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria) argued that case management would provide Aboriginal children with better rights protection and judicial oversight of DHS’s decisions.¹³⁵
- 8.95 Some submissions focused on how case management could alleviate some of the delays in the Court,¹³⁶ such as moving ‘cases more quickly towards a final disposition’, which was supported by the Children’s Court Clinic.¹³⁷ One submission recommended that, in order to reduce tactical delays, the same magistrate who presides over the final hearing should be docketed to hear the directions hearing ‘so that the parties cannot change direction or come up with other issues out of the blue without consequences’.¹³⁸
- 8.96 The submission from the Australian Childhood Foundation was pessimistic about procedural reform, stating:

*the adversarial nature of the Children’s Court will not be reduced by introducing procedural reform. The experience of participants in Court processes will be less adversarial if the focus of the Court is clarified on protecting children from abuse.*¹³⁹

- 8.97 The Children’s Court of Victoria noted the desirability of docket systems, but stated that it did not currently have the capacity to implement an individual docket system:

*Some courts are well resourced to ‘docket’ cases. They are not high volume State courts. The Court is unaware of any summary, high volume, State courts that are able to docket cases. The Children’s Court does not have the capacity to do so.*¹⁴⁰

- 121 Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993) 156; Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004) 40.
- 122 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC Report No 84 (1997) 447.
- 123 Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court’s Individual Docket System* (2002) 1.
- 124 See Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 293.
- 125 See Chapter 4.
- 126 Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 293.
- 127 *Ibid.* 296.
- 128 *Ibid.*
- 129 James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, 539, 543 (recommendation 13.11).
- 130 Children’s Court of New South Wales, *Pilot of a “Docket System” in Care and Protection Matters Commencing on 8 February 2010 at the Parramatta Children’s Court* (2010) <www.lawlink.nsw.gov.au/lawlink/childrens_court/ll_cc.nsf/pages/CC_publicationsnews> at 18 May 2010.
- 131 *Ibid.*
- 132 Submission 15 (Connections).
- 133 Submission 45 (FCLC).
- 134 See submissions 25 (LIV), 48 (Victorian Bar) 37 (OCSC), 8 (Angela Smith).
- 135 Submission 26 (FVPLS Victoria).

- 136 See, for example, submissions 8 (Angela Smith) and 48 (Victorian Bar). The Victorian Bar argued that case management could assist ‘where it is often important to test evidence and formulate appropriate orders during the early stages of a protection application to avoid the establishment of a status quo that is not in the best interests of a child’.
- 137 Submission 17 (CCC). The Children’s Court Clinic supported a greater role for the Court in managing cases through court processes, noting that ‘[u]ltimately, judicial officers remain the final authority and this should allow them to have a monitoring or overseeing role in the case and be more active in directing how a case proceeds and what is required by both the family and the DOHS in the best interests of the child’.
- 138 Submission 28 (Anonymous).
- 139 Submission 41 (Australian Childhood Foundation).
- 140 Submission 46 (Children’s Court of Victoria) 69 (citations omitted). The Court argued that it ‘needs to have sufficient flexibility to enable it to provide two magistrates to sit at Moorabbin, a magistrate available regularly to travel to the country to hear lengthy contests and magistrates available to sit in the criminal mention court; the Family Division mention court; the special mention court and contest courts. Children’s Court magistrates also participate in statewide after hours service which means they are unable to sit during the day, during the week of their service. In addition, the Criminal Division requires an additional judicial officer to conduct a Koori Court every second Thursday and a Sex Offences list every fourth Friday.’

- 8.98 The Children's Court explained that its judicial officers currently manage the progress of cases through the Court to avoid delay: 'Members of the Court actively ensure that cases are dealt with as expeditiously as possible. Magistrates sitting in the mention court scrutinise adjournment applications.'¹⁴¹
- 8.99 The Court believes that a docket system would require a significant increase in resources.¹⁴² The Court suggested that with the provision of further resources, it wished to develop intensively case-managed lists run by a single judicial officer for some matters.¹⁴³

The Commission's views

- 8.100 The Commission believes that the Children's Court should seriously consider adopting an individual docket system as soon as the Court believes it is capable of doing so. A case management system that has a single judicial officer responsible for each case that comes before the Court is an important step in establishing processes for dealing with child protection matters that will 'minimise disputation and maintain a focus on the best interests of the child'.
- 8.101 The Children's Court believes that it needs additional resources in order to introduce an individual docket system.¹⁴⁴ While no high volume summary state court in Victoria currently operates under a docket system, it is noteworthy that the NSW Children's Court has agreed to pilot a docket program at its main venue at Parramatta.
- 8.102 The FMC is a high volume summary federal court that has operated on an individual docket basis since it started in 2000. In 2008, each federal magistrate had an average of 74 new family law matters added to her or his docket every month and case-managed approximately 400 matters at any given time.¹⁴⁵ FMC also operates its docket system in conjunction with an extensive judicial circuit to 38 regional areas, and accepts that this occasionally means that another federal magistrate will be involved at the intermediate stage of a matter.¹⁴⁶
- 8.103 The Children's Court observed, based on 2007 BCG data, that any delays in cases before it are frequently caused by the parties.¹⁴⁷ An individual docket system would provide the Court with additional tools, most notably case familiarity, with which to comprehensively manage party tactics that may contribute to delay. The NSW Children's Court has already embraced this view.¹⁴⁸ A docket system should also encourage rigorous case preparation by parties because of their awareness that the same judicial officer will be responsible for the case each time it comes before the Court.¹⁴⁹
- 8.104 A docket system cannot be introduced at the Children's Court without the support of its judicial officers and court staff. Some pilot programs may be necessary. Docketing may be difficult to achieve for those cases requiring emergency intervention through the new emergency removal orders, interim care orders and short-term assessment orders proposed in this chapter. In the first instance, it might be possible to achieve docketing of cases to the same judicial officer in Victoria's metropolitan and regional Children's Courts. The Commission suggests that consultants should be engaged to assist the Children's Court to determine how a docket system could be implemented and the amount of additional resources that may be required.¹⁵⁰

Cases involving allegations of child sexual abuse and the Magellan case management model

- 8.105 The Commission believes that in cases involving serious allegations about physical or sexual abuse of children, it would be beneficial for the Children's Court to consider adopting the Magellan case management model used by FCA since 1998. This model, along with the similar Columbus model used in the Family Court of Western Australia, is described in detail in Chapter 4.
- 8.106 Cases involving allegations of child sexual abuse are among the most difficult matters dealt with by the Family Division of the Children's Court. Dr Cathy Humphreys expressed a preference for a specialist list in the Family Division for child sexual abuse matters.¹⁵¹ These cases carry great significance for the children and their families, as well as the potential for criminal proceedings and stigmatisation for the alleged perpetrator.
- 8.107 Some aspects of the Magellan process may be suitable for inclusion in any case management model employed by the Family Division of the Children's Court of Victoria. The Children's Court itself supports the creation of a specialist list and the adoption of a problem-oriented approach for child sexual abuse cases.¹⁵² In particular, use of the Magellan model's collaborative, child-focused approach to providing information to achieve a timely resolution may be beneficial. Other aspects of the model, such as cooperation between key agencies through the development of memoranda of understandings, early specialist assessment and evidence gathering, could be used in a specialist child sexual abuse list in the Family Division of the Children's Court.

THE INTRODUCTION OF PROBLEM-ORIENTED APPROACHES

- 8.108 Problem-oriented approaches to justice encourage a holistic and collaborative view of matters coming before a court, including the nature and causes of the problems faced by court users. Although problem-oriented approaches originated in the criminal courts, they are relevant to other areas of law.¹⁵³ Problem-oriented approaches draw upon therapeutic, collaborative and less-adversarial conceptions of a court system.

The principles of therapeutic jurisprudence and influence on problem-oriented approaches

- 8.109 The principles of therapeutic jurisprudence have been especially important in the development of problem-oriented approaches. Therapeutic jurisprudence focuses on the emotional and psychological welfare of those who come into contact with the justice system.¹⁵⁴
- 8.110 Courts that adopt a problem-oriented approach tend to focus upon a particular type of 'problem' area of law, locality, or specific population, such as Drug Courts, Neighbourhood Justice Centres or Family Violence Courts. Problem-oriented courts are not simply specialised courts that deal with a particular area of law, but courts that adopt a philosophy of seeking to deal with the special problems faced by court users.¹⁵⁵

- 141 Ibid. The Court's submission cited 2007 Boston Consulting Group data to back its claim that the causes of delay do not emanate from court processes. That data shows that departmental delay accounts for 35 per cent of adjournment applications and parent delay for 34 per cent of adjournment applications. The data referred to is Boston Consulting Group, *Children's Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007).
- 142 Submission 46 (Children's Court of Victoria) 69.
- 143 Ibid 73–5.
- 144 Ibid 69.
- 145 Federal Magistrates Court of Australia, *Annual Report 2007–2008* (2008) 24.
- 146 Federal Magistrates Service, *Annual Report 2000–01* (2001) 17.
- 147 Submission 46 (Children's Court of Victoria) 69.
- 148 Children's Court of New South Wales, above n 130.
- 149 Australian Law Reform Commission, *Managing Justice*, above n 113, [9.23].
- 150 This was also recommended in Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 296.
- 151 Submission 7 (Prof Cathy Humphreys). Prof Humphreys suggested this specialist list should be presided over by magistrates with special training to overcome the problems associated with evidence and protection of children in such cases.
- 152 Submission 46 (Children's Court of Victoria) 75. See also the discussion under 'The introduction of problem-oriented approaches', below. A number of magistrates in Dr Rosemary Sheehan's 2001 study of judicial decision making in the Children's Court of Victoria argued that sexual abuse cases exemplify the complexity of child protection cases and the difficulties they have with finding proof, especially where allegations of sexual abuse rely on a child's disclosures, and they are cases that are almost always contested: Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (2001) 98.
- 153 Michael King and C L Tatasciore, 'Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Approach to Care and Protection Applications' (2006) *eLaw: Murdoch University Electronic Journal of Law* (Special Series) 78, 89–91.
- 154 David Wexler, 'An Orientation to Therapeutic Jurisprudence' (1994) 20 *New England Journal on Criminal and Civil Confinement* 259, 259.
- 155 Michael King et al, *Non-Adversarial Justice* (2009) 142.

- 8.111 Courts that adopt problem-oriented approaches do not need to become full problem-oriented courts, but can adapt individual elements of problem-oriented courts.¹⁵⁶ This model of generalising elements of the problem-oriented approach has been developed by the USA's Center for Court Innovation.¹⁵⁷ The Victorian Government's Next Generation Courts Project (discussed below) has been established to embed already successful problem-oriented approaches within the day-to-day business of generalist courts.
- 8.112 In 2009, the Australasian Institute of Judicial Administration and the Legal Services Board of Victoria produced a bench-book that aims to provide Australian judges with a practical and theoretical understanding of the techniques of 'solution-focused judging'.¹⁵⁸ The bench-book is designed to offer 'specific strategies judicial officers can use when adopting a problem-solving methodology'.¹⁵⁹
- 8.113 Problem-oriented approaches are compatible with proposals for the introduction of case management, more inquisitorial and less adversarial approaches, as both problem-oriented and more inquisitorial approaches require an ongoing familiarity with individual cases by the judicial officer.

Problem-oriented approaches in Victoria

- 8.114 The Victorian Government has demonstrated a strong commitment to problem-oriented approaches in creating the Neighbourhood Justice Centre, the Dandenong Drug Court, the Koori Court, the Koori County Court, the Children's Koori Court and the Family Violence Division of the Magistrates' Court. As noted in Chapter 1, the Commission has undertaken visits to these courts.
- 8.115 The Victorian Government's Next Generation Courts Project seeks to 'make problem-oriented approaches to justice part of the mainstream, day-to-day functions of Victoria's courts'.¹⁶⁰ The project aims to improve efficiency and access to programs, better identify and respond to gaps in each specialist list or program, and to pool information and resources more effectively.¹⁶¹

The use of problem-oriented approaches in the Family Division of the Children's Court

- 8.116 Although problem-oriented approaches to justice have originated in the criminal context, they may be well suited to the child protection jurisdiction of the Family Division of the Children's Court. The particular nature of the child welfare jurisdiction—responding to concerns about child abuse and neglect often in circumstances of acute family disadvantage or marginalisation—appears to favour the Court adopting a problem-oriented approach to cases that come before it. Some commentators suggest that any setting where a best interests approach is demanded, such as in juvenile or family law, explicitly fosters a problem-oriented approach.¹⁶² This view was affirmed in submissions to the Commission.¹⁶³
- 8.117 For some time, the Criminal Division of the Court has been successfully employing problem-oriented approaches through the Children's Koori Court.¹⁶⁴ In its submission, the Children's Court demonstrated a strong commitment towards increasing its capacity to bring problem-oriented approaches into its Family Division.¹⁶⁵
- 8.118 Dr Michael King suggested that the

*establishment of a specialist court applying therapeutic jurisprudence is an option that could be considered in promoting a more therapeutic and less adversarial approach to resolving child welfare problems where the intervention of a court is required.*¹⁶⁶

West Heidelberg Community Legal Centre also supported the shift of court-based decision-making towards a problem-oriented model, but cautioned that this approach would only work if a model of collaborative service provision was adopted along with court review of departmental provision of support services.¹⁶⁷

8.119 The Children’s Court argued strongly in its submission that the expansion of problem-oriented approaches is a key part of its strategy to conduct Family Division matters in a less adversarial way.¹⁶⁸ The Court pointed out that it has always shown a commitment to innovative problem-oriented approaches, especially in its Criminal Division.¹⁶⁹ The Court identified four types of Family Division cases where intensive problem-oriented case management would be appropriate:

- cases involving Koori families
- infant cases (from newborn children until they are three years old)
- drug and family treatment models
- sexual abuse cases.¹⁷⁰

For each of these types of matters, the Court expressed a desire to develop lists managed by a single judicial officer. The Court emphasised that its development of any of these special lists would depend upon the injection of significant resources into the Court.¹⁷¹

The Commission’s response and suggested proposals for reform

8.120 The Commission believes that the Court should be given a range of powers that encourage it to control the conduct of child protection proceedings by taking a problem-oriented approach. Many of the problem solving approaches that could be adopted overlap with a more inquisitorial role for the Court. While the Commission supports the Court in adopting more problem-oriented approaches in the Family Division, it should be careful not to assume the case management functions currently performed by the Secretary of DHS under the *CYF Act 2005*.

Proposal 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.

156 For example, in 2009 the Law Reform Commission of Western Australia recommended the introduction of a pilot general court intervention program, which consisted of various problem-oriented approaches, in the criminal division of the Western Australian Children’s Court, which would remain separate from other specialist problem-oriented courts such as the Perth Drug Court: Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report*, Project No 96 (2009) 117.

157 King et al, *Non-Adversarial Justice*, above n 155, 165–7. For further information, see the Center for Court Innovation <www.courtinnovation.org> at 20 May 2010.

158 Michael King, *Solution-Focused Judging Bench Book* (2009).

159 Ibid.

160 Department of Justice (Victoria), *Next Generation Courts: The Next Chapter of Reform* (2010) Courts & Tribunals Victoria <www.courts.vic.gov.au/CA256EBD007FC352/page/New+Initiatives-Next+Generation+Courts?OpenDocument&1=05-New+Initiatives-&2=0-Next+Generation+Courts-&3=->> at 20 May 2010.

161 Ibid.

162 Donald Farole et al, ‘Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts’ (2005) 26 *The Justice System Journal* 57, 64.

163 Submission 7 (Prof Cathy Humphreys), which argued that: ‘In other children’s court jurisdictions a process of enquiry into the most effective way of realising children’s best interests has been part of a culture of innovation between state and courts. Even in Victoria itself, we see some exciting court developments with the Koori Court, exploration of new developments in drug courts, and juvenile justice.’

164 The specialist nature of the work of the Family Division suggests that problem-oriented approaches may fit well with existing practices designed to achieve the best outcomes for children, including the Court’s existing and planned ADR services, the presence of special mention courts and new programs such as the Diversion to Mediation Program with the Dispute Settlement Centre of Victoria used for stalking intervention order applications.

165 Submission 46 (Children’s Court of Victoria) 72–5.

166 Submission 2 (Dr Michael King) (citations omitted). Dr King argued that a special program could be incorporated into Family Division practices that involves a multi-disciplinary court team formulating a plan with parents to address underlying issues which affect their parenting, linkage to appropriate support services and regular review by the Court of parents’ progress under this plan. Dr King argued that more collaborative and less adversarial approaches are the practices most likely to achieve the best outcomes for children in this field, noting: ‘Rather than taking a paternalistic or coercive approach, the court program would aim at promoting therapeutic values such as voice, validation and respect and participant self-determination and self-efficacy – principles that are seen to be important in promoting positive behavioural change.’

167 Submission 24 (WHCLS).

168 Submission 46 (Children’s Court of Victoria) 30.

169 Ibid 72.

170 Ibid 73.

171 Ibid 72–5.

THE INTRODUCTION OF MORE INQUISITORIAL APPROACHES**Introduction**

- 8.121 Many examples of more inquisitorial approaches to conducting legal proceedings already exist within the Australian civil and criminal legal systems. In this section, the Commission considers the desirability of introducing a range of more inquisitorial processes into the Family Division of the Children’s Court of Victoria, modelled on the provisions in Division 12A of Part VII of the *Family Law Act 1975* (Cth) (FLA 1975).
- 8.122 Margaret Harrison summarises the features of an inquisitorial approach to conducting legal proceedings as:
- *The judge has an investigative role and can pursue avenues of inquiry he/she considers relevant, including the appointment of experts.*
 - *The proceedings are not regulated by detailed procedural or evidentiary rules.*
 - *The proceedings take the form of an ongoing inquiry rather than a single trial event.*
 - *Non litigated outcomes are assumed to be the preferred outcome (although European approaches had not, until very recently, incorporated mediation into their court dispute resolution armoury).*
 - *The judge’s responsibility to ascertain the truth exceeds the responsibility to determine the dispute between the parties.*
 - *The focus on carefully defined issues encourages the proceedings to be short in duration.*¹⁷²

The introduction of Division 12A processes into the Children’s Court of Victoria

- 8.123 The Taskforce recommended that the Commission consider whether the CYF Act 2005 should be amended to enable the Children’s Court to conduct less adversarial trials with powers similar to those found in Division 12A of Part VII of the FLA 1975 (Division 12A).¹⁷³ Division 12A, which is discussed in Chapter 4 and reproduced in Appendix O, gives courts exercising family law jurisdiction a range of powers that allow cases involving children to be conducted in a far more inquisitorial manner than has traditionally occurred in Australia.
- 8.124 The Division 12A powers have been used somewhat differently in practice by the two courts that currently carry primary responsibility for determining matters under the FLA 1975. FCA has implemented the less adversarial trial (LAT) process—a child-focused individual docket case-management system¹⁷⁴—while FMC employs its docket case management model.
- 8.125 Under Division 12A, the role of the court-appointed child development expert is particularly important in family court processes.¹⁷⁵ In the family courts, the information provided by the family consultant is central and designed to assist parents, lawyers and judges to reach the safest and most developmentally appropriate outcomes for children.¹⁷⁶ The family consultant is the court-appointed expert on child welfare and development.¹⁷⁷
- 8.126 Almost all submissions¹⁷⁸ received by the Commission that addressed this issue expressed general support for the introduction of Division 12A type processes in the Family Division.¹⁷⁹

- 8.127 The Victorian Bar argued that the application of some of the Division 12A provisions to the work of the Children’s Court would enable more direct judicial control of proceedings and would help reduce some of the more adversarial litigation practices.¹⁸⁰ The Law Institute of Victoria argued that Division 12A processes would better enable a focus on the child and his or her future and allow the parties to speak directly to the judge.¹⁸¹ The Child Safety Commissioner also commented on LAT’s positive features, including the focus on children and their future, greater flexibility and less costs than traditional trials.¹⁸²
- 8.128 Many children and young people involved in the consultation with CREATE expressed a desire for greater involvement in proceedings.¹⁸³ While individual judicial officers sometimes adopt a different approach, one young person consulted by CREATE commented that the judicial officers they encountered ‘never speak with young people or look at them when talking, like they don’t exist’.¹⁸⁴
- 8.129 The Children’s Court stated that it was ‘impressed’ with the LAT procedure developed by FCA.¹⁸⁵ The Court argued that most but not all of the Division 12A provisions should be incorporated into the CYF Act 2005 in place of the current section 215(1).¹⁸⁶ Essentially, the Court submitted that it could adopt similar actively judge-managed processes to those used by family courts under Division 12A, with the following changes:
- the Family Division of the Children’s Court not be required to deal with as many aspects of the matter as it can on a single occasion¹⁸⁷
 - sections 69ZU and 69ZW of the FLA 1975 be omitted from the CYF Act 2005 (these sections relate to the giving of un-sworn testimony by court appointed child development experts and notifications by state and territory child welfare agencies)¹⁸⁸
 - the addition of a provision explicitly permitting video and audio taped evidence for children if this is consistent with the *Evidence Act 2008 (Vic)*¹⁸⁹

- 172 Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (2007) 7.
- 173 Child Protection Proceedings Taskforce, above n 1, 13.
- 174 For a detailed description of the LAT process and evaluations of its effectiveness, see Chapter 4.
- 175 In the FCA, a court-employed family consultant is assigned to each case and is in attendance on the first day of the LAT. The consultant has usually spoken to the family before the first trial date and may prepare a report. Communications with family consultants are not confidential: *Family Law Act 1975 (Cth)* s 11C. Further, the FCA has made use of single expert witnesses since 2004 to eliminate controversy created by the conflict of party-appointed expert witnesses. In the FMC, family reports prepared by court-based or external family consultants can be ordered by federal magistrates to assist with determination of parenting disputes: *Family Law Act 1975 (Cth)* s 62G. Family consultants may provide oral reports to the Court for certain interim applications in the FMC.
- 176 Deborah Fry, ‘The Role of the Family Consultant in the Less Adversarial Trial’ (2007) 21 *Australian Journal of Family Law* 113, 117.
- 177 Fry further outlines this role in the LAT trial process, explaining that ‘The judge may ask the family consultant to elaborate or clarify certain points or may ask specific questions of them and may invite the parties and lawyers to do likewise’: *ibid*.
- 178 Only one submission received by the Commission did not support the introduction of Division 12A processes on the basis that trials in the FCA and FMC are not much less adversarial than the current procedure used in the Children’s Court of Victoria: submission 28 (Anonymous).
- 179 Submissions 1 (Anonymous), 25 (LIV), 31 (Gatehouse Centre), 37 (OCSC) 38 (VALS), 46 (Children’s Court of Victoria) 75–83, 48 (Victorian Bar); Consultations 9 (Barristers), 13 (DHS CP Workers Hume), 16 (VLA).
- 180 Submission 48 (Victorian Bar).
- 181 Submission 25 (LIV).
- 182 Submission 37 (OCSC).
- 183 CREATE Foundation, *Children and Young People in Care Consultation for the Victorian Law Reform Commission* (2010) 7.
- 184 *Ibid* 6.
- 185 Submission 46 (Children’s Court of Victoria) 79.
- 186 *Ibid* 79, 81. The Court suggested that ss 69ZN–69ZR of the *Family Law Act 1975 (Cth)* should be introduced into the Victorian Act and that ss 69ZT, 69ZV and 69ZX of the *Family Law Act 1975 (Cth)* could be implemented with some modifications. The Court set out its proposed scheme for the div 12A reforms in Appendices 7 and 8 of its submission.
- 187 That is the provision in *Family Law Act 1975 (Cth)* s 69ZQ(1)(g). See submission 46 (Children’s Court of Victoria) 79–80, where the Court explained its reasons for rejecting this provision.
- 188 The latter provision is only relevant in a federal context where the state and territory authorities are not usually parties to family law proceedings.
- 189 Submission 46 (Children’s Court of Victoria) 124.

- the addition of principles that the Court must determine:
 - disputed issues of past fact on the balance of probabilities¹⁹⁰
 - the likelihood of future harm on the basis of ‘whether there is a real possibility, which cannot sensibly be ignored having regard to the nature and gravity of the feared harm, of the requisite harm being suffered by the child in the future’.¹⁹¹

The Commission’s response and suggested proposals for reform

- 8.130 The Commission believes that the Family Division of the Children’s Court should have powers similar to those given to FCA and FMC by Division 12A. While the Commission accepts that the public law nature of matters heard in the Family Division of the Children’s Court distinguishes that jurisdiction in significant ways from private family law matters, the centrality of children in decision-making to both jurisdictions justifies the use of LAT in both areas of law.
- 8.131 The provisions of Division 12A provide an excellent legislative model for the adoption of more inquisitorial approaches to protection application hearings in the Children’s Court. In particular, the Commission proposes that the Family Division adopts a first day ‘LAT-style’ hearing for a range of new applications before the Court. These new powers for the Family Division would be best supported by the introduction of an individual docket system within the Court, in line with the way that both FCA and FMC have implemented the Division 12A provisions.
- 8.132 A central aspect of any new Division 12A-type process in the Court is the role of a child development specialist as a single expert witness. The Commission believes that when developing new trial processes in the Family Division of the Children’s Court, careful attention should be paid to the availability of reliable and testable evidence on child welfare that is presented in a cost-effective and timely manner.¹⁹²
- 8.133 The Commission believes that in proceedings, the Court should speak directly to the parties and actively encourage their participation. A Division 12A-type process has the benefit of allowing the parties to converse directly with the judicial officer, to feel listened to and to engage in the process. If a case concerns a child who chooses to attend the Court with their representative, it may benefit her or him to have the magistrate explain the process to them in open court so that it becomes less intimidating and confronting.¹⁹³ Both parents and children are likely to engage better with the process if a single judicial officer who speaks to them directly conducts their case from beginning to end.
- 8.134 In a recent evaluation by the Australian Institute of Family Studies, a majority of family law professionals endorsed the introduction of Division 12A.¹⁹⁴ Legal practitioners expressed some concern, however, about the different approaches taken by judicial officers in applying the new provisions. Lawyers considered that some judicial officers were interventionist in their approach, and some more traditional, and this made case preparation and advising clients more difficult.¹⁹⁵ The Commission therefore suggests that careful consideration should be given to the implementation of any new, more inquisitorial processes so that some consistency in approach is achieved.
- 8.135 The Commission believes that its proposed reforms to the operation of the Family Division of the Children’s Court, including the incorporation of Division 12A procedures and problem-oriented processes, are constitutionally valid because they would not undermine the ‘institutional integrity’ of the Children’s Court of Victoria. The constitutional issues are discussed briefly in Appendix R.

Proposal 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)*.

MODELS OF REPRESENTATION FOR CHILDREN CHILDREN AND YOUNG PEOPLE AS PARTIES TO PROCEEDING

- 8.136 As noted in Chapter 3,¹⁹⁶ children and young people are named on all protection applications and from the age of 12 years they are given copies of the application.¹⁹⁷ Children do not, however, automatically have the status of a party in the case.
- 8.137 The failure to afford party status to children in protection proceedings appears to be an historical anomaly that might not be consistent with contemporary human rights protections. Under the Charter, a child who is the subject of a protection application has the right to be recognised 'as a person before the law'¹⁹⁸ and to be treated equally before the law.¹⁹⁹
- 8.138 Various other jurisdictions provide for the child to be a party in protection proceedings. Legislation in South Australia, Western Australia, Queensland, the Northern Territory, Tasmania and the ACT provides that the child is a party to a protection application.²⁰⁰ In most other Australian jurisdictions, the party status of the child is directly linked to an entitlement to legal representation.²⁰¹ Some states that connect party status directly to the entitlement to legal representation leave the appointment of a child's legal representative to the court's discretion.²⁰²
- 8.139 The Commission believes that a child who is the subject of a protection application should be a party to those proceedings regardless of her or his age.

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

190 Ibid 120. This is an adaptation of the current s 215(1)(c) of the *Children, Youth and Families Act 2005 (Vic)*.

191 Submission 46 (Children's Court of Victoria) 120. For further discussion about the appropriateness of adopting these two new principles, see the section below entitled 'Findings of fact on the balance of probabilities'.

192 Submission 27 (CPS) highlighted the importance of changed methods of obtaining expert evidence on child well-being. The submission stated: 'A more inquisitorial model would permit the body deciding child protection matters to question CPS staff (and other experts) about all aspects of their assessments. CPS suggests that a more inquisitorial model would have greater success in discovering the full facts about a particular case and, thereby, be in a better position to advance the best interests of children.'

193 The Commission similarly notes that in the recent evaluation of the Division 12A provisions conducted by the Australian Institute of Family Studies, some lawyers thought that their parent clients appreciated the chance to speak directly to the judge while other lawyers felt that inarticulate, nervous or uneducated clients were not able to effectively use the opportunity to speak to the judge and would have been better off with a court advocate: Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (2009) 330.

194 Ibid 333.

195 Ibid 334.

196 See 'Children, parents and other parties with a direct interest in proceedings' in Chapter 3.

197 *Children, Youth and Families Act 2005 (Vic)* ss 242(1)(a), 243(2)(c).

198 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 8(1).

199 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 8(2).

200 *Children's Protection Act 1993 (SA)* s 46(1); *Children and Community Services Act 2004 (WA)* s 147; *Child Protection Act 1999 (Qld)* sch 3 definition of 'party'; *Care and Protection of Children Act 2007 (NT)* ss 94, 125; *Children, Young Persons and Their Families Act 1997 (Tas)* s 64; *Children and Young People Act 2008 (ACT)* s 700.

201 For example the Northern Territory lists the child as a party and then provides that all parties may be legally represented: *Care and Protection of Children Act 2007 (NT)* s 101. The ACT legislation names the child as a party and provides that any party to proceedings may be legally represented: *Children and Young People Act 2008 (ACT)* s 74E.

202 Although in the ACT the child is a party to proceedings and, as such, entitled to legal representation, the Court can proceed to hearing an application with a child unrepresented if it is satisfied that the child or young person has had reasonable opportunity to get legal representation and the best interests of the child or young person will be adequately represented in the proceedings: *Children and Young People Act 2008 (ACT)* s 74G.

REPRESENTATION OF CHILDREN AND YOUNG PEOPLE IN PROCEEDINGS**Current law**

8.140 As discussed in Chapter 3, in Victoria children considered mature enough to give instructions to a lawyer (generally seven year olds or older)²⁰³ are legally represented in child protection proceedings.²⁰⁴ A legal practitioner representing a child or young person in any proceeding

*must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.*²⁰⁵

8.141 For the more than 50 per cent of children subject to protection applications who are under the age of seven,²⁰⁶ (and therefore generally considered to lack capacity to give instructions),²⁰⁷ separate legal representation is provided only in exceptional circumstances when the Court exercises its power to make an appointment.²⁰⁸ The Children's Court advised that this power has been exercised in only 33 cases. If appointed, a child's representative must 'act in accordance with what he or she believes to be in the best interests of the child'²⁰⁹ and is to be guided by the Act's best interests principles when determining what is in the child's best interests.²¹⁰

Models of representation for children and young people

8.142 There are two basic models for representation of children and young people: the best interests model and the direct representation model.

The best interests representative

8.143 The best interests model of representation for children does not involve the lawyer acting on the child's instructions, but acting instead on his or her own assessment of the child's best interests.²¹¹ On this model, the child and representative are not in a solicitor–client relationship.²¹² Rather, the representative acts as an officer assisting the Court by representing the child's best interests.²¹³

8.144 The New South Wales Law Society has published principles (the NSW principles) to guide children's lawyers in that jurisdiction.²¹⁴ These principles, which have been revised three times,²¹⁵ contain information about the role of a best interests representative for children. The NSW principles state that it is the 'overriding duty' of a best interests representative to ensure that the child's long-term best interests are served by informing the Court of all the evidence that is relevant to its determination.²¹⁶ The representative has a role in requesting that experts provide reports or opinions,²¹⁷ cross-examining witnesses and questioning the accuracy of evidence called by other parties.²¹⁸

8.145 The best interests representative's role also involves seeking the child's views and presenting them to the Court,²¹⁹ which is a different exercise from obtaining and acting upon instructions. It is particularly important that the best interests representative's assessment of what is in the child's best interests is made objectively,²²⁰ based on the evidence available and not on personal value judgments.²²¹ The representative should meet the child in order to ascertain his or her views, as well as seek other information that may be relevant to the child and his or her wellbeing.²²² Although not acting on instructions, the representative has a responsibility to explain the available options to the child and to advise about possible consequences.²²³

8.146 The independent children's lawyer (ICL) in Australian family law is one example of a best interests representative for children.²²⁴ In family law, where the child's best interests or welfare is the paramount or a relevant consideration in proceedings, the court may order that the child be independently represented by an ICL.²²⁵ The ICL's functions include forming an independent view of what is in the child's best interests based on the evidence available.²²⁶ An ICL is independent of the parties and acts in accordance with their own view of the child's best interests.²²⁷ ICLs gather relevant information from various professionals that may not have been obtained by the parties to ensure that all relevant material regarding the child is available.²²⁸ Part of the effectiveness of best interests representation by ICLs is the collaborative relationship they share with experts.²²⁹ Depending on the case's circumstances, ICLs often request general family assessments but may also request specific assessments or reports (such as a psychiatric assessment of a parent). Experts may also provide guidance to the ICL on general child development and welfare issues.

8.147 In its 1997 report, *Seen and Heard*,²³⁰ the ALRC raised concerns that discussions between a child and a best interests representative may not be covered by legal professional privilege, as the child is not the representative's client.²³¹ Under such an arrangement, representatives could be cross-examined on discussions with the child.²³² This was historically cited as a reason for representatives in family law matters not meeting with the children they represented.²³³ This problem has been resolved for ICLs in family law; the FLA 1975 provides that the ICL is under no obligation to and cannot be required to disclose to the Court any information that the child communicates to the ICL.²³⁴

- 203 Victoria Legal Aid, *Grants Handbook* (12th ed, 2001) 30.
- 204 *Children, Youth and Families Act 2005* (Vic) ss 524(2), 525(1).
- 205 *Children, Youth and Families Act 2005* (Vic) s 524(9)–(10). Note that there is also provision for the direct representative of the child to be a layperson, but the Commission is not aware of any circumstances in which this has occurred.
- 206 Email from Russell Hastings, Children's Court of Victoria, 7 June 2010. Statistics provided in this email for primary applications registered statewide suggest 52 per cent of children who are the subject of these applications are under seven years of age. Primary applications include 3034 protection applications and 13 of the other types of primary applications. The statistics provided by the Department for protection applications are similar: Email from Department of Human Services (Victoria), 22 March 2010. The DHS statistics suggest that in 2008–09, 55 per cent of children who were the subject of 3145 protection applications were under seven years of age, with only 45 per cent being over the age of seven.
- 207 '[I]n administering this guideline, VLA will act on the basis that, in general, a child aged seven or older is of sufficient maturity to give instructions': Victoria Legal Aid, *Grants Handbook*, above n 203, 30.
- 208 *Children, Youth and Families Act 2005* (Vic) s 524(4).
- 209 *Children, Youth and Families Act 2005* (Vic) s 524(11)(a).
- 210 *Children, Youth and Families Act 2005* (Vic) s 10.
- 211 Geoff Monahan, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) 8(2) *QUT Law and Justice Journal* 392, 392–3. It is also possible, on the best interests model, for the lawyer to be instructed by a competent adult acting on behalf of the child.
- 212 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 253.
- 213 Law Society of New South Wales, *Representation Principles for Children's Lawyers* (3rd ed, 2007) 7.
- 214 *Ibid.* Note also the *Guidelines for Lawyers Representing Children and Young People in Care and Protection Matters in the ACT Children's Court* (2004) and the South Australian *Guidelines for Lawyers Acting for Children* (2007). The NSW principles are used because the Victorian Guidelines were published before the 'exceptional circumstances' best interests representation provision was incorporated in the CYF Act 2005. The provision for a best interests representative in 'exceptional circumstances' came into force when s 524(4) of the *Children, Youth and Families Act 2005* (Vic) was proclaimed on 23 April 2007, whereas the Victorian guidelines were published in August 1999: Louise Akenson, Victoria Law Foundation, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (1999).
- 215 With the first edition adopted by the Council of the NSW Law Society on 19 October 2000, and the second edition adopted on 21 March 2002.
- 216 Law Society of New South Wales, *Representation Principles*, above n 213, 23.
- 217 *Ibid.* 7.
- 218 *Ibid.* 24.
- 219 *Ibid.* 7.
- 220 *Ibid.* 10.
- 221 Dan L Goldberg, 'Representing Children in Custody and Access Proceedings' (Paper presented at the Voice of the Child Conference, Toronto, 5 March 2009) 12.
- 222 Law Society of New South Wales, *Representation Principles*, above n 213, 15.
- 223 *Ibid.*
- 224 This is discussed in Chapter 4.
- 225 *Family Law Act 1975* (Cth) s 68L(1)–(2).
- 226 *Family Law Act 1975* (Cth) s 68LA(2)(a).
- 227 *Family Law Act 1975* (Cth) s 68LA(2)(b).
- 228 *P and P* (1995) 19 Fam LR 1, 33.
- 229 The experts are either family consultants (employed or engaged by the FCA or FMC) or private practitioners with relevant social science qualifications and experience.
- 230 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122.
- 231 *Ibid.* 276.
- 232 *Ibid.*
- 233 *Ibid.*
- 234 *Family Law Act 1975* (Cth) s 68LA(6). Note, however, that the ICL may disclose information to the court if he or she considers disclosure to be in the child's best interests, even if such disclosure is against the wishes of the child: s 68LA(7)–(8).

8.148 Although the Victorian *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (the Victorian guidelines) in relation to the CYF Act 2005 recommend that a direct representative must not disclose information without the child's consent, even where the child is at risk,²³⁵ they say nothing about the role of the best interests representative. This is because provision for best interests representation of children in 'exceptional circumstances' was incorporated into the Act long after the Victorian guidelines were published.²³⁶ In order to ensure that best interests representatives in the Family Division of the Children's Court are protected from having to disclose to the Court matters divulged by the child in confidence, a similar system to that for ICLs in family law would have to be introduced.

The direct representative

- 8.149 Direct representation,²³⁷ the present model almost universally employed in the Family Division of the Children's Court, involves a very different role from best interests representation. Under the direct representation model, the child or young person is the representative's client.²³⁸ The direct representative obtains instructions from a child or young person who is considered capable of instructing and acts upon them. The solicitor–client relationship is theoretically identical to that which exists between lawyers and their competent adult clients.²³⁹ In relation to direct representation, in *Seen and Heard* it was recommended that 'the child's willingness to participate and ability to communicate should guide the representative rather than any assessment of the "good judgment" or level of maturity of the child'.²⁴⁰
- 8.150 The Victorian guidelines provide that the lawyer should ensure that the Court hears the child's or young person's 'views'²⁴¹ and that it is for the Court to decide what weight should be given to those views and where the young person's best interests lie.²⁴² The guidelines state that 'the aim of the lawyer must be to achieve the result requested by the young client'.²⁴³ The direct representative's role is contrasted with that of the best interests representative, as the former is 'bound' by the child or young person's instructions. The direct representative's own assessment of what is in the child's or young person's best interests is relevant only insofar as advising the client of the likely approach the Court will take²⁴⁴ or advising the client about the prospects of obtaining VLA funding.²⁴⁵
- 8.151 Where the child or young person is incapable of giving instructions, it is clear that the lawyer cannot act on a direct representative basis.²⁴⁶ The practitioner ordinarily determines the child's capacity to instruct.²⁴⁷ In NSW, if the child or young person is incapable of giving instructions, the lawyer should bring this to the Court's attention and seek the appointment of a best interests representative.²⁴⁸ This is not the case in Victoria, where a best interests representative is only appointed in exceptional circumstances.²⁴⁹ As noted previously, this limitation results in over 50 per cent of children being unrepresented before the Family Division of the Children's Court.²⁵⁰ It is significant that while Victorian children are typically considered capable of instructing a lawyer from the age of seven,²⁵¹ in NSW the legislation establishes a rebuttable presumption that children under 12 are incapable of giving proper instructions.²⁵²

8.152 The direct representative must interview children and young people effectively and in a manner that is developmentally appropriate.²⁵³ Both the NSW principles and *Seen and Heard* recommend that direct representatives seek the input of behavioural scientists in order to ascertain the wishes and directions of younger children.²⁵⁴ This approach is consistent with article 12(1) of the *United Nations Convention on the Rights of the Child* (CROC), which provides that where a child is capable of forming his or her own views, state parties will allow the child to express those views freely in all matters affecting him or her.²⁵⁵ Article 12(2) provides that the child may do this either directly or through a representative or appropriate body.²⁵⁶ This principle is also relevant to best interests representatives when ensuring that children's views are expressed to the Court.

8.153 The Victorian guidelines suggest that lawyers acting for children who have been deemed mature enough to instruct should:

- ensure the Court hears the child's views²⁵⁷
- continually assess the child's capacity to give instructions, based on his or her ability to understand the nature of court proceedings and possible consequences²⁵⁸
- not undermine the child's preference/s even when limited instructions are given²⁵⁹
- do all that is possible to ensure the child makes his or her own decision without pressure from others, including the lawyers themselves²⁶⁰
- present confused or inconsistent views 'as is' to the Court²⁶¹
- represent the child in a competent and professional manner²⁶²
- always seek their client's permission before any disclosure takes place²⁶³

235 Akenson, *Guidelines for Lawyers*, above n 214, 18. Note, however, that the representative should discuss with the child the benefits of bringing the matter to the attention of the Department and must not mislead the court by intimating that the child is not at risk: at 18. Lawyers are not subject to mandatory reporting under the Act, but if a lawyer believes that a child is in need of care and protection and makes a report to a protective intervener, he or she will not be in breach of professional ethics or subject to any liability in respect of the report: *Children, Youth and Families Act 2005* (Vic) s 189(a)–(b).

236 As noted above, the provision for a best interests representative came into force when s 524(4) of the *Children, Youth and Families Act 2005* (Vic) was proclaimed on 23 April 2007, whereas the Victorian guidelines were published in August 1999.

237 Note that 'direct representation' and 'representation on instructions' can be used interchangeably.

238 Law Society of New South Wales, *Representation Principles*, above n 213, 7.

239 Nicola Ross, 'Legal Representation of Children' in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 544, 552.

240 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 274.

241 It should be noted that although the word 'views' is used here, a best interests representative will also have a role in putting the child's views before the Court, but acting on instructions requires more than just eliciting the child or young person's views.

242 Akenson, *Guidelines for Lawyers*, above n 214, 8.

243 *Ibid.*

244 *Ibid.* 9.

245 Victoria Legal Aid will not fund a lawyer to act for a party, including a child, if the case is without merit: Victoria Legal Aid, *Grants Handbook*, above n 203; *Legal Aid Act 1978* (Vic) s 24(4)(b).

246 Law Society of New South Wales, *Representation Principles*, above n 213, 9.

247 *Ibid.* 10; Akenson, *Guidelines for Lawyers*, above n 214, 12.

248 Law Society of New South Wales, *Representation Principles*, above n 213, 10.

249 *Children, Youth and Families Act 2005* (Vic) s 524(4). See the discussion in Chapter 3 under 'Lawyers for children and types of legal representation'.

250 See Chapter 3 under 'Children, parents and other parties with a direct interest in proceedings'.

251 See Victoria Legal Aid, *Grants Handbook*, above n 203, 30.

252 The age presumption was raised from 10 to 12 years by the *Children and Young People (Care and Protection) Miscellaneous Amendments Act 2006* (NSW) s 99B. This was because 'there is clear evidence based on child development that most 10 and 11 year olds are incapable of understanding the legal ramifications of their instructions, the intricacies of legal procedure in care matters and the various legal, procedural and jurisdictional issues that may arise': New South Wales, *Parliamentary Debates*, Legislative Council, 15 November 2006, 3930 (Henry Tsang, Parliamentary Secretary).

253 Law Society of New South Wales, *Representation Principles*, above n 213, 12.

254 *Ibid.*; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 272–3.

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

256 *Ibid.* art 12(2).

257 Akenson, *Guidelines for Lawyers*, above n 214, 8.

258 *Ibid.* 12.

259 *Ibid.* 14–15.

260 *Ibid.* 16.

261 *Ibid.*

262 *Ibid.* 16–17.

263 *Ibid.* 18.

264 *Ibid.*

- maintain the child's confidence, even if the child refuses to disclose information indicating a serious risk.²⁶⁴

Distinguishing between an 'ability to express a view' and a 'capacity to give instructions'

- 8.154 A child's or young person's ability to express views and capacity to instruct a lawyer are not the same. A child with the ability to express an opinion may have their opinion or views directly relayed to the Court whether represented on a 'direct representation' or 'best interests' model. The ability of a child to express his or her views, where willing, is not necessarily synonymous with that child's capacity to instruct. Notably, some members of the Children's Court of Victoria argued that 'in many cases children's lawyers have real concerns about the viability of their instructions and the risk to their clients if those instructions were adopted'.²⁶⁵
- 8.155 The complexity of giving instructions, or the higher level of comprehension needed, is provided by the following examples. The Victorian guidelines highlight that to be capable of giving instructions a young client needs to understand and articulate concepts like 'who', 'when' and 'where',²⁶⁶ as well as their lawyer's role, and the nature and potential consequences of the proceedings.²⁶⁷ The guidelines define capacity to instruct as based on a child's or young person's 'ability to understand the nature of the proceedings and to have an appreciation of the possible consequences of the proceedings, both in the short-term and long-term'.²⁶⁸
- 8.156 The Commission believes that there is a distinction between a child's or young person's ability to express views and a capacity to instruct, and that a capacity to instruct involves more complex or higher levels of comprehension of the nature of proceedings, court processes and consequences. It would be helpful for the distinction between expressing wishes and providing instructions to be set out in new guidelines for the representation of children in child protection matters. The existing Victorian guidelines, published prior to the current CYF Act 2005, require updating.

STANDARDS APPLICABLE TO ALL REPRESENTATION OF CHILDREN AND YOUNG PEOPLE

- 8.157 Some considerations apply to the representation of all children and young people, regardless of the model adopted. In all instances and on any model, the child's or young person's representative must be 'very involved, active, and professional'.²⁶⁹ For the purposes of this reference, the CREATE Foundation conducted a consultation with 25 children and young people, in which they described their interactions with lawyers.²⁷⁰ When asked how they would treat young people if they were a lawyer, the children and young people stated they would

*get to know the young person by asking them how they are going and what they did yesterday; listen to the young people's stories and requests; respect the young people; and simply explain what is going to happen and the possible outcomes.*²⁷¹

- 8.158 Many participants in this consultation wanted the lawyer to employ the exact words used by the child or young person when putting their views to the Court.²⁷² The children and young people wanted the lawyer always to use language that they could understand and to fully explain the process.²⁷³
- 8.159 Broadly speaking, the child's representative should:
- elicit the child's views in a developmentally appropriate manner²⁷⁴
 - advise the child²⁷⁵
 - provide guidance²⁷⁶

- express the child’s wishes and preferences to the Court where relevant²⁷⁷
- explain to the child, in an appropriate way, information that will allow the child to have maximum input²⁷⁸
- inform the child about significant developments in his or her matter,²⁷⁹ relevant facts and applicable laws and processes, as appropriate to the child’s ability to understand²⁸⁰
- ensure that the child has the opportunity to express any further view or instruction or any refinement or change to previously expressed views.²⁸¹

8.160 *Seen and Heard* identified additional standards for all legal representatives of children.²⁸²

The report emphasised that the child’s representative should always meet with the child, preferably face to face.²⁸³ This meeting should occur where and when it is comfortable for the child, and not merely at a time and place convenient for the representative.²⁸⁴ It was also recommended that representatives should at least see a non-verbal child who they are representing, preferably in the child’s home environment.²⁸⁵ When communicating with a child, representatives should use appropriate language for the child’s level of understanding and should listen to the child.²⁸⁶ The Victorian guidelines provide guidance for representatives on how to communicate with children when interviewing them.²⁸⁷

8.161 With regard to eliciting views, another important requirement is that verbal children are not forced to express a view against their will. This is encapsulated by CROC’s article 12 right for children to express their views ‘freely’ in matters affecting them²⁸⁸—interpreted by CROC to mean that the child can express or withhold his or her views without pressure.²⁸⁹

8.162 The representative has an important role in assisting those children and young people who wish to participate directly in proceedings. The representative must clearly inform the Court of the child’s or young person’s desire to participate.

265 Submission 46 (Children’s Court of Victoria) 66.

266 Akenson, *Guidelines for Lawyers*, above n 214, 13.

267 *Ibid* 14.

268 *Ibid* 12.

269 Donald Duquette, ‘Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required’ (2000) 34(3) *Family Law Quarterly* 441, 457.

270 CREATE Foundation, above n 183.

271 *Ibid* 6.

272 *Ibid* 24.

273 *Ibid*.

274 See, *The President’s Initiative on Adoption and Foster Care Guidelines for Public Policy and State Legislation Governing Permanence Care for Children* (1999), in Duquette, above n 269, 456–7.

275 *Ibid*.

276 *Ibid*.

277 *Ibid*.

278 *Ibid*.

279 Family Court of Australia, *Guidelines for Independent Children’s Lawyers*, endorsed by the Chief Justice of the Family Court of Australia and by the Federal Magistrates Court of Australia (2007) 4.

280 See, *The President’s Initiative on Adoption and Foster Care Guidelines for Public Policy and State Legislation Governing Permanence Care for Children* (1999), in Duquette, above n 269, 456–7.

281 Family Court of Australia, *Guidelines for Independent Children’s Lawyers*, above n 279, 4. One of the disadvantages of the current direct representation model is that lawyers representing children during ADR or negotiation processes may struggle to obtain up to date instructions where negotiations are particularly dynamic. That may limit the effectiveness and participation of the child representative in the negotiation process.

282 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 272.

283 *Ibid*.

284 *Ibid*.

285 *Ibid*.

286 *Ibid*.

287 Akenson, above n 214, *Guidelines for Lawyers* 11.

288 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990). This is discussed in Chapter 3 under ‘Charter of Human Rights and Responsibilities and international rights instruments’.

289 Committee on the Rights of the Child, *General Comment 12: The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [22]. This is discussed in Chapter 3 under ‘Charter of Human Rights and Responsibilities and international rights instruments’.

8.163 The *Seen and Heard* inquiry received a number of submissions emphasising the need for specialist training of children’s representatives.²⁹⁰ The report emphasised the importance of skills in interviewing children and taking instructions, and recommended the development of multi-disciplinary training for lawyers and social scientists.²⁹¹ Specialist accreditation is one way to ensure that representatives are adequately trained to represent on either a best interests or direct representation model.²⁹² The NSW principles emphasise the need for training of children’s representatives in child development and language, and how to communicate with children.²⁹³ The Commission supports specialist accreditation in the area of children’s law for Victorian lawyers practising in the Children’s Court, and understands that the Law Institute of Victoria is currently exploring this possibility.²⁹⁴

THE NEED FOR ALL CHILDREN AND YOUNG PEOPLE TO BE REPRESENTED IN PROTECTION PROCEEDINGS

8.164 No Australian jurisdiction other than Victoria provides that children who are unable to give instructions should only be represented in protection applications in ‘exceptional circumstances’. In South Australia, *all* children must be represented in care and protection proceedings, unless the child has made an express decision not to be represented.²⁹⁵ Similarly, the NSW principles provide that a child who is unwilling or unable to give instructions should still be represented.²⁹⁶ This Victorian approach to children’s representation remains despite a General Comment from the Committee on the Rights of the Child in 2005, which provided that:

*States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child’s interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences.*²⁹⁷

8.165 Some submissions suggested that best interests legal representation of infants and young children was generally not required given the Department’s duty to represent a child’s best interests.²⁹⁸ One submission suggested that while best interests lawyers were desirable in private family law proceedings where parents may be promoting their own interests and not representing a child’s best interests, in protection proceedings the child protection practitioner had the responsibility to ensure a child’s best interests were met.²⁹⁹

8.166 Some of the people who supported the status quo in relation to children’s representation suggested that a best interests appointment is only necessary in cases where the Court had doubts that the Department’s disposition recommendation was in the child’s best interests.³⁰⁰

8.167 The Commission considers that the roles of a best interests representative and child protection practitioner are distinct, yet complementary. A best interests representative stands apart from both the child protection practitioner and the child’s parents to present an independent view of what is in the child’s best interests. The Commission considers that a best interests representative, while having the same objective as a child protection practitioner—to ensure that processes and the outcome are in the child’s best interests—has the capacity to bring a unique perspective that may greatly assist the decision maker.

8.168 Many of the arguments against introducing a best interests representative for children in protection proceedings assume that there is only one perspective on what is in a child's best interests. As applicants in proceedings, protective interveners necessarily seek a particular disposition from the Court in the child's best interests. Evidence will be presented in support of the disposition sought. In some cases, the unique perspective of a best interests representative who meets the child directly and makes appropriate enquiries may result in options being advanced that have previously not been considered.

8.169 Some people expressed concerns that lawyers lacked the expertise to make assessments about a child's best interests.³⁰¹ Well-developed models of best interests representation for children, however, recognise that lawyers need to work alongside experts in child welfare and development. A best interests lawyer should have ongoing training in child development and risk issues in order to base opinions on available evidence about what is in a child's best interests.

8.170 There are many demands on a child protection practitioner. Commentators in other jurisdictions have acknowledged that child welfare agencies 'often have responsibility to the entire family and must often allocate scarce and inadequate resources to many children or families'.³⁰² This view was echoed in one submission from a social worker that was supportive of the appointment of a child's representative early in the process to 'better present the interests of the child',³⁰³ as protection workers are often overworked and are required to focus on the adults' behaviour rather than just the child's interests.³⁰⁴

THE NEED FOR TWO MODELS OF REPRESENTATION

8.171 Both the best interests and direct representation models are needed if all children are to be represented, as 'trying to define a single lawyer role for children of all ages and capacities is not possible'.³⁰⁵ Neither model is well suited to all children and young people.

290 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 287. Although this point was made with specific regard to children's representatives in the Family Court, the same concept is applicable to children's representatives in the Family Division of the Children's Court.

291 *Ibid* recommendation 84.

292 The New South Wales Law Society offers specialist accreditation in Children's Law: Law Society of New South Wales, *Specialist Accreditation: Areas of Practice* (2009) <www.lawsociety.com.au/ForSolicitors/Education/specialists/areasofpractice/index.htm> at 30 May 2010.

293 Law Society of New South Wales, *Representation Principles*, above n 213, 18.

294 Specialist accreditation and training generally is discussed in greater detail later in this chapter.

295 *Children's Protection Act 1993* (SA) s 48. This will be on a direct representation model if the child is capable of giving instructions, and on a best interests model otherwise.

296 Law Society of New South Wales, *Representation Principles*, above n 213, 10. Note, however, that whether a child or young person needs to be represented remains at the discretion of the Court in NSW: *Children and Young People (Care and Protection) Act 1998* (NSW) s 99.

297 Committee on the Rights of the Child, *General Comment No 7: Implementing Rights in Early Childhood*, 40th sess, CRC/C/7/rev 1 (20 September 2006) [13]. This is also discussed in relation to children's rights in Chapter 3.

298 Submission 19 (Joe Gorman); consultation 4 (DHS Managers).

299 Submission 19 (Joe Gorman).

300 See, for example, submission 19 (Joe Gorman). Note also that the 'status quo proponents' of the Children's Court were satisfied that the vast majority of the Department's disposition recommendations were in the best interests of the child, and considered this to be sufficient representation of the child's best interests in all but exceptional circumstances: submission 46 (Children's Court of Victoria) 63. Three submissions expressed concern, in discussing the Department's role in representing the best interests of children, that the Department no longer has the expertise of many experts in early childhood development, since the Office of Children, formerly within the Department of Human Services, was transferred to the Department of Education and Early Childhood in 2007: submissions 33 (Youthlaw), 43 (VCOSS & YACVic), 45 (FCLC).

301 See, for example, submission 37 (OCSC).

302 See Duquette, above n 269, 446, in relation to child welfare agencies in the US and the need for a separate representative of the child's best interests.

303 Submission 8 (Angela Smith).

304 *Ibid*.

305 Duquette, above n 269, 456–7.

- 8.172 A direct representation model allows older, more mature children to apply their own judgment in directing a lawyer about the outcome the child believes will best meet their own needs.³⁰⁶ A best interests model of representation for some mature children, in certain circumstances, may be inconsistent with the participatory principle enshrined in article 12 of CROC³⁰⁷ and may be unacceptably paternalistic.³⁰⁸ Circumstances in which direct representation would be appropriate include where mature children, who wish to directly participate in proceedings, do not want a lawyer putting submissions to the Court that are inconsistent with their own considered views.³⁰⁹
- 8.173 A best interests model has advantages for both young children and older children who may wish to express their point of view but do not wish to actively participate in and make decisions about their representation, and do not reject a best interests model of representation. *Seen and Heard* identified that best interests representation for children may 'allow children to express a view without feeling responsible for the ultimate decision'.³¹⁰ A best interests lawyer should put a child's views (if the child wishes to express views) before the Court directly and not editorialise or discount a child's view 'simply because the representative disagrees with those views'.³¹¹ A best interests model of representation is particularly appropriate for less mature children with understandable wishes that are not realisable.
- 8.174 A direct representation model for all children means that representation flows from the child's ability to give instructions. Given the limitation on best interests representation under the CYF Act 2005,³¹² this is essentially the present situation in the Family Division of the Children's Court. The pure direct representation model creates a clear problem for children who are incapable of instructing. One response to this problem has been to not separately represent these children at all.³¹³ A number of submissions expressed concern that a large proportion of children who are incapable of instructing a representative are unrepresented.³¹⁴ Another response to having only one direct representation model for children³¹⁵ is to assume that young children who are capable of expressing views are also capable of instructing. This response is understandable, as an eight- or nine-year-old child would generally be denied separate legal representation in proceedings if a less liberal approach were adopted. However, it is a model that may not be furthering the interests of the very young client.
- 8.175 Direct representation and best interests models each have advantages for the representation of children and young people in different circumstances. The advantage of direct representation is that it allows children and young people to direct how their voice is heard in proceedings if they are capable of doing so. The best interests model of representation provides that children's views, where expressed, are made known and that a child's interests are independently represented. There may be situations where both models are required: for instance, in a case involving siblings of varying ages, an older child may be unwilling to be represented by a 'best interests' lawyer and may have their own direct representative.

Guidance for determining when each model would apply

- 8.176 It is imperative that guidance is developed to assist in deciding when a best interests model should be followed and when the child or young person should be directly represented.

8.177 If a well-developed best interests model of representation for children is developed in the Children's Court, it is likely to be the more commonly applied model based on the current very young age of most children involved in protection proceedings. More than 50 per cent of children subject to protection applications in the Children's Court of Victoria are under seven years of age and more than 70 per cent of children involved in protection applications are under 12 years of age.³¹⁶ While age alone is no measure of maturity, it does serve as a general guide.

8.178 The conventional wisdom in Victoria about when a child is capable of giving instructions is very different to that in NSW.³¹⁷ Although developmental psychology has many benefits for enhancing understanding of children's development, its use as a 'yardstick' in law can be problematic.³¹⁸ The danger arises when 'evidence' of child development is cited simplistically, without specific indication of the evidence relied on.³¹⁹

RELEVANT MODELS OF REPRESENTATION IN OVERSEAS JURISDICTIONS

8.179 The Commission looked to other relevant jurisdictions for guidance about children's representation. A number of submissions and consultations suggested considering guardian *ad litem* systems in other jurisdictions as models of representation.³²⁰ In 1996, the Auditor-General also recommended this model, suggesting that:

*consideration be given to the appointment of Guardian Ad Litem to independently assess and advise Magistrates on what are considered to be the best interests of the child in terms of future placements.*³²¹

306 This was raised in *Seen and Heard*, where it was stated that the major criticism of a best interests model 'is that it effectively denies competent children the right to instruct their advocates even where they are directly involved in a case': Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 259.

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

308 Duquette, above n 269, 447.

309 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 259.

310 *Ibid* 258.

311 *Ibid* 260.

312 The Court is to adjourn proceedings in exceptional circumstances where the Court determines that it is in the best interests of a child to allow legal representation to be obtained despite the opinion that the child is not mature enough to give instructions: *Children, Youth and Families Act 2005* (Vic) s 524(4).

313 Duquette, above n 269, 448.

314 See, for example, submissions 33 (Youthlaw), 37 (OCSC), 43 (VCOSS & YACVic). Submission 45 (FCLC) supported the notion of separate representation for children who are incapable of instructing a representative. The 'best interests proponents' within the Children's Court expressed concerns about the operation of a solely direct instruction model: submission 46 (Children's Court of Victoria) 65.

315 Unless there are 'exceptional circumstances' under *Children, Youth and Families Act 2005* (Vic) s 524(4).

316 See, Hastings, above n 206; Department of Human Services (Victoria), above n 206.

317 In Victoria, children aged seven and over are typically assessed as capable of giving instructions: Victoria Legal Aid, *Grants Handbook*, above n 203, 30. In NSW, there is a presumption that children aged 12 and over are capable of giving instructions: *Children and Young People (Care and Protection) Miscellaneous Amendments Act 2006* (NSW) s 99B.

318 Ross, above n 239, 567.

319 *Ibid*. An example of this is in the second reading speech to the Children and Young People (Care and Protection) Miscellaneous Amendments Bill (NSW), which stated 'there is clear evidence based on child development that most 10 and 11 year olds are incapable of understanding the legal ramifications of their instructions, the intricacies of legal procedure in care matters and the various legal, procedural and jurisdictional issues that may arise': New South Wales, *Parliamentary Debates*, Legislative Council, 15 November 2006, 3930 (Henry Tsang, Parliamentary Secretary).

320 See, for example, consultations 22 (DHS CP Workers Southern), 18 (DHS CP Workers Gippsland), 20 (DHS Community Care Managers), 24 (Prof Cathy Humphreys); submissions 8 (Angela Smith), 29 (Anglicare Victoria), 37 (OCSC), 38 (VALS), 41 (Australian Childhood Foundation).

321 Victorian Auditor-General's Office, *Special Report No 43 Protecting Victoria's Children: The Role of the Department of Human Services* (1996) 241.

England and Wales

- 8.180 England and Wales have a guardian *ad litem* system of representation for children in ‘specified proceedings’,³²² including protection proceedings. The guardian *ad litem* in England and Wales is an independent professional appointed in accordance with court rules to safeguard the child’s interests.³²³ The Court must appoint a guardian unless satisfied that it is not necessary to do so to protect the child’s best interests.³²⁴ When a guardian is deemed necessary, the Children and Family Court Advisory and Support Service (CAFCASS) provides the Court with the name of an available guardian (usually a CAFCASS officer who is a social worker)³²⁵ and the Court makes an order appointing that guardian, by name, for the individual child.
- 8.181 The guardian investigates the child’s circumstances³²⁶ and provides the Court with a report on the child’s wishes and his or her welfare, ‘but the case advocated on behalf of the guardian is based on the child’s welfare’.³²⁷ The guardian will have direct contact with the child to establish his or her wishes, read social services files, interview members of the child’s family and make an assessment of the child’s interests, sometimes with the assistance of expert reports.³²⁸
- 8.182 The guardian appoints a solicitor for the child, unless the Court has already done so.³²⁹ The guardian instructs the solicitor about matters relevant to the child’s interests, unless the child is judged to be of sufficient maturity to do this him- or herself.³³⁰ In certain circumstances, the child has a right to have his or her views represented directly by the solicitor, rather than through the guardian’s instructions.³³¹ This right is subject to three conditions:
- that the child is competent to give instructions
 - that the child wishes to give instructions
 - that the child wishes to give instructions that differ from those of the guardian.³³²

Commentators have noted that this step occurs rarely, and in all other cases the solicitor acts on the guardian’s instructions and does not raise issues other than those identified with the guardian.³³³

Northern Ireland

- 8.183 Northern Ireland also has a guardian *ad litem* system, under which a guardian is ‘an independent officer of the Court who is experienced in working with children and families ... employed by the Northern Ireland Guardian Ad Litem Agency’ (NIGALA).³³⁴ The function of NIGALA is to provide independent social work investigation and advice in specified proceedings under the *Children (Northern Ireland) Order 1995*.³³⁵ The Court must appoint a guardian unless it is satisfied that it is not necessary to do so in order to safeguard the child’s interests.³³⁶
- 8.184 The guardian performs a very similar function in Northern Ireland to the guardian in England and Wales. The guardian, who is a social worker, is required to investigate the child’s circumstances and provide an independent report to the Court, as well as appoint a solicitor for the child if the Court has not done this.³³⁷ The guardian instructs the solicitor unless the child is competent to do so, or unless the child wishes to give the solicitor different instructions to those of the guardian *ad litem* and the solicitor considers the child competent to do so.³³⁸

Scotland

- 8.185 The Scottish ‘safeguarder’ plays a similar role to a guardian *ad litem*. A safeguarder is appointed if the children’s hearing determines that this is necessary to safeguard the interests of the child in the proceedings.³³⁹ The role of the safeguarder is to make recommendations about the child’s best interests, producing a report for the children’s hearing.³⁴⁰ The safeguarder is appointed from a panel maintained by the local authority, which can include safeguarders who are legally qualified.³⁴¹
- 8.186 Since 2002 in Scotland, free legal representation has also been available for children in protection hearings³⁴² when it is required to ensure effective participation, or when the hearing is considering placing a child in secure accommodation.³⁴³ There is a clear distinction between the role of legal representatives and safeguarders:

*A safeguarder safeguards the interests of the child, takes account of his/her views and interests and makes a recommendation on what is in the child’s best interest. A legal representative will protect the child’s rights, and if the child is able to instruct the solicitor, will act on the child’s wishes. The legal representative need not consider the child’s interests.*³⁴⁴

United states—general

- 8.187 Federal legislation in the US requires a guardian *ad litem* to be appointed to represent the child in every case involving allegations of abuse or neglect.³⁴⁵ The guardian can be a lawyer, social worker or layperson, including a court appointed volunteer.³⁴⁶ Different states have implemented this requirement in different ways.

United states (Michigan)

- 8.188 In Michigan, a lawyer guardian *ad litem* is appointed in all child protection cases.³⁴⁷ The lawyer guardian *ad litem* serves as the independent representative of the child’s best interests, is entitled to full and active participation in proceedings and has access to all relevant information regarding the child.³⁴⁸ The lawyer guardian *ad litem* meets the child to ascertain his or her wishes, reviews the agency case file and consults with other relevant parties.³⁴⁹

- 322 ‘Specified proceedings’ for the purposes of appointing a guardian *ad litem* include any proceedings: on an application for a care or supervision order; in which the court is considering whether to make an interim care order; on an application for the discharge or variation of a care order; for an emergency protection order or child assessment order; for appeal against various decisions: *Children Act 1989* (UK) s 41(6). The England and Wales guardian *ad litem* system is also discussed in Chapter 5.
- 323 *Children Act 1989* (UK) s 5 (41).
- 324 *Children Act 1989* (UK) s 41(1).
- 325 Jane Fortin, *Children’s Rights and the Developing Law* (3rd ed, 2009) 247.
- 326 House of Commons, Committee on the Lord Chancellor’s Department, *Children and Family Court Advisory and Support Service: Third Report of Session 2002–03*, vol 1 (23 July 2003) 9; Fortin, above n 325, 9.
- 327 *Family Proceedings Rules 1991* (UK) rr 4.11(1), 4.11(2)(b); Judith Masson, ‘Representation of Children in England: Protecting Children in Protection Proceedings’ (2000) 34(3) *Family Law Quarterly* 467, 485.
- 328 House of Commons, above n 326, 9; Fortin, above n 325, 9–10.
- 329 Children and Family Court Advisory and Support Service (CAFCASS), *Practice Guidance for Guardians Appointing a Solicitor for the Child* (2006) 3.
- 330 *Ibid.*
- 331 Masson, above n 327, 485.
- 332 *Family Proceedings Rules 1991* (UK) r 4.121(a).
- 333 Masson, above n 327, 485.
- 334 Northern Ireland Guardian Ad Litem Agency, *Information for Professionals* (2005) <www.nigala.hscni.net/faq/info_professionals.htm> at 28 June 2010.
- 335 *Ibid.*
- 336 *Children (Northern Ireland) Order 1995* (NI) art 60.
- 337 Northern Ireland Guardian Ad Litem Agency, above n 334.
- 338 *Ibid.*
- 339 *Children (Scotland) Act 1995* (Scotland) s 41. The Scottish children’s hearing is discussed in Chapter 5.
- 340 *Children’s Hearings (Scotland) Rules 1996* (Scotland) r 14.
- 341 *The Panels of People to Safeguard the Interests of Children (Scotland) Regulations 2001* (Scotland).
- 342 The impetus for introduction, and the history and debate around legal representation in hearings, is covered in more detail in Chapter 5.
- 343 *Children’s Hearings (Legal Representation) (Scotland) Rules 2002* (Scotland) r 3. See also, Rachel Ormston and Louise Marryat, *Review of the Children’s Legal Representation Grant Scheme: Research Report* (2009) 4.
- 344 Scottish Executive, *Advice to Panel Members: The Children’s Hearings (Legal Representation) (Scotland) Rules 2001* (2002) as cited in Ormston and Marryat, above n 343. It has been suggested that the distinction between safeguarder and legal representative can be confusing: Ormston and Marryat, above n 343, 33.
- 345 *Child Abuse Prevention and Treatment Act* (US) 42 USC § 5106a (b)(2)(A)(xiii) (1998).
- 346 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 256.
- 347 Duquette, above n 269, 444.
- 348 *Probate Code of 1939 MICH COMP LAWS* § 712A.17d(1)(b).
- 349 *Probate Code of 1939 MICH COMP LAWS* § 712A.17d(1)(d).

- 8.189 The lawyer guardian *ad litem* makes a determination regarding the child's best interests, taking into account the child's wishes in accordance with his or her competence and maturity.³⁵⁰ The lawyer guardian *ad litem* may make a best interests determination that diverges from what the child wants.³⁵¹ The lawyer guardian *ad litem* must nevertheless inform the Court about the child's wishes and preferences, consistent with the law governing attorney–client privilege.³⁵²
- 8.190 If the lawyer guardian *ad litem* determines that his or her assessment of the child's best interests differs from the child's own assessment, the lawyer guardian *ad litem* must communicate the child's position to the Court.³⁵³ The Court may appoint an attorney for the child if it considers the appointment appropriate in light of the child's maturity and the nature of the inconsistency between the child's and lawyer guardian *ad litem*'s identification of the child's interests.³⁵⁴ An attorney appointed for the child serves in addition to the child's lawyer guardian *ad litem*.³⁵⁵

Features drawn from other models

- 8.191 The guardian *ad litem* models have various features that are informative when proposing a model of representation for children. A characteristic of all the models discussed is that they emphasise the need to have an independent representative focused on the child's best interests from the early stages of proceedings. The guardian *ad litem* systems, particularly those in which the guardian is not a lawyer, also provide for a lawyer for the child. Either the guardian or the child or young person, depending on his or her age or maturity, will instruct the lawyer for the child. An advantage of various guardian *ad litem* systems is that they allow professionals with social work expertise—guardians—to be closely involved in assessment of what is in the child's best interests.
- 8.192 The guardian *ad litem* model in England has been of particular interest to the Commission. As noted above, it appears that ordinarily a case regarding the child's best interests³⁵⁶ will be presented to the Court by or on behalf of the guardian *ad litem*.³⁵⁷ The guardian ordinarily appoints and instructs the lawyer for the child; the child would only instruct the solicitor directly where an inconsistency arises between the child's and the guardian's assessments of best interests and the child wishes to instruct.³⁵⁸ The *Practice Guidance for Guardians* provides that 'if the child is competent and wishes to instruct the solicitor directly it is likely that the guardian will separate from the child's solicitor'.³⁵⁹
- 8.193 Lawyers and guardians reportedly have strategies for avoiding conflicts when a child or young person gives instructions that are not considered to be in his or her best interests.³⁶⁰ However, commentator Judith Masson has noted that these 'strategies' may include:
- withholding information from the child or young person regarding the contents of the guardian's report
 - the lawyer only meeting with the child or young person in the presence of the guardian, not privately
 - both the guardian and the lawyer for the child being reluctant to recognise a child as competent when the child or young person's instructions do not appear to be in his or her best interests.³⁶¹

The Commission does not view these as acceptable mechanisms for dealing with conflicts. As Masson notes, '[w]ithout a clear understanding of what the guardian was proposing and time to discuss privately with the solicitor, children had no opportunity to identify their disagreement and give contrary instructions'.³⁶²

8.194 While the Commission is in favour of certain aspects of the guardian *ad litem* system in England, such as the social work expertise a guardian brings to the assessment of the child's best interests, it is keen to ensure that the child is always fully informed about the role of his or her representative(s). The Commission strongly supports appointment of a separate lawyer to represent the child or young person on instructions when necessary, but expresses concern about the possibility for a lawyer to initially act on instructions from the guardian and then switch to act on direct instructions from the child. The potential problems and conflicts that may arise emphasise the need for clear guidelines about the roles of representatives. The Commission also believes that the tandem model of appointing a guardian and a lawyer in all cases³⁶³ may be unnecessary.

THE COMMISSION'S VIEWS

8.195 The Commission proposes the following model for representation of children and young people in protection matters.³⁶⁴ Every child or young person who is a party to a protection application should be separately represented on either a best interests model or instructions model, but two or more siblings may be represented by the same lawyer on a best interests basis.

8.196 Children and young people should be represented on a best interests model by a lawyer unless the lawyer considers that:

- a mature child or young person has a desire to participate in proceedings and has the understanding and capacity to direct his or her representation³⁶⁵
- the child or young person, who has had explained to him or her the duty of a lawyer to directly relay the child or young person's views to the Court, nevertheless is unwilling to accept representation on a best interests basis
- where both of these conditions are satisfied, a separate practitioner should be appointed to represent the child or young person on the child or young person's instructions.

8.197 Guidelines drawing on social science research should be drafted to assist lawyers in assessing a child's or young person's capacity to instruct. Guidelines for the respective models should also be developed so that the practitioner's role, function and duties under a best interests model and a direct representation model are clear.

8.198 A best interests model should, at the least, require that the representative of the child or young person must:

- ensure that any views (even where contradictory) that a child or young person may choose to express are put before the Court. However, a child or young person would not be required to express a view and the representative would not be required to put before the Court any views expressed to him or her in confidence
- assist the Court in ensuring that all relevant evidence is available to the Court
- have access to social science input on matters such as risk assessment and the child's best interests
- make an assessment of the child's best interests based on the information available, both expert and in relation to the particular child, rather than on a personal view.

350 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(1)(h).

351 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(1)(h).

352 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(1)(h).

353 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(2).

354 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(2).

355 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(2). It has been suggested that in order to avoid dual representation, although reportedly rare, an attorney could be appointed instead of a lawyer guardian ad litem for children and young people over a certain age or level of maturity: Duquette, above n 269, 462–3.

356 Also referred to as the child's 'welfare' in England.

357 *Family Proceedings Rules 1991* (UK) rr 4.11(1), 4.11(2)(b); Masson, above n 327, 485. An email from Bruce Clark, Director of Policy at CAFCASS, 1 June 2010, informed the Commission that ordinarily the guardian will attend all court hearings and present the report, responding to questions about the report.

358 *Family Proceedings Rules 1991* (UK) r 4.12(1)(a).

359 CAFCASS, above n 329, 5.

360 Masson, above n 327, 485.

361 *Ibid* 486.

362 *Ibid*.

363 Where the guardian puts a best interests assessment to the court and also instructs a lawyer for the child.

364 'Matters' is used here rather than 'proceedings' in order to allow for representation of the child in family decision-making processes. In Chapter 7, the Commission proposes that family group conferences become the primary decision-making forum in Victoria's child protection system.

365 The Commission notes that the Federation of Community Legal Centres, in its submission, supported best interests representation for children who lack capacity to instruct a lawyer, but opposed this model for children with capacity to instruct: submission 45 (FCLC).

8.199 An instructions model should, at the least, require that the representative of the child or young person must:

- interview the child or young person and elicit his or her instructions
- act upon the instructions of the child or young person when presenting his or her case to the Court
- inform the child or young person about significant developments in his or her matter, relevant facts and applicable laws and processes and ensure that the child has the opportunity to express instructions at each stage of proceedings.

Proposal 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.

DIRECT PARTICIPATION OF CHILDREN AND YOUNG PEOPLE IN PROCEEDINGS

8.200 The direct participation of children in matters affecting them is an important children’s rights issue. While representation of children and young people is important, the child or young person should also be given the opportunity to participate in proceedings him- or herself. The CYF Act 2005 requires the Court, as far as practicable, to allow the child ‘to participate fully in the proceeding’.³⁶⁶ This is consistent with article 12 of CROC, which provides that where a child is capable of forming his or her own views, states parties shall allow the child to express those views freely in all matters affecting him or her.³⁶⁷ Article 12 requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative.³⁶⁸

8.201 The Commission proposes that the participatory right in the CYF Act 2005 should be strengthened. The legislation in both South Australia and Tasmania provides that in protection proceedings, the child or young person may put his or her views personally before the Court unless the Court is satisfied that he or she is not capable of doing so.³⁶⁹ South Australia also limits the child’s or young person’s entitlement to express his or her views personally to the Court if doing so would ‘give rise to an unacceptable risk to the child’s wellbeing’.³⁷⁰ The Commission favours this aspect of the South Australian approach, and proposes that a lawyer acting on a best interests basis would make submissions to the Court about whether the child is capable of putting their views directly to the Court and whether this would be in the child’s best interests. The Court would then make this determination. A lawyer acting on a direct representation model would indicate the child’s desire to participate directly in proceedings and the Court would provide an opportunity for the child to do so.

8.202 An important aspect of the right to direct participation is that the child is able to express his or her views ‘freely’.³⁷¹ This has been interpreted by CROC to mean that the child can express or withhold his or her views without pressure.³⁷² Consistently with this, the Tasmanian legislation clarifies that this provision for the child to put his or her views personally to the Court does not permit the Court or any person to *require* the child to express his or her wishes in relation to any matter.³⁷³ This consideration should be expressly incorporated into the relevant section of the CYF Act 2005.³⁷⁴ The words ‘participate fully’ do not necessarily denote the child putting his or her views to the Court personally and the section’s wording should reflect this distinction by replacing ‘fully’ with ‘personally’ or ‘directly’.

Proposal 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.

NEW GROUNDS FOR INTERVENTION AND AGREEMENT PROVISION

INTRODUCTION

8.203 The grounds upon which the Children’s Court can find a child to be ‘in need of protection’ under the CYF Act 2005 have evolved substantially over time.³⁷⁵

8.204 As discussed in Chapter 2,³⁷⁶ Victoria’s first child welfare legislation was the *Neglected and Criminal Children’s Act 1864* (Vic) (the 1864 Act). In the 1864 Act, the grounds for state intervention were directed to children who were exhibiting undesirable behaviour, and ‘appeared likely to develop into unsatisfactory adults’.³⁷⁷ Under the 1864 Act, a child could be found to be a ‘neglected child’ if the child was found begging, wandering the streets, frequenting a tavern, residing in a brothel, or associating with known criminals, or was homeless or had committed an offence.³⁷⁸

CURRENT GROUNDS IN VICTORIA

8.205 The current grounds for finding that a child is in need of protection³⁷⁹ may be traced back to the 1984 report by the Carney Committee.³⁸⁰ In formulating these grounds, the Carney Committee stressed the importance of having grounds that reflected a “‘harms” rather than a “needs” approach to abuse and neglect’.³⁸¹

8.206 All except the first two grounds in section 162 of the CYF Act 2005³⁸² concern situations where the parent or caregiver has failed to either protect the child, or is unlikely to protect the child from certain harms. The Court has noted almost all protection applications are brought on one of the latter four grounds.³⁸³

8.207 It is likely that the current grounds increase disputation between the parties, because they do not allow for a finding that a child is in need of protection through no fault of his or her parents, or for an agreement between the parents and the Department that the child is in need of protection without identifying one of the statutory grounds that involve some form of parenting failure.

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

367 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990). Children’s participation in a rights context is discussed in Chapter 3 under ‘Charter of Human Rights and Responsibilities and international rights instruments’.

368 *Ibid* art 12(2).

369 See *Children’s Protection Act 1999* (SA) s 48(3); *Children, Young Persons and Their Families Act 1997* (Tas) s 56.

370 *Children’s Protection Act 1999* (SA) s 48(3).

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

372 Committee on the Rights of the Child, *General Comment 12*, above n 289, [22]. This is discussed in Chapter 3.

373 *Children, Young Persons and Their Families Act 1997* (Tas) s 58.

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

375 For a discussion of the current grounds see Chapter 3.

376 See *Neglected and Criminal Children’s Act 1864* (Vic) in Chapter 2.

377 Committee of Enquiry into Child Care Services in Victoria, *Report* (1976) 15.

378 *Neglected and Criminal Children’s Act 1864* (Vic) s 13. As the discussion in Chapter 2 illustrates, it took Victoria 114 years (and several Acts) to move completely away from viewing a child’s undesirable (but non-criminal) behaviour in itself as sufficient grounds for state intervention. It was not until the passage of the *Community Welfare Services Act 1978* (Vic) that all grounds relating to the child’s behaviour were removed, and replaced entirely with grounds relating to the maltreatment (or abandonment) of a child by his or her guardian. The first ground to refer to the ‘unfitness’ of a guardian was introduced in 1933: *Children’s Welfare Act 1933* (Vic) s 2. See further discussion in Chapter 2.

379 The grounds are set out in s 162 of the *Children Youth and Families Act 2005* (Vic) and are discussed briefly in Chapter 3.

380 Child Welfare Practice and Legislation Review, above n 20. This report is discussed in both Chapter 2 and Appendix D.

381 *Ibid* vol 2, 218.

382 The first two grounds in s 162(1) concern situations where there is no suitable carer for the child following the abandonment of a child or death or incapacity of parents or carers: *Children, Youth and Families Act 2005* (Vic) s 161(1)–(2). ‘Parent’ is broadly defined in s 3 of the Act.

383 Submission 46 (Children’s Court of Victoria) 18.

PREVIOUS PROPOSALS FOR NEW GROUNDS**ALRC Report No 18: Child Welfare**

8.208 In its 1981 *Child Welfare* report, the ALRC analysed the appropriateness of the grounds available in the ACT for statutory intervention in a child's life, and concluded that 'it is actual or potential harm to the child which should, in general, provide the basis for coercive state intervention'.³⁸⁴ The ALRC focused on the advantages and disadvantages of retaining a ground in the *Child Welfare Ordinance 1957* (ACT), which justified intervention in relation to 'uncontrollable' children.³⁸⁵ The ALRC concluded that '[g]enerally the community should not assume an intrusive role with regard to so-called "uncontrollable" children',³⁸⁶ but that the harm the child may be causing him- or herself needed to be addressed.³⁸⁷ The ALRC emphasised that

*society's concern in care proceedings should be to protect the child, not to curb non-criminal behaviour which excites disapproval. The aim should be prevention of harm.*³⁸⁸

8.209 The ALRC warned against formulating any ground for intervention that 'focuses on the behaviour and child-rearing practices of the *parents* and not on the behaviour of the child',³⁸⁹ because:

*The parents may be extremely conscientious and do their best to control a child, but whether his behaviour does or does not stem from a failure or absence of control should not, under the principles proposed by the Commission, be the sole determinant of whether intervention should occur ... it is the actual or potentially harmful nature of the child's non-criminal behaviour which should provide the ground for intervention.*³⁹⁰

8.210 The ALRC also warned that a definition that focused solely on a child's behaviour could also be harmful and confer too much power on the Department.³⁹¹ Striking a compromise between the need for the ground to refer to the child's parents' lack of capacity to curb the child's harmful behaviour, but not to attribute blame, the ALRC proposed wording that 'would indicate that it is the harmful behaviour which justifies intervention, but that it must be viewed in the context of the child's home situation'.³⁹² The ALRC therefore recommended that the new ground for bringing care proceedings should be defined as if the child

*is engaging in behaviour that is, or is likely to be, harmful to him and his parents or his guardian are unable or unwilling to prevent him from engaging in that behaviour.*³⁹³

DHS technical options paper

8.211 As part of its comprehensive review of the child protection system in Victoria, which led to the introduction of the CYF Act 2005, in 2004 the Department published a discussion paper that set out technical options for improving the system (the technical options paper).³⁹⁴ In this paper, the Department canvassed the idea of introducing a new ground of intervention for children who are causing harm to themselves. The Department suggested that a new ground for intervention be introduced 'for children who are in need of protection because they are placing themselves at risk of significant harm'.³⁹⁵ This idea, while not incorporated in the CYF Act 2005, remains relevant.³⁹⁶

VIEWS IN CONSULTATIONS AND SUBMISSIONS

Alteration of current grounds

8.212 Many submissions supported the retention of the existing grounds in the CYF Act 2005.³⁹⁷ Comments raised in consultations, however, highlighted that the existing grounds 'are worded in a punitive way',³⁹⁸ and that 'all the grounds talk about fault'.³⁹⁹ As noted by the Victorian Bar:

*The existing grounds require a finding that a parent or guardian is or is highly likely to fail in their parental obligations towards the child, or has actually harmed or is likely to actually harm the child. This, combined with the current range of orders available, does not assist families in situations where they are not at fault, but still need assistance.*⁴⁰⁰

8.213 In its submission, Victoria Police expressed concerns that the grounds in section 162 of the CYF Act 2005 'emphasise parental blame', 'do not provide for cases where parents are unaware or unable to prevent the risk', and 'do not include grounds that recognise a need for protection where children place themselves at risk'.⁴⁰¹ The Children's Court also acknowledged that '[m]ost—if not all—of the grounds in s162(1) ... are predicated in some way or another on fault by a parent'.⁴⁰²

Addition of no-fault ground

8.214 Many people supported the inclusion of a no-fault ground in section 162 of the CYF Act 2005.⁴⁰³ Some submissions pointed out that a no-fault provision would 'avoid the stigmatisation of an innocent parent',⁴⁰⁴ and 'may work to diffuse the adversarial nature of proceedings' in the Children's Court.⁴⁰⁵ It was also noted that 'from a child's perspective it is a negative thing to see the parent at fault'.⁴⁰⁶

8.215 One submission made the important point that the 'fault' or 'family dysfunction' involved in child protection cases is 'often economic, social and demographic in origin rather than individual in the classic sense of fault'.⁴⁰⁷

8.216 The situations identified in the submissions and consultations for which a no-fault ground might be desirable included:

- an older child or teenager who is 'out of control' or 'goes off the rails' and the parents cannot protect the young person from his or her own harmful behaviour⁴⁰⁸
- an autistic child⁴⁰⁹
- '[w]here a child has been sexually abused by a sibling or some other person in circumstances where the parents did not know and could not reasonably have known of the abuse'⁴¹⁰
- where the parent or carer of a child has an intellectual or physical disability which severely impairs their capacity to parent⁴¹¹
- where a parent has been hospitalised due to illness.⁴¹²

8.217 OCSC gave an example of a case in which a no-fault ground would have been appropriate.⁴¹³ The case concerned an adolescent male with an acquired brain injury. His mother was 'highly motivated and caring' but was unable to manage his behaviour 'given his physical destruction of their home'. His behaviour had reached the point that 'it became physically dangerous for him to remain there'. The OCSC stated that this situation led to a protection application being filed in relation to the adolescent on the grounds of physical harm (the ground in subsection 162(1)(c)).⁴¹⁴

384 (Australian) Law Reform Commission, *Child Welfare*, above n 82, 221.

385 Ibid 224–6.

386 Ibid 227.

387 Ibid.

388 Ibid.

389 Ibid (emphasis in original).

390 Ibid.

391 Ibid.

392 Ibid.

393 Ibid.

394 Community Care Division, Department of Human Services (Victoria), *Protecting Children: Ten Priorities for Children's Well-Being and Safety in Victoria—Technical Options Paper* (2004).

395 Ibid 114.

396 In considering a new ground on this basis, the Department stated: 'The child protection system is primarily concerned with protecting children from harm resulting from the actions of others. Some young people inflict harm on themselves or place themselves in danger. These young people create great challenges for parents, the service system and the workers within it. In most instances, the young person has at least one parent seeking help in addressing the young person's behaviour. Some parents report the system is perversely unresponsive because they are trying to protect their child, and that it is only through giving up and abandoning the child that Child Protection and other services will become involved. It has been suggested the current grounds for intervention are inadequate in such situations and a new ground should be introduced for children who are in need of protection because they are placing themselves at risk of significant harm. This, it is argued, would avoid a perception that parents are being blamed by having to prove maltreatment': ibid 113.

397 Submissions 1 (Anonymous), 15 (Connections), 17 (CCC), 25 (LIV), 26 (FVPLS Victoria), 31 (Gatehouse Centre), 38 (VALS), 46 (Children's Court of Victoria) 48–9.

398 Consultation 17 (Victoria Police).

399 Consultation 3 (CAU).

400 Submission 48 (Victorian Bar).

401 Submission 34 (Victoria Police).

402 Submission 46 (Children's Court of Victoria) 48.

403 Consultation 3 (CAU); submissions 10 (Anonymous), 11 (VLA), 17 (CCC), 22 (Anchor), 27 (CPS), 28 (Anonymous), 34 (Victoria Police), 46 (Children's Court of Victoria) 48–9, 48 (Victorian Bar).

404 Submission 46 (Children's Court of Victoria) 49.

405 Submission 29 (Anglicare Victoria).

406 Consultation 3 (CAU).

407 Submission 28 (Anonymous).

408 Submissions 11 (VLA), 17 (CCC), 25 (LIV), 27 (CPS), 34 (Victoria Police), 37 (OCSC), 46 (Children's Court of Victoria) 48, 48 (Victorian Bar); consultations 2 (CCC), 6 (Private Practitioners 1).

409 Submission 46 (Children's Court of Victoria) 48.

410 Ibid.

411 Submissions 37 (OCSC), 48 (Victorian Bar); consultation 6 (Private Practitioners 1).

412 Submission 11 (VLA).

413 Submission 37 (OCSC).

414 Ibid.

8.218 The Children’s Court stated that the way it currently deals with applications concerning one of the first three ‘no-fault’ situations identified above is to make a finding that a child is in need of protection under the ‘emotional abuse’ ground in subsection 162(1)(e).⁴¹⁵ The Court expressed concern about this method of dealing with ‘no-fault’ situations, stating that the making of the finding ‘involves the fiction that the child’s or the perpetrator’s aberrant behaviours are in some way the fault of the parent’.⁴¹⁶ The Court explained that

Currently the ‘no-fault’ situation is usually dealt with by a notation on the Court file that all parties acknowledge that the parents have not caused harm to the child. However, the Court does not consider such a notation to be adequate. It is for cases like [the first three situations mentioned above] that it believes the current grounds are deficient and the Court recommends the addition of a ‘no-fault’ provision, such as:

‘For the purposes of this Act, a child is in need of protection if harm to the child contemplated by sections 162(1)(c),(d),(e) or (f) exists or is likely to exist through no fault of the parents of the child.’⁴¹⁷

NO-FAULT GROUNDS IN OTHER JURISDICTIONS

Australian jurisdictions

8.219 In other Australian jurisdictions, there are different models of ‘no fault’ grounds in the child protection legislation, including:

- In NSW, the Children’s Court can make a care order if ‘the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection’.⁴¹⁸
- In the Northern Territory, a child is defined to be in need of care and protection if ‘the child is not under the control of any person and is engaged in conduct that causes or is likely to cause harm to the child or other persons’.⁴¹⁹
- In South Australia, a care and protection order can be made if a child is ‘at risk’, which is defined to include where ‘there is a significant risk that the child will suffer serious harm to his or her physical, psychological or emotional wellbeing against which he or she should have, but does not have, proper protection’.⁴²⁰
- In Tasmania, a care and protection order can be made if a child is ‘at risk’.⁴²¹ A child is defined as being ‘at risk’ if ‘the child has been, is being, or is likely to be, abused or neglected’.⁴²²

8.220 Aside from these specific ‘no-fault grounds’, it is important to note that in most Australian jurisdictions other than Victoria, the language used to refer to parents’ responsibility for harm the child may be suffering is being ‘unable or unwilling’ (or not ‘willing and able’) to protect the child.⁴²³ The language used in sub-paragraphs 162(1)(c)(d) and (e) of the CYF Act 2005, namely that the child’s parents ‘have not protected, or are unlikely to protect, the child from harm’, is not used in any other Australian jurisdiction.⁴²⁴

Overseas jurisdictions

8.221 Under the New Zealand child protection legislation—the *Children, Young Persons, and Their Families Act 1989* (NZ) (CYFP Act 1989)—there are four no-fault grounds. The first two refer only to the existence of past harm or risk of future harm to the child, and require no connection to the home context.⁴²⁵ The third no-fault ground under the CYFP Act 1989 defines a child to be in need of care and protection if:

The child or young person has behaved, or is behaving, in a manner that:

- (i) *is, or is likely to be, harmful to the physical or mental or emotional well-being of the child or young person or to others*
- (ii) *the child's or young person's parents or guardians, or the persons having the care of the child or young person, are unable or unwilling to control.*⁴²⁶

8.222 The fourth no-fault ground under the CYFP Act 1989 refers only to the parents' inability or unwillingness to care for the child, but makes no reference to the child suffering, or being likely to suffer, any harm.⁴²⁷

8.223 In England and Wales, a care and supervision order can be made if:

- the child is currently suffering or likely to suffer significant harm
- the harm is attributable to the fact that the child is beyond parental control.⁴²⁸

NEW NO-FAULT GROUNDS

8.224 The Commission proposes that a no-fault ground should be added to the grounds for intervention in section 162 of the CYF Act 2005. It is highly desirable that the CYF Act 2005 permits a finding that a child is in need of protection that does not imply the parents or guardians of a child are at fault.

8.225 The Commission supports the alteration of section 162 in two ways to enable protection orders to be made in no-fault situations, without the need to resort to the 'fiction of finding fault against an innocent parent'.⁴²⁹

8.226 The first alteration is the inclusion of the words 'unable or' before the words 'are unlikely' in sub-paragraphs of section 162(1)(c),(d),(e) and (f). This would enable those existing grounds to be relied upon in a situation when the parents lack the capacity (but not the motivation) to protect the child, including by reason of mental impairment or intellectual disability. It would also cover the situation involving an autistic child whose parents are simply unable to address the special needs of the child.

8.227 The second proposed alteration of section 162 is the addition of a new ground specifically designed to justify intervention in circumstances where a child is engaging in behaviour that is harmful, or potentially harmful, to him- or herself. Most submissions that addressed this point, including that from the Children's Court, supported this no-fault ground.

8.228 Care must be taken when wording this ground, as the ALRC 1981 report warns. The report explains that this ground must be drafted in such a way that:

- it makes clear that it is the harm or risk of harm to the child (caused by his or her own behaviour) that justifies intervention, not the fact of the behaviour itself

415 Submission 46 (Children's Court of Victoria) 48.

416 Ibid 49.

417 Ibid 48.

418 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71.

419 *Care and Protection of Children Act 2007* (NT) s 20.

420 *Children's Protection Act 1993* (SA) ss 6(2), 37.

421 *Children, Young Persons and Their Families Act 1997* (Tas) s 42.

422 *Children, Young Persons and Their Families Act 1997* (Tas) s 4.

423 *Children and Young People Act 2008* (ACT) s 345; *Care and Protection of Children Act 2007* (NT) s 20; *Child Protection Act 1999* (Qld) s 10; *Children's Protection Act 1993* (SA) s 6(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 4.

424 Under s 28(2) of the *Children and Community Services Act 2004* (WA), the words 'unlikely or unable' are used.

425 *Children, Youth and Their Families Act 1989* (NZ) s 14(1)(a)–(b).

426 *Children, Young Persons and Their Families Act 1989* (NZ) s 14(d).

427 *Children, Young Persons and Their Families Act 1989* (NZ) s 14(f).

428 *Children Act 1989* (UK) s 31(2). The grounds for intervention utilised in Scotland's child protection system blur the distinction between protecting children and addressing criminal and non-criminal behaviour by children, as Scotland has a combined system for dealing with child protection and juvenile crime matters. These grounds therefore do not provide an appropriate basis for protective intervention in Victoria. For further discussion of the Scottish child protection system, see Chapter 5.

429 Submission 46 (Children's Court of Victoria) 49.

- it is not so broad so as to enable (or even require) the Department to intervene when the harm to the child has no connection with the child's home context
 - it does not attribute blame to the parents for their inability to prevent the harmful behaviour of the child.⁴³⁰
- 8.229 It is important that any new ground in section 162 that refers to a child's behaviour does not suggest that it is this behaviour that justifies intervention, rather than the harm caused to the child *by* that behaviour. For the legislation to provide otherwise would be to revert to the pre-1978 Victorian child protection system, before non-criminal behaviour on the child's part was unequivocally rejected as an appropriate basis for protective intervention.⁴³¹
- 8.230 The second point requires a move away from the models of no-fault grounds used, for example, in the Tasmanian Act,⁴³² or as the first two no-fault grounds available under the New Zealand CYPF Act 1989.⁴³³ These models require no connection between the harm or risk to the child and the child's home context.
- 8.231 The third point noted by the ALRC requires avoiding referring to a parent's 'unwillingness' to curb a child's harmful behaviour. If a parent is able, but not willing, to protect a child from his or her own harmful behaviour, then the existing grounds in section 162(1) would apply, as it could be said that that parent had not protected, or is unlikely to protect the child. To the Commission, a no-fault ground that refers to the unwillingness of a parent to protect a child seems to be self-defeating.
- 8.232 The Commission believes that the wording of any no-fault ground must clearly indicate that the basis for intervention is the existence of risk of harm to the child. For this reason, it is not desirable to refer to a lack or failure of control over that child's behaviour. This concept is used in the United Kingdom and New Zealand.⁴³⁴ However, in its 1981 report, the ALRC outlined how use of such a concept improperly shifts the focus either to the child's 'uncontrollable' (ie undesirable) behaviour, or to the parents' inability to control their child.⁴³⁵ For this reason, the ground proposed by the ALRC avoids using this concept.⁴³⁶
- 8.233 The reason why the Commission does not favour the Children's Court's proposed model of a no-fault ground is the very problem identified by the Court in its submission. The no-fault ground suggested by the Children's Court essentially provides that the grounds in sub-paragraphs of section 162(1)(c), (d), (e) and (f) can be found to be made out 'through no fault of the parents of the child'.⁴³⁷ In its submission, the Court states that it acknowledges
- a potential problem with a 'no fault' provision. It may create more contests with parents arguing that they are not at fault in situations where they clearly are. Parents would certainly have nothing to lose by attempting to avoid a finding that they were at fault.*⁴³⁸
- 8.234 In order to remove the problem of creating this choice of arguing that parents are not at fault, the Commission proposes no-fault grounds that are limited in application and a separate provision that will allow the parents and the Department to agree to an outcome when there is no agreement as to grounds.
- 8.235 The Commission proposes the inclusion of a no-fault ground in relation to children engaging in behaviour harmful to themselves that combines aspects of both the ALRC's proposed ground, and relevant aspects of the New Zealand legislation.

Proposal 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.

‘AGREEMENT AS TO OUTCOME’ PROVISION

- 8.236 In the context of discussing the adequacy of the current grounds and desirability of creating a no-fault ground, some submissions raised the possibility of the parents and the Department being able to agree to a protection order being made without the need to agree on the specific ground upon which the child is in need of protection.⁴³⁹
- 8.237 In its submission, the Children’s Court stated that in situations where the parents are not at fault,
- there is usually agreement between the Department, the parents and the child that it is appropriate for a protection order to be made so that the child may be provided with services designed to assist him or her.*⁴⁴⁰
- 8.238 The Court went on to say, however, that even where the parties agree on a particular protection order being made but not on the specific grounds, in order for the Court to make the order, it has to find that the child is in need of protection under one of the grounds in section 162(1).⁴⁴¹ The Court expressed its disapproval of this ‘fiction’, and for this reason requested a no-fault ground be included in the CYF Act 2005.⁴⁴²
- 8.239 For the reasons set out above, the Commission does not support the Court’s broad ‘no fault’ ground, but believes that the Court’s wish to make an order on the basis of an agreed outcome can be satisfied with the inclusion of an ‘agreement provision’ in the CYF Act 2005.
- 8.240 The proposed ‘agreement provision’ would permit the Children’s Court to make a protection order if the Department and parents agree that such an order should be made. It might avoid disputation between the parents and the Department where the question of which ground is relied upon is immaterial because there is agreement about the need for both an order to protect the child and the content of that order. The Court should be permitted to make the order if agreed to by one parent, when the other parent cannot be located or expresses no interest in an application’s outcome.
- 8.241 The Court should not be able to make the order unless satisfied it is in the child’s best interests. The Court should be required to take the child’s views and wishes into account before making any order. A child represented on instructions (who, on the Commission’s proposed direct representation model, would have sufficient maturity and capacity to understand the nature and effect of any proposed protection order) would need to ‘not oppose’ the making of the order by agreement. A child of sufficient maturity and capacity should have a right to object to the making of a particular protection order.

430 (Australian) Law Reform Commission, *Child Welfare*, above n 82, 227.

431 See the discussion of the *Community Welfare Services Act 1978* (Vic) in Chapter 2 under ‘Legislative history’.

432 *Children, Young Persons and Their Families Act 1997* (Tas) ss 4, 42.

433 *Children, Youth and Their Families Act 1989* (NZ) s 14(1)(a)–(b).

434 *Children Act 1989* (UK) s 31(2); *Children, Young Persons and Their Families Act 1989* (NZ) s 14(d).

435 (Australian) Law Reform Commission, *Child Welfare*, above n 82, 227.

436 *Ibid.*

437 Submission 46 (Children’s Court of Victoria) 48.

438 *Ibid.* 49.

439 *Ibid.* 48; submission 28 (Anonymous).

440 Submission 46 (Children’s Court of Victoria) 48.

441 *Ibid.*

442 *Ibid.*

Proposal 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.

FINDINGS OF FACT ON THE BALANCE OF PROBABILITIES

8.242 In cases where the parties do not agree whether a child is ‘in need of protection’, the Court often has to make findings of fact. Nearly all protection applications that come before the Court are brought on one of four grounds.⁴⁴³ These grounds require a finding either that the child has suffered significant harm (that a parent has failed to protect them from) or the child is likely to suffer significant harm (that a parent is unlikely to protect them from).

8.243 The standard of proof that the Court must apply in making findings of fact is the civil standard of ‘the balance of probabilities’.⁴⁴⁴ In cases involving serious allegations, such as sexual abuse of a child, the Court sometimes refers to the ‘*Briginshaw* qualification’.⁴⁴⁵ This qualification stems from a 1938 adultery case, *Briginshaw v Briginshaw*,⁴⁴⁶ in which Justice Dixon said:

*The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.*⁴⁴⁷

8.244 The *Briginshaw* qualification is often misunderstood to mean that in cases involving serious allegations, such as sexual abuse by a parent, a higher standard of proof—somewhere between the civil standard and the criminal standard—is required. This is a misunderstanding that also arises in other areas of law.⁴⁴⁸

8.245 In a recent Children’s Court case, Magistrate Power referred to the following comments of Justice McHugh with approval:

*There are only two standards of proof: balance of probabilities and proof beyond reasonable doubt. I know *Briginshaw* is cited like it was some sort of ritual incantation. It has never impressed me too much. I mean, it really means no more than, Oh, we had better look at this a bit more closely than we might otherwise’, but it is still balance of probabilities in the end.*⁴⁴⁹

8.246 Some people expressed concern that the *Briginshaw* qualification meant that it was difficult for the Department to obtain a court finding that a child had been significantly harmed or was likely to be significantly harmed as a result of sexual abuse.⁴⁵⁰

8.247 Since 1 January 2010, section 140 of the *Evidence Act 2008* (Vic) governs the standard of proof in protection applications.⁴⁵¹ The section reads:

- (1) *In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.*
- (2) *Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—*
 - (a) *the nature of the cause of action or defence; and*
 - (b) *the nature of the subject-matter of the proceeding; and*
 - (c) *the gravity of the matters alleged.*

8.248 This section clearly applies to findings of fact about past events. In considering whether any fact is established, the Court must make a determination having regard to the nature and subject matter of the application, as well as the gravity of the matters alleged. As allegations of sexual abuse and serious physical abuse are grave, the Court must take this into account before deciding on the balance of probabilities, and not to any higher standard, whether conduct of this nature has occurred.

8.249 It is unclear whether the Court will accept that section 140 of the *Evidence Act 2008* (Vic) governs its findings about whether a child is, in the future, 'likely' to suffer any of the particular harms described in section 162(1) of the CYF Act 2005.

8.250 When making a determination about whether it is 'likely' that a child will suffer significant harm in the future, the Children's Court has considered whether there is 'a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and the gravity of the feared harm in the particular case'.⁴⁵² In adopting this approach, the Court has drawn on the leading English child protection case on the topic—*Re H (Minors) (Sexual Abuse: Standard of Proof)*.⁴⁵³

8.251 When dealing with 'likely' future harm, this second standard of proof probably adds unnecessary complexity to child protection cases. In NSW, this matter is dealt with by stipulating that findings of this nature, as with findings of past fact, must be made on the balance of probabilities.⁴⁵⁴ The Commission proposes that the Victorian legislation should contain a similar provision in order to remove any doubt about the applicability of section 140 of the *Evidence Act 2008* (Vic) to the Court's findings about whether a child is, in the future, 'likely' to suffer any of the particular harms described in section 162(1) of the CYF Act 2005.

8.252 In Australian family law, when serious allegations such as sexual abuse against a child are raised, the Court is required to consider whether a parenting order would expose the child to an 'unacceptable risk' of abuse.⁴⁵⁵ Family law courts make findings on the balance of probabilities about the existence or otherwise of any relevant fact, but may refrain from making a finding as to whether sexual abuse occurred. The ultimate finding is future-focused and encompasses consideration of the nature and degree of future risk.

Proposal 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.

443 These grounds are *Children, Youth and Families Act 2005* (Vic) s 162(1)(c), (d), (e), (f); *ibid* 18.

444 *Children, Youth and Families Act 2005* (Vic) s 215(1)(c).

445 See, for example, *DOHS v Mr K and Ms D* (Unreported, Children's Court of Victoria, Magistrate Power, 15 June 2009) 17–18; *DOHS v Mr and Mrs K* (Unreported, Children's Court of Victoria, Magistrate Power, 27 November 2009) 19–20; *DOHS v C* (Unreported, Children's Court of Victoria, Magistrate Power, 8 November 2006) 27.

446 (1938) 60 CLR 336.

447 (1938) 60 CLR 336, 362.

448 For a discussion of this misunderstanding in anti-discrimination law, see L De Plevitz, 'The Briginshaw "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27 *Melbourne University Law Review* 308, 332–3.

449 Magistrate Power attributes the comments by McHugh J to his exchange with the NSW Solicitor-General during argument in *Witham v Holloway* (1995) 183 CLR 525; *DOHS v Mr and Mrs K* (Unreported, Children's Court of Victoria, Magistrate Power, 27 November 2009) 20.

450 Consultation 4 (DHS Managers); submission 7 (Prof Cathy Humphreys).

451 Section 4(1) of the *Evidence Act 2008* (Vic) provides that the 'Act applies to all proceedings in a Victorian court'. 'Civil proceeding' is defined in the sch to mean 'a proceeding other than a criminal proceeding'.

452 See for example *DOHS v Mr K and Ms D* (Unreported, Children's Court of Victoria, Magistrate Power, 15 June 2009) 17–18.

453 [1996] AC 563.

454 Section 93(5) of the *Child and Young Persons (Care and Protection) Act 1998* (NSW) provides that when the Children's Court is required to be 'satisfied' of any particular matter, it must 'be satisfied on the balance of probabilities'. Section 71 provides that the Children's Court may make a care order when 'satisfied' that a child or young person is in need of care or protection for any of the reasons (or grounds) set out in that section.

455 The leading High Court case is *M v M* (1988) 166 CLR 69.

REVIEW OF CASE PLAN DECISIONS

- 8.253 Case plans are considered in Chapter 3. In brief, a case plan (often referred to as a 'statutory case plan' or 'statutory best interests plan') is a document prepared by Child Protection within six weeks of the Court making certain protection orders.⁴⁵⁶ It contains all of the Secretary's significant decisions concerning the child that relate to the child's present and future wellbeing, including the placement of, and access to the child.⁴⁵⁷ It could include a stability plan, or for an Aboriginal child, a cultural plan.⁴⁵⁸ While the CYF Act 2005 directs that a case plan must be reviewed by the Secretary 'from time to time',⁴⁵⁹ the Child Protection Practice Manual sets a specific standard that a case plan 'meeting must be held for the purpose of review ... at least 6 weeks prior to the expiry of an order'.⁴⁶⁰
- 8.254 Copies of the plan must be provided to the child and parents within 14 days of preparation, together with a notice advising of procedures for an internal review.⁴⁶¹ Parents and children may seek an internal review of a case plan decision and, if unsatisfied with the result, they have a right of review by the Victorian Civil and Administrative Tribunal (VCAT).⁴⁶²

Relationship between case plans and further protection applications

- 8.255 Although case plans are made at the conclusion of court proceedings, in practice there may be many secondary applications concerning a child. This means that a case is not always 'finalised' by an initial protection order that may last for periods of up to 12 or 24 months.⁴⁶³ If ongoing Child Protection involvement is necessary, the Department must bring a further (secondary) application to court. In 2008–09 the Court heard over 7000 secondary applications.⁴⁶⁴ During that year, 70 per cent of the Court's applications concerned cases that had previously been in the system.
- 8.256 It is helpful to consider a hypothetical case that illustrates the relationship between case plans and protection applications. A child may be initially placed on a custody to Secretary order for 12 months,⁴⁶⁵ pursuant to which the child is placed in foster care or community care (residential units). A case plan is prepared within six weeks of the Court order. The case plan could contain goals for reunification of the child with his or her family and include access conditions and family assistance to attempt to achieve that goal. Alternatively, the case plan could set out goals for the child being placed in long-term out-of-home care.
- 8.257 If the latter goal is adopted, it will guide decisions relating to parental access (often reduced) and the type of assistance provided to parents. If parents or children who disagree with an out-of-home care goal are unsuccessful in seeking internal review of the case plan, they must lodge an application for review at VCAT. If they require legal assistance, they will need to argue for special consideration under legal aid guidelines, as VLA does not routinely fund VCAT reviews. In the meantime, a secondary application (for instance an application to extend the custody to Secretary order) could be brought back to the Children's Court within 12 months of making of the initial order.⁴⁶⁶ The issues about whether a child should be returned home or remain in out-of-home care would be the same for both the review of the case plan and for the application for an extension of the custody to Secretary order.

Overlap of case plan review issues and secondary application issues

- 8.258 The Commission heard concerns about how case plans (and, where a protection order had not yet been made, a best interests plan) may seek a particular goal or outcome that was at the heart of the matter in dispute between family members and Child Protection.⁴⁶⁷

8.259 The Victorian Bar submitted that a party's failure to review a case plan decision had a detrimental impact on their ability to challenge future applications brought by the Department. The Victorian Bar stated:

*When an Application to Extend a Custody to the Secretary Order is lodged with the Children's Court and opposed by one or more parties, this opposition often stems from disagreements over Case planning decisions during the life of the previous order. When the effect of these decisions and motives for them is challenged in a contested hearing, DHS has asserted that the aggrieved party should have sought review of the decision via VCAT.*⁴⁶⁸

8.260 In consultations, child protection practitioners also acknowledged concerns about the current interaction of case plan decisions with subsequent protection applications in the Children's Court. One child protection practitioner spoke of her obligation to set goals for a child and prepare a case plan so that the child was not 'left in limbo'. Yet it was often only when an application was filed for an extension of a custody to Secretary order (or revocation of an order and application for a guardianship order) that parents would seek to challenge the case plan in the Children's Court.⁴⁶⁹

Case plans for Aboriginal children

8.261 The Aboriginal Family Violence Prevention and Legal Service (FVPLS Victoria), the Victorian Aboriginal Child Care Agency Co-op (VACCA) and the Victorian Aboriginal Legal Service Cooperative (VALS) all expressed concerns about case plans and case plan reviews. In the Commission's consultation with FVPLS Victoria, a participant stated that if Aboriginal Family Decision Making (AFDM) was not included in a case plan 'we must then go to VCAT if we want to make an AFDM happen'. VACCA submitted that the role of ACSASS and interested Aboriginal agencies should be enhanced in case plan decisions 'to ensure that both the best interests of Aboriginal children and the principle of self-determination is being adhered to'.⁴⁷⁰ VACCA proposed that the jurisdiction of the Children's Court should be expanded to enable it to conduct a full case plan review. In its submission, VALS stated 'that the current practice of case planning appeals being heard by and decided [by] VCAT is unsatisfactory'.⁴⁷¹

Access to justice

8.262 Many stakeholders discussed concerns that the review processes were not easily accessible to affected parents, children and carers. The Fitzroy Legal Service submitted:

*Complaining to VCAT about case planning matters usually involves exhausting the Department's review processes. Lack of legal support or advice about how to do this and delays involved are a significant disincentive to parents who want reconsideration of a matter.*⁴⁷²

8.263 Some stakeholders expressed concern that VLA did not generally provide funding for review of case plan decisions. While funding may be granted for 'substantive disputes',⁴⁷³ the Victorian Bar suggested that funding was not usually available. The Victorian Bar noted that '[n]ot being able to obtain legal representation is a severe impediment for many family members in accessing VCAT'.⁴⁷⁴

8.264 Some stakeholders also stated that it was difficult for people to navigate the processes and rules of two separate decision-making bodies. The Victorian Bar noted:

*It is confusing to many people that these review functions are separated between distinct bodies ... One specialist jurisdiction should be resourced to deal with both Protection Applications and merits review of administrative decisions made by DHS.*⁴⁷⁵

456 *Children, Youth and Families Act 2005* (Vic) s 167. The orders are: supervision order, supervised custody order, custody to the Secretary order, guardianship order, long-term guardianship order or therapeutic treatment (placement) order.

457 *Children, Youth and Families Act 2005* (Vic) s 166.

458 For circumstances in which stability plans and cultural plans apply, refer to Chapter 3.

459 *Children, Youth and Families Act 2005* (Vic) s 168.

460 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Concluding the Protection Order Phase', Advice No 1496 (23 April 2007), from CD-ROM provided at 23 March 2010.

461 *Children, Youth and Families Act 2005* (Vic) ss 167(2), 331.

462 *Children, Youth and Families Act 2005* (Vic) s 333.

463 For length of each order and extensions of orders see Chapter 3. Note that a long-term guardianship to Secretary order may be made for a child of or above the age of 12 years, to last until he or she is 18 years old.

464 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 3.

465 Children's Court of Victoria, *Annual Report 2008–2009* (2009) 19: in 2008–09, the Court made 1288 custody to Secretary orders.

466 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 7: in 2008–09 the Children's Court heard 1669 applications for extension of custody to Secretary orders. As case plans are generally reviewed by a child protection practitioner six weeks prior to the expiry of an order, a party seeking to challenge a case plan decision made at this time has little time to do so before a secondary application is listed in the Children's Court.

467 Submission 28 (Anonymous).

468 Submission 48 (Victorian Bar).

469 Consultation 25 (DHS CP Workers East & Nth West).

470 Consultation 27 (FVPLS Victoria) submission 39 (VACCA).

471 Submission 38 (VALS).

472 Submission 36 (FLS).

473 Ros Porter, 'Current Lessons in Child Protection: The Experience in Victoria' (Paper presented at the NSW Legal Aid Commission Care and Protection Conference, NSW, April 2008) 23.

474 Submission 48 (Victorian Bar).

475 Ibid.

8.265 The Federation of Community Legal Centres, Fitzroy Legal Service, VACCA, VALS, the Victorian Bar and Youthlaw all provided written submissions supporting the expansion of the Children’s Court’s jurisdiction to review case plan decisions. The 2004 report by Kirby, Ward and Freiberg included a recommendation to review VCAT’s role in reviewing case planning decisions.⁴⁷⁶

The Commission’s views

8.266 In 2009, there were only 12 case plan reviews by VCAT. The Commission understands that the President of VCAT supports the Children’s Court and VCAT having concurrent jurisdiction in relation to case plan reviews.⁴⁷⁷

8.267 The Commission considers that it would be highly desirable for the Children’s Court to have concurrent jurisdiction in relation to hearing case plan reviews, for reasons of both efficiency and accessibility for participants. As explained above, there is often substantial overlap between the issues raised in a protection application and those that inform a case plan following a protection order. In such circumstances, it is inefficient and undesirable to force participants to apply to a separate decision-making body for case plan review from the body (the Children’s Court) that made the initial protection order.

Proposal 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.

INCREASING THE JURISDICTIONAL AGE LIMIT OF THE FAMILY DIVISION OF THE CHILDREN’S COURT

CURRENT LAW

8.268 There is an anomaly in the Children’s Court jurisdiction to make protection orders concerning older children that should be remedied. As discussed in Chapter 3, the Family Division of the Children’s Court generally only has child protection jurisdiction of children under the age of 17, with the exception that it can make orders for a child on an existing protection order that may last until the child turns 18.⁴⁷⁸ A person who has had his or her 17th birthday cannot be the subject of a new protection application.

8.269 The Court’s Criminal Division has jurisdiction in relation to all persons who are between the ages of 10 and 18 at the time of committing the alleged offence, and are under 19 at the time the criminal proceedings commence.⁴⁷⁹

8.270 When the Family Division is exercising its powers to make, vary, revoke or extend intervention orders under the *Family Violence Prevention Act 2008* (Vic) (FVP Act) and *Stalking Intervention Orders Act 2008* (Vic) (SIO Act), the ‘child’ is defined as a person who is under the age of 18 at the time the application for the intervention order is made.⁴⁸⁰

HISTORICAL BACKGROUND

8.271 It appears that this discrepancy exists because of historical accident rather than well-considered policy making. As discussed in Chapter 2, when children’s courts were first created in Victoria in 1906, the Court was given exclusive jurisdiction in relation to both criminal and child protection matters concerning children under the age of 17 years.⁴⁸¹

- 8.272 In 1984, the Carney Committee recommended increasing the maximum age for a child falling under the jurisdiction of the Court's Criminal Division to 18 years in order to rationalise the various age requirements in Victorian legislation and to reflect society's thinking about the definition of adulthood.⁴⁸² The Carney Committee also believed that the age jurisdiction of the Family Division should extend to children up to 18 years old.⁴⁸³
- 8.273 It was not until 2004 that the age limit for the jurisdiction of the Court's Criminal Division was raised to 18 years.⁴⁸⁴ No reason was given for why the Family Division's child protection jurisdictional age limit was not also increased at this time.⁴⁸⁵

PREVIOUS RECOMMENDATIONS AND OTHER AUSTRALIAN JURISDICTIONS

- 8.274 Two previous major reviews of Australian laws relating to children have recommended that children's courts should have child protection jurisdiction for children up to 18 years old.
- 8.275 In its 1981 *Child Welfare* report, the ALRC concluded that the upper limit of the ACT Children's Court jurisdiction should remain at 18 years of age, commenting that
- the age of eighteen has a particular significance. In our society it seems to be the age which is most closely associated with 'adulthood'. Many of the school pupils to whom members of the Commission spoke regarded the attainment of the age of 18 as marking a significant change of status.*⁴⁸⁶
- 8.276 The ALRC also noted that 18 is the age of majority for many legal purposes, the voting age, and the age at which a person can no longer be the subject of a guardianship, custody or access order under the FLA 1975.⁴⁸⁷
- 8.277 In their 1997 report, the ALRC and the Human Rights and Equal Opportunity Commission⁴⁸⁸ noted that the definition of 'child' in legislation in certain jurisdictions precluded courts making care and protection orders in relation to young people aged 16 or 17, 'even where there may be evidence of abuse or neglect'.⁴⁸⁹ The Commissions stated that '[f]amily services departments should be able to respond to the needs of all children and young people who require care and protection'.⁴⁹⁰ The Commissions recommended that care and protection legislation in all Australian jurisdictions should define a child as a person under the age of 18.⁴⁹¹
- 8.278 Victoria is now the only Australian jurisdiction to exclude 17-year-olds (not already on a child protection order) from its child protection system. In every other state and territory, the child protection jurisdiction of the relevant court extends to people under 18 years old.⁴⁹²

THE NEED TO COVER THE GAP BETWEEN CHILD PROTECTION AND GUARDIANSHIP

- 8.279 An important reason for increasing the upper age limit of the Family Division's child protection jurisdiction is the gap between the CYF Act 2005 and the *Guardianship and Administration Act 1986* (Vic). Under the *Guardianship and Administration Act 1986* (Vic), a guardian can only be appointed for a person with a disability who has reached 18 years of age.⁴⁹³
- 8.280 Under current Victorian law, a 17-year-old who has a disability and whose parents are unable to adequately care for him or her does not come within either the child protection jurisdiction or the guardianship jurisdiction. The state offers 17-year-olds no formal protection other than through the Supreme Court's *parens patriae* jurisdiction.

- 476 Freiberg, Kirby and Ward, above n 121, 36.
- 477 Email from Justice Ross, President of VCAT, 31 May 2010.
- 478 See sub-s (b) of the definition of 'child' in s 3 of the *Children, Youth and Families Act 2005* (Vic).
- 479 See sub-s (a) of the definition of 'child' in s 3 of the *Children, Youth and Families Act 2005* (Vic).
- 480 See sub-ss (aa), (ab) of the definition of 'child' in s 3 of the *Children, Youth and Families Act 2005* (Vic); *Family Violence Protection Act 2008* (Vic) ss 4, 146, 147; *Stalking Intervention Orders Act 2008* (Vic) s 6.
- 481 *Children's Court Act 1906* (Vic) s 12.
- 482 Child Welfare Practice and Legislation Review, above n 20, vol 2, 409–13. See Chapter 2 and Appendix D for further discussion of the Carney Committee's report.
- 483 See the definition of 'child' in s 3 of the draft Bill proposed by the Carney Committee: Child Welfare Practice and Legislation Review, above n 20, vol 1.
- 484 *Children and Young Persons (Age Jurisdiction) Act 2004* (Vic).
- 485 This remained the same as originally introduced in 1906.
- 486 (Australian) Law Reform Commission, *Child Welfare*, above n 82, 35.
- 487 *Ibid.*
- 488 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122.
- 489 *Ibid.* 461.
- 490 *Ibid.*
- 491 The Commissions stated 'a court should be able to make orders for a young person aged 16 to 18 if it finds, after taking into consideration the wishes of the young person, that the young person is in need of care and protection': *ibid.* 463.
- 492 *Children and Young People Act 2008* (ACT) s 12; *Legislation Act 2001* (ACT) dictionary pt 1; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3; *Care and Protection of Children Act 2007* (NT) s 13; *Child Protection Act 1999* (Qld) s 8; *Children's Protection Act 1993* (SA) s 6; *Children, Young Persons and Their Families Act 1997* (Tas) s 3; *Children and Community Services Act 2004* (WA) s 3.
- 493 *Guardianship and Administration Act 1986* (Vic) s 19(1).

INTERNATIONAL OBLIGATIONS

- 8.281 It is important to consider whether the age limit on the Family Division's child protection jurisdiction is compatible with Australia's obligations under CROC.⁴⁹⁴ Article 19 of CROC requires states parties to implement statutory systems to protect children from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (including sexual abuse) while in the care of parents or legal guardians.⁴⁹⁵
- 8.282 Article 1 of CROC states that the term 'child' in the Convention means a person under the age of 18, with one limited exception that is not applicable to Australia.⁴⁹⁶ The absence of child protection jurisdiction in the Children's Court in relation to 17-year-olds therefore may not be consistent with the state's obligation in article 19 to take all appropriate legislative measures to protect persons under the age of 18.
- 8.283 The Commission considers that the age jurisdiction of the Family Division of the Children's Court should be increased to include children under 18 years old to ensure that 17-year-olds who are in need of protection (and cannot be allocated a guardian) can be brought within the Court's protective jurisdiction. This reform would bring Victoria's child protection system in line with all other Australian jurisdictions, and be consistent with international obligations under CROC.

Proposal 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.

CROSS-JURISDICTIONAL ISSUES**JURISDICTIONAL OVERLAP BETWEEN FAMILY LAW AND CHILD PROTECTION**

- 8.284 Many jurisdictional difficulties arise because state law, and state courts, deal with child protection matters, while federal courts deal with private disputes concerning children that fall under the FLA 1975. These difficulties spring from the distribution of law-making powers between the parties to the Australian federation.
- 8.285 Difficulties about overlapping jurisdiction may arise when child abuse allegations are made in the course of family law proceedings in the Family Court, and when a child protection application is brought in the Children's Court in relation to the same child.⁴⁹⁷ Jurisdictional overlap can also occur in cases where there is no issue of child abuse. Arguments about whether a child should live and have contact with a particular person may arise in the context of a dispute between the state and the child's parents in a child protection proceeding in the Children's Court, or as part of a dispute between the parents in family law proceedings in the Family Court.⁴⁹⁸
- 8.286 In the Commission's consultation with the Children's Court, one member of the Court commented that very often child protection proceedings occurred in the context of family law disputes, and that the Children's Court and the Family Court were dealing with the same families, and yet the Children's Court has no power to make family law orders.⁴⁹⁹
- 8.287 In its submission, Family Relationship Services Australia also expressed concerns about the 'disconnection' between the legal systems for child protection and family law. It suggested that one way of ensuring that fewer children were 'caught between two systems' would be to grant the Family Court the jurisdiction to make child protection orders, and to give the Children's Court the jurisdiction to make parenting orders.⁵⁰⁰

8.288 The fragmentation of jurisdiction in relation to children between state and federal courts has been ‘a source of difficulty at least since the Family Law Act came into effect in 1976’.⁵⁰¹ For example, it became apparent soon after the FLA 1975 commenced operations that there was a gap in the Family Court’s jurisdiction because it could not make orders in relation to children of unmarried parents, referred to as ‘ex-nuptial’ children. In the 1980s, the states (except Western Australia) transferred power to the Commonwealth so that it could legislate to enable the Family Court to make custody, guardianship and access orders in relation to ex-nuptial children.⁵⁰²

8.289 In 1997, the ALRC and the Human Rights and Equal Opportunity Commission noted the ‘jurisdictional confusion’ that exists due to both the Commonwealth and the states and territories having jurisdiction in relation to children, in different (but often related) contexts.⁵⁰³ The Commissions noted:

*The lack of co-ordination between the family law and care and protection jurisdictions and between the care and protection systems of each State and Territory was raised as a source of serious concern during the Inquiry. There was wide agreement that the current jurisdictional arrangements fail to serve the interests of many children in the family law and care and protection systems and may add to their disadvantage and distress.*⁵⁰⁴

8.290 The Commissions identified a number of issues that arose out of the jurisdictional division between the Family Court and the state and territory children’s courts, including:

- the consequences of making an inappropriate choice of forum
- tandem or serial proceedings in relation to the same matter
- low priority given by child protection departments to Family Court notifications of suspected abuse or risk of abuse.⁵⁰⁵

Options for addressing the family law/child protection overlap—the ‘one court principle’

8.291 As part of their current inquiry into family violence laws (discussed in Chapter 1), the ALRC and the NSW Law Reform Commission (NSWLRC) are examining the intersection between family violence laws, family law, and child protection laws in Australia.⁵⁰⁶

8.292 In their consultation paper, the ALRC and NSWLRC state that their preliminary view is that: ‘wherever possible, matters involving children should be dealt with in one court—or as seamlessly as the legal and support frameworks can achieve in any given case’.⁵⁰⁷ The Commissions adopt the ‘one court principle’ recommended by the Family Law Council in its 2002 report, *Family Law and Child Protection*.⁵⁰⁸ However, the Commissions acknowledge⁵⁰⁹ the challenge presented by the fact that it is not constitutionally possible for a state law to vest jurisdiction in a federal court.⁵¹⁰

8.293 The ALRC and NSWLRC outline options for enabling child protection and family law matters to be dealt with in the same court. The options can be summarised as:

- vesting family law jurisdiction in state courts
- transferring (‘referring’) state powers in relation to child protection to the Commonwealth
- creating state family courts with both federal family law and state child protection jurisdiction
- amending state child protection legislation to enable children’s courts to make an order granting residence to one parent and prohibiting contact between the child and the other parent.

494 The incompatibility with CROC of having an under 17 jurisdictional limit for the Criminal Division was one of the reasons given for increasing the upper age limit of the Criminal Division’s jurisdiction in 2004: see Victoria, *Parliamentary Debates, Legislative Assembly*, 16 September 2004, 566 (Robert Hulls, Attorney-General).

495 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 19 (entered into force 2 September 1990).

496 *Ibid* art 1. The limited exception applies if the law of the state party provides that the age of majority is younger than 18, but, as the ALRC noted in the *Child Welfare* report discussed above, in Australia the age of majority is 18: (Australian) Law Reform Commission, *Child Welfare*, above n 82.

497 Family Law Council, *Family Law and Child Protection: Final Report* (2002) 86.

498 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper No 1 (2010) 577.

499 Consultation 1 (Children’s Court of Victoria).

500 Submission 35 (FRSA).

501 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 357.

502 *Ibid* 358.

503 *Ibid* 355.

504 *Ibid* 356.

505 *Ibid* 359–63.

506 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498.

507 *Ibid* 654.

508 *Ibid* 86–91.

509 *Ibid* 652.

510 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. See further Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498, 105.

Vesting family law jurisdiction in state and territory children's courts

8.294 Because the High Court has determined that the Constitution does not permit state jurisdiction to be vested in federal courts,⁵¹¹ the child protection jurisdiction of the states cannot be exercised by the Family Court of Australia or the Federal Magistrates Court.

8.295 It is constitutionally possible for the Commonwealth to vest family law jurisdiction in state courts and this happens to some extent. The courts in each state and territory that are 'courts of summary jurisdiction' are able to exercise federal family law jurisdiction under Part VII of the FLA 1975.⁵¹² These courts, however, cannot hear contested proceedings for a parenting order under the FLA 1975 unless all the parties consent.⁵¹³

Problems with this option

8.296 It appears that state and territory general magistrates exercise this FLA jurisdiction, but children's court magistrates do not.⁵¹⁴ This limitation appears to be a consequence of there being doubt about whether those children's courts that are independent of magistrates' courts, especially those comprised of both magistrates and a higher court judge (as in Victoria, NSW and South Australia), are 'courts of summary jurisdiction'.⁵¹⁵

8.297 There are two ways for the Commonwealth Government to ensure that children's courts can exercise family law jurisdiction under Part VII of the FLA 1975:

- it could amend section 69J of the FLA 1975 to expressly make reference to children's courts⁵¹⁶
- it could declare the relevant children's courts in each state or territory to be courts of summary jurisdiction under the *Judiciary Act 1903* (Cth).⁵¹⁷

8.298 Even if either of these actions were taken to remove doubt that the Children's Court in Victoria could exercise federal family law jurisdiction under section 69J of the FLA 1975, this jurisdiction would remain conditional on the parties to a child protection proceeding agreeing to the Court exercising its power to make parenting orders. Accordingly, to effectively enable children's courts to exercise federal family law jurisdiction under Part VII of the FLA 1975 in child protection proceedings, an additional amendment would be required to the FLA 1975 to remove the requirement for consent from all the parties.⁵¹⁸

Referral of powers in relation to child protection to the Commonwealth

8.299 Another way in which one court could exercise federal family law and state child protection jurisdiction would be for the states to refer their powers to make laws in relation to child protection to the Commonwealth.⁵¹⁹ This approach would require political support in all jurisdictions, and it would be practically difficult to refer only enough legislative power to enable the Commonwealth to give federal courts concurrent jurisdiction in relation to child protection, without creating inconsistent state and federal laws.⁵²⁰

Creation of state family courts with both federal family law and state child protection jurisdiction

8.300 Jurisdiction under Part VII of the FLA 1975 can also be vested in state family courts.⁵²¹ The only state to have utilised this provision is Western Australia, which has created the Family Court of Western Australia, a state court that exercises both federal family law jurisdiction and state jurisdiction.

8.301 The Family Court of Western Australia is able to exercise child protection jurisdiction in limited circumstances. Under the *Family Court Act 1997* (WA), the Family Court of Western Australia can only exercise the powers of the Children's Court if a child who is the subject of family law proceedings appears also to be a child in need of protection within the meaning of the *Children and Community Services Act 2004* (WA).⁵²² The practice in Western Australia therefore remains that child protection proceedings are generally commenced in the Children's Court.

Amendment of state child protection laws to enable children's courts to make orders granting residence to one parent and exclude contact with the other

8.302 In its 2002 report about the interaction between state and federal systems when child protection issues arise in cases under the FLA 1975, the Family Law Council of Australia made a number of recommendations to reduce problems associated with this overlap.⁵²³ One recommendation was that in child protection proceedings, state and territory children's courts should be given the power to make long-term orders granting residence to one parent and prohibiting contact between the child and the other (often abusive) parent.⁵²⁴ The Council suggested that this would remove the need to make a separate application for such an order in the Family Court when a protection application was on foot.⁵²⁵

8.303 The Council noted that granting this power to state and territory children's courts would be consistent with the principle underpinning most child protection legislation that the courts should take the least intrusive form of intervention necessary to ensure the child's safety. A children's court should have this power in situations where this objective can be achieved by an order denying contact with one parent and a residence order in favour of the other when the parents have separated.⁵²⁶

8.304 The Council stated:

*The removal of parental responsibility from both should only be justified where neither parent is adequate to care for the child and to protect him or her from harm. The inability under some State and Territory laws to make such orders results in over-intrusive interventions.*⁵²⁷

8.305 The Council noted that one jurisdiction in which the children's court did have such a power was NSW. Section 79 of the *Child and Young Persons (Care and Protection Act) 1998* (NSW) (the NSW Act) provides that

If the Children's Court finds that a child or young person is in need of care and protection, it may:

- (a) *make an order allocating the parental responsibility for the child or young person, or specific aspects of parental responsibility:*
 - (i) *to one parent to the exclusion of the other parent.*

8.306 Subsection 79(2) makes clear that an aspect of parental responsibility that can be allocated pursuant to subsection (1) is the residence of the child. An order under section 79(1) could be combined with an order denying contact to the abusing parent under section 86(1)(c) of the NSW Act.

8.307 The Council noted two possible objections to granting state and territory children's courts the power to make residence and contact orders to a parent:

- it could clog up those courts with applications for variation and enforcement of those orders
- it could 'tie up State court resources on what are essentially private law matters'.⁵²⁸

511 Ibid.

512 *Family Law Act 1975* (Cth) s 69J. Part VII of the FLA deals with matters involving children.

513 *Family Law Act 1975* (Cth) s 69N.

514 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498, 652.

515 See Family Law Council, above n 497, 82. The Commission questions whether these doubts are properly held because it is strongly arguable that children's courts, whether led by a judicial officer from a higher court or not, are state courts of summary jurisdiction. The argument that the Children's Court of Victoria is not a state 'court of summary jurisdiction' for the purposes of section 69J of the *Family Law Act 1975* (Cth) appears to rely upon an unnecessarily narrow interpretation of that section read in conjunction with s 26 of the *Acts Interpretation Act 1901* (Cth).

516 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 372.

517 Ibid 375.

518 This was recommended by Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 372 and Family Law Council, above n 497, 81–2.

519 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 372.

520 Ibid 373–4.

521 *Family Law Act 1975* (Cth) s 69H(2).

522 *Family Court Act 1997* (WA) s 36(6). The Commission understands that the Attorney-General of Western Australia has recently requested that a Reference Committee be set up by 1 July 2010 to examine the advantages and disadvantages of child protection matters being heard exclusively in the Family Court of Western Australia.

523 Family Law Council, above n 497.

524 Ibid 86.

525 Ibid 82–4.

526 Ibid 84.

527 Ibid 84–5.

528 Ibid.

8.308 In response to the first objection, the Council proposed that applications for variations and enforcement of orders made under a child protection Act could be dealt with by the Family Court 'if there is a need to resolve what is essentially a private dispute between the parents without raising the same child protection concerns which led to the initial proceedings'.⁵²⁹ This could be achieved by the state or territory child protection authority consenting⁵³⁰ to proceedings being brought in the Family Court under the FLA 1975 'if issues arose between the parties which did not involve significant child protection concerns'.⁵³¹

8.309 The Council rejected the suggestion that enabling children's courts to make orders granting residence to one parent to the exclusion of the other would tie up state courts' resources with private family law matters. It emphasised that the courts would only be given the power to make such orders in child protection proceedings initiated by child protection authorities.⁵³² The Council stated that

*There is no danger then, of State courts being caught up in private residence and contact disputes because the initiation of such proceedings would be entirely a matter for the child protection authority, and their continuance is usually also a matter for that authority. The making of an order concerned with residence and contact could only occur, under Council's proposals, as a disposition available to the Court if grounds for a care order have been proven.*⁵³³

8.310 The Council concluded:

*The enactment of provisions allowing for the making of residence and contact orders as an outcome of a child protection proceeding has the great advantage of allowing maximum flexibility within the present state-federal arrangements to deal with all substantive matters through proceedings in one court. In this way, the most appropriate orders could be made depending on the circumstances of the case without the need to initiate proceedings in another court to ensure the child's best interests are addressed. Such movements between courts are contrary to the child's best interests, administratively cumbersome, and costly.*⁵³⁴

The Commission's views

8.311 The Commission, like the ALRC and NSWLRC, supports the Family Law Council's recommendation of the 'one court principle'. The Commission encourages the ALRC and NSWLRC to consider recommendations that would enable child protection and family law matters to be dealt with by the one court. It is beyond the scope of the Commission's reference to comment on which of the options for realising this objective should be pursued.

8.312 The Commission believes that granting the Children's Court the power to make long-term orders granting custody and guardianship to one parent to the exclusion of the other, as is the case in NSW, is one step that the government should take towards the 'one court principle'.

Proposal 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.

JURISDICTION TO MAKE FAMILY VIOLENCE ORDERS UNDER THE *FAMILY VIOLENCE PROTECTION ACT 2008 (VIC)*

Current jurisdiction of the Children's Court

- 8.313 As discussed in Chapter 1, there is a strong connection between family violence and child protection.⁵³⁵ This point was made during consultations and in the submissions received by the Commission.⁵³⁶
- 8.314 The Family Division of the Children's Court of Victoria has jurisdiction to make, vary, revoke or extend intervention orders under the *Family Violence Prevention Act 2008 (Vic)* (FVP Act) and *Stalking Intervention Orders Act 2008 (Vic)* (SIO Act), if either the affected family member (or for the SIO, 'affected person'), protected person, or respondent is under the age of 18 (a 'child') at the time the order was made.⁵³⁷
- 8.315 Under the FVP Act, the Children's Court can also hear and determine an application for a family violence order, which does not involve a child as the affected family member, protected person or respondent, providing that the application is made on the grounds of the same or similar circumstances as an application made to the Court involving a child.⁵³⁸ The application for a child's protection can be included on the application for protection of his or her parent, rather than in two separate applications.⁵³⁹
- 8.316 In practice, this means that the Children's Court has the jurisdiction to hear an application for a family violence order that either includes a child on the application, or is related to an application that includes a child. This is consistent with the Commission's recommendation in its *Review of Family Violence Laws Report*.⁵⁴⁰ It is also important to note that an application for a family violence order to protect a child can be made on the basis that the respondent has caused the child to hear or witness, or otherwise be exposed to, the effects of family violence, as this in itself constitutes family violence as defined in the FVP Act.⁵⁴¹
- 8.317 If the Children's Court makes a family violence order under the FVP Act, there may be an issue if there is a previous family law order made under the FLA 1975 that is inconsistent with the family violence order. This would be the case, for example, if the previous family law order provided that the child was to have contact with the person against whom a family violence order in favour of the child is subsequently made. The usual position would be that the family law order, made pursuant to a law of the Commonwealth, would prevail over the order made pursuant to a state child protection law to the extent of any inconsistency.⁵⁴²
- 8.318 The FLA 1975 seeks to avoid this outcome by providing that state and territory courts making family violence orders have the power to 'revive, vary, discharge or suspend' a parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child.⁵⁴³ In this way, the state court can remove any inconsistency between the family violence and family law orders. In fact, the FVP Act requires a court making a family violence order to use the power in this section to remove any inconsistency in a prior family law order.⁵⁴⁴
- 8.319 This can only be used, however, by those state and territory courts that have jurisdiction under Part VII of the FLA 1975.⁵⁴⁵ If, for the purposes of the FLA 1975, the Children's Court is not 'a court of summary jurisdiction', family law orders will prevail over family violence laws made by the Children's Court.

529 Ibid.

530 In accordance with s 69ZK(1) of the *Family Law Act 1975 (Cth)*.

531 Family Law Council, above n 497, 85.

532 Ibid.

533 Ibid 85–6.

534 Ibid 86.

535 Freiberg, Kirby and Ward, above n 121, 35.

536 Consultations 15 (Koori Justice Unit), 27 (FVPLS Victoria); submissions 26 (FVPLS Victoria), 46 (Children's Court of Victoria) 95.

537 *Children, Youth and Families Act 2005 (Vic)* s 515(2); *Family Violence Protection Act 2008 (Vic)* pt 6; *Stalking Intervention Orders Act 2008 (Vic)* s 6.

538 *Family Violence Protection Act 2008 (Vic)* s 147.

539 This is permissible under s 47 of the *Family Violence Protection Act 2008 (Vic)*.

540 Victorian Law Reform Commission, *Review of Family Violence Laws Report*, Report No 10 (2006) 258–60.

541 *Family Violence Protection Act 2008 (Vic)* s 5(1)(b).

542 *Australian Constitution* s 109.

543 *Family Law Act 1975 (Cth)* s 68R.

544 *Family Violence Protection Act 2008 (Vic)* s 90.

545 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498, 385.

Option for an integrated approach to child protection and family violence

8.320 The ALRC and NSWLRC discuss the protection afforded to children by family violence legislation, in the context of the orders that state and territory children's courts are able to make in child protection proceedings. They note that under the *Domestic Violence and Protection Orders Act 2008* (ACT) in the ACT, the Children's Court can make both final and interim intervention orders if an application for a care and protection order has been made but not yet finally determined.⁵⁴⁶ If satisfied that the grounds for making the order under family violence legislation are made out, the Court can make such orders either on the application of a party or on its own motion.⁵⁴⁷

8.321 The ALRC and NSWLRC express the view that

*Allowing a children's court to make a protection order in favour of that child, when the child or young person is already subject to care proceedings before the court, and final care orders are pending, gives the court another tool to protect children from harm. It is also consistent with the broad goal of this Inquiry of providing a more seamless system for victims of family violence, including children.*⁵⁴⁸

8.322 As noted above, the Children's Court currently has jurisdiction to make a family violence order if the child is the person in need of protection from a family member. However, it does not have jurisdiction to hear and determine an application for a family violence order if the child is not listed on the application.

8.323 The Commission believes that the child protection and family violence jurisdictions should be streamlined as much as possible.⁵⁴⁹ If during child protection proceedings the Children's Court considers that a family violence order, rather than a protection order, is the more appropriate response to concerns for the child's welfare, then the Court should have the power to make a family violence order.

8.324 The Commission believes that the Children's Court should have the power to hear and determine an application for a family violence order, even if a child is not included on the application,⁵⁵⁰ if making the order would protect a child who is the subject of protection proceedings under the CYF Act 2005. This would require an extension of the jurisdiction currently afforded to the Court under section 146 of the FVP Act.

8.325 If the Children's Court's jurisdiction under the FVP Act is extended to enable it to hear applications for family violence orders that do not include a child, the power in section 77 of the FVP Act should also be available to the Children's Court. Currently under that section, the Magistrates' Court, when considering an application for a family violence order that does not include a child, must consider whether there are any children of the affected family member or respondent who have been subjected to family violence by the respondent.⁵⁵¹ If the Court is satisfied on the balance of probabilities that the child of the affected family member or respondent satisfies the test for the making of a family violence order, the Court may, on its own initiative, include the child on the order protecting the affected family member, or make a separate final order for the child as the protected person.⁵⁵²

Proposal 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'.

BUILT ENVIRONMENT OF THE CHILDREN'S COURT

INTRODUCTION

- 8.326 In Chapter 6, the Commission proposed that new procedures specially designed for use in child protection matters should only foster supported child-centred agreement-making processes and rely upon adjudication by inquisitorial means when proceeding by way of supported agreement is unachievable or inappropriate in the circumstances. If this proposal is adopted, it should be supported by changes to the built environment of the Children's Court, which currently emphasises the Court's adjudicatory role.
- 8.327 The issue of the current court space and environment was repeatedly raised in consultations with and submissions to the Commission. The recent Taskforce report also examined the Court's physical environment. The Taskforce noted the issue of overcrowding, particularly of the Melbourne Court. One strategy suggested by the Taskforce, and supported by the Commission, is to minimise the need for children to attend court unless they wish to do so.⁵⁵³
- 8.328 Concerns about the physical environment and facilities of the Children's Court are not new. Twenty-six years ago, the Carney Committee wrote:
- There is no doubt that any building serving as a Children's Court should have, as a minimum, suitable waiting facilities, private interview rooms for young people and families to talk to their advisors, and a court layout and furniture which is compatible with the participation of all parties. Court layout should allow children to sit with parents/guardians or other support persons if they choose.*⁵⁵⁴
- 8.329 The academic literature in the field of court architecture, environment and behaviour relations, organisational behaviour and development indicates both the complexity and the importance of the built environment.⁵⁵⁵ Over the years, there have been many attempts to improve the situation for the Children's Court, with the most significant being the commissioning of a purpose-built court building in Little Lonsdale Street, Melbourne, which was completed in 2000.

METROPOLITAN CHILDREN'S COURT BUILDINGS

- 8.330 There are two metropolitan locations for hearing Children's Court matters. The main court in Little Lonsdale Street, Melbourne, houses nine courtrooms: five in the Family Division, three in the Criminal Division and one that may be locked off from either Division depending on whether the case being heard is a Family Division or criminal matter.⁵⁵⁶ In addition, the Little Lonsdale Street building has spaces downstairs to accommodate dispute resolution conferences. The Court Clinic is also located at this venue, with a separate entrance to the side of the court.
- 8.331 The second court is located within the Moorabbin Justice Centre (MJC) complex, which houses the Melbourne Magistrates' Court, both Criminal and Family Divisions of the Children's Court, and VCAT hearings. The complex was not purpose-built for the Children's Court. In response to pressures on the Little Lonsdale Street courthouse, on 1 June 2009, a Children's Court (Family Division) was opened in Moorabbin. This move to the MJC complex involved some changes and refitting to allow for security screening equipment and increasing the height of the bench in one court room.⁵⁵⁷ Other small modifications to the waiting areas were required to make it more suitable for young children.⁵⁵⁸
- 8.332 MJC now houses two courtrooms for Children's Court matters and a separate space for convening DRCs. The Criminal Division is accommodated in the section of the complex alongside the adult courts.⁵⁵⁹

- 546 *Children and Young People Act 2008* (ACT) ss 459–60.
- 547 *Children and Young People Act 2008* (ACT) ss 459–60.
- 548 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498, 634.
- 549 This is reflected, for example, in the proposed requirement that a protective worker consider whether a safety notice or family violence order would be an adequate and appropriate alternative to removing the child from the home: see the discussion in the first section of this chapter.
- 550 Including if there is no related application—within the meaning of s 147 of the *Family Violence Protection Act 2008* (Vic)—concerning a child.
- 551 *Family Violence Protection Act 2008* (Vic) s 77(1).
- 552 *Family Violence Protection Act 2008* (Vic) s 77(2).
- 553 Child Protection Proceedings Taskforce, above n 1, 27.
- 554 Child Welfare Practice and Legislation Review, above n 20, vol 2, 240; see also 405–6.
- 555 The Commission would like to thank Emeritus Professor Graham Brawn, of the University of Melbourne and Professor David Tait of the University of Western Sydney, who assisted the Commission in highlighting areas for consideration when considering principles of court architecture and design.
- 556 The Court advises that if there are at least eight magistrates available then Family Division cases can be listed on the criminal division side. This occurs on average one day per week: Email from Janet Matthew, Court Liaison Officer, Children's Court of Victoria, 28 May 2010. Court 7, in the Criminal Division, has been used on one day per fortnight for sittings of the Children's Koori Court. Court 7 is also used for judicial resolution conferences in Family Division cases.
- 557 This was because one of the original courtrooms now utilised for family matters was originally intended as a VCAT hearing room which traditionally has a lower bench.
- 558 This included the removal of a metal sculptural detail from the far corner of the (now) Family Division to ensure that young children do not fall or hurt themselves. There is no play area at Moorabbin court.
- 559 It is the Commission's understanding, however, that this court only operates when the adults courts are not sitting.

8.333 Cases from the Department’s Southern Metropolitan region are now listed at Moorabbin, which is closer to the DHS regional offices of Cheltenham, Dandenong and Frankston. There is, however, a need to continue to list some Southern Region cases at Little Lonsdale Street due to security arrangements, such as where a party is in custody or in secure welfare, and also cases for final contest.⁵⁶⁰

Little Lonsdale Street—Courthouse

8.334 The Little Lonsdale Street court was a purpose-built Children’s Court finalised in 2000. The new court building and facilities were widely acknowledged as being a vast improvement on the previous facilities in the non-purpose built building in Queensbridge Street, South Melbourne.

8.335 The architects Bates Smart won a number of awards⁵⁶¹ for the building, which uses natural light within the design as well as housing all the functions of the Court within one building and allowing for secure outdoor spaces. Bates Smart commented that ‘[t]he building design derives from humane modernist principles and utilises glass, steel, concrete and timber as the primary building materials’.⁵⁶²

8.336 The project included the following design elements:

- a concentration on the use of natural light aimed at de-institutionalising the feel of the Court
- a desire to make courtrooms less formal and more innovative, including having external-facing windows with the use of screening and planting
- separate, but equal, accommodation for criminal and family divisions and a desire to maximise back office functions between these divisions
- a focus on security considerations, with the design enabling judicial officers to be separated from public spaces—resulting in a series of internal walkways and the retention of a bench within courtrooms
- the commissioning of artworks for public areas, such as the wall panels by artist Bruno Leti and timber sculptures by Bruce Armstrong.⁵⁶³

8.337 Although aesthetically pleasing, the Little Lonsdale Street building does not currently serve its occupants well. Changing practice and procedure in child protection has meant that the way in which the building is utilised has changed. The increase in emergency applications by safe custody and the growth in the number of secondary applications have meant that children and their families, carers, workers and lawyers spend increasingly long times in a space that is inadequate for their needs. The intermediary spaces are too small, particularly as many of the exchanges between child protection workers and lawyers occur in the corridors. As the Children’s Court put it, ‘there are now too many people in too small a space and this creates tension, antagonism and frustration’.⁵⁶⁴

8.338 Increases in judicial and administrative personnel have also placed strains on the Court’s Little Lonsdale Street facilities. The Commission understands that the registry space has been refitted a number of times to accommodate growing staff numbers and workload. While the Commission is aware of some innovative ways in which the building has been made more child-friendly and welcoming, such as rolling exhibitions of artwork by children⁵⁶⁵ and greater use of the Koori Court for JRCs where appropriate, it is widely acknowledged that the court ‘is not a good place for a child’.⁵⁶⁶

8.339 Criticisms include a lack of private, secure spaces to talk with families, lack of appropriate childcare facilities, inadequate places to purchase food or drink,⁵⁶⁷ lack of personal security throughout and fear of incidents occurring due to narrow spaces and overcrowding. In its submission, the Children’s Court noted:

*There is an urgent need for childcare facilities at the Melbourne court and [the Court] has long argued this position. On any given day there are many children and families in the waiting areas of the Family Division. These areas are not child or family friendly.*⁵⁶⁸

8.340 The issue of physical space was revisited in the preparatory work for the 2010 Taskforce, with the report recommending ‘the feasibility of structural works at the Melbourne Children’s Court to make better use of space’.⁵⁶⁹ The Taskforce noted:

*Child protection is emotionally demanding and the overcrowding contributes to the distress, anxiety and agitation of those who are not at court. Put simply, there are too many people in too small a space. It is not a good place for a child.*⁵⁷⁰

Views from consultations and submissions

8.341 Children and young people had revealing views on the way the Court looked, such as that it ‘was a really big building that had metal detectors at the front and it was really intimidating’,⁵⁷¹ and that ‘it had ‘high ceilings, grey carpet on the floor and was scary’. A number of young people noted the metal detectors and the feeling of being at the airport or on a TV show. Carers who have attended Court also commented on the lack of facilities for young people.⁵⁷²

8.342 A number of people raised the issue of security. Carers noted that in areas like bathrooms and waiting areas around the reconfigured court space (particularly outside court six) security could be a concern.⁵⁷³ Others raised the recent incidents involving use of capsicum spray as reasons why children either should not attend court or should have properly arranged care.⁵⁷⁴ Some young people commented on the layout of the courtrooms, especially about the magistrate being up high, using words such as ‘looking down at me’, ‘intimidating’, ‘scary’ and that they were in ‘big trouble’.⁵⁷⁵

8.343 The Commission heard that the current space was inadequate for the Court’s needs.⁵⁷⁶ Many respondents commented on the inadequacy of the children’s play area⁵⁷⁷ and lack of childcare facilities.⁵⁷⁸ Carers and workers noted the state of bathrooms, with references to graffiti and rubbish.⁵⁷⁹ Concern was expressed about the lack of refreshment facilities (only vending machines), which meant that leaving the court to find a café could mean missing your name being called over the public announcement system.

8.344 Foster and kinship carers commented both on the lack of signage, and on signs that direct you to people who ‘won’t speak to you’.⁵⁸⁰ The carers provided photographic examples of signage they considered unclear or inadequate for helping them negotiate the court environment.⁵⁸¹ This included signs, some with handwritten additions, stating ‘Don’t Knock’, and ‘We Are Not Legal Aid, No Entry’.⁵⁸²

8.345 Some people referred to the intrusive sound of the public announcement system. Foster and kinship carers noted that they found being called over a loudspeaker ‘intimidating’.⁵⁸³ Others commented on the level of noise and ‘chaos’ at the Court.⁵⁸⁴

560 Child Protection Proceedings Taskforce, above n 1, 28.

561 Property Council of Australia (Vic) Category Winner, Public Buildings 2001 and RAI (Vic) Chapter Award for New Institutional Buildings, Award of Merit.

562 Bates Smart, *Children’s Court Project Sheet* <www.batesmart.com.au/projects/community-culture/childrens-court-of-victoria-melbourne> at 7 May 2010.

563 Telephone discussion with Andrew Raftopoulos, Associate Director, Bates Smart, 20 May 2010. Mr Raftopoulos was project architect at time of designing and building the Children’s Court, 1998–2000.

564 Submission 46 (Children’s Court of Victoria) 30.

565 ‘Boorai—The Children’s Art Gallery’ was established by the University of Melbourne’s Early Learning Centre to present exhibitions that stimulate and challenge audiences to recognise and value the personal, social and cultural comments expressed by young children through the arts and language. Boorai develops and presents exhibitions for local and international audiences and has partnerships with a number of public and private organisations. It provides a variety of services including Boorai: University of Melbourne, *Boorai—The Children’s Art Gallery: About the Gallery* (2009) <www.edfac.unimelb.edu.au/eldi/elc/boorai/index.html> at 1 June 2010.

566 Child Protection Proceedings Taskforce, above n 1, 27.

567 The Commission has observed the work undertaken by the Salvation Army in supplying tea, coffee and pastries to families as well as workers.

568 Submission 46 (Children’s Court of Victoria) 12.

569 Child Protection Proceedings Taskforce, above n 1, 12.

570 *Ibid.* 27.

571 CREATE Foundation, above n 183, 13.

572 Foster Care Association of Victoria Inc, *Results of Consultation with Carers Undertaken by the Foster Care Association of Victoria for Victorian Law Reform Commission* (2010) 16.

573 *Ibid.* 15.

574 Consultations 1 (Children’s Court of Victoria), 6 (Private Practitioners 1); submission 16 (Anonymous).

575 CREATE Foundation, above n 183, 15.

576 Consultation 1 (Children’s Court of Victoria); submission 13 (Anonymous).

577 Submissions 13 (Anonymous), 28 (Anonymous).

578 Consultations 1 (Children’s Court of Victoria), 11 (FCLC).

579 Foster Care Association of Victoria, above n 572, 16; submission 13 (Anonymous).

580 Foster Care Association of Victoria, above n 572, 16.

581 *Ibid.* 15.

582 *Ibid.* 27, Appendix C.

583 *Ibid.*

584 Submission 13 (Anonymous).

- 8.346 When asked how they would design a Children’s Court and where they would like that court to be, young people commented variously on having more toys, games and seats, as well as a less formal environment, using words like ‘friendlier’ and ‘cosy’.⁵⁸⁵ The importance of quiet spaces was also raised, with one young person calling for ‘[m]ore rooms for private conversations and to be able to have time alone, when you’re at court your business is everyone else’s, nothing is private’.⁵⁸⁶
- 8.347 When asked how the courtroom could be set up, one suggestion presented to CREATE was to have a round table in the courtroom where everyone can sit. Young people said that this would allow them to have more opportunities to be involved.⁵⁸⁷

Childcare facilities at Little Lonsdale Street

- 8.348 Although the Commission has considered ways of overcoming the need for children to attend court, some older children may wish to do so. Families will still be required to attend court and at times may bring children not involved in a care matter with them.
- 8.349 There are no childcare facilities at the Little Lonsdale Street Court. In its submission, the Children’s Court said there is ‘an urgent need for childcare facilities at the Court’.⁵⁸⁸
- 8.350 The Court’s facilities for children taken into safe custody consist of a small waiting room to the side of the Department workers’ office. The space, which also doubles as a staff locker room, is cramped and does not have access to natural light or ventilation. In addition, this room can become overcrowded if workers are required to mind multiple children brought in on an application by safe custody. The room does not have access to a toilet or washroom, requiring Department workers to take children out into the public waiting areas to use the bathroom. There are no facilities for children who may require a bath or shower and fresh clothing.
- 8.351 In consultation, foster and kinship carers in particular noted the lack of appropriate children’s spaces at the current courthouse, particularly for children in their care. Carers made some detailed recommendations about how facilities may be better suited to children.⁵⁸⁹ In comments to the Commission, Department workers at the Court echoed these views.⁵⁹⁰
- 8.352 The children’s play area at the Court is some distance from the main waiting space for the courtrooms. The area is unsupervised, although the Commission understands that the Salvation Army provides cadets three days a week to undertake activities in the space and parents/carers are required at other times (although again this is unsupervised).⁵⁹¹ The play area is directly behind the outside smoking area and has access to a downstairs bathroom and television.
- 8.353 The Commission attended the Commonwealth Law Courts to discuss and view the childcare facilities for children who are subject of proceedings in the family courts. The primary role of this facility is to accommodate children required to attend court pursuant to judicial officer’s order, or those required to attend for an appointment with a family consultant.⁵⁹²
- 8.354 The Commission also looked at the model of childcare provided by the Neighbourhood Justice Centre (NJC). The NJC has an arrangement with a local childcare centre to provide, with prior notice, some occasional care places for NJC clients (for example, for clients with appointments at the NJC or to fulfil conditions of court-enforceable orders).⁵⁹³ The NJC also has a fully equipped, unsupervised children’s playroom on the ground floor that can be utilised by families and their children and a smaller play area attached to the victim and witness facilities at the court level.

8.355 The Commission believes that further work should be undertaken to examine possible improvements to both the children's room and DHS worker facilities. This work could examine whether it is feasible to make the current play area a supervised facility (for children attending with families). There is also merit in further examining the feasibility of other on-site models for children involved in proceedings, (similar to the family courts model) or an off-site model along the lines of that used at the NJC.⁵⁹⁴

Moorabbin Justice Centre (MJC)

8.356 The Moorabbin Children's Court (Family Division) is part of a larger multi-jurisdictional court complex for the Melbourne Magistrates' Court, Children's Court Criminal Division and VCAT hearings. The building itself is notable for the use of night sky cooling and thermal louvres in its design. The principles of using calming colours and natural light also contribute to the relaxed internal environment.

8.357 Court users commented that the environment at MJC was more favourable than Little Lonsdale Street. This seemed due to both the reduced volume of cases through the Court, allowing for less time at court by all parties, and the fact that some felt the space was better utilised, perhaps because it is less crowded.⁵⁹⁵ The Moorabbin Children's Court is also able to make use of a mobile refreshment facility serving the wider court complex.

8.358 Nevertheless, the Taskforce raised some concerns about the MJC, including issues such as air-conditioning and security, as well the cost implications of running a decentralised model for the Court and professional staff.⁵⁹⁶

REDUCING VOLUME: DECENTRALISATION OF METROPOLITAN CHILD PROTECTION MATTERS

8.359 The Taskforce recommended that the Children's Court be decentralised.⁵⁹⁷ This included, in the first instance, the recommendation that some of the old County Court building in William Street be utilised for child protection cases from the DHS Eastern Region. The Taskforce also recommended relocating all DRCs off-site.⁵⁹⁸

8.360 The Taskforce, based on the model set by the Moorabbin relocation, explored the possibility of further decentralisation to other metropolitan courts. The Commission notes that while the Taskforce stopped short of recommending in detail how this would work, it understands that this would focus nominally on 'growth corridor' areas and include considerations such as refurbishment of other metropolitan courts.⁵⁹⁹

8.361 In its submission, the Children's Court supported this approach, noting:

The Court seeks Government support to continue moving cases away from the Melbourne Court. It supports the Taskforce recommendations that two court rooms of the old County Court building be allocated to the Children's Court for Eastern Region cases. If this recommendation is adopted by Government, the pressure at Melbourne would be reduced with that Court effectively becoming the court for the North West Region.⁶⁰⁰

REGIONAL CHILDREN'S COURTS

8.362 The Children's Court is split between a specialist metropolitan court model and a generalist regional model. This difference in operation has a significant impact on the built environment of regional Children's Courts because they are essentially Magistrates' Courts with no designated or separate waiting areas for children and/or their families.

585 CREATE Foundation, above n 183, 20.

586 Ibid.

587 Ibid 8.

588 Submission 46 (Children's Court of Victoria) 57.

589 Foster Care Association of Victoria suggest that the Court or DHS lease an empty office space in an adjoining building and set this up as a safe space for children: Foster Care Association of Victoria Foster Care Association of Victoria, above n 572, 20–1.

590 Visit to Family Division to observe facilities, 1 June 2010.

591 Ibid.

592 Family Court of Australia, *Children's Facility Protocols in the Melbourne Registry* (2008); Email from Ilana Katz, Regional Coordinator Child Dispute Services, Family Court of Australia, 31 May 2010.

593 Neighbourhood Justice Centre, *Childcare Practice Guidelines at the NJC* (2009).

594 A recent in-house study by the Magistrate's Court of Victoria undertook a review of the relevant legislation in this area including definitions of a children's service and the licensing requirements of the operation of a defined children's service: 'Proposal to Establish a Child Care Service at the Melbourne Children's Court', received by the Commission on 19 February 2010.

595 Child Protection Proceedings Taskforce, above n 1, 28.

596 Ibid.

597 Ibid 12. Under the recommendation 'Improving the physical environment of the Court' the Taskforce noted 'The principle that the Children's Court should operate on a decentralised model'.

598 Ibid, see Recommendation 11. Note that the Taskforce recommends remodelling DRCs as 'Child Protection Resolution Conferences'.

599 Ibid 28.

600 Submission 46 (Children's Court of Victoria) 12.

8.363 A number of people commented on the run-down nature of facilities in several regional areas and the fact these generalist courts have no private spaces for children and their carers.⁶⁰¹ The Foster Care Association of Victoria's consultation observed, however, that people were more positive about regional court facilities, noting that carers in general felt less overwhelmed or rushed in regional courts compared to Melbourne.⁶⁰²

INVOLVING COURT USERS IN DESIGN

8.364 The Commission understands that while judicial officers, court staff and other professionals, such as legal practitioners, were consulted in the initial planning stages of the Little Lonsdale Street Court, children and families were not. The Commission suggests that 'when new courts are being designed and constructed, the therapeutic needs of the court and its users should be carefully considered and accommodated'.⁶⁰³ The views of children have been sought in the concept, design and planning stages of other new institutions for children, such as the Royal Children's Hospital building project.⁶⁰⁴

A NEW-LOOK CHILDREN'S COURT

8.365 Although children involved in protection applications should not have to attend court unless they wish to do so, the Commission acknowledges that there will be occasions when it is necessary to depart from this general rule. Children who attend court should enter 'an environment that promotes respectful and empathetic communication, participation, collaboration and healing'.⁶⁰⁵

8.366 There are changes that could be made to the Children's Court in Little Lonsdale Street, some of which have been previously recommended,⁶⁰⁶ that could have a positive impact for all court users, particularly children and families. These include:

- a welcoming and well-lit waiting area with information readily available and someone to answer questions or assist people arriving at court⁶⁰⁷
- walls decorated by locally produced artwork that could include artwork from children who have been present at court
- an area where visitors can obtain light refreshments and snacks
- appropriate, supervised facilities for children required at court, with games and other activities to occupy them while waiting
- quiet areas/zones where visitors can go to be with their family or support person
- roving, rather than static, security presence where possible.⁶⁰⁸

COURT ADMINISTRATION

INTRODUCTION

8.367 Court administration is an important component of problem-oriented approaches to justice. As noted by King et al:

The development of non-adversarial justice and in particular therapeutic jurisprudence along with procedural justice research has led judicial officers to explore how they and their courts can 'treat all of our customers with courtesy, respect and dignity, by providing services that meet their needs'.⁶⁰⁹

8.368 In previous reports, the Commission has explored the interrelated issues of court governance and administration and their role in assisting cultural change.⁶¹⁰ The purpose of this section is to look briefly at the role administration and governance can play in facilitating cultural change, particularly in setting an example to those working within the court environment. In this section, the Commission briefly sets out the current Court operating model before examining other models of court administration and governance.

CURRENT COURT OPERATING MODEL

- 8.369 The Children’s Court is headed by a President (a County Court Judge), with 11 specialist magistrates in the Melbourne metropolitan region sitting in two court locations (Melbourne and Moorabbin). A principal registrar, operations manager, court coordinator and court liaison officer, and approximately 33 other staff working from the Melbourne and/or Moorabbin complexes, support the judicial officers. Local court registrars in the regional courts support regional coordinating magistrates.⁶¹¹ Staff of the Children’s Court are Victorian Public Sector employees and report through their direct line managers to the CEO of the Magistrates’ Court of Victoria.
- 8.370 The Children’s Court at Melbourne hosts a number of agencies. These include the Court Clinic, which is separate from the registry and directly reports to the CEO of the Magistrates’ Court, as well as agencies such as the VLA duty desk, the CAU, the Court Network (a voluntary support agency) and the Salvation Army. The Court has two rooms for use by private practitioners and one room and anteroom used by Department child protection workers.
- 8.371 The Commission understands that the Children’s Court has a ‘Court User Forum’ that meets three times a year, chaired by the President of the Court, and involves all court professionals and service delivery staff, but not security personnel.

601 See, for example, comments on Geelong, Shepparton and Bendigo Magistrates’ Courts in Foster Care Association of Victoria, above n 572, 16–17.

602 Ibid 17.

603 King et al, *Non-Adversarial Justice*, above n 155, 217.

604 In the process of consultation, the Royal Children’s Hospital heard the views and perspectives of over 600 children, adolescents and adult family members on what is important to them in the design of the new hospital: Royal Children’s Hospital, Melbourne, *Working with Families: Report of the Consultation with Children and Families – Informing Hospital Design* (2006).

605 King et al, *Non-Adversarial Justice*, above n 155, 216.

606 Boston Consulting Group, *Children’s Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007) recommended the following considerations to improve the Little Lonsdale Street courthouse: additional waiting areas for families; larger offices for VLA, CAU, private practitioners and support services; a crèche for children attending court with their families; and desk space for additional registry staff as well as additional chambers for magistrates: at 62. Further, the Taskforce recommended the feasibility of minor structural changes following on from the relocation of the DRC function to outside of the courthouse to make better use of available space: Child Protection Proceedings Taskforce, above n 1, 29. This would enable the expansion of office space for support services and lawyers such as the VLA, CAU and private practice solicitors.

607 A recent review of the NJC highlighted the following points as contributing to the success of the NJC: design, including the waiting area being marked by its space, light and openness; the courtroom being well fitted out with good seating for observers and participants; a spacious foyer and access to interview rooms as well as a small outside deck and a kiosk: Department of Justice (Victoria), *Evaluating the Neighbourhood Justice Centre in Yarra 2007–2009* (2010) 17.

608 In highlighting these areas, the Commission is aware that security considerations must be taken into account, but notes the NJC as an example of balancing the therapeutic aims of minimising overt security presence with the highly skilled and trained security staff who are part of the centre’s management processes. For example, the security staff at the NJC attend the staff and centre management meetings on a fortnightly basis. Similar cooperative practices could be adopted at the Children’s Court.

609 King et al, *Non-Adversarial Justice*, above n 155, 218.

610 See Victorian Law Reform Commission, *Review of Family Violence Laws*, above n 540, 419–21; Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 791.

611 There are currently 27 members of staff at the Melbourne registry and four full-time members of staff at Moorabbin, plus one staff member who spends two days per week at Moorabbin and the Melbourne registry conducting dispute resolution conferences. These figures do not include staff of the Children’s Court Clinic (the basis of a separate review by Department of Justice as discussed in Chapter 1) or the four sessional dispute resolution convenors engaged by the Court. Magistrates in suburban and regional courts sit as Children’s Court magistrates at gazetted times. Suburban courts (excluding Moorabbin) hear Children’s Court criminal matters only, whereas country courts hear cases in both divisions: Email from Janet Matthew, Court Liaison Officer, Children’s Court of Victoria, 25 June 2010.

Meeting the needs of Aboriginal clients in the Family Division

8.372 The Children's Court (Family Division) Koori Family Support Program (KFSP) identified the need for some type of Koori-specific support to families at court, such as an Indigenous Court Officer. The Commission believes this may be further explored through the KFSP consultation process. Other submissions raised the idea of making the Court more culturally responsive and generally a friendlier place.⁶¹²

Court Network and the Salvation Army

8.373 The Court Network and the Salvation Army provide valuable assistance to vulnerable family members. These agencies provide support and refreshments to families and staff alike, as well as activities and games for children in the waiting area. Court Network staff provide some basic information and referral information to family members requiring non-legal assistance.

Desirability of further assistance for vulnerable family members at court

8.374 The Commission notes that the limitations in space prevent more extensive availability of services at court. However, basic measures such as brochures and information or staff members to assist with explaining court processes to people could help. In consultations, young people and foster and kinship carers noted the lack of information about what to expect at court.

8.375 The Court arranges for interpreters who attend court to assist clients of non-English speaking backgrounds. Employees from disability services, Aboriginal agencies, the Office of the Public Advocate and other agencies may attend court to assist vulnerable family members, but unlike the Neighbourhood Justice Centre (discussed below), there is not a broad range of service providers with a continual presence at court.

8.376 Information such as a simple map or floor plan showing families where things are, or answers to questions such as 'who sits where in the courtroom and what is court etiquette' could be very useful.⁶¹³ The CREATE foundation suggested that a modification of the current VLA publication involving 'Lex the Cat' could be appropriate.⁶¹⁴

OTHER MODELS OF ADMINISTRATION**The Neighbourhood Justice Centre model**

8.377 As discussed earlier in this chapter, the NJC is an example of a highly regarded and successful problem-oriented court.⁶¹⁵ The NJC model of governance and administration provides an example of how judicial and administrative arms can complement and support one another while retaining clear lines of independence.

8.378 The NJC employs the services of a Director who, along with other NJC staff, manages behaviour in the corridors and other non-courtroom spaces at the Court. The Director leads and manages a multi-disciplinary team. The broad role of the Director includes court operations, community engagement, crime prevention, mediation and access to justice. It is also to 'develop, enhance and support various governance structures surrounding the NJC'.⁶¹⁶ These governance structures include a Centre Leadership Group (including monthly reflective practice meetings), which involves heads of agencies working within the centre such as prosecutions, VLA, drug and alcohol agencies, and housing agencies. They also include a staff forum that includes all centre staff including security, and a Community Advisory Group who oversee a small grants program for the centre.

The Magistrates' Court of Victoria—specialist courts

8.379 The Magistrates' Court of Victoria has adopted some new therapeutic jurisprudence approaches in recent years. The family violence registry at Melbourne Magistrates' Court⁶¹⁷ conducts itself in ways that aim to minimise the stress and impact on court users. The Dandenong Drug Court also has an interesting structure of judicial, administrative and clinical staff. The Court is structured with one magistrate who is supported administratively by a program manager.⁶¹⁸ The program manager runs the Drug Court program, but not the line management of the clinicians working at the Drug Court centre.

NEXT STEPS

8.380 The Commission sees great merit in a director-type role for the Children's Court based on the NJC model. This role would complement existing court staff and act as a conduit between the judicial and non-judicial roles. It is envisaged that the person in the role would have an active hands-on approach to everyday problem solving in the court environment. This could include examining issues such as children's spaces, security, community forums and education, and court user groups, including professionals working within the court environment.

TRAINING

Views from consultations and submissions

8.381 The issue of training for practitioners and judicial officers was repeatedly raised during consultations.⁶¹⁹ There were many general comments on cross-disciplinary training for all child protection practitioners, as well as specific comments on training about disability⁶²⁰ and cultural and linguistic diversity (CALD) awareness.⁶²¹

8.382 A number of submissions highlighted a general need for Aboriginal cultural awareness training.⁶²² In their submission, VACCA stated that there is 'need for the implementation of Aboriginal cultural competence standards ... to ensure a culturally responsive service'.⁶²³ The Commission believes that training or professional development regarding the Aboriginal Child Placement Principles and related cultural awareness would be valuable for legal representatives, Children's Court magistrates and family decision-making convenors.

8.383 Many submissions emphasised the importance of shared, cross-disciplinary training of all stakeholders.⁶²⁴ The Australian Institute of Family Studies highlighted this point.⁶²⁵ The Law Institute of Victoria argued that, rather than widespread legislative or process change, the child protection system required in part 'increased training and support for Children's Court staff and other professionals in the system'.⁶²⁶ A number of submissions supported a 'systemic guarantee' of the priority of reunification, supported in part through 'adequate ... training for professionals'.⁶²⁷

612 Submission 39 (VACCA).

613 Foster Care Association of Victoria, above n 572, 20.

614 CREATE Foundation, above n 183, 7; Victoria Legal Aid, *Just in Case ... You Visit the Children's Court* (2nd ed, 2008).

615 Department of Justice (Victoria), *Evaluating the Neighbourhood Justice Centre*, above n 607.

616 Department of Justice (Victoria), *Position Description: Neighbourhood Justice Centre Director* (August 2006).

617 Other family violence lists are located at Heidelberg, Sunshine and Broadmeadows. There is not a specialist registry at these locations to attend to family violence matters.

618 This program manager reports to a specialist courts manager within the office of the CEO, Magistrates' Court of Victoria, who reports to the CEO.

619 See, for example, consultations 4 (DHS Managers), 9 (Barristers), 13 (DHS CP Workers Hume), 17 (Victoria Police), 22 (DHS CP Workers Southern), 24 (Prof Cathy Humphreys), 28 (VACCA); submissions 2 (Dr Michael King), 7 (Prof Cathy Humphreys), 8 (Angela Smith), 11 (VLA), 24 (WHCLS), 25 (LIV), 28 (Anonymous), 30 (CECFW), 34 (Victoria Police), 36 (FLS), 37 (OCSC), 38 (VALS), 39 (VACCA), 40 (AIFS), 44 (CHP), 45 (FCLC), 46 (Children's Court of Victoria) 29, 38, 41, 47 (DDL). See also, CREATE Foundation, above n 183; Foster Care Association of Victoria, above n 572; Myriad Consultants, *Protection Applications in the Children's Court: Report of Consultations with New and Emerging Communities* (2010).

620 See, for example, submission 47 (DDL), which noted the need for all stakeholders to undertake training 'regarding the needs and rights of parents with disabilities'.

621 A number of submissions and consultations highlighted the importance of adequate training regarding culturally and linguistically diverse (CALD) families, including awareness of the unique issues facing, and experiences of, the communities; cultural differences between different communities; and language issues. See, for example, submission 30 (CECFW); consultation 7 (Private Practitioners 1). Myriad Consultants noted that there is 'very little literature related to CALD experiences of Child Protection matters in the Children's Court. There is however an increasing focus on CALD communities and their experiences with Child Protection Systems'. It also highlighted that there is a need for significant community education for CALD communities about the Court's role in the child protection system: Myriad Consultants, above n 619, 5, 17.

622 Consultation 28 (VACCA); submissions 25 (LIV), 39 (VACCA).

623 Submission 39 (VACCA).

624 Consultation 24 (Prof Cathy Humphreys); submissions 25 (LIV), 38 (VACCA), 40 (AIFS), 44 (CHP), 45 (FCLC).

625 Submission 40 (AIFS).

626 Submission 25 (LIV).

627 Submissions 38 (VALS), 44 (CHP), 45 (FCLC).

Training for protection workers

- 8.384 New child protection practitioners are required to undertake a compulsory seven-week intensive induction, called the 'Beginning Practice in Child Protection Program'.⁶²⁸ The Commission understands that the program is broken into workplace-based learning, including mentoring, and 12 days of practice clinics (comprising three clinics, each four days in length). During the workplace-based time, new workers gain experience in all aspects of their work—for example, sitting in on interviews and visiting families—without taking primary responsibility for any case.⁶²⁹
- 8.385 The legal context of the child protection role is raised throughout their training, but the third practice clinic focuses completely on legal and court processes. It includes a one- to two-hour address at the Melbourne Children's Court by a current magistrate, and presentations by the Court Advocacy Unit and Victoria Police's Sexual Offences and Child Abuse Unit. As part of the practice clinic, workers also spend a full day practising giving evidence and being cross-examined on the court report they have produced during training by a barrister currently practising in the Children's Court.⁶³⁰
- 8.386 During the program, the practitioner is introduced to and works with resources such as the Child Protection Practice Manual⁶³¹ and a *Guide to Court Practice for Child Protection Practitioners 2007*.⁶³² In addition, protection workers receive a child protection court kit.⁶³³ New protection workers may also have undertaken a practical session of court skills training provided by a former magistrate.⁶³⁴
- 8.387 Experienced child protection practitioners can undertake a Graduate Certificate in Child and Family Practice to advance their practice knowledge and skills.⁶³⁵ The DHS Child Protection and Youth Justice Professional Development Unit also conducts a range of compulsory and non-compulsory training programs for protection workers after they have completed the Beginning Practice in Child Protection Program. One such program relates to sexual abuse and includes a component by the Court Advocacy Unit about how to deal with such cases at court, and how to prepare evidence.⁶³⁶
- 8.388 The Ombudsman's report raised concerns about the adequacy of the training provided to protection workers.⁶³⁷ The report noted a key theme for child protection workers was feeling inadequately prepared to present matters at the Children's Court.⁶³⁸ The Taskforce recommended that additional training, including in court preparation, be added to the DHS training calendar.⁶³⁹
- 8.389 Many submissions and consultations raised training as an area of concern or importance.⁶⁴⁰ A number of submissions highlighted concern specifically with the inadequacy of training for protection workers in Children's Court proceedings and related activities.⁶⁴¹
- 8.390 As discussed in Chapter 1, the State Services Authority is undertaking a review of the current protection workforce. The Commission also understands that DHS is undertaking 'a training needs analysis in respect of all aspects of training' for protection workers, and that the resulting package will be aimed at workers with 18 months to two years experience and will include training in Court preparation.⁶⁴²
- 8.391 The Commission is mindful that any training would need to be sensitive to the different requirements of regional- and Melbourne-based protection workers. For example, the Commission is aware that many regional workers often self-represent in court, which is rare for Melbourne-based workers.

Training of lawyers, including specialist accreditation

8.392 A number of submissions and consultations raised concerns with lawyers' training⁶⁴³ and whether they have a 'comprehensive understanding of the complexities of child welfare and psychology'.⁶⁴⁴

8.393 The Commission has previously noted that the practice of law has become increasingly specialised.⁶⁴⁵ Additionally, '[r]epresenting children is recognised as a specialist occupation these days'.⁶⁴⁶ The Law Institute of Victoria states that specialisation benefits both the public and the legal profession through enhancing client confidence in their legal representative, increasing professional competence and encouraging best practice.⁶⁴⁷

8.394 Following discussions with the Commission, the Law Institute of Victoria's Specialisation Board is exploring the possibility of a children's law specialisation.⁶⁴⁸ The Law Society of New South Wales offers specialist accreditation in Children's Law.⁶⁴⁹ Specific accreditation programs are generally offered every two to three years, based on interest from practitioners, renewal rates, and any legislative changes.⁶⁵⁰ In 2009, 13 practitioners undertook Children's Law accreditation in NSW, and there has been a consistent pool of interest.⁶⁵¹

8.395 England provides another example of an accreditation scheme. As noted in Chapter 5, practitioners who represent children are selected from the Law Society's Children Panel. The Law Society runs the accreditation scheme by which solicitors can become members of this Panel. In relevant children's matters, children are entitled to non means- or merits-tested, publicly-funded legal representation.⁶⁵² Through selection of children's representatives from the Panel, a solicitor's accreditation is linked to access to legal aid funding.

8.396 In Victoria, it is likely that the majority of solicitors who may be interested in attaining Children's Law accreditation would be the practitioners currently appearing in the Family Division of the Children's Court.⁶⁵³ Additionally, there may be interest from practitioners who appear in the Court's Criminal Division, and lawyers who act for children in family law cases.⁶⁵⁴ The Commission is mindful of the fact that a move to specialisation, with its eligibility requirements,⁶⁵⁵ should not discourage new lawyers from moving into this jurisdiction by ensuring that such lawyers have access to appropriate professional development.

628 Child Protection Proceedings Taskforce, above n 1, 33. This report provides an overview of the current training undertaken by new child protection workers. See also, Lynne McPherson and Mark Barnett, 'Beginning Practice in Child Protection: A Blended Learning Approach' (2006) *Social Work Education* 25 (2) 192–8, which provides a detailed overview of the program as it was initially set up.

629 Telephone discussion with Natasha Courtney, Assistant Manager, Department of Human Services, Child Protection and Youth Justice Professional Development Unit, 31 May 2010.

630 Ibid.

631 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, from CD-ROM provided at 23 March 2010.

632 Department of Human Services (Victoria), *Guide to Court Practice for Child Protection Practitioners 2007* (2007).

633 Department of Human Services (Victoria), *Child Protection Court Kit* (2007). It is a guide to assist practitioners with the 'processes, procedures and legal and practice requirements associated with applications to the Children's Court and related jurisdictions': at 1.

634 Child Protection Proceedings Taskforce, above n 1, 33. The Commission understands that this practical training session was offered to all Department staff, not just new protection workers, and was run over the last year throughout the various regions around the state. As all the regions have now taken part, the program is currently finished.

635 Department of Human Services (Victoria), *Children, Youth and Families: Announcing the 2010–2011 Graduate Certificate in Child and Family Practice*, <www.cyf.vic.gov.au/home/announcing-the-2010-2011-graduate-certificate-in-child-and-family-practice> at 31 May 2010.

636 Courtney, above n 629.

637 Office of the Victoria Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 14. The following areas were noted: inadequate training of staff in how to use the relevant DHS information technology system leading to instances where criminal records checks of carers were not conducted, which has led to some children being placed with convicted sex offenders; and inadequate training to ensure an appropriate level of privacy compliance.

638 Ibid 56.

639 Child Protection Proceedings Taskforce, above n 1, 13, recommendation 15.

640 See, for example, consultations 9 (Barristers), 17 (Victoria Police); submissions 11 (VLA), 24 (WHCLC), 25 (LIV), 28 (Anonymous), 36 (FLS), 37 (OCSC), 38 (VALS), 44 (CHP), 45 (FCLC), 46 (Children's Court of Victoria) 29, 47 (DDLS).

641 See, for example, submissions 28 (Anonymous), 34 (Victoria Police), 46 (Children's Court of Victoria) 29, 85, 87.

642 Child Protection Proceedings Taskforce, above n 1, 33 which states that '[t]he training package that will be developed as a result of the analysis will include training in Court preparation'. The Commission understands that the dual impetus for this training analysis was a ministerial announcement regarding the need for additional training for this section of protection workers, with specific funding attached, and the findings in the Victoria Ombudsman *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009): Telephone discussion with Department of Human Services (Victoria), 27 May 2010.

643 See for example, consultation 13 (DHS CP Workers Hume), 28 (VACCA); submissions 16 (Anonymous), 37 (OCSC), 39 (VACCA).

644 Submission 16 (Anonymous). See also submission 39 (VACCA).

645 Victorian Law Reform Commission, *Jury Directions: Final Report*, Report No 17 (2009) 137.

646 Ross, above n 239, 570. It is also noted that 'this does not hold true in many country and rural areas, where children's representation is arguably very different from that delivered by their urban and regional counterparts'.

647 Law Institute of Victoria, *Accredited Specialisation* <www.liv.asn.au/Education---Events/Accredited-Specialisation.aspx> at 18 May 2010.

648 Email from Julie McCormack, General Manager Education and Secretary to Specialisation Board, 22 February 2010; meeting with the Law Institute of Victoria Specialisation Board on 23 March 2010.

649 Email from Anita Khosla, Business Manager Specialist Accreditation, Law Society of New South Wales, 22 March 2010. See also Ross, above n 239, 571, which states that at the time of publication there had been two intakes.

650 Ibid. See also, Law Society of New South Wales, *Be the Right Lawyer for the Job!* (2010)—a pamphlet outlining the Accredited Specialist program.

651 Khosla, above n 649.

652 Law Society (UK), *Good Practice in Child Care Cases: A Guide for Solicitors Acting in Public Law Children Act Proceedings Including Involving Adoption* (2004) [2.7.1].

653 The Commission estimates that there are over 120 such practitioners.

654 The Commission estimates that there are 70 ICLs on the Panel, and four Legal Aid ICLs. The Commission also notes that national ICL training for new ICLs is regularly offered by the Family Law Section of the Law Council of Australia, in conjunction with National Legal Aid. State and territory legal aid bodies take turns at co-hosting this training. Training is not a one-off event; state and territory legal aid bodies provide ongoing training. For example, VLA provides a full day of specialist training for existing ICLs approximately once per year.

655 There is a requirement to have five years practice, with three years substantial experience prior to application: Law Institute of Victoria, *Accredited Specialisation: Why Become an Accredited Specialist* <www.liv.asn.au/education---events/accredited-specialisation/why-become-an-accredited-specialist> at 27 May 2010.

8.397 Another way of promoting training and professional development among legal practitioners working in the Children's Court is to make eligibility for the VLA panel conditional on completion of nominated training and professional development. In Western Australia, a grant of legal aid is conditional upon a practitioner having experience in mediation.⁶⁵⁶

Cross-jurisdictional training—lawyers and protection workers

8.398 Rosemary Sheehan has suggested that 'effective child protection is a shared enterprise amongst the professionals'.⁶⁵⁷ The Taskforce's report noted the desirability of moving towards a more collaborative approach between professionals as a means of improving the Court's culture.⁶⁵⁸ Concerns about the current culture were raised during many consultations.⁶⁵⁹ While not a complete solution,⁶⁶⁰ appropriate training could encourage more collaboration.⁶⁶¹

8.399 One example of cross-disciplinary training is the Western Australian 'Signs of Safety' program. This was brought to the Commission's attention during the current reference⁶⁶² and was considered by the Taskforce. 'Signs of Safety' was developed in collaboration between legal aid, the Department of Child Protection, a hospital and the Perth Children's Court. It aims to use mediation and the involvement of all interested parties to resolve child welfare disputes as early as possible and to reduce the number of matters reaching the court system.⁶⁶³

8.400 As part of this program, child protection workers and lawyers undertake joint training in the Department's risk assessment model.⁶⁶⁴ The Taskforce noted that this joint training was, in part, responsible for the 'striking feature about the culture' that the Department and lawyers 'recognised and respected each other's legitimate role in protecting children'.⁶⁶⁵

8.401 The Taskforce recommended that introducing a joint training package, following the Western Australian idea, across both VLA and DHS would benefit both professional groups by 'encouraging lawyers to become more familiar with child protection practice and familiarising child protection workers in their preparation for and involvement in Children's Court processes'.⁶⁶⁶

8.402 The Commission is aware that DHS and VLA are moving ahead with such a program, and that an initial joint training session is scheduled for the end of July 2010. The initial training session will be in the new dispute resolution model recommended by the Taskforce and a subsequent session on DHS's best interests case practice model is mooted.⁶⁶⁷ In addition, the Commission is aware of many other collaborative initiatives between DHS and VLA.⁶⁶⁸

8.403 The Commission supports the Taskforce's recommendations and the work initiated collaboratively by DHS and VLA, including joint training.

Judicial training

8.404 A number of submissions and consultations raised the importance of judicial training.⁶⁶⁹ The Commission recognises, as it has in previous reports, the complex and challenging nature of the work undertaken by judicial officers and the need for ongoing education and professional development to support this work.⁶⁷⁰

8.405 The Children's Court is a specialist court. It has been suggested that what makes 'work in the Children's Court so challenging [is] that it calls on expertise other than legal training'.⁶⁷¹ The importance of multi-disciplinary knowledge of decision makers in the child protection area was noted in a number of submissions and consultations.⁶⁷²

- 8.406 The Medical Director of the Victorian Paediatric Forensic Medical Services noted that decision makers should have a good knowledge across areas including child development and behaviour, the effect of trauma on children, parental mental illness and prenatal exposure to drugs, family violence and the dynamics of sexual assault.⁶⁷³ It was also suggested that outcomes for children and young people would be enhanced through court personnel having 'further training in the areas of child development and the effects of abuse and trauma on children'.⁶⁷⁴
- 8.407 Any changes to court processes should be accompanied by appropriate judicial training. This would include changes aimed at encouraging more inquisitorial and problem-oriented approaches, the introduction of new decision-making processes (discussed in Chapter 7), and the extension of the Children's Court jurisdiction to other areas such as family violence and family law (also discussed in Chapter 7).
- 8.408 The Judicial College of Victoria is the primary body for assisting judges with their professional development.⁶⁷⁵ The College has indicated awareness of the current reference to the Commission, and has demonstrated interest in exploring potential training to support any reforms.⁶⁷⁶

- 656 Legal Aid Western Australia, *Specialised Family Law Panels* (2009) <<http://www.legalaid.wa.gov.au/infolawyers/aspx/default.aspx?Page=Grants/FamilyLawSpecialised.xml>> at 15 June 2010. The website notes that where a matter cannot be dealt with in-house, a grant of legal aid is made to a private practitioner on a specialist panel; for children's representatives this is the Child Representatives Panel. Requirements for being on the panel include: experience in advocacy and mediation, and extensive knowledge of family law practice and procedures, child welfare issues and relevant case law.
- 657 Sheehan, above n 152, 223.
- 658 Child Protection Proceedings Taskforce, above n 1, 26, 33. Office of the Victoria Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program*, above n 637, 13, also noted the desirability of moving to a more collaborative approach.
- 659 See, for example, consultations 3 (CAU), 7 (Private Practitioners 2), 9 (Barristers), 22 (DHS CP Workers Southern), 25 (DHS CP Workers East & Nth West).
- 660 For example, submission 46 (Children's Court of Victoria) 30 notes that the 'adversarialism' complaints are 'frequently complaints about the process at the Melbourne Court and particularly the conditions for court users in that building', and refers to the Taskforce finding that the work is emotionally demanding and the court's overcrowding adds to the distress, anxiety and agitation of court users. See also, Child Protection Proceedings Taskforce, above n 1, 7, where the Taskforce discusses collaboration more broadly, such as developing a Code of Conduct and Memorandum of Understanding.
- 661 See for example, Child Protection Proceedings Taskforce, above n 1, 33, which states that: 'The Western Australians told us that training was the key to the success of a more collaborative approach in that State'.
- 662 A member of the Commission's research team joined the Taskforce during their visit to Western Australia.
- 663 Information taken from the *Taskforce Visit Information Pack*, introduction page, provided to a Commission research and policy officer during a visit to WA.
- 664 Child Protection Proceedings Taskforce, above n 1, 33.
- 665 Ibid 26.
- 666 Ibid 8, see recommendations 15–16.
- 667 Department of Human Services (Victoria), Telephone discussion, above n 642. It is also noted in Child Protection Proceedings Taskforce, above n 1, 33.
- 668 For instance, a team associated with the Signs of Safety program in Western Australia conducted a seminar on that program for DHS and VLA employees. In addition, VLA and DHS are developing a joint Memorandum of Understanding and a Code of Conduct. Further, the Commission is aware that in June 2010, a VLA lawyer was seconded to DHS to undertake compulsory protection worker induction—Beginning Practice in Child Protection Program; to assist with the development of the Code of Conduct and the MOU; and, to assist with the new ADR model for the Children's Court, facilitating children's participation in legal proceedings without the need to attend court, and earlier disclosure and preparation of matters: Department of Human Services (Victoria), Telephone discussion, above n 642.
- 669 See, for example, consultation 28 (VACCA); submissions 8 (Angela Smith), 39 (VACCA), 46 (Children's Court of Victoria) 41.
- 670 Victorian Law Reform Commission, *Jury Directions*, above n 645, 143.
- 671 Sheehan, above n 152, 87.
- 672 Consultation 10 (VFPMS); submission 39 (VACCA).
- 673 Consultation 10 (VFPMS).
- 674 Foster Care Association of Victoria, above n 572, 18.
- 675 Victorian Law Reform Commission, *Jury Directions*, above n 645, 143.
- 676 Letter from Lyn Slade, Chief Executive Officer, Judicial College of Victoria, 23 March 2010.

Chapter 9

Option 3—Office of the Children and Youth Advocate (OCYA): A New Multi-Disciplinary Body to Advance the Interests of Children and Young People

CONTENTS

368	Introduction
371	Structure of OCYA
372	OCYA organisational chart
372	OCYA's objectives
373	Functions to be performed by OCYA
382	Independence of OCYA

Option 3—Office of the Children and Youth Advocate (OCYA)

INTRODUCTION

- 9.1 This chapter describes Option 3, which involves altering the legal structure of Victoria’s child protection system by creating a new independent statutory commissioner. This commissioner would represent and promote the best interests of children and facilitate supported agreement-making processes, at all stages of the child protection process.
- 9.2 The current framework comprises two significant institutions: the Department of Human Services (the Department) that is usually a party to a case, most often the applicant,¹ and a court (the Children’s Court) which is the ultimate decision maker. A third institution—Victoria Legal Aid (VLA)—is involved as a service provider in most cases because it provides legal assistance to children and their families.
- 9.3 Different interests guide all three institutions. Those interests are best seen as responsibilities. The Department is responsible for ensuring that the state protects some of its most vulnerable members—children—from risks of serious harm, often as a result of acts or omissions of parents. These responsibilities arise before, during and after court proceedings. The Department investigates reports of child abuse, it initiates and conducts proceedings in the Children’s Court, and it administers orders made by the Court when a child is found to be in need of protection.
- 9.4 VLA is responsible for ensuring that parents who cannot afford private lawyers, as well as some children, receive legal assistance before any decisions are made about the need for protection. Because of potential for conflict between the interests of family members, many lawyers may be assigned to a particular case. Some of those lawyers are employees of VLA, while others are private practitioners who receive grants of aid, meaning they are separately paid for each court event. In nearly all cases when a child under the age of seven is the subject of a protection application, that child is not represented.
- 9.5 The Children’s Court has the responsibility of being an impartial decision maker. The Court must ensure that fair processes are followed before it decides on evidence presented to it whether there should be any changes to the rights and responsibilities of parents, children, the state and any other interested parties.
- 9.6 Given the diverse interests involved in Children’s Court proceedings and the history of the jurisdiction, especially its close connection with criminal law and procedure, the existing framework is a recipe for conflict, especially because the consequences of the Court’s decisions are so great. The Victorian Ombudsman concluded his 2009 report on child protection services by declaring that the evidence he gathered ‘raises fundamental questions regarding the design of the legal framework around the child protection system in Victoria’.²
- 9.7 The Commission believes that Victoria’s child protection system may benefit from a change in legal structure to create a new statutory body that would undertake a number of key roles within the system. That body could represent the interests of the child and play a leading role in facilitating supported agreement-making processes.
- 9.8 Many of the specific functions that could be given to a new body arise from the proposals contained in Options 1 and 2 of this report.³ The Commission suggests that consideration be given to establishing a new statutory commissioner to head a body known as the Office of the Children and Youth Advocate (OCYA).

- 9.9 The purposes of OCYA, broadly stated, should be to:
- promote child-focused processes and outcomes
 - ensure the representation of children at all stages in child protection decision-making processes
 - assist the parties to reach agreement in the best interests of the child whenever possible.
- 9.10 The Commission proposes that OCYA promote those purposes by undertaking the following functions:
- convening family group conferences (FGCs)
 - representing children in all decision-making processes
 - providing specialist expertise to the child protection system.

HISTORICAL INFLUENCES ON THE UNIQUE JURISDICTION OF CHILD PROTECTION

- 9.11 As discussed in Chapter 2, the child protection jurisdiction of the Family Division of the Children’s Court has grown out of criminal-style proceedings in which a child was charged with being ‘neglected’ and a state authority was responsible for proving the charge.⁴ Because of this history, child protection proceedings in the Family Division are still characterised in quasi-criminal terms: reference is made to ‘apprehending’ children in need of protection,⁵ the Department is often described as the ‘prosecutor’,⁶ and parallels are drawn between applications for interim accommodation orders and applications for bail.⁷ These concepts are not helpful when seeking to achieve an outcome that is in the child’s best interests.
- 9.12 As discussed in Chapter 3, child protection proceedings are neither criminal nor civil in nature. The Family Division of the Children’s Court exercises a unique jurisdiction dealing with three different interests that may sometimes overlap but may not be easily reconciled at other times.⁸ The child who is the subject of a protection application is not a party to those proceedings. In over 50 per cent of cases, the child is not represented by an advocate and has no voice in proceedings.⁹
- 9.13 There may be value in changing the legal structure of Victoria’s child protection system in order to ensure that the person who has the most at stake in child protection proceedings—the child—has a voice that is more likely to be heard because it has separate institutional support. This can be achieved by creating a new body whose main function is to advocate for the child in each case and to advance that child’s interests by non-adversarial means.

TENSION BETWEEN THE INSTITUTIONS OF CHILD PROTECTION

- 9.14 As discussed in Chapter 6, child protection proceedings in the Children’s Court involve the coming together of professionals with different perspectives and qualifications, as well as parents and children, in order to achieve an outcome that is in the child’s best interests. Reconciling these different perspectives is a challenging task, made more difficult by the sensitivity of issues relating to the protection of children.

1 It is only in the very rare irreconcilable difference application that the Department may not be a party, although the Department has a role in pre-litigation conciliation counselling and may seek leave to appear in these proceedings.

2 Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 64.

3 Most of the functions that the Commission believes could be given to a new body have been allocated to VLA in Options 1 and 2.

4 See Chapter 2 for a discussion of the legislative history.

5 See, for example, submission 46 (Children’s Court of Victoria) 53.

6 See, for example, submission 48 (Victorian Bar).

7 Springvale Legal Service, *Lawyers Practice Manual Victoria* (2009) [6.2.403].

8 These interests are discussed in Chapter 6.

9 See the discussion on this point in Chapter 3 under the heading ‘Children, parents and other parties with a direct interest in proceedings’.

Option 3—Office of the Children and Youth Advocate (OCYA)

9.15 These challenges are not new, but appear to have become more difficult over time. In 1993, Justice Fogarty commented on tensions between the Children’s Court magistrates and the Department’s child protection workers who give evidence in child protection proceedings.¹⁰ Justice Fogarty observed that a ‘major issue’ in child protection proceedings in the Children’s Court was that the magistrates and the child protection workers questioned each other’s professionalism (see Appendix D for more detail).¹¹ In 2004, Kirby, Ward and Freiberg noted that:

*The Children’s Court and the Child Protection service are embedded in an adversarial legal system which has historical and cultural determinants. The professional orientations of the Court and the Child Protection service differ and might not ultimately be reconcilable.*¹²

9.16 The friction that exists between the Department and the Children’s Court as a result of their different professional orientations was noted in consultations.¹³ In its submission, the Children’s Court acknowledged the long-held ‘perception of tension between the Department and the Court’.¹⁴

9.17 This friction is not surprising, and to some extent is inevitable, given the inherent tension between the competing principles involved in deciding whether to remove a child from his or her family.¹⁵ As Terry Carney recognised in 1982, in child protection law

*[t]ension exists between, on the one hand, the proponents of the view that the family relationship is sacrosanct and entitled to considerable autonomy, and on the other, the alternative view ... that the state has an overriding duty to step in and protect the interests of its weaker members ... Intersecting with these two fundamental sets of values is the more modern, but equally forceful, articulation of the case in favour of recognizing the independent interests of the child.*¹⁶

9.18 In each individual child protection case, these three different perspectives must be reconciled to achieve the correct balance that can be said to be ‘in the best interests of the child’. However, at present there is, in the majority of cases, no separate party to represent the third view: the independent interests of the child.

9.19 The Department is obliged to protect the child from harm. The lawyers representing the parents will often resist an application for the child to be separated from his or her family by asserting the need to protect and preserve the family unit. The child’s interests will not necessarily fall within either of those two positions and may involve a combination of both. This third view is further complicated by what the High Court has referred to as the

*natural reciprocity between the duty and authority of parents with respect to the nurturing, control and protection of their child and the child’s rights and its interests in being nurtured, controlled and protected.*¹⁷

9.20 In practice, it appears that the Children’s Court, in the absence of any other body, has been expected to identify this third perspective. This practice appears to have sometimes drawn the Court into unhelpful conflict with the Department, which sees itself as having a statutory charter to safeguard the child’s best interests, especially because the Court must decide where the balance between the three views should lie in each case.

- 9.21 In order to reduce this tension, and to properly promote the human rights of each child of whatever age, the Commission believes that there is merit in having an independent party represent the child's interests in every child protection matter. By representing the child's interests and presenting an assessment of how the competing values should be reconciled in the individual case, the independent party can assist the Court and ensure that the child's views are heard while also helping the Court to fulfil its role of being the impartial decision maker when agreement cannot be reached.
- 9.22 To be successful in this role, however, the third party must be able to draw from a specialised body of workers, from both social science and legal backgrounds. Only a body that is independent of both the Department and the Court, but can understand and draw from their different professional orientations, and has the integrity of a stand-alone institution, is likely to gain the trust of DHS child protection workers, legal practitioners and the Children's Court.
- 9.23 A multi-disciplinary body of this nature could play an important role in actively encouraging inter-professional collaboration in this jurisdiction, which is one of the key principles the Commission believes should govern child protection processes.¹⁸
- 9.24 In Option 1, the Commission proposes a fundamental restructuring of the current method used to resolve child protection concerns between parents and the Department; that is, to make FGCs the primary decision-making forum. This new structure would need the support of both the Court and the Department to succeed. The likelihood of success could be enhanced by assigning responsibility for convening FGCs to an independent body that has the force and integrity of an institution in its own right and can draw upon expertise from both legal and social science disciplines. Accordingly, the Commission proposes that this also be a function of OCYA.
- 9.25 The need to introduce a third institution into child protection proceedings that is independent of the Department and the Court was recognised by the Australian Law Reform Commission (ALRC) in 1981, in its report *Child Welfare*.¹⁹ In that report, the ALRC raised the need to address problems that are 'fundamentally institutional' with 'an institutional solution'.²⁰ The Commission believes that similar comments could be made about the need for institutional change in the current Victorian system. The Commission proposes that a statutory commissioner be established to head OCYA, with the functions described below.

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

STRUCTURE OF OCYA

- 9.26 In order for OCYA to operate effectively and fulfil its functions in relation to every protection application made to the Children's Court, a sufficient number and range of professionally qualified staff would be required. A combination of lawyers, social workers, psychologists and other appropriate professionals in the one office should facilitate the sharing of expertise, and ultimately benefit the children and young people OCYA supports and represents.

- 10 Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993) 73,143–7.
- 11 Ibid 144. For a discussion of the recommendations of Justice Fogarty's report, see Appendix D.
- 12 Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004) 40.
- 13 Consultations 4 (DHS Managers), 17 (Victoria Police).
- 14 Submission 46 (Children's Court of Victoria) 86.
- 15 See discussion in Chapter 3 under 'Charter of Human Rights and Responsibilities and international rights instruments', under the sub-heading 'Protection of families and children—a balancing exercise'.
- 16 Terry Carney, 'Recent Developments in Child Welfare in Victoria' (1982) *Recent Developments in Family Law* 36, 37.
- 17 *J v Lieschki* (1987) 162 CLR 447, 458 (Brennan J).
- 18 See the Commission's list of principles under the heading 'The principles that have guided the development of the options' in Chapter 6.
- 19 (Australian) Law Reform Commission, *Child Welfare*, Report No 18 (1981). For a full discussion of this report, see Appendix E.
- 20 Ibid 245.

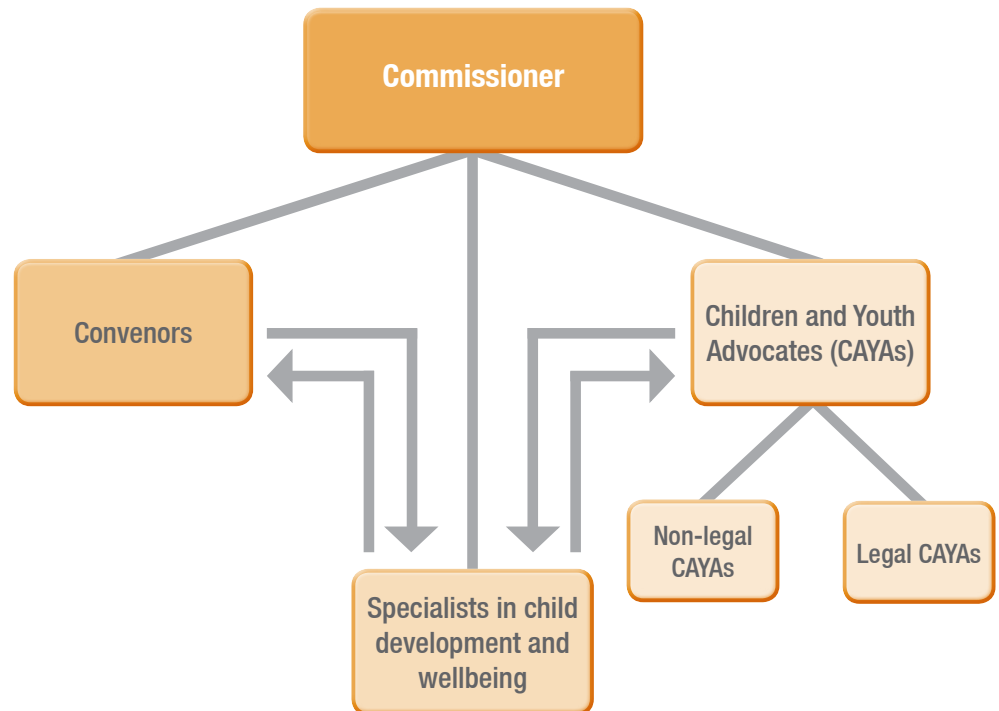
Option 3—Office of the Children and Youth Advocate (OCYA)

9.27 It is envisaged that OCYA would have the following three branches, represented in the diagram below:

- convenors of FGCs
- children and youth advocates, both legal and non-legal
- specialists in child development and wellbeing.

OCYA would need to be adequately resourced in order to play an important role in ensuring that the best interests of children and young people are paramount in child protection processes.

OCYA ORGANISATIONAL CHART



METROPOLITAN HEAD OFFICE AND REGIONAL OPERATIONS

9.28 To deal with child protection matters throughout Victoria, OCYA would need to establish a presence in regional areas. A number of sources alerted the Commission to differences in child protection processes and procedures in regional areas.²¹ To facilitate statewide coverage, but minimise costs, OCYA could be co-located with an existing service in regional areas. The Commission understands co-location already exists between other government services in some regional areas.

OCYA'S OBJECTIVES

9.29 The overarching aims of OCYA's involvement in child protection matters would be to ensure that:

- all decision-making processes are child-centred
- the best interests of children and young people are paramount in all decision-making processes, including supported negotiation

- children and young people have their views and experiences heard and made known in the decision-making process, and are given adequate opportunity to participate in decision-making processes as appropriate
- the best information available is provided in decision-making forums concerning children and young people.

FUNCTIONS TO BE PERFORMED BY OCYA

INTRODUCTION

- 9.30 The new independent statutory commissioner could undertake many of the new activities proposed in Option 1 and Option 2. In particular, OCYA could be responsible for the following:
- convening FGCs
 - representing children and young people at all stages of the process
 - providing specialist services.
- 9.31 In performing these functions, OCYA should act as an 'honest broker' to assist and encourage the parties to reach an agreement that is in the best interests of the child or young person whenever possible. In Tasmania, the separate representative of the child provides a good example of the 'honest broker' role. Because of his or her independence, the separate representative is often able to initiate conferences between the Department, the parents, the child and their legal representatives in order to clarify the issues in dispute.²²

DISTINGUISHING OCYA FROM OTHER AGENCIES

- 9.32 It is important to indicate clearly those functions that the Commission proposes could be fulfilled by OCYA, and those that are unsuitable. OCYA should not be responsible for bringing protection applications to the Court. This function should remain with DHS. The Commission's proposals concerning the carriage of child protection matters on behalf of the Department in the Children's Court are dealt with in Option 4.²³
- 9.33 The role of OCYA should not extend to guardianship and custody powers in relation to children and young people on protection orders. The Department should remain responsible for acting as the custodian or guardian of a child and young person found to be in need of protection, when there is no other more suitable person to undertake this role.²⁴
- 9.34 Additionally, it is not intended that OCYA would take on the Department's primary investigative role in relation to children about whom there are protective concerns, other than to make relevant inquiries to support the functions described below.
- 9.35 The functions that OCYA would adopt are separate from those of the Office of the Child Safety Commissioner (OCSC), which are discussed in Option 5. It is envisaged that OCYA and OCSC would provide complementary services designed to protect and promote the best interests of the children and young people in Victoria. In time, the two offices could merge.

21 Consultations 4 (DHS Managers), 16 (VLA), 27 (FVPLS Victoria); submissions 34 (Victoria Police), 39 (VACCA); Foster Care Association of Victoria Inc, *Results of Consultation with Carers Undertaken by the Foster Care Association of Victoria for Victorian Law Reform Commission* (2010) 16–18.

22 From telephone conversation with Andrew Mead, private legal practitioner, 21 April 2010.

23 See Chapter 10.

24 Note, however, that the Department has the power to delegate this role to the principal officer of an authorised Aboriginal agency: see the discussion in Chapter 3 under 'Institutions and participants involved in child protection proceedings', sub-heading 'Aboriginal agencies'.

Option 3—Office of the Children and Youth Advocate (OCYA)

CONVENING FAMILY GROUP CONFERENCES

- 9.36 In Option 1, the Commission suggests that FGCs should become the primary decision-making forum in Victoria’s child protection system.²⁵ In order for an FGC to be an effective mechanism for resolving protection concerns by agreement, it is essential that the FGC convenor be an independent person.²⁶ A convenor who is independent of the parties is better placed to be an ‘honest broker’ between the parents and the Department.
- 9.37 It is also essential for the FGC process to have the support of all participants in the child protection system, including the Court. FGC convenors should be independent of both the Court and the Department, but respected by both. These goals might be best achieved if an employee of OCYA convenes FGCs. In consultations there was support for an independent statutory commissioner who has a role in relation to ADR processes.²⁷
- 9.38 Placing the function of convening FGCs within OCYA would enable convenors to draw on the expertise of the specialists employed by OCYA, in relation to matters such as training and risk assessment. In Option 1, the Commission suggests that convenors should have appropriate qualifications and training,²⁸ and notes the importance of the Department and families having confidence that convenors have a thorough understanding of child development issues.²⁹
- 9.39 Children and youth advocates employed by OCYA should represent children in FGCs. These advocates and the convenors should be drawn from separate branches of OCYA. After careful deliberation, the Commission believes that these two roles would not be in conflict. VLA effectively manages these quite different functions in a family law context in its Roundtable Dispute Management conferences, in which both convenors and representatives for the parents or the child are employees of VLA.
- 9.40 It is important to note that particular considerations exist in relation to family decision-making processes for Aboriginal children, young people and families. As noted in Option 1, the Commission considers that the Children’s Court (Family Division) Koori Family Support Program (KFSP) is the appropriate vehicle for identifying the specific needs of Aboriginal communities in Victoria in relation to child protection matters.³⁰ Findings of the KFSP should inform the manner in which FGCs would be convened by OCYA for Aboriginal children, young people and families. Considerations for Aboriginal children, young people and families, when convening FGCs, are discussed in greater detail in Chapter 7.

REPRESENTING CHILDREN AND YOUNG PEOPLE

Introduction

- 9.41 The Commission has proposed elsewhere in this report that all children and young people who are the subject of protection matters should be represented.³¹ Option 2 contains a proposed model of representation for children and young people.³²
- 9.42 If OCYA is established, the Commission still envisages that all children and young people would be represented in child protection matters affecting them and that the models of representation described in Option 2 would apply. OCYA, however, would be the body primarily responsible for providing representatives for children.

Children and youth advocates

- 9.43 In order to fulfil its representation function, OCYA could employ a number of children and youth advocates (advocates).³³ As proposed in Options 1 and 2, the child or young person would be represented in both family decision-making processes and in court proceedings.³⁴ In this option, advocates would be both lawyers and non-lawyers. There may be various types of matters and various stages in proceedings where a non-lawyer advocate would be best placed to represent the child. For example, non-lawyer advocates could be appointed in cases in which the legal issues are relatively simple.³⁵
- 9.44 The concept of non-lawyer representatives in protection matters is not new. As noted in Chapter 3, the *Children, Youth and Families Act 2005* (Vic) (CYF Act 2005) provides for a child to be represented by a layperson—that is, a person who is not a legal practitioner or a parent of the child.³⁶ The Commission is not aware of proceedings in which this has occurred.
- 9.45 The Children’s Court referred to the appointment of non-lawyer advocates in its submission, stating that ‘although the Court would generally be reluctant to allow a non-lawyer to represent a child, it is not difficult to think of instances where this might be appropriate.’³⁷ Although the reasons for the Court’s reluctance are not identified in its submission, the Commission suggests that all advocates, lawyers and non-lawyers alike, should be subject to extensive training. All advocates would need to be bound by guidelines relating to:
- the two models of representation for children and young people, and when each is to apply
 - interviewing children and young people and ascertaining their views
 - making an assessment of the child’s or young person’s best interests, in cases where acting on a best interests basis
 - assessing the capacity of children and young people to instruct, in cases where direct instruction may be appropriate
 - avoiding and resolving conflicts of interest
 - court process in protection proceedings.³⁸
- 9.46 In its submission, the Children’s Court approved of non-lawyer representatives being appointed only with the leave of the Court.³⁹ With sufficient training and support for adherence to guidelines, the Commission believes that non-lawyer advocates could effectively represent children and young people in some protection matters before the Court. In its submission, the West Heidelberg Community Legal Service referred to the need for an independent advocate of children, stating that ‘such an advocate need not be a lawyer’.⁴⁰ It should be noted that in some other jurisdictions, the child or young person may be represented by a lay advocate in an FGC.⁴¹ However, the Commission envisages the role of non-lawyer advocates within OCYA extending beyond that played by any layperson. The advocates, both lawyers and non-lawyers, should be appropriately qualified professionals trained in the representation of children.

- 25 See Chapter 7, Proposal 1.5.
- 26 See the discussion about the importance of the independence of FGC convenors in Chapter 7.
- 27 Consultations 20 (DHS Community Care Managers), 23 (DRC), 27 (FVPLS Victoria).
- 28 See Chapter 7, Proposal 1.2.
- 29 The qualifications, training and functions of FGCs convenors are discussed in Chapter 7.
- 30 The Koori Family Support Program is discussed in Chapter 7.
- 31 See discussion of representation in Chapter 8 under the heading ‘The need for all children and young people to be represented in protection proceedings’.
- 32 See Proposal 2.16 in Chapter 8. Although this model of representation was proposed in Option 2 specifically in the context of protection proceedings before the Family Division of the Children’s Court, it could equally apply to family decision-making processes with additional guidelines to regulate the role of the child’s representative. The term ‘family decision-making processes’ is used to refer to family group conferences, conciliation conferences and judicial resolution conferences. In Option 1, the Commission acknowledges the importance of legal advice around family decision-making processes and proposes that the child, at least, should have a representative in these processes. See Chapter 7 discussion of representation of children in family decision-making processes.
- 33 ‘Children and youth advocates’ will be referred to in this chapter as ‘advocates’ for simplicity. ‘Advocates’ is not being used to refer to representatives of other parties involved in protection matters, but rather children’s representatives employed by OCYA.
- 34 As noted, ‘family decision-making processes’ is used to refer to family group conferences, conciliation conferences and judicial resolution conferences.
- 35 This idea was raised in the Department of Health (UK) *Consultation Paper: Support Services in Family Proceedings—Future Organisation of Court Welfare Services* (1998) 42.
- 36 *Children, Youth and Families Act 2005* (Vic) s 524(8). As noted in Chapter 5, the New Zealand CYPF Act 1989 also provides for lay advocates to represent children and young people in FGCs: *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1).
- 37 Submission 46 (Children’s Court of Victoria) 67.
- 38 As noted above, additional guidelines for representatives may be necessary in relation to family decision-making processes.
- 39 Submission 46 (Children’s Court of Victoria) 67. This is the situation as provided for under *Children, Youth and Families Act 2005* (Vic) s 524(8).
- 40 Submission 24 (WHCLS).
- 41 See, for example, New Zealand: *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1); and South Australia: *Children’s Protection Act 1999* (SA) s 29(2). See Chapter 5 for this point in relation to New Zealand, and Chapter 4 for South Australia.

Option 3—Office of the Children and Youth Advocate (OCYA)

9.47 A report prepared for the Commission by Foster Care Association Victoria (FCAV) for the purposes of this reference also recommended that children have skilled advocates.⁴² According to FCAV:

*These advocates would understand child development and the impact of traumatic events and child abuse. They would know not only what to ask children, but also how to best act upon what they have heard.*⁴³

This comment emphasises the benefit of child representatives having the relevant professional experience and expertise to efficiently and sensitively interact with and represent children.

9.48 The Commission favours a flexible approach to the appointment of lawyer and non-lawyer advocates within OCYA. In certain cases it may be more appropriate to appoint a non-lawyer advocate and in other cases a lawyer may better meet the child's or young person's needs. The Commission envisages a non-lawyer advocate with relevant social work experience being particularly useful, for example, early in proceedings where risk assessment is critical. Additionally, a non-lawyer advocate, perhaps with child psychology expertise, might be especially skilled in interviewing children and young people in order to elicit their views. Many children and young people involved in the consultation with CREATE expressed a desire to have proceedings explained to them in language they could understand.⁴⁴ Advocates would not necessarily have to have legal expertise and training to fulfil this function when a matter concerning a child or young person is initially referred to OCYA for FGC.

9.49 A 1998 Welsh Department of Health report made several suggestions about the appointment of non-lawyer representatives for children in the context of their guardian *ad litem* system. The report suggested that if a non-lawyer representative was initially appointed, the opportunity to later appoint a legal representative must be available if the necessity arose.⁴⁵ The report also suggested that legal representatives should be able to withdraw from cases if legal representation was no longer necessary, and that access to legal advice should always be available from the outset even if the child's appointed representative is a non-lawyer.⁴⁶ Considerations such as these may need to be adopted in relation to representation of children and young people by OCYA's non-lawyer advocates.

9.50 While the Commission has canvassed the many advantages of having children and youth advocates with experience and expertise in disciplines other than law, there would still be an ongoing need for lawyer advocates who would represent the child or young person in legally complicated cases.

Models of representation and avoiding conflicts

9.51 Advocates from OCYA should represent children and young people on the models set out in Option 2.⁴⁷ This means that children and young people would be represented by OCYA on a best interests basis, unless:

- a mature child or young person has a desire to fully participate in proceedings and has the understanding and capacity to direct their representation
- the child or young person, having had explained to them the duty of a representative to directly relay the child's or young person's views to the Court, nevertheless refuses to accept representation on a 'best interests' basis.⁴⁸

- 9.52 Where these conditions are satisfied, an advocate from OCYA should be appointed to represent the child or young person on his or her instructions. Where necessary, advocates may wish to draw on the expertise of OCYA specialists to determine whether a child or young person should be directly represented.
- 9.53 If OCYA was providing representation for just one child or young person, and it was deemed appropriate for that child or young person to be represented on his or her instructions, then an OCYA advocate would act as the child's or young person's direct representative. However, where OCYA had appointed an advocate to act in the best interests of a sibling group, and it was determined that an older sibling was to be represented on instructions, a direct representative from outside OCYA would need to be appointed to avoid any conflict of interest.
- 9.54 OCYA could not appoint both an advocate to act in the sibling group's best interests and another advocate to act on the instructions of an older sibling in the one matter. However, the Commission does not consider that a conflict would arise where an advocate acting on a best interests model for a sibling group was required to put divergent views to the Court from different children in that sibling group. The advocate would be presenting the individual views of each child in addition to an overall assessment of the children's best interests.

Role of advocates in obtaining expert reports and assisting decision making

- 9.55 The Commission envisages that where an OCYA advocate is acting on a best interests representation model, he or she would have a role in obtaining expert reports to inform the child's representation and assist decision making.⁴⁹ This is a typical role for a best interests representative to fulfil—gathering information to put before the decision maker and thereby enabling the decision maker to determine what is in the child's best interests.⁵⁰
- 9.56 This role would be important both in family decision-making processes⁵¹ and in proceedings before the Family Division of the Children's Court. In family decision-making processes, it may be necessary, for example, to obtain an expert report for informed negotiation and decision making to continue. This would be necessary in circumstances where an issue required determination before discussion and decision making could take place. An advocate acting for a child or young person on a best interests basis would be responsible for seeking expert reports or otherwise gathering information to enable participants in a family decision-making process to reach an agreement in the child's best interests.
- 9.57 Similarly, advocates acting on a best interests basis and appearing in hearings before the Court would gather relevant information, including expert reports. These expert reports could come from the specialists within OCYA or an external source. The Commission believes that a conflict would not arise where both the child's or young person's representative and an expert report came from within OCYA.
- 9.58 Where a child or young person is represented directly by an OCYA advocate, that advocate would not have this information-gathering role. It is the role of the direct representative to act on the child's or young person's instructions, and the direct representative is not required to provide information beyond those instructions.⁵² It is important for the representative-client relationship that the child's or young person's instructions are not undermined by information gathering that is inconsistent with those instructions. However, the direct representative could obtain expert reports if this was consistent with the child's or young person's instructions.

42 Foster Care Association of Victoria Inc, above n 21, 18.

43 Ibid.

44 CREATE Foundation, *Children and Young People in Care Consultation for the Victorian Law Reform Commission Report* (2010) 7.

45 Department of Health (UK), above n 35, 42.

46 Ibid.

47 See Chapter 8 under the heading 'Representation of children and young people in proceedings'. The Commission's proposed model of representation is set out under the subheading 'The Commission's views'.

48 See Chapter 8, Proposal 2.16.

49 This role may need to be performed at any stage, including FGCS, conciliation conferences, judicial resolution conferences and proceedings before the Family Division of the Children's Court.

50 See, for example, the role of the ICL in family law. This is discussed below and throughout Chapter 8.

51 Including FGCS, conciliation conferences and judicial resolution conferences.

52 The role of the direct representative is discussed in Chapter 8 under the heading 'The direct representative'.

Option 3—Office of the Children and Youth Advocate (OCYA)

- 9.59 It is possible in certain circumstances that the Court will desire more information on which to base its determination. At any stage of proceedings, and regardless of the model on which the child is represented, the Court must have the power to request expert reports or other information on its own motion, even where the child's representative is not responsible for facilitating the provision of those reports.⁵³ The Commission suggests that this power could include the Court requesting expert reports from within OCYA without conflict arising, even where a child or young person was directly represented by an advocate from OCYA. The representation and specialist branches of OCYA would need to be distinct and an OCYA direct representative for a child would be able to cross-examine a specialist from OCYA where necessary.⁵⁴
- 9.60 In circumstances where an advocate from OCYA directly represents the child or young person and the Court requires further information to make its determination, it should also retain the power to appoint a best interests representative for the child or young person if required. The Commission considers that this would only occur in rare cases, in circumstances where the Court considered it was unable to make its determination without appointing a best interests representative.

Continuity of the representative

- 9.61 It is highly desirable that, whenever possible, the same advocate represents a child or young person throughout the entire process. One advocate should have responsibility for a child's or young person's matter from the time a case is referred to OCYA for an FGC until any proceedings before the Family Division of the Children's Court are finalised. If a lawyer has been acting for a child in the Children's Court on a best interests basis, and the case is subsequently heard in a family court and an independent children's lawyer (ICL) is requested, ideally that lawyer should be the same lawyer who appeared for the child in the Children's Court.⁵⁵ In cases that are transferred from the family courts where an ICL has been acting for a child to the Children's Court, it is suggested that either the ICL continues to appear for the child, if best interests representation is the appropriate model, or otherwise liaises closely with the OCYA advocate.
- 9.62 Continuity of representation is also important when a non-lawyer advocate is appointed to represent a child in FGCs and Children's Court proceedings. If the non-lawyer advocate needs to engage a lawyer for court hearings, it is envisaged that the non-lawyer would continue to be the child's advocate and maintain a close working relationship with the child. In this way, the non-lawyer advocate would minimise the need for the child or young person to unnecessarily repeat information to a legal representative. If a case were subsequently heard in either the Family Court or Federal Magistrates Court, the non-lawyer advocate would not be qualified to appear as an ICL. The non-lawyer advocate could, however, work closely with any ICL to assist the child.

Representation of Aboriginal children

- 9.63 Several submissions raised the importance of representation for Aboriginal children in child protection processes.⁵⁶ In its submission, the Aboriginal Family Violence Prevention and Legal Service stated:

*FVPLS Victoria is of the view that ATSI children and families must have the option to access legal assistance through ATSI legal services where cultural issues and holistic service provision are at the forefront of advocacy.*⁵⁷

It was also noted in this submission that Aboriginal legal services would need to be resourced adequately to facilitate representation in the Children's Court, and that processes would need to be implemented to support such representation.⁵⁸

- 9.64 The Commission envisages that OCYA would have responsibility for all children and young people who are the subject of protection matters in Victoria, including Aboriginal children and young people. This means that OCYA advocates would be responsible for representing Aboriginal children and young people,⁵⁹ for which specific, culturally-appropriate practices would need to be developed.
- 9.65 To ensure adequate representation of Aboriginal children and young people in child protection matters, OCYA would need advocates with the necessary cultural competence, as well as training in the representation of children and young people. Guidelines governing the representation of children and young people, as discussed above,⁶⁰ would need to encompass representation issues specific to Aboriginal children and young people. These guidelines would need to be developed in partnership with Aboriginal agencies. If OCYA were to represent Aboriginal children and young people, there would need to be a specialised group of advocates to perform this function.
- 9.66 In its submission, the Victorian Aboriginal Child Care Agency Co-Op emphasised the need for all children to have an advocate, and proposed expanding the functions of the Aboriginal Child Specialist Advice and Support Service (ACSASS) to fulfil this role for Aboriginal children and young people.⁶¹ The Commission considers that ACSASS or a similarly expert advisory body would need to be involved in the representation of Aboriginal children and young people by OCYA. Aboriginal agencies would need to be involved in developing practice guidelines for the representation of Aboriginal children and young people through OCYA. The Commission reiterates its view that the Children’s Court (Family Division) Koori Family Support Program is the appropriate vehicle for identifying the specific needs of Aboriginal communities in Victoria in relation to child protection matters.

PROVIDING SPECIALIST SERVICES

- 9.67 OCYA should have an in-house body of experts in child development and wellbeing who would:
- provide expert input to advocates and convenors in the performance of their functions
 - assist with training and professional development of advocates and convenors
 - provide expert reports to family decision-making forums and the Court in some circumstances.
- 9.68 As well as professionals with expertise in child development and wellbeing, it would also be beneficial for the body of specialists within OCYA to include culturally competent professionals, who could inform OCYA’s operations when representing and convening FGCs for Aboriginal children, young people and families. Such specialists would need to liaise with Aboriginal agencies.
- 9.69 Having such specialists within OCYA would benefit not only Aboriginal children and young people, but also those from other culturally and linguistically diverse (CALD) communities. Specific considerations relating to CALD communities were raised in consultations and submissions.⁶² A devolved consultation undertaken by Myriad Consultants for the purposes of this reference identified cultural barriers experienced by Afghani, Sudanese and Somali people when interacting with the child protection system in Victoria.⁶³ Employment of culturally competent specialists within OCYA, who could liaise with relevant community leaders and engage translators, might mitigate some of the difficulties experienced in Victoria’s child protection system by people from new and emerging communities. These specialists would assist OCYA’s convenors and advocates in their provision of services to children, young people and families from CALD communities.

- 53 It should be noted that the *Children, Youth and Families Act 2005* (Vic) already provides for the Family Division of the Children’s Court to ‘inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary’ (s 215(1)(d)) and gives the Family Division the power to summons any person to give evidence or produce documents or things before the Court, with or without any party having made an application for it to do so (s 532). This means that the Family Division already has the power to inform itself of certain matters by summoning persons, including experts, to give evidence in protection proceedings.
- 54 Lawyers from Legal Aid Queensland have the capacity to adduce further evidence from their in-house social workers with the leave of the court: telephone conversation with Kyle Terrance, Queensland Legal Aid, 15 June 2010.
- 55 All OCYA legal representatives would need to be accepted on the VLA panel of ICLs, and VLA (who allocate ICLs) would need to be notified that a particular OCYA lawyer had been representing a child.
- 56 See, for example, submissions 26 (FVPLS Victoria), 38 (VALS), 39 (VACCA).
- 57 Submission 26 (FVPLS Victoria).
- 58 Ibid.
- 59 Unless a child was represented by an Aboriginal legal organisation.
- 60 See above under the heading ‘Children and youth advocates’.
- 61 ACSASS currently provides advice to the Department on culturally appropriate intervention for Aboriginal children and young people alleged to be at risk of abuse and/or neglect: Submission 39 (VACCA).
- 62 See, for example, consultation 23 (DRC); submissions 15 (Connections), 43 (VCOSS & YACVic).
- 63 Myriad Consultants, *Protection Applications in the Children’s Court: Report of Consultations with New and Emerging Communities* (2010) 17.

Option 3—Office of the Children and Youth Advocate (OCYA)

Providing expert input for advocates and convenors

- 9.70 The Commission envisages that a body of experts within OCYA would greatly assist both advocates and convenors in carrying out their respective functions.
- 9.71 Various systems in other jurisdictions demonstrate the benefits of lawyers working collaboratively with other experts, such as social workers, in child protection matters. As noted in the discussion of Option 2,⁶⁴ a number of stakeholders recommended that a guardian *ad litem* system be adopted.⁶⁵ In cases where the guardian is instructing the child’s solicitor on behalf of the child, the guardian is providing social work expertise and input about the child’s best interests. Both non-lawyer advocates and specialists in child development and wellbeing working within OCYA could provide this type of input. Employing non-lawyer advocates and a central body of experts within OCYA would eliminate the need for dual representation—both a guardian *ad litem* and a solicitor for the child—which occurs in some other jurisdictions, such as England.
- 9.72 In Option 2, the Commission also discussed the collaborative relationship that exists between ICLs and other experts in family law cases.⁶⁶ The experts may be either family consultants, engaged by the Family Court and Federal Magistrates Court, or private practitioners with relevant social science qualifications and experience.⁶⁷ ICLs are responsible for gathering information from various professionals that may not have been obtained by the parties to ensure that all relevant material regarding the child is put before the court.⁶⁸ Experts can assist the ICL in making their assessment of the child’s best interests and may provide guidance on issues of child development and wellbeing.
- 9.73 The ICL guidelines explicitly provide that the ICL should seek to work together with any family consultant or external expert in the case to promote the child’s best interests.⁶⁹ The ICL is also encouraged to seek peer and professional support where a case raises issues beyond his or her expertise.⁷⁰ When making submissions about the weight to be given to a child’s views, it may be necessary for the ICL to consult with the family consultant or other expert in relation to questions of:
- the content of the child’s views
 - the context in which those views arise and are expressed
 - the willingness of the child to express views
 - any relevant factors associated with the child’s capacity to communicate.⁷¹

It is these kinds of assessments that the in-house specialists at OCYA could assist the advocates to make. Experts may also assist the ICL in making an assessment of whether, where and how to meet with the child,⁷² and may be able to provide information relating to the dynamics of the family, for example.⁷³

- 9.74 Ontario's Office of the Children's Lawyer (OCL) is an organisation that utilises multidisciplinary collaboration. OCL is responsible for providing representatives for children in various types of proceedings, including child protection proceedings.⁷⁴ As well as a role in providing legal representation, OCL also employs 'clinical investigators',⁷⁵ who need to have social work qualifications.⁷⁶ Clinical investigators may assist lawyers where there are serious clinical concerns that need to be addressed for the lawyer to represent the interests of the child.⁷⁷ A lawyer within OCL may provide a clinical investigator with legal advice and guidance to assist with preparation of reports.⁷⁸ For example, assistance may be required on issues such as evidence, interpretation of documents and legal procedures.⁷⁹ While clinical investigators are responsible for preparing OCL reports in custody and access cases,⁸⁰ it is rare that both an expert report and legal representation would be provided by the OCL in the same case.⁸¹
- 9.75 Legal Aid Queensland employs social workers who prepare family reports for family law matters and social assessment reports for proceedings in the Children's Court of Queensland.⁸² These social workers only accept referrals from in-house ICLs in family law matters and children's separate representatives in protection matters.⁸³ In these particular cases, Legal Aid Queensland lawyers are not representing either parent, so conflicts of interest are avoided.⁸⁴
- 9.76 The kind of expert input for children's representatives detailed above is particularly useful, as in the case of the ICL, where the representative is required to make assessments and submissions to the Court regarding what is in the child's best interests. Specialists within OCYA would assist advocates acting on instructions in different ways. For example, expert input in relation to communicating with children and eliciting and interpreting their instructions would be invaluable to an advocate acting on a direct representation model.
- 9.77 Specialists within OCYA could also assist FGC convenors in the fulfilment of their functions by providing expert advice on matters such as family dynamics, power imbalances between negotiating parties, screening and risk assessment.⁸⁵

Assisting with training and professional development

- 9.78 As well as providing expert input for the other branches of OCYA, the in-house specialists at OCYA could assist with training of advocates and FGC convenors. Such training would need to address matters such as:
- risk assessment
 - interviewing children and eliciting their views and instructions
 - child-inclusive practices, such as explaining processes in language that the child or young person is able to understand
 - issues impacting on what is in the child's best interests.
- 9.79 The in-house specialists at OCYA would have an ongoing research role, to ensure that OCYA's convenors and advocates remained aware of current information in relation to child development and wellbeing.

Providing expert reports

- 9.80 Where advocates are acting on a best interests basis they could have a role in obtaining expert reports for family decision-making forums and, in some circumstances, the Court. The Court should have the power to request expert reports on its own motion. There is potential for the specialists within OCYA to provide these reports.

- 64 See Chapter 8 under the heading 'Relevant models of representation in overseas jurisdictions' for a detailed discussion of guardian *ad litem* systems in England and Wales, Northern Ireland, Florida, Michigan and the 'safeguarder' role in Scotland.
- 65 See, for example, consultations 18 (DHS CP Workers Gippsland), 20 (DHS Community Care Managers), 22 (DHS CP Workers Southern), 24 (Prof Cathy Humphreys); submissions 8 (Angela Smith), 29 (Anglicare Victoria), 37 (OCSC), 38 (VALS), 41 (Australian Childhood Foundation).
- 66 See Chapter 8 for this discussion.
- 67 See Chapter 8 for this discussion.
- 68 *P and P* (1995) 19 Fam LR 1, 33.
- 69 Family Court of Australia, *Guidelines for Independent Children's Lawyers*, endorsed by the Chief Justice of the Family Court of Australia and by the Federal Magistrates Court of Australia (2007) 2.
- 70 *Ibid.*
- 71 *Ibid.* 4.
- 72 *Ibid.* 6.
- 73 *Ibid.*
- 74 Ministry of the Attorney General, Ontario Office of the Children's Lawyer, *More About What We Do* (2007) <www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp> at 3 June 2010.
- 75 *Ibid.*
- 76 Ministry of the Attorney General, Ontario Office of the Children's Lawyer, *Join the Office of the Children's Lawyer* (2007) <www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp> at 3 June 2010.
- 77 Ministry of the Attorney General, Ontario Office of the Children's Lawyer, *More About What We Do*, above n 74.
- 78 *Ibid.*
- 79 *Ibid.*
- 80 *Ibid.* The Commission is aware that most collaboration between lawyers and experts in the OCL occurs in custody and access cases rather than protection cases.
- 81 Ministry of the Attorney General, Ontario Office of the Children's Lawyer, *More About What We Do*, above n 74.
- 82 Email from Kyle Terrance at Queensland Legal Aid, 9 June 2010.
- 83 *Ibid.*
- 84 *Ibid.*
- 85 The importance of such considerations when convening FGCs is discussed in Chapter 7.

Option 3—Office of the Children and Youth Advocate (OCYA)

Distinguishing non-lawyer advocates from OCYA specialists

- 9.81 Both lawyer and non-lawyer advocates should be supported by an in-house body of specialists in child development and wellbeing. While there is likely to be some overlap between the role of non-lawyer advocates and the role of specialists within OCYA, the two roles should be distinguished and the representation and specialist branches of OCYA should be separate.
- 9.82 As detailed above, the advocates' role is to represent children and young people in protection matters. OCYA specialists would play a role in assisting the advocates and convenors to perform their functions by providing expert input, and in training and professional development. While non-lawyer advocates would bring certain expertise to bear on their representation of children and young people, the purpose of having an in-house body of experts is to broaden the competence of all advocates and convenors.

Proposal 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.

Proposal 3.3: In performing the above 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.

Proposal 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.

INDEPENDENCE OF OCYA

- 9.83 It is important that OCYA be an independent body so that it enjoys the confidence of the families, children and young people who are involved in protection matters, the Children's Court, the Department and the broader community. The need for widespread confidence in OCYA would be vital, because the issues at stake in protection matters have such far-reaching consequences for the people directly involved and because the jurisdiction is much in need of an 'honest broker' who can assist the parties to reach agreements in structured and supportive environments.

9.84 Perceptions of independence are likely to be just as important as actual independence in bringing about real change. A new statutory commissioner that is established to:

- facilitate FGCs
- be the advocate for each child involved in a protection matter
- assist the Children’s Court to act in an inquisitorial manner

would need to be sufficiently removed from the Department—the representative of the state in child protection matters—for those perceptions of independence to be widely held. It is important, therefore, that OCYA report to a minister other than the minister responsible for DHS. The Attorney-General would be the most appropriate minister to have responsibility for OCYA.

9.85 OCYA’s independence should be secured through appropriate appointment, tenure and reporting provisions in the legislation creating the new statutory commissioner. The Public Advocate is a useful model of a statutory commissioner who is involved in advocacy for vulnerable people in individual cases.⁸⁶ The Commission suggests that the provisions in Schedule 3 of the *Guardianship and Administration Act 1986* (Vic), concerning the Public Advocate’s appointment, tenure, and removal from office are appropriate for the statutory commissioner to head OCYA. Importantly, the Governor in Council should appoint the commissioner of OCYA, like the Public Advocate, for a period of seven years, and the commissioner should have the same security of tenure as the Public Advocate.⁸⁷

9.86 Parliamentary reporting powers are important because they provide statutory officers with the opportunity to speak directly to the elected representatives of the entire community. In view of the large number of reports into the child protection system over the past few decades, it is highly likely that most members of parliament would have a strong interest in receiving regular reports from OCYA about its activities. The Commission proposes that OCYA be required to report annually to parliament.

Proposal 3.5: The Commissioner should:

- a) be appointed by the Governor in Council
- b) hold office for a period of 7 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.

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

86 The functions of the Public Advocate, which involve advocating for people with a disability, are set out in the *Guardianship and Administration Act 1986* (Vic) s 15.

87 See *Guardianship and Administration Act 1986* (Vic) sch 3.

Chapter 10

Option 4—Representing the Department of Human Services: A Role for the VGSO in Protection Matters

CONTENTS

- 386 Introduction
- 386 The Secretary's statutory functions
- 386 The Department of Human Services legal services
- 388 Views in consultations and submissions
- 391 Practices in other jurisdictions
- 392 Models of legal representation
- 397 The Commission's views

Option 4—Representing the Department of Human Services

INTRODUCTION

10.1 In this option, the Commission proposes a new system for conducting cases on behalf of the protective interveners in the Children’s Court.

THE SECRETARY’S STATUTORY FUNCTIONS¹

10.2 The *Children, Youth and Families Act 2005* (Vic)² gives the Secretary of the Department of Human Services (DHS)³ numerous functions and powers in relation to family services,⁴ child protection,⁵ and children and the criminal law.⁶

10.3 The Secretary’s many child protection functions include assisting families,⁷ promoting the prevention of child abuse and neglect,⁸ ensuring children receive appropriate care,⁹ conducting research into child welfare¹⁰ and developing policy.¹¹ The Secretary also has other functions and powers that range from keeping a register of out-of-home carers¹² and community services,¹³ preparing and reviewing case plans for children,¹⁴ to making determinations on reports received from mandatory reporters.¹⁵ The Secretary also has the power to conduct inquiries as he or she considers appropriate.¹⁶

10.4 The Secretary oversees the guardianship and custody of children,¹⁷ and the placement of children in care.¹⁸ The Secretary also has the power to apply for a temporary assessment order with or without notice¹⁹ and to make a protection application as a protective intervener.²⁰

THE DEPARTMENT OF HUMAN SERVICES LEGAL SERVICES

10.5 A range of in-house and procured legal service providers assist the Secretary to perform his or her many functions. The in-house legal service providers include:

- the Legal Services Branch
- regional court officers²¹
- in-house lawyers.

10.6 The Department’s Legal Services Branch (LSB) provides legal advice to child protection workers about child protection matters through the Community Services Team and the Court Advocacy Unit (CAU).²²

10.7 In addition to in-house services, DHS also procures legal services through the Government Legal Services Panel.²³ The Government Legal Services Panel involves a formal tender process for private law firms who are engaged on an occasional basis to provide services in metropolitan legal matters.²⁴

THE COMMUNITY SERVICES TEAM

10.8 The Community Services Team is responsible for matters involving former wards of state, applications under the Hague Convention on child abduction,²⁵ adoption, and VCAT matters in the guardianship list. It also provides legal advice in matters where there is no current child protection application before the court and a question of statutory interpretation arises.²⁶ This advice is provided with the assistance of the CAU, as it has expertise in operational matters.²⁷

THE COURT ADVOCACY UNIT

10.9 The CAU was formed in 1994 to incorporate both court officers and legal representatives within one unit.²⁸ The CAU was established as a unit within the LSB to maximise the integration and expertise brought to the full range of child protection matters,²⁹ and to ensure the legal professional privilege of the Secretary is preserved.³⁰

10.10 The CAU is currently composed of a manager, principal, senior solicitors, solicitors, paralegals and administrative staff.³¹ The CAU also briefs barristers to appear in protection applications in contested matters:³²

*In this instance, the CAU plays a portion of the role of instructing solicitor, particularly in the more complex or sensitive matters before the court. However, Child Protection practitioners play a significant role instructing counsel about the facts of matters and the outcomes sought and the rationales for them.*³³

10.11 The CAU provides legal and strategic operational advice in all jurisdictions where the Secretary is the applicant in a child protection application.³⁴ The Community Services Team and the CAU also provide duty services to regional and rural offices.³⁵ Each day, two CAU lawyers take duty calls on current or pending protection applications.³⁶

OPERATIONS OF THE COURT ADVOCACY UNIT

Metropolitan legal service delivery

10.12 The CAU represents or arranges representation for the Department in child protection proceedings in metropolitan Melbourne.³⁷ The CAU 'usually appear in mention matters, direction hearings and submission contests in the Children's Court'.³⁸

10.13 Child protection workers are required to 'seek legal consultation and advice at the earliest point of statutory intervention' in each case.³⁹ The Commission understands that the current model of early involvement of legal services is the Litigation Management Model (LMM).⁴⁰ The aim of the LMM is to ensure the identification and management of legal risk, and to achieve optimal outcomes at court.⁴¹ An important new feature of the model is that the same solicitor is responsible for the legal management of a matter after it is initially allocated.⁴²

Rural region legal service delivery

10.14 As discussed in Chapter 3, the Department's operations are divided into regions, including rural regions. Rural child protection workers can contact the CAU duty service that operates daily to provide legal advice.

- 1 This section provides a brief overview of the Secretary's statutory functions in relation to child protection only. The Secretary also has functions in the areas of housing, disability and other community services.
- 2 An overview of the Act and participants in the child protection system is provided in Chapter 3.
- 3 See s 16 of the *Children, Youth and Families Act 2005* (Vic). The Secretary is given a broad power of delegation by s 17 of the Act. The *Children, Youth and Families Act 2005* (Vic) *Instrument of Delegation and Revocation* contains the delegations for each of the Secretary's functions and powers.
- 4 See *Children, Youth and Families Act 2005* (Vic) ch 3.
- 5 See *Children, Youth and Families Act 2005* (Vic) chs 4, 6, 7.
- 6 See *Children, Youth and Families Act 2005* (Vic) ch 5.
- 7 *Children, Youth and Families Act 2005* (Vic) s 16(1)(b).
- 8 *Children, Youth and Families Act 2005* (Vic) s 16(1)(a).
- 9 *Children, Youth and Families Act 2005* (Vic) s 16(1)(d)–(e).
- 10 *Children, Youth and Families Act 2005* (Vic) s 16(1)(h).
- 11 *Children, Youth and Families Act 2005* (Vic) s 16(1)(c).
- 12 *Children, Youth and Families Act 2005* (Vic) s 80(1).
- 13 *Children, Youth and Families Act 2005* (Vic) s 54.
- 14 *Children, Youth and Families Act 2005* (Vic) ss 166(1), 168.
- 15 *Children, Youth and Families Act 2005* (Vic) s 187.
- 16 *Children, Youth and Families Act 2005* (Vic) s 62.
- 17 *Children, Youth and Families Act 2005* (Vic) s 172(1).
- 18 *Children, Youth and Families Act 2005* (Vic) s 174.
- 19 *Children, Youth and Families Act 2005* (Vic) ss 229(1), 238(1).
- 20 *Children, Youth and Families Act 2005* (Vic) ss 181, 240.
- 21 The court officer role is discussed in Chapter 3.
- 22 These units are composed of twenty-four lawyers and four lawyers respectively.
- 23 Further detail on the Government Legal Services Panel and the Legal Panel Gateway for panel work is described in the section below.
- 24 The difficulties of extending the Government Legal Services Panel to regional areas are discussed in Beaton Consulting, *Report on the Legal Services to Government Contract* (2007) 36. The Commission understands that rural regions may choose to directly engage private solicitor firms for court work, as discussed below.
- 25 *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, Hague XXVIII (entered into force 10 December 1983).
- 26 Email from Department of Human Services (Victoria), 22 June 2010.
- 27 Ibid.
- 28 Email from Department Human Services (Victoria), 15 June 2010.
- 29 Email from Department of Human Services (Victoria), 16 June 2010.
- 30 Department of Human Services (Victoria), Email 22 June 2010, above n 26.
- 31 Ibid.
- 32 Chapter 3 discusses statistics in regards to the number of contested child protection matters.
- 33 Department of Justice (Victoria), *Guide to Court Practice for Child Protection Practitioners 2007* (2007) 6.
- 34 The jurisdictions covered are the Children's Court of Victoria, the Magistrates' Court of Victoria, the County Court of Victoria, the Supreme Court of Victoria and the Family Court of Australia.
- 35 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Legal Services Branch', Advice No 1337 (23 April 2007), from CD-ROM provided at 23 March 2010, 230.
- 36 During May 2010, the CAU took 288 duty calls: Department of Human Services (Victoria), Email 22 June 2010, above n 26.
- 37 Department of Justice (Victoria), *Guide to Court Practice*, above n 33, 5.
- 38 Ibid 6. These arrangements are discussed in detail in Chapter 3.
- 39 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Early Legal Advice', Advice No 1339 (23 April 2007), from CD-ROM provided at 23 March 2010, 233.
- 40 Department of Human Services (Victoria), Email 16 June 2010, above n 29.
- 41 Ibid.
- 42 Ibid. This issue is also discussed in the 'Ombudsman's Comment' section below.

Option 4—Representing the Department of Human Services

- 10.15 Rural departments have a different system for court matters.⁴³ They directly employ in-house solicitors and court officers who mostly work autonomously, subject to regular meetings and consultations with the CAU manager.⁴⁴ The role of rural solicitors is broadly similar to that of their counterparts in the CAU, but a larger portion of their time involves advocacy at various rural courts.⁴⁵ Rural solicitors generally take instructions directly from child protection workers.
- 10.16 Rural solicitors often travel long distances between sub-offices within their region.⁴⁶ This requirement limits the time solicitors can spend on their office work. Because of distance constraints, workloads and other commitments, rural regions may also employ barristers and private law firms to act on their behalf.⁴⁷ The engagement of private firms is usually coordinated by the Department's rural solicitor. If the rural solicitor is absent, the child protection manager in the regional office may take this responsibility.⁴⁸
- 10.17 The number of rural private legal practitioners with experience in child protection matters is quite small. Some of these solicitors also act for families on grants of legal aid. In some rural regions, child protection workers are required to draft orders and present uncontested matters to the court; that is, 'the rural practitioner is sometimes both applicant in the application and representative of the department before the court'.⁴⁹

OMBUDSMAN'S COMMENTS

- 10.18 In his November 2009 report to parliament, the Victorian Ombudsman noted that 'several witnesses expressed concern as to whether sufficient legal support was provided by the department to enable child protection workers to present cases to the best of their ability'.⁵⁰ He referred to concerns about whether all child protection workers were able 'to write court reports and to give competent evidence in the Children's Court'.⁵¹ The Ombudsman also mentioned concerns about 'the quality of the department's legal representation'.⁵² He highlighted issues with the current operating model, both regional and metropolitan, and noted recent Department initiatives designed to deal with some of those matters.⁵³ The LMM is an important recent initiative designed to address the issue of multiple lawyers in individual cases.

VIEWS IN CONSULTATIONS AND SUBMISSIONS

- 10.19 The Commission heard a range of views about the current system for conducting child protection applications on behalf of the Department. There was broad support for change.
- 10.20 The Children's Court and many others were of the view that DHS has too many child protection functions.⁵⁴ The Court stated in its submission:
- At present the Department performs a number of functions, including the inherently contradictory dual roles of both assisting children and families and initiating and conducting court proceedings involving those same families in child protection cases and sometimes in intervention order cases ... Given the conflictual [sic] nature of those two roles, it is not surprising that tensions often exist between the Department and the family members, particularly at court.*⁵⁵
- 10.21 Other submissions highlighted the many roles of child protection workers, noting that they often perform many of the tasks that a solicitor would perform, such as filing court documents (including subpoenas), drafting affidavits and preparing documents and reports for hearings.⁵⁶

DHS STAFF ATTRITION AND KNOWLEDGE OF LEGAL PROCESSES

- 10.22 It was suggested that some child protection workers, or their managers, do not accept the advice given by Departmental lawyers and instruct them to put untenable arguments to the Court. For example, some consultees expressed concern that Departmental lawyers could be 'held captive' by the unrealistic instructions of child protection workers.⁵⁷ One submission referred to 'protective workers regularly rejecting the advice of their own legal representatives'.⁵⁸
- 10.23 While there are many very experienced and dedicated lawyers working for the Department, there was anecdotal evidence of high turnover amongst DHS lawyers.⁵⁹ Some people expressed concern that this resulted in a lack of legal experience among Department legal staff.⁶⁰ Barristers in particular expressed concern about the inexperience of some Departmental lawyers, who must deal with legal practitioners for families who have 20 years or more experience in the jurisdiction.⁶¹

LEGAL REPRESENTATION

- 10.24 The Commission received submissions about the manner in which some of the Department's cases are presented in court. One submission suggested that the Department should seek independent legal advice about the strength of the evidence required in particular cases.⁶² The experience of some participants was that

*DHS workers or managers make the decision to commence proceedings without having provided DHS lawyers with the evidence upon which this decision is based or without heeding the advice of the lawyers as to the merits of the case.*⁶³

- 10.25 In the past, concerns have been raised about the often poor standard of presentations of suspected sexual abuse cases in court.⁶⁴ Child protection workers sometimes request that members of the Victoria Police Sexual Offences and Child Abuse Unit give evidence, rather than the workers.⁶⁵ An experienced solicitor suggested that proceedings had become more adversarial 'since the DHS Court Advocacy Unit assumed the role of representation from the Victorian Government Solicitor'.⁶⁶

- 43 The Commission notes that the CAU takes responsibility for rural region appeals: Department of Human Services (Victoria), Email 22 June 2010, above n 26.
- 44 Department of Justice (Victoria), *Guide to Court Practice*, above n 33, 6.
- 45 Ibid.
- 46 Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 56.
- 47 Department of Justice (Victoria), *Guide to Court Practice*, above n 33, 6.
- 48 The Commission understands that rural region child protection unit managers and team leaders meet twice a month to discuss issues. Senior CAU solicitors may also attend these meetings to consider the list of files held by teams and assess their complexity and need for legal management.
- 49 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Legal Representatives and Child Protection's Roles and Responsibilities in Court Proceedings', Advice No 1331 (23 April 2007), from CD-ROM provided at 23 March 2010, 196.
- 50 Office of the Victorian Ombudsman, above n 46, 55.
- 51 Ibid 57.
- 52 Ibid 56.
- 53 Ibid.
- 54 Submission 27 (CPS) noted that there is a 'prima facie case' for a potential conflict between the various functions of the Secretary, while submission 38 (VALS) refers to an '[i]nherent conflict of interest' in the roles of the Department. The concept of conflict was further highlighted in a number of submissions including submissions 26 (FVPLS Victoria), 41 (Australian Childhood Foundation), 46 (Children's Court of Victoria). Also highlighted was the lack of 'meaningful independent oversight of DHS, aside from the role that the Children's Court plays' (submission 45 (FCLC)). See also submissions 11 (VLA), 31 (Gatehouse Centre), 36 (FLS). Conversely, submission 22 (Anchor) maintained it is 'not clear whether the Secretary has too many functions'. Submission 37 (OCSC) considered the existing functions of the Secretary appropriate, but it was suggested that enhanced planning, review and accountability could improve certain areas.
- 55 Submission 46 (Children's Court of Victoria) 85.
- 56 Submissions 1 (Anonymous), 48 (Victorian Bar). A consultee in consultation 17 (Victoria Police) commented that police officers are often subpoenaed at very late notice, leaving insufficient time to prepare for court in two or three days' time.
- 57 Consultations 9 (Barristers), 17 (Victoria Police).
- 58 Submission 19 (Joe Gorman).
- 59 Consultations 3 (CAU), 7 (Private Practitioners 2), 9 (Barristers).
- 60 Consultations 9 (Barristers), 17 (Victoria Police).
- 61 Consultation 9 (Barristers).
- 62 Submission 48 (Victorian Bar).
- 63 Submission 45 (FCLC).
- 64 Victorian Auditor-General's Office, *Special Report No 43 Protecting Victoria's Children: The Role of the Department of Human Services* (1996) 194.
- 65 Consultation 17 (Victoria Police). Further, a recommendation of the Victorian Auditor-General's Office's report was that '[i]f joint multi-disciplinary teams were established, comprising specialist investigators from DHS and Victoria Police, the quality of evidence and presentation in Court would most likely improve. In addition, such teams would tend to develop evidence to a standard of "beyond reasonable doubt" which would enhance the ability to prove cases both within the Children's Court and criminal jurisdictions': Victorian Auditor-General's Office, above n 64, 194. The Commission notes that this statement is made in the context of dual protection/criminal prosecution proceedings.
- 66 Submission 19 (Joe Gorman).

Option 4—Representing the Department of Human Services

INDEPENDENT STATUTORY COMMISSIONER/OFFICE OF PUBLIC PROSECUTIONS MODEL

10.26 A number of people suggested that an independent statutory body, similar to the Office of Public Prosecutions (OPP), should conduct proceedings for the Department.⁶⁷ Some barristers suggested that independent legal representation for the Department would enhance the role of the child protection workers, who would then be able to concentrate on their investigative role.⁶⁸ The Children’s Court also supported an OPP model,⁶⁹ commenting that

*the Public Prosecutions Act 1994 (Vic) provides a good starting point for new legislation governing the functions, powers, terms and conditions of an independent statutory commissioner and the functions of his or her Office.*⁷⁰

10.27 A number of people, including private legal practitioners and Victoria Legal Aid duty lawyers, commented that an independent ‘prosecutor’ would be beneficial to the court process.⁷¹

10.28 The Children’s Court stated that, as a result of comments made to it, it was of the view that

*the CAU is not able to perform nearly as independent a role as it would like or as it should because its clients often do not accept its forensic legal advice.*⁷²

The Children’s Court said that it ‘strongly supports the establishment of an independent statutory commissioner—largely analogous to the Office of Public Prosecutions’.⁷³

10.29 The Court proposed that a lawyer working for an independent prosecutorial body

*would take instructions from a protective worker but would not be bound to follow them if he considered it was not in the best interests of the subject child to do so.*⁷⁴

Further, the body ‘would act as a truly independent model litigant on behalf of the State’.⁷⁵

10.30 One submission suggested that an independent statutory commissioner with a function equivalent to the OPP would ‘provide DHS with the opportunity to focus its attentions to promoting the best interest of the child’.⁷⁶ Other participants were concerned about the independence of any new ‘prosecutor’, suggesting that the body responsible for the carriage of proceedings ‘must look only to the best interests of the child and not the interests of the service system, its funding body or its providers’.⁷⁷

10.31 One submission suggested that functions should not be handed to another body ‘unless it would simplify issues that currently impede children’s lives’.⁷⁸ Other respondents felt that a new body might create more complexity⁷⁹ or gaps⁸⁰ in the system. The Gatehouse Centre questioned whether an additional body may create another layer of decision making,⁸¹ and submissions from the Australian Childhood Foundation and Anglicare Victoria suggested that a new body might further marginalise families by diluting lines of accountability.⁸²

PRACTICES IN OTHER JURISDICTIONS

AUSTRALIAN CAPITAL TERRITORY

- 10.32 Prior to 1994, the Youth Advocate, an independent statutory official, was responsible for the initiation and carriage of child protection proceedings in the ACT. The history of the ACT Youth Advocate is discussed in Chapter 2.
- 10.33 The Youth Advocate was given the sole power to initiate child protection proceedings, other than in emergencies, when the police retained the power to commence proceedings. The Youth Advocate had the ability to act on information provided by the public where it was suspected that child protection proceedings were necessary.⁸³ This model sought to improve inter-agency collaboration by drawing upon the Youth Advocate's knowledge of the various welfare services that might be of assistance.⁸⁴
- 10.34 The Youth Advocate was required to consult the Standing Committee of the Children's Services Council before initiating care proceedings.⁸⁵ The idea was that proceedings would only be commenced if the Youth Advocate 'was not satisfied that sufficient efforts had been made to reach an informal solution' in a particular case.⁸⁶ In practice, the Standing Committee was bypassed in some circumstances, with a tendency for welfare agencies to "'go it alone" and not to involve the Youth Advocate and other agencies in the examination of its more difficult cases'.⁸⁷ Partly as a result, the Youth Advocate was unable 'to make full use of his independence to hold the welfare agencies accountable for their handling of cases'.⁸⁸
- 10.35 In 1991, the Youth Advocate's functions were transferred to the Community Advocate.⁸⁹ In 1994, all of the Community Advocate's functions in care proceedings were transferred to the Director of Family Services,⁹⁰ accompanied by comments about the 'friction' between the Community Advocate and the Director, and the need for 'a clear line of authority or responsibility ... for managing child protection services in the Territory'.⁹¹
- 10.36 The ACT's experience with the Youth Advocate demonstrates the importance of placing the carriage of child protection proceedings with a body that specialises in litigation and case management. It also highlights the importance of establishing systems that assist child protection workers and their lawyers to work cooperatively by giving them complementary functions.

SOUTH AUSTRALIA

- 10.37 In South Australia, the Crown Solicitors Office represents the relevant department in child protection proceedings in the Youth Court.⁹² The Crown solicitors bring a 'whole of government' perspective to the task, and are able to advise child protection workers in particular cases that the basis for a protection order might be weak, generally due to a lack of evidence.⁹³
- 10.38 The level of experience of the Crown solicitors who work with the department varies, with personnel ranging from newly admitted practitioners to practitioners with up to 23 years of experience.⁹⁴ The difficulty of child protection work is acknowledged and addressed by incorporating other legal work, including administrative law, equal opportunity and Hague Convention (child abduction) work into the solicitors' case load.⁹⁵

- 67 Submissions 25 (LIV), 48 (Victorian Bar). The OPP is an independent statutory body responsible for preparing and conducting criminal prosecutions in Victoria on behalf of the Director of Public Prosecutions (DPP). The DPP has responsibility for prosecuting on behalf of the Crown all indictable offences under the laws of the State of Victoria in the High Court, the Supreme Court of Victoria and the County Court of Victoria: Office of Public Prosecutions (Victoria) <www.opp.vic.gov.au/> at 28 June 2010.
- 68 Consultation 9 (Barristers).
- 69 Submission 46 (Children's Court of Victoria) 89.
- 70 Ibid 87.
- 71 Consultation 7 (Private Legal Practitioners 2); submission 19 (Joe Gorman). Submission 19 specifically states: '[c]onsiderable Court time and resources are occupied unnecessarily as a result of DHS protective workers regularly rejecting the advice of their own legal representatives. As well as protracting proceedings, this inevitably results in the proceedings being more adversarial than is warranted'.
- 72 Submission 46 (Children's Court of Victoria) 88.
- 73 Ibid 84.
- 74 Ibid 89.
- 75 Ibid.
- 76 Submission 25 (LIV).
- 77 Submission 27 (CPS).
- 78 Submission 22 (Anchor).
- 79 Submission 34 (Victoria Police).
- 80 Consultation 10 (VFPMS).
- 81 Submission 31 (Gatehouse Centre).
- 82 Submissions 41 (Australian Childhood Foundation), 29 (Anglicare Victoria).
- 83 (Australian) Law Reform Commission, *Child Welfare*, Report No 18 (1981) 241.
- 84 Ibid 242.
- 85 John Seymour, 'The Youth Advocate' (1990) 15(4) *Legal Service Bulletin* 164, 166.
- 86 (Australian) Law Reform Commission, above n 83, 242.
- 87 Seymour, above n 85, 167.
- 88 Ibid.
- 89 See the *Community Advocate Act 1991* (ACT).
- 90 See the *Children's Services (Amendment) Act 1994* (ACT).
- 91 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 May 1994, 1364 (Gary Humphries). This debate concerned the introduction of the Children's Services (Amendment) Bill 1994 (ACT).
- 92 Robyn Layton, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (2003) [7.4].
- 93 Discussion with Jennifer Olsson, Managing Solicitor in the Crown Solicitors Office, South Australia, 24 March 2010.
- 94 Ibid.
- 95 Ibid.

Option 4—Representing the Department of Human Services

NEW ZEALAND

- 10.39 As discussed in Chapter 5, the New Zealand child protection model is largely facilitated by family group conferences (FGC). FGCs are used in every case where statutory action might be warranted. The focus is on broader community involvement, supported by advice from professionals.⁹⁶ The relevant department, Child, Youth and Family (CYF), is not legally represented at FGCs.⁹⁷
- 10.40 Unless there has been emergency action, the court process begins ‘with an application for the Court to make a declaration that the child or young person is in need of care or protection’.⁹⁸ Subject to exceptions, an application cannot be made unless an FGC has been held.⁹⁹ A CYF social worker generally makes an application for a declaration.¹⁰⁰
- 10.41 Court action generally occurs where there is an immediate issue of child safety, or in cases of gross neglect.¹⁰¹ When an application is made to the court, FGC social workers generally prepare affidavits and arrange proceedings in consultation with CYF’s in-house lawyers.¹⁰²
- 10.42 Currently, an in-house lawyer is employed in each CYF office; private lawyers are not engaged by CYF. New Zealand’s Crown Solicitor once had carriage of proceedings, but this no longer occurs.¹⁰³

MODELS OF LEGAL REPRESENTATION

- 10.43 In this section, we consider a number of different models for conducting litigation on behalf of the state.

PURCHASER/PROVIDER MODEL

- 10.44 The purchaser/provider (or client/lawyer) model is the standard form of legal services provision. In Australia, the lawyer’s professional role ‘is exemplified largely in the notion of the client’s authority delegated to the lawyer through the agency contract’.¹⁰⁴
- 10.45 The lawyer will often consult with his or her client objectively, with a view to outlining the realistic expectations of the legal course of action. In conveying to clients what is legally realistic, ‘most lawyers patiently, but insistently, remind their clients of the constraints that the law imposes on both of them, that is, of law’s definition of reality’.¹⁰⁵
- 10.46 Joint decision making is a factor in the client–lawyer relationship. However, conventional accounts of lawyers’ work do not readily acknowledge the client’s production role in legal service delivery.¹⁰⁶ The client’s role is integral to the production, as well as the consumption, of legal services.¹⁰⁷
- 10.47 Tension occurs when the client attempts to control the legal service process. This may prevent the lawyer carrying out his or her role and may also jeopardise the validity of court proceedings. The interplay of power and control also damages the professional relationship. Legal academics William Felstiner and Austin Sarat note that some clients remain ‘suspicious about the depth of commitment lawyers bring to their cases and their own ability to control the content and timing of their lawyers’ actions’.¹⁰⁸

INDEPENDENT STATUTORY OFFICE: OFFICE OF PUBLIC PROSECUTIONS

10.48 Many people suggested that the Commission consider the model of legal service delivery provided by the Office of Public Prosecutions, which conducts legal proceedings on behalf of the Director of Public Prosecutions. The Victorian prosecutions service, which is established by the *Public Prosecutions Act 1994 (Vic)*, encompasses the Director of Public Prosecutions (DPP), the Solicitor for Public Prosecutions, the Office of Public Prosecutions (OPP) and Crown Prosecutors.¹⁰⁹ This service is 'responsible for preparing and presenting cases against people accused of serious crimes',¹¹⁰ and is funded (in the main) by grants from the Department of Justice.¹¹¹

10.49 The OPP represents the DPP, operating like a large legal firm with the DPP as its only client.¹¹² The DPP is appointed by the Governor in Council.¹¹³ The DPP briefs Crown Prosecutors, private barristers from the Victorian Bar, or its own solicitor advocates in court matters.¹¹⁴ Matters prosecuted by the DPP and the OPP play a crucial part in the fair and effective operation of the Victorian criminal justice system.¹¹⁵ The OPP prosecution policies and guidelines for staff cover, among other considerations:¹¹⁶

- prosecutorial ethics (including an excerpt from the Victorian Bar Rules of Conduct on the duties of the prosecution in criminal matters)¹¹⁷
- the prosecutorial discretion
- the Crown's role on plea and sentence
- appeals by the Director
- application of model litigant guidelines
- early resolution of cases.

10.50 As the agency responsible for carrying out functions set out by the Victorian Parliament in the *Public Prosecutions Act 1994 (Vic)*, the OPP is required to adopt and incorporate the model litigant guidelines.¹¹⁸ The application of the model litigant guidelines is 'kept under review and may be issued in amended form at a later date'.¹¹⁹ This is discussed in more detail below.

96 See generally Child, Youth and Family (NZ), *An Interagency Guide to Breaking the Cycle: Let's Stop Child Abuse Together* (2001).

97 Telephone discussion with Allan Cooke, Barrister, New Zealand, 19 May 2010.

98 Child, Youth and Family (NZ), above n 96, 38.

99 *Children, Young Persons, and Their Families Act 1989 (NZ)* s 70.

100 *Children, Young Persons, and Their Families Act 1989 (NZ)* s 68.

101 Cooke, above n 97.

102 Ibid.

103 Ibid.

104 Michael Robertson, 'Principal, Producer and Consumer: The Client's Role in the Co-Production of Lawyers' Services' (2002) 6(1) *Newcastle Law Review* 35, 44.

105 William Felstiner and Austin Sarat, 'Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions' (1992) 77 *Cornell Law Review* 1447, 1463-4.

106 Robertson, above n 104, 35.

107 Ibid 36.

108 Felstiner and Sarat, above n 105, 1455.

109 Office of Public Prosecutions (Victoria), *Annual Report 2008/09* (2009) 5.

110 Ibid 6.

111 Ibid 45.

112 Office of Public Prosecutions (Victoria), *Annual Report 2007/08* (2008) 3.

113 Office of Public Prosecutions (Victoria), *Annual Report 2008/09*, above n 109, 5.

114 Ibid.

115 Office of Public Prosecutions (Victoria), *Annual Report 2007/08*, above n 112, 3.

116 See Office of Public Prosecutions (Victoria), *Prosecution Policies and Guidelines* (2010) <www.opp.vic.gov.au/wps/wcm/connect/justlib/office+of+public+prosecutions/home/opp++prosecution+policies+and+guidelines+%28pdf%29> at 28 June 2010.

117 See Office of Public Prosecutions (Victoria), *1. Prosecutorial Ethics* (2010) Appendix A <www.opp.vic.gov.au/wps/wcm/connect/46622580404a14a3abdcfbf5f2791d4a01_Prosecutorial_Ethics_with_AppendixAB.pdf?MOD=AJPERES> at 28 June 2010.

118 Office of Public Prosecutions (Victoria), *15. Application of the Model Litigant Guidelines* (2008) [15.1.4] <www.opp.vic.gov.au/wps/wcm/connect/18c9ac00404a14a4abfafbf5f2791d4a/15_Application_of_model_litigant_guidelines.pdf?MOD=AJPERES> at 28 June 2010.

119 Ibid [15.3.1].

Option 4—Representing the Department of Human Services

THE ROLE OF THE VICTORIAN GOVERNMENT SOLICITOR'S OFFICE AND THE GOVERNMENT LEGAL SERVICES PANEL

- 10.51 Many Victorian Government departments and agencies use the services of the Victorian Government Solicitor's Office (VGSO) when conducting litigation. In 1989, a Legal and Court Advisory Unit was established within DHS, consisting of solicitors out-posted from the VGSO, and Child Protection staff.¹²⁰ Restructuring in 1993 saw the creation of a new court unit, and the Department's arrangement with the VGSO ceased.¹²¹
- 10.52 The VGSO is the primary source of legal services to the Victorian Government and its statutory authorities.¹²² In contrast to the state-funded OPP, the VGSO is funded by fees earned from the provision of legal services¹²³ and 'displays all the characteristics of a whole-of-government in-house legal function for the State'.¹²⁴
- 10.53 The VGSO is a Victorian administrative office.¹²⁵ The Premier appoints the Victorian Government Solicitor on the recommendation of the Attorney-General.
- 10.54 The role of the VGSO is to help clarify and articulate legal issues, and to establish the most effective way to meet particular legal service or advice requirements, whether through one of the Government Legal Service Panel firms, barristers or the VGSO itself.¹²⁶ The VGSO maintains experience in whole-of-government issues, statutory interpretation, and issues requiring a high level of understanding of the Victorian Government.¹²⁷
- 10.55 There are many reasons why the VGSO may be a suitable 'vehicle' for the carriage of the Department's proceedings in the Family Division of the Children's Court. These include:
- the VGSO's independence
 - VGSO lawyers' litigation and case management experience
 - the significance of the VGSO being the Victorian Government's primary legal service provider
 - respect for the VGSO among the judiciary and members of the profession.
- 10.56 The VGSO has a practice of staff rotation in order to ensure that lawyers gain experience in a range of practice areas. This practice could be particularly important in an emotionally-charged jurisdiction such as child protection, where 'burn out' might contribute to high levels of staff turnover.
- 10.57 The VGSO continues to gain recognition as a competitive service provider in the legal services market.¹²⁸ Talented lawyers are increasingly attracted to practice in government law due to the variety of legal issues and rewarding career opportunities.¹²⁹

Government Legal Services Panel

- 10.58 A factor in the breadth of the VGSO's expertise is the implementation of the Government Legal Services Panel through the Legal Panel Gateway (LPG).¹³⁰ The LPG is a web-based interface that coordinates the arrangements for, manages and monitors the delivery of legal services to Victorian Government departments and participating statutory bodies. Access to the LPG is organised by a contract manager within each participating agency.¹³¹ All engagements of legal services under the panel arrangements must be arranged through the LPG.¹³²

- 10.59 Twenty firms are currently engaged on the Government Legal Services Panel.¹³³ All panel firms must participate in a formal tender process and are required to follow the model litigant guidelines (see further discussion below).¹³⁴
- 10.60 The Department currently uses the Government Legal Services Panel for metropolitan matters. In 2007, the Department was one of the top five purchasers of government legal services.¹³⁵ Additionally, in the financial year 2005–06, one third of the total Government Legal Services Panel usage of barristers was by clients directly briefing barristers, and slightly over half of these briefs were provided by the Department’s CAU.¹³⁶ The Department continues to utilise government legal services by directly briefing barristers through the LPG.¹³⁷

THE MODEL LITIGANT GUIDELINES

- 10.61 All legal practitioners have a duty to the administration of justice, the client, and the court as provided in the Law Institute of Victoria’s *Professional Conduct and Practice Rules 2005*¹³⁸ and the Victorian Bar Practice Rules.¹³⁹
- 10.62 As representatives of the state, the Department’s legal representatives are also required to uphold the *State of Victoria’s Obligation to Act as a Model Litigant* (the model litigant guidelines).¹⁴⁰
- 10.63 Model litigant guidelines acknowledge the nature of public bodies and ‘the resource and power advantages they enjoy over individual citizens’.¹⁴¹ They provide guidance to ensure that public agencies do not use their position to exploit litigants who are not as well resourced or as powerful.¹⁴²
- 10.64 The model litigant guidelines comprise three sections. First is a requirement that ‘[i]n order to maintain proper standards in litigation, the State of Victoria, its Departments and agencies behave as a model litigant in the conduct of litigation’.¹⁴³ Second, the guideline obligations are set out. Third are a number of notes that further elaborate on the guidelines.
- 120 Department of Human Services (Victoria), Email 15 June 2010, above n 28.
- 121 Ibid. See also submission 46 (Children’s Court of Victoria) 89, footnote 172: ‘It should be remembered that prior to May 1993, the task of representing the Department in the Family Division was performed by the Victorian Government Solicitor. Observations from that time by magistrates who still sit in the Children’s Court are that the process was efficient and served the Court well. At that time, the workload of the Court was confined to five courts (including Family and Criminal Division matters). Since then the case load in the Children’s Court has “exploded” and now 11 courts (including Moorabbin JC) are required to deal with cases in both Divisions, cases which appear to be becoming ever more complex and difficult. Now, more than ever before, an independent, specialised group of lawyers is required to conduct the Department’s cases in the Family Division.’
- 122 Department of Justice (Victoria), *Victorian Government Solicitor’s Office* (2009) <www.lawreform.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/about+us/our+organisation/justice+agencies/justice++victorian+government+solicitors+office++home> at 28 June 2010.
- 123 Zoe Lyon, ‘The Attraction of Going Public’ *Lawyers Weekly* (17 June 2009) <www.lawyersweekly.com.au/blogs/special_reports/archive/2009/06/17/the-attraction-of-going-public.aspx> at 28 June 2010.
- 124 Beaton Consulting, above n 24, 19.
- 125 See Information Victoria, *Victorian Government Directory* (35th ed, 2008) 297.
- 126 Department of Justice (Victoria), above n 122.
- 127 Victorian Government Solicitor’s Office, *More Than Just a Legal Adviser* (2009) <www.vgso.vic.gov.au/about-vgso/more-just-legal-adviser> at 28 June 2010.
- 128 Beaton Consulting, above n 24, 20.
- 129 Lyon, above n 123.
- 130 See Victorian Government Purchasing Board, *Legal Services Panel* (2010) Victorian Government Procurement <www.vgpb.vic.gov.au/CA2575BA0001417C/pages/state-contracts-legal-government-legal-services> at 28 June 2010.
- 131 Ibid.
- 132 Victorian Government Purchasing Board, *How to use this Contract: Guidance for Obtaining Legal Services* (2010) Victorian Government Procurement <www.vgpb.vic.gov.au/CA2575BA0001417C/pages/state-contracts-legal-government-legal-services-how-to-use-this-contract> at 28 June 2010.
- 133 Victorian Government Purchasing Board, *Legal Services Panel*, above n 130.
- 134 Department of Justice (Victoria), *Government Legal Services Annual Report 2007–2008* (2009) 3.
- 135 Ibid.
- 136 Beaton Consulting, above n 24, 18. The Commission understands that the high rate of barrister use by the Department is due to insufficient CAU resources to cover the average of 3000 applications each year: Department of Human Services (Victoria), Email 22 June 2010, above n 26.
- 137 See generally Department of Justice (Victoria), *Government Legal Services Annual Report*, above n 134.
- 138 Rule 13.1 reads: ‘A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client’s and any instructing practitioner’s wishes where practicable.’
- 139 See The Victorian Bar, *Rules of Conduct & Compulsory Continuing Legal Education Rules* (effective 22 September 2009).
- 140 The guidelines are widely available, but can be found in the Standard Legal Services to Government Panel Contract and appear in the *Guide to Court Practice for Child Protection Practitioners 2007*. An outline of the guidelines appears in the section below.
- 141 Camille Cameron and Michelle Taylor-Sands, ‘“Corporate Governments” as Model Litigants’ (2007) 10(2) *Legal Ethics* 154, 154.
- 142 Ibid.
- 143 State Government of Victoria, *Guidelines on the State of Victoria’s Obligation to Act as a Model Litigant* (2004).

Option 4—Representing the Department of Human Services

10.65 The guidelines require that the State of Victoria, its Departments and agencies:

- (a) *act fairly in handling claims and litigation brought by or against the State or an agency*
- (b) *act consistently in the handling of claims and litigation*
- (c) *avoid litigation, wherever possible*
- (d) *pay legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid*
- (e) *where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by:*
 - i. *not requiring the other party to prove a matter which the State or the agency knows to be true and*
 - ii. *not contesting liability if the State or the agency knows that the dispute is really about quantum,*
- (f) *do not rely on technical defences unless the State's or the agency's interests would be prejudiced by the failure to comply with a particular requirement*
- (g) *do not take advantage of a claimant who lacks the resources to litigate a legitimate claim; and*
- (h) *do not undertake and pursue appeals unless the State or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.*¹⁴⁴

10.66 The state must behave as a model litigant regardless of

*which Court, which claim, which area of law the claim involves, whether the ... State is plaintiff, defendant or third party, whether the claim is pre-litigation, interlocutory, trial appeal or even in a costs-recovery phase.*¹⁴⁵

10.67 As the Children's Court pointed out in its submission, the Department has a number of functions in relation to Family Division proceedings. The Department is:

- a party to proceedings
- the agency that generally initiates and conducts the proceedings
- the investigating body for reports made to the Department, and
- the body responsible for delivering assistance to children and families.¹⁴⁶

10.68 The Children's Court suggested that this range of functions is 'not entirely complementary', which sometimes results in the Department

*demonstrating a lack of objectivity in the way in which matters are litigated by it in the Children's Court and sometimes makes it difficult for the Department to perform properly the function of a model litigant.*¹⁴⁷

10.69 The strength of the model litigant guidelines is that there is an obligation to avoid litigation, or at least to keep the costs of litigation to a minimum. The model litigant principles are also important as they help ensure 'that the public has good reason to trust its public officials and the way its public officials and lawyers conduct litigation affecting rights of its own citizens'.¹⁴⁸ The guidelines suggest that there must be 'reasonable grounds' to issue any proceedings. 'Reasonable grounds' must include evidence and not merely a personal belief that a child is in need of protection.¹⁴⁹

- 10.70 A shortcoming of the model litigant guidelines is their commercial focus. Given the unique nature of child protection proceedings, it appears highly desirable to develop specific guidelines for use in this jurisdiction that recognise the state's obligations, parents' responsibilities and rights, and the need to always consider the child's best interests.
- 10.71 Another interesting development is the 2009 Victorian Parliamentary Law Reform Committee's *Inquiry into Alternative Dispute Resolution and Restorative Justice*.¹⁵⁰ The Law Reform Committee made two recommendations regarding model litigant guidelines, including the amendment of Victoria's model litigant guidelines to include requirements 'that the State of Victoria, its departments and agencies:
- cannot commence court proceedings until ADR [appropriate dispute resolution] processes have been considered
 - continue to consider using ADR and other settlement methods throughout the litigation process
 - participate fully and effectively in all appropriate ADR processes applicable to the dispute.'¹⁵¹
- 10.72 The Committee also recommended an annual review of compliance with the model litigant guidelines, and the publication of the review's results.¹⁵² The Victorian Government has accepted both of these recommendations in principle.¹⁵³ The Attorney-General is currently reviewing the model litigant guidelines.¹⁵⁴
- 10.73 In June 2010, the Attorney-General announced that all firms on the Victorian Government's Legal Services Panel and the VGSO had signed a pledge to promote ADR among their clients.¹⁵⁵ The Commission believes that the developments regarding the model litigant guidelines, including the emphasis on ADR, are particularly important for child protection proceedings.¹⁵⁶

THE COMMISSION'S VIEWS

- 10.74 The Commission acknowledges that many people and organisations, most particularly the Children's Court, supported the creation of a new statutory commissioner who would have the carriage of protection proceedings, in a way broadly similar to that in which the Director and the OPP conduct criminal proceedings on behalf of the state.
- 10.75 While the Commission sees some merit in the views raised, we do not believe that it is helpful to continue to view protection proceedings through a criminal law lens, or to adapt criminal law processes for use in this jurisdiction. We need to re-cast the way in which protection proceedings are characterised and devise processes that are specifically designed for use in that new model.
- 10.76 Commentators have referred to the possible tension that arises between in-house lawyers and their clients, largely because the employer is also the client.¹⁵⁷ The in-house lawyer may feel that their employment is jeopardised if they refuse to follow the client's instructions. Similar issues were raised in the Australia Law Reform Commission report *Privilege in Perspective: Client Legal Privilege in Federal Investigations*.¹⁵⁸
- 10.77 The role of in-house lawyers is often multilayered,¹⁵⁹ with the in-house lawyer 'more likely to act for purposes unrelated to legal proceedings than an external solicitor'.¹⁶⁰ The Commission believes that the Department's in-house lawyers sometimes feel under pressure to present arguments in Children's Court proceedings that have little merit. This is a matter of particular concern in regional offices because of the line management of the Department's lawyers.

- 144 Ibid.
- 145 Stephen Lee, 'The State as Model Litigant' (Paper presented at the 'VGSO Lunchtime Seminar', Melbourne, 28 September 2006) 1.
- 146 Submission 46 (Children's Court of Victoria) 87.
- 147 Ibid.
- 148 Lee, above n 145, 3.
- 149 Department of Justice (Victoria), *Guide to Court Practice*, above n 33, 9.
- 150 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009).
- 151 Ibid 158.
- 152 Ibid.
- 153 Victorian Government response to Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009) 10 <www.parliament.vic.gov.au/images/stories/committees/lawreform/alternate_dispute/govt_resp.pdf> at 28 June 2010.
- 154 Rob Hulls, Deputy Premier and Attorney-General (Victoria), 'Landmark Pledge Commits Lawyers to Dispute Resolution', (Media Release, 18 June 2010) <www.premier.vic.gov.au/newsroom/10814.html> at 28 June 2010.
- 155 Ibid.
- 156 Refer to Chapter 7 for detailed discussion of ADR (called 'family decision-making') in child protection proceedings.
- 157 Maxine Evers and Jason Harris, 'The Duties of In-House Counsel: The Bold, the Bright and the Blurred?' (2009) 37 *Australian Business Law Review* 267.
- 158 Australia Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.83]–[3.88], [8.101]–[8.103].
- 159 Evers and Harris, above n 157, 268.
- 160 *Sydney Airports Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 (Unreported, Spigelman CJ, Sheller JA and Campbell AJA, 9 March 2005) [24], quoted in Evers and Harris, above n 157, 268.

Option 4—Representing the Department of Human Services

UTILISING THE SERVICES OF THE VICTORIAN GOVERNMENT SOLICITOR'S OFFICE

- 10.78 The Commission believes that steps should be taken to overcome some of the current concerns about the way in which proceedings are conducted on behalf of the Secretary. The VGSO is well placed to provide Department staff with an independent assessment of evidence and frank advice about the merits of particular cases. It should also be able to ensure that lawyers are rotated at reasonable intervals, and that appropriately experienced solicitors conduct cases on the Department's behalf. Finally, because other members of the legal profession and the judiciary hold the VGSO in high regard, interaction with other lawyers and the Court might be easier with VGSO involvement than is presently the case.
- 10.79 For these reasons, the Commission believes that the VGSO is the most appropriate body to conduct child protection cases on behalf of the state in the Children's Court.

Possible mixed service provision

- 10.80 In 1999, the Commonwealth Government took the step of allowing private firms to complete Commonwealth Government litigation work by tender.¹⁶¹ This arrangement provides government agencies with a wider choice 'between in-house or external lawyers', with the selection of external lawyers primarily dependent on individual agencies.¹⁶² This also allows private law firms more variety in the type of work they offer.¹⁶³
- 10.81 Private tender and panel arrangements (such as the Government Legal Services Panel discussed above) offer government agencies a 'greater flexibility in a market competing to provide quality services at the best value, while ensuring that appropriate safeguards are in place'.¹⁶⁴ Panel arrangements are also common in the private sector, with large firms dividing legal work between their in-house legal team and external providers. This was discussed in the *Report of the Review of Commonwealth Legal Services Procurement*:
- Key to best practice in private sector organisations is a clear definition and understanding of the role of in-house lawyers, a sound knowledge of the market from which external services are purchased and the ability and willingness to cost work rigorously.*¹⁶⁵
- 10.82 One approach may be for the Department to conduct a trial of a mixed provision model, with the VGSO providing legal services to the Department in metropolitan matters. Government Legal Services Panel firms and the Department's in-house lawyers could supplement the VGSO's services. It is the Commission's view that a new model of mixed service provision will encourage competition and, in doing so, lift the standard of legal service provision as a whole. Moreover, a mixed model utilising the VGSO would have the added benefit of attracting a range of professionals to undertake child protection work but allow the development of professional skills through exposure to other areas of practice via rotation. It is the Commission's understanding that this approach has worked well for the Victoria Police/VGSO model.

Accommodating metro and regional considerations in a new operating model

10.83 Regardless of whether a mixed service provision model is adopted, the Commission recognises that due to practical necessity, a different model of legal representation is required in rural regions. One reason for this is that the VGSO and Government Legal Services Panel only service the Department's metropolitan areas.

10.84 The implementation of the proposed VGSO model would need to take into account the differences between rural and metropolitan practice. This may involve the continued negotiation of arrangements with some private solicitor firms in rural regions, or the arrangement for VGSO solicitors to be out-posted to rural regions. In preparing the model litigant guidelines, thought should be given to how the guidelines apply to private practitioners representing the Department in rural regions.

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

Proposal 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 which are specifically designed for protection applications in the Children's Court.

Proposal 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.

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

161 Prior to this, private firms could carry out most government legal work, apart from litigation.

162 Daryl Williams, 'Greater Competition for Commonwealth Legal Work' (1999) 26(8) *Brief* 23, 23.

163 *Ibid.*

164 *Ibid.* 'Appropriate safeguards' include model litigant guidelines.

165 Anthony Blunn and Sibylle Krieger, *Report of the Review of Commonwealth Legal Services Procurement* (2009) 30.

Chapter 11

Option 5—Broadening the Role of the Office of the Child Safety Commissioner



CONTENTS

- 402 Introduction
- 402 Overarching policy framework
- 403 The Office of the Child Safety Commissioner
- 404 Relationship of OCSC with other children's agencies and bodies
- 406 Views in consultations and submissions
- 408 Previous reviews
- 409 Other Australian and international models
- 415 Additional functions to be performed by the Child Safety Commissioner
- 420 Strengthening the independence of the Child Safety Commissioner

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

INTRODUCTION

- 11.1 This option deals with ongoing review of the child protection system and the role that the Child Safety Commissioner could play in monitoring the wellbeing of that system.
- 11.2 There was strong support in consultations and submissions for the creation of an independent Children and Young People’s Commissioner for Victoria¹ with responsibility for overseeing the child protection system. As Justice John Fogarty said of the child protection system 17 years ago, ‘[w]e cannot continue to have reviews in Victoria every few years’.²
- 11.3 An independent body with specialist expertise in child protection can play a significant role in highlighting systemic problems in this key area of governmental responsibility. This step may overcome the need for so many external reviews by independent experts and statutory authorities such as the Ombudsman and this Commission.
- 11.4 In this chapter we examine the overarching policy framework for child protection in Victoria, including the current role and functions of the Child Safety Commissioner and the functions of other bodies which have some oversight role in relation to children in the child protection system. The chapter also describes the operations of other children’s commissioners, both within Australia and internationally. Finally, the chapter contains proposals for broadening the role and strengthening the independence of the Child Safety Commissioner.

OVERARCHING POLICY FRAMEWORK

THE GROWING VICTORIA TOGETHER AND A FAIRER VICTORIA POLICY AGENDAS

- 11.5 *A Fairer Victoria*³ and its predecessor *Growing Victoria Together*⁴ are whole-of-government social policy action plans to address disadvantage and promote inclusion and participation. Protection of the state’s most vulnerable children is central to both strategies.⁵
- 11.6 Under the *Growing Victoria Together* policy agenda, the Victorian Government introduced a comprehensive reform program to children, youth and family services, including new legislation in 2005—the *Children Youth and Families Act 2005* (Vic) (CYF Act 2005) and the *Child Wellbeing and Safety Act 2005* (Vic) (CWS Act 2005).⁶ At a policy level, this reform program included the 2006 *Future Directions: An Action Agenda for Young People*⁷ and the 2008 *Vulnerable Youth Framework*.⁸
- 11.7 New service pathways and child protection processes were introduced to support earlier intervention and promote preventative measures for vulnerable children and their families.⁹ As discussed in Chapter 2, these changes were accompanied by measures to oversee administration of children’s services across government, including the establishment of the Child Safety Commissioner, the Victorian Children’s Council and Children’s Services Coordination Board.¹⁰
- 11.8 *A Fairer Victoria: Real Support – Real Gains*¹¹ outlines how recent amendments to the CWS Act 2005 have extended the powers of the Child Safety Commissioner to undertake independent reviews, with the aim of increasing scrutiny and accountability.¹²

THE STATE OF VICTORIA'S CHILDREN: 2006 AND 2008

- 11.9 In October 2006, the Victorian Government released *The State of Victoria's Children 2006*.¹³ The report is published biennially, the most recent being *The State of Victoria's Children 2008*.¹⁴ The report provides an account on how Victorian children and young people (from ages 0 to 18 years) are faring against the whole-of-government outcomes framework, focusing on their health, wellbeing, learning, safety and development.¹⁵ It aims to provide a growing evidence base to assist the Government to shape its policy and programs so that every Victorian child is afforded the opportunity to reach their full potential.¹⁶
- 11.10 *The State of Victoria's Children* draws on statistics from the Victorian Child and Adolescent Outcomes Framework.¹⁷ This framework comprises 35 outcomes of children's health, learning, development, wellbeing and safety, and 150 indicators to measure progress towards the outcomes.¹⁸

THE OFFICE OF THE CHILD SAFETY COMMISSIONER

- 11.11 The Office of the Child Safety Commissioner (OCSC) was established in 2005 by the CWS Act 2005.¹⁹ The Commissioner reports to the Minister for Community Services²⁰ who is required to table the Commissioner's annual report in parliament within 21 days of receipt.²¹
- 11.12 The Child Safety Commissioner is appointed by the Premier for a specified period and can be removed from office by the Premier.²² The current incumbent was appointed as the inaugural Commissioner in 2005 for an initial period of three years. The Commissioner was reappointed for a five-year term in May 2008.
- 11.13 Section 18 of the CWS Act 2005 stipulates that the Child Safety Commissioner is to be employed under Part 3 of the *Public Administration Act 2004* (Vic). Section 11 of Part 3 outlines the employment conditions for public employees, including those of an administrative office.²³ Unlike the heads of other statutory bodies within the Human Services and Health portfolios, such as the Health Services Commissioner²⁴, the Disability Services Commissioner,²⁵ and the President of the Mental Health Review Board,²⁶ the Child Safety Commissioner is not appointed by the Governor in Council.

- 1 Submissions 33 (Youthlaw), 36 (FLS), 38 (VALS), 41 (Australian Childhood Foundation), 43 (VCOSS & YACVic), 44 (CHP), 45 (FCLC). Some of these submissions also raised issues with regards to an advocacy role for children; we discuss this further in Chapter 3.
- 2 Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993) 4.
- 3 Relevant reports include: Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Real Support – Real Gains* (2010); Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Strong People Strong Communities* (2008); Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Progress and Next Steps* (2006); Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Creating Opportunity and Addressing Disadvantage* (2005).
- 4 Department of Premier and Cabinet (Victoria), *Growing Victoria Together: Innovative State. Caring Communities.* (2001).
- 5 Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Creating Opportunity and Addressing Disadvantage* (2005) 17–19; Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Progress and Next Steps* (2006) 14, 16, 88, 92; Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Strong People Strong Communities* (2008) 21, 23, 25, 33; Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Real Support – Real Gains* (2010) 20, 28–31; Department of Premier and Cabinet (Victoria), *Growing Victoria Together*, above n 4, 10.
- 6 This includes the White Paper which was the precursor to the 2005 legislative changes published by the Office for Children, Department of Human Services (Victoria), *Protecting Children ... The Next Steps* (2005).
- 7 Department of Planning and Community Development (Victoria), *Future Directions: An Action Agenda for Young Victorians* (2006).
- 8 Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Strong People Strong Communities*, above n 5.
- 9 The roles and responsibilities of all agencies are discussed in further detail below.
- 10 Department of Education and Early Childhood Development (Victoria), *The State of Victoria's Children 2008: Reporting on How Children and Young People are Faring* (2009) 84.
- 11 Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Real Support – Real Gains*, above n 5. An annual report assessing the achievements of *A Fairer Victoria* is published by the Department of Premier and Cabinet. See above n 3 for the names of previous relevant reports.
- 12 Department of Premier and Cabinet (Victoria), *A Fairer Victoria: Real Support – Real Gains*, above n 5, 28. See below for a description of the additional functions as provided by the *Children Legislation Amendment Act 2009* (Vic).
- 13 Department of Human Services (Victoria), *The State of Victoria's Children Report 2006: Every Child Every Chance* (2006).
- 14 *The State of Victoria's Children 2008* is published by the Department of Education and Early Childhood Development in collaboration with the Department of Human Services, the Department of Planning and Community Development, the Department of Transport, the Department of Justice (including Victoria Police). See Department of Education and Early Childhood Development (Victoria), *The State of Victoria's Children 2008*, above n 10.
- 15 Department of Education and Early Childhood Development (Victoria), *The State of Victoria's Children 2008*, above n 10, i.
- 16 Ibid.
- 17 The Victorian Child and Adolescent Outcomes Framework is monitored by the Victorian Child and Adolescent Monitoring System.
- 18 Department of Education and Early Childhood Development (Victoria), *The State of Victoria's Children 2008*, above n 10, 3.
- 19 *Child Wellbeing and Safety Act 2005* (Vic) s 18.
- 20 *Child Wellbeing and Safety Act 2005* (Vic) s 41(1).
- 21 *Child Wellbeing and Safety Act 2005* (Vic) s 41(2).
- 22 Under s 12(2) of the *Public Administration Act 2004* (Vic) the Premier, on behalf of the Crown, may employ a person as a Department Head or Administrative Office Head.
- 23 Under s 11 of the *Public Administration Act 2004* (Vic) the Office of the Child Safety Commissioner is an administrative office (there are currently 9 administrative offices in Victoria).
- 24 *Health Services (Conciliation and Review) Act 1987* (Vic) s 5(2).
- 25 *Disability Act 2006* (Vic) s 14(2).
- 26 *Mental Health Act 1986* (Vic) sch 1, cl 1(a).

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

11.14 The recently published Ombudsman’s report into out-of-home care observed that ‘the Child Safety Commissioner is the only such body in Australia unable to table a special report to Parliament on issues arising from his functions’.²⁷

FUNCTIONS OF THE COMMISSIONER

11.15 The functions of the Child Safety Commissioner are listed in section 19 of the CWS Act 2005. They include:

- to provide advice and recommendations to the Minister about child safety issues, at the request of the Minister²⁸
- to promote child-friendly and child-safe practices in the Victorian community²⁹
- the functions relating to working with children³⁰
- the functions relating to the monitoring of out-of-home care services³¹
- the functions relating to inquiries into child deaths and child safety³²
- any other functions conferred on the Child Safety Commissioner under this Act or any other Act.³³

11.16 The CYF Act 2005 was amended in 2009 to add an inquiry function relating to child safety.³⁴ The Minister may recommend that an inquiry be conducted in relation to ‘a child protection client’³⁵ if the Minister believes a review will help improve child protection practices and enhance child safety.³⁶ The object of an inquiry under this section is ‘to promote continuous improvement and innovation in policies and practices relating to child protection’.³⁷

RELATIONSHIP OF OCSC WITH OTHER CHILDREN’S AGENCIES AND BODIES

VICTORIAN CHILDREN’S COUNCIL

11.17 The CWS Act 2005 also established the Victorian Children’s Council (the Council).³⁸ The Council consists of the Child Safety Commissioner and at least eight other members with expert knowledge of policies and services that enhance the health, wellbeing, development or safety of children.³⁹ Like the OCSC, the Council has a particular focus on children who are vulnerable and at risk of poor outcomes.⁴⁰ The Council also advises the government on all matters relating to children from ages 0 to 18 years.⁴¹

11.18 The Council provides the Premier, the Minister for Children and Early Childhood Development and the Minister for Community Services with independent and expert advice concerning policies and services that enhance the health, wellbeing, development and safety of children.⁴² The Council has a role in forward planning and assists departments across government ‘to build a stronger evidence base and understanding of how to improve child outcomes and opportunities’.⁴³

CHILDREN’S SERVICES COORDINATION BOARD

11.19 In addition to the OCSC and the Council, the CWS Act 2005 also established a Children’s Services Coordination Board (the Board).⁴⁴

11.20 The interdepartmental Board consists of a range of key decision makers across government to ensure the coordination of activities affecting children.⁴⁵ Members include the Chief Commissioner for Police and the Secretaries of the Departments of Premier and Cabinet, Treasury and Finance, Education and Early Childhood Development, Human Services, Planning and Community Development and Justice.⁴⁶

11.21 The Board considers the methods to deal with cross-portfolio issues influencing children's policy.⁴⁷ This includes considering how to best deal with the coordination of different cross-government programs,⁴⁸ as well as reviewing and reporting annually to the Minister on government actions affecting children, particularly vulnerable children.⁴⁹

THE VICTORIAN CHILD AND ADOLESCENT MONITORING SYSTEM

11.22 The Victorian Child and Adolescent Monitoring System (the Monitoring System) provides a comprehensive overview of the way in which the service system, the community and the family all interact to determine the wellbeing of children.⁵⁰ The aim is to provide a sound basis for government planning and intervention in order to ensure children are consistently given a higher priority across all levels of government to improve their safety, health, development, learning and wellbeing.⁵¹

11.23 The Monitoring System was established to provide government with information through systematically monitoring how children are faring from birth to adulthood.⁵² The data is intended to inform the government on how best to prioritise issues and allocate resources.⁵³

11.24 The outcomes associated with child protection are encompassed in indicator 20, which relates to 'The Family: Key Outcome: Free from Abuse and Neglect'⁵⁴ and specifies the requirement to monitor the rate of substantiated child abuse, rate of children on child protection orders and rate of children in out-of-home care.⁵⁵

ROLE OF VICTORIAN OMBUDSMAN IN RELATION TO CHILDREN AND CHILD PROTECTION

11.25 The Ombudsman may conduct an investigation on his own motion or following a complaint.⁵⁶ At any time, either House of Parliament or a joint committee of both Houses may refer any matter—other than a matter concerning a judicial proceeding—to the Ombudsman for investigation and report.⁵⁷ Since 2004, the Ombudsman has prepared a discussion paper and undertaken three investigations about matters relating to child protection, two of which have been 'own motion' inquiries into aspects of the Victorian child protection scheme.⁵⁸

27 Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care* (2010) 121.

28 *Child Wellbeing and Safety Act 2005* (Vic) s 19(a).

29 *Child Wellbeing and Safety Act 2005* (Vic) s 19(b).

30 *Child Wellbeing and Safety Act 2005* (Vic) s 19(c). See also ss 24–8.

31 *Child Wellbeing and Safety Act 2005* (Vic) s 19(d). See also ss 29–32.

32 *Child Wellbeing and Safety Act 2005* (Vic) s 19(e). See also ss 33–33A.

33 *Child Wellbeing and Safety Act 2005* (Vic) s 19(f).

34 *Children Legislation Amendment Act 2009* (Vic) s 12. Refer below for an argument provided by the Ombudsman as to why these additional functions are inadequate.

35 Under s 33A(5) of the *Child Wellbeing and Safety Act 2005* (Vic), a child is a 'child protection client' if the child is the subject of a report under ss 28, 33(2), 183 or 184 of the *Children, Youth and Families Act 2005* (Vic). Section 28 of the *Children, Youth and Families Act 2005* (Vic) refers to where a person has a significant concern for the wellbeing of a child and has made a report to the Secretary. Section 33(2) provides for community-based child and family services to make reports to the Secretary where it is considered that a child is in need of protection. Section 183 refers to a report to the Secretary or a member of the police force made by any person who believes on reasonable grounds that a child is in need of protection. Section 184 stipulates that a mandatory reporter must make a report to the Secretary if they form the belief on reasonable grounds that a child is in need of protection.

36 *Child Wellbeing and Safety Act 2005* (Vic) s 33A(1).

37 *Child Wellbeing and Safety Act 2005* (Vic) s 33A(3).

38 *Child Wellbeing and Safety Act 2005* (Vic) s 8.

39 *Child Wellbeing and Safety Act 2005* (Vic) s 9(3).

40 Department of Education and Early Childhood Development (Victoria), *Victorian Children's Council* (2010) <www.education.vic.gov.au/about/directions/children/vcc.htm> at 28 June 2010.

41 *Ibid.*

42 *Child Wellbeing and Safety Act 2005* (Vic) s 10(1).

43 Department of Education and Early Childhood Development (Victoria), *Victorian Children's Council*, above n 40.

44 *Child Wellbeing and Safety Act 2005* (Vic) s 13.

45 Department of Education and Early Childhood Development (Victoria), *Children's Services Coordination Board* (2010) <www.education.vic.gov.au/about/directions/children/cscb.htm> at 28 June 2010.

46 *Ibid.* See also *Child Wellbeing and Safety Act 2005* (Vic) s 14. It was through the Children's Services Board that the government departments were able to endorse 150 Victorian Child and Adolescent Monitoring System indicators.

47 Department of Education and Early Childhood Development (Victoria), *Children's Services Coordination Board*, above n 45.

48 *Ibid.* This function is related to s 15(b) of the *Child Wellbeing and Safety Act 2005* (Vic).

49 *Child Wellbeing and Safety Act 2005* (Vic) s 15(a).

50 Department of Education and Early Childhood Development (Victoria), *Building a Monitoring System* (2010) <www.education.vic.gov.au/about/directions/children/vcams/default.htm#H2N1000B> at 28 June 2010.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 Department of Education and Early Childhood Development (Victoria), *Indicators from the Victorian Child and Adolescent Monitoring System—January 2009* (2009) <www.eduweb.vic.gov.au/edulibrary/public/govrel/Policy/children/vcams150indicators.pdf> at 28 June 2010.

55 *Ibid.* 5.

56 *Ombudsman Act 1973* (Vic) s 14(1).

57 *Ombudsman Act 1973* (Vic) s 16(1).

58 These are the: Office of the Victorian Ombudsman, *Discussion Paper: Improving Responses to Sexual Abuse Allegations* (2005); Office of the Victorian Ombudsman, *Improving Responses to Allegations Involving Sexual Assault* (2006); Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009); Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care* (2010).

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

11.26 The decision to launch an own motion investigation is generally undertaken following the identification of consistent themes in complaints lodged to the Ombudsman's office, or subsequent to findings made in an earlier investigation. The Ombudsman's reports in 2009 and 2010 are examples of this use of the own motion investigation power. Child protection matters also featured in the 2007,⁵⁹ 2008⁶⁰ and 2009⁶¹ Ombudsman's *Annual Reports*.

OMBUDSMAN'S CRITICISMS OF THE CURRENT OCSC MODEL

11.27 In the 2009, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) the Ombudsman identified limitations to the role of the Child Safety Commissioner.⁶² The Ombudsman reiterated similar concerns in the 2010 report, *Own Motion Investigation into Child Protection: Out of Home Care* (2010) commenting that the limitations include:

- a lack of coercive powers to investigate matters, therefore relying on the cooperation of the Department and other agencies to perform functions
- the ability to table only an annual report (the Victorian Child Safety Commissioner being the only Children's Commissioner type body in Australia unable to table a 'special report')
- that the Commissioner reports directly to the responsible Minister.⁶³

11.28 The Ombudsman argued that '[s]uch limitations to the role do not provide for the necessary independent scrutiny of the out-of-home care system'.⁶⁴

11.29 Further, the Ombudsman noted that the Child Safety Commissioner does not have a role in advocating on behalf of individual children.⁶⁵ The Ombudsman did not recommend any specific changes to the Commissioner's role, but focused on 'alternative approaches'. This included recommending that the 'Minister for Community Services examines mechanisms which would provide a greater level of scrutiny and transparency to the *out-of-home care* program'.⁶⁶

11.30 The Secretary responded to this recommendation:

*The principle of appropriate scrutiny and transparency of the OOHC [out of home care system] is supported. The Minister for Community Services will consider the report in detail and the department will scope options and mechanisms for enhancing appropriate levels of scrutiny and transparency in OOHC.*⁶⁷

VIEWS IN CONSULTATIONS AND SUBMISSIONS

11.31 The third option identified in the Commission's Information Paper was the creation of an independent statutory commissioner with some of the functions currently performed by the Department. The Commission asked questions about a number of functions that could be undertaken by a new statutory commissioner, including the carriage of proceedings and responsibility for guardianship of a child or young person found to be in need of protection. This option has been refined following further research and consultation and is dealt with in Chapter 9.

11.32 Many submissions called for an independent statutory body to advocate for children and young people.⁶⁸ The Australian Childhood Foundation argued for the establishment of an independent Child Protection Inspectorate to regularly inspect, audit and review the effectiveness of all state-run children's services, child protection systems and out-of-home care.⁶⁹

- 11.33 The Youth Affairs Council of Victoria (YACVic) and the Victorian Council of Social Service (VCOSS) proposed the creation of an independent Children and Young People’s Commission in Victoria.⁷⁰ YACVic and VCOSS⁷¹ said that while they welcomed the appointment of an Advocate for Children in Care in 2004 (replaced by the OCSC in 2005), ‘models have fallen short of what is needed to effect systematic change to better protect the rights and interests of all children and young people in Victoria’.⁷²
- 11.34 Both the Federation of Community Legal Centres and the Council to Homeless Persons supported the establishment of an independent statutory commission with responsibility for protecting and promoting the rights of all children and young people at a state level, subject to further evidence of the effectiveness of models in other jurisdictions.⁷³
- 11.35 The Victorian Aboriginal Legal Service Cooperative Limited (VALS) submission highlighted the need for an independent statutory commissioner, but argued that this would also require an appropriately resourced Aboriginal Child Safety Commissioner.⁷⁴ VALS directed the Commission towards previous calls for an Aboriginal Social Justice Commissioner and argued that this is integral to the long-term empowerment of Aboriginal people.⁷⁵
- 11.36 Some submissions that supported a Children and Young Person’s Commission did not want the commissioner to have a role in individual cases, saying that any commissioner should ‘have the responsibility of promoting rights of all children and young people at state level’.⁷⁶
- 11.37 A number of submissions highlighted a lack of accountability within the current Department structure. The Federation of Community Legal Centres believed that the Department’s problems were compounded by ‘a lack of meaningful and independent oversight’.⁷⁷ The Federation further argued that there must be greater scope to hold the Department ‘accountable for failures to provide appropriate support to families or to work in accordance with the principles outlined in the Act’.⁷⁸ Other community legal centres and agencies echoed these views.⁷⁹

- 59 Office of the Victorian Ombudsman, *Annual Report: 2007* (2007) 18–19, 33.
- 60 Office of the Victorian Ombudsman, *Annual Report: 2008* (2008) 47–9.
- 61 Office of the Victorian Ombudsman, *Annual Report: 2009* (2009) 28–32, 35–6.
- 62 Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 15, 120–1.
- 63 Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care*, above n 27, 119, 121.
- 64 Ibid 121.
- 65 Ibid. The Commission addresses this concern in Chapter 9.
- 66 Ibid 126.
- 67 Ibid.
- 68 As noted previously these were submissions 33 (Youthlaw), 36 (FLS), 38 (VALS), 41 (Australian Childhood Foundation), 43 (VCOSS & YACVic), 44 (CHP), 45 (FCLC). As also noted previously, some of these submissions raised issues with regards to an advocacy role for children. We discuss this further in Option 3.
- 69 Submission 41 (Australian Childhood Foundation).
- 70 Submission 43 (VCOSS & YACVic).

- 71 The combined submission of Victorian Council of Social Service and Youth Affairs Council of Victoria cited the model put forward in the *Are You Listening to Us?* Discussion Paper. This consisted of the following functions: involvement and engagement of young people; perform an advocacy role; monitor policies and practices; initiate and conduct inquiries; report and make recommendations to parliament; provide information referral and assistance to complaints; research critical issues; promote models of child and youth participation in decision making; apply for standing before the court in special selected cases involving the rights of children and young people; form partnerships with other statutory bodies. See submission 43 (VCOSS & YACVic).
- 72 Ibid.
- 73 Submission 44 (CHP), 45 (FCLC).
- 74 Submission 38 (VALS).
- 75 Ibid.
- 76 Submission 38 (VALS); similar claims were made in submissions 43 (VCOSS & YACVic), 45 (FCLC).
- 77 Submission 45 (FCLC).
- 78 Ibid.
- 79 Submission 38 (VALS), 26 (FVPLS Victoria), 39 (VACCA).

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

PREVIOUS REVIEWS

- 11.38 Previous reviews of Victoria's child protection system have called for the establishment of a children's commissioner with statutory oversight powers.⁸⁰
- 11.39 In 2001, this idea was restated in YACVic's discussion paper, *Are You Listening to Us?*⁸¹ The paper presented a case for a Victorian Children and Young People's Commission.⁸² YACVic argued that there was a need to improve the status of children and young people in the community.⁸³ The proposal outlined the commissioner's role as having a unique ability to protect and promote the rights of children and young people at a state level, and envisaged a broad overview function.⁸⁴ The role of the new Commission, according to YACVic's model, would complement those bodies already in place, namely the Ombudsman and the Equal Opportunity Commission, but would focus on the interests of children and young people and advocate for and improve their status within the community.⁸⁵
- 11.40 Additional support for a children's commissioner came in 2003, from the former President of the Children's Court, Judge Jennifer Coate.⁸⁶ Judge Coate argued that a commissioner should report directly to parliament and be independent of government.⁸⁷ Further, Judge Coate emphasised the importance of the Commission having the power to scrutinise legislation affecting children and young people so that it complies with the *United Nations Convention on the Rights of the Child* (CROC).⁸⁸
- 11.41 In 2004, the Kirby Report suggested that a Children and Young Person's Commissioner was necessary to increase the accountability of the child protection system.⁸⁹ The establishment of the OCSC went some way to fulfilling the recommendations of the Kirby Report. The Fitzroy Legal Service submitted that the powers vested in the Child Safety Commissioner by the CWS Act 2005 were limited and did not promote the level of accountability required to achieve full independence and meaningful external review.⁹⁰

THE OFFICE OF THE PUBLIC ADVOCATE

- 11.42 When considering the establishment of a statutory authority with oversight and monitoring responsibilities, it is useful to consider existing Victorian bodies with similar functions. The Office of the Public Advocate (OPA) was established nearly a quarter of a century ago with important oversight and advocacy functions for people with a disability.⁹¹
- 11.43 OPA's functions under the *Guardianship and Administration Act 1986* (Vic) include:
- to promote, facilitate and encourage the provision, development and coordination of services and facilities provided by government, community and voluntary organisations for people with a disability⁹²
 - to support the establishment of organisations involved with people with a disability and their relatives, guardians and friends⁹³
 - to arrange, coordinate and promote informed public awareness and understanding by the dissemination of information⁹⁴
 - to investigate, report and make recommendations to the Minister on any aspect of the operation of the Act referred to OPA by the Minister.⁹⁵

11.44 OPA is a statutory body within the Attorney General's portfolio.⁹⁶ The Public Advocate is appointed by the Governor in Council and holds office for a period of seven years.⁹⁷ The Public Advocate may be removed from office by the Governor in Council only following a resolution by both Houses of Parliament that the Public Advocate be removed from office.⁹⁸

OTHER AUSTRALIAN AND INTERNATIONAL MODELS

11.45 This section contains information about children and young people's commissions in other Australian states and territories, New Zealand, Scotland, and England and Wales. There is a comparative table at Appendix S.

AUSTRALIAN CAPITAL TERRITORY—ACT CHILDREN AND YOUNG PEOPLE COMMISSIONER

11.46 The ACT Children and Young People Commissioner was established in 2006⁹⁹ and forms part of the ACT Human Rights Commission. The Commissioner's functions include:

- providing a process for resolving complaints
- contributing to the review and improvement of service quality
- identifying and reviewing inquiries into complaints under the Act
- reporting to or advising the Minister accordingly.¹⁰⁰

11.47 The Commissioner is able to investigate and decide individual complaints.¹⁰¹

11.48 The Children and Young People Commissioner is not subject to the direction of anyone in relation to the exercise of a function, except that he or she must comply with the Minister's directions to inquire into and report on a matter that is the subject of a complaint under the Act.¹⁰²

11.49 The Commissioner reports to the Minister for the Department of Justice and Community Safety¹⁰³ and is required to report annually to parliament.¹⁰⁴ The Commissioner may be appointed for a term no longer than five years and may be removed from office for reasons including misbehaviour and contravening territory law.¹⁰⁵

80 The Norgard Committee recommended the establishment of a commissioner in 1976: Committee of Enquiry into Child Care Services in Victoria, *Report* (1976) 30. See also Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 148–50. *Seen and Heard* refers to numerous submissions received by the ALRC and past literature written about the need to establish a national commissioner for children. More recent calls have been made; these include: Australian Law Reform Commission, 'Children and Young People' (2008) 92 *Reform*; Australian Human Rights Commission, 'A National Children's Commissioner would Improve Protection of Children's Rights' (Media Release, 12 May 2010) 1; Sarah Hanson-Young, Australian Greens, 'It's Time To Give Our Kids Real Protection' (Media Release, 21 April 2010) 1; Jason Silverii, 'A Voice for the Children' (2003) *Law Institute Journal* 28, 28.

81 Youth Affairs Council of Victoria, *Are You Listening to Us? The Case of a Victorian Children and Young People's Commission* (2001). YACVic is the peak body and leading policy advocate on young people's issues in Victoria.

82 At that point there were Children and Young People Commissioners/Guardians in NSW, Queensland and Tasmania.

83 Youth Affairs Council of Victoria, above n 81, 4.

84 *Ibid.*

85 The principles of the proposed model included the importance of the Commission possessing independent statutory powers, an age remit of 0–18 years, adequate resources, accessibility for children, and a broad perspective and jurisdiction, taking into account government, non-government and commercial organisations.

86 Silverii, above n 80, 28.

87 *Ibid.*

88 *Ibid.*

89 Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004) 30.

90 Submission 36 (FLS).

91 *Guardianship and Administration Act 1986* (Vic) s 15.

92 *Guardianship and Administration Act 1986* (Vic) s 15(a).

93 *Guardianship and Administration Act 1986* (Vic) s 15(b).

94 *Guardianship and Administration Act 1986* (Vic) s 15(c).

95 *Guardianship and Administration Act 1986* (Vic) s 15(d).

96 Office of the Public Advocate, *About Us* (2010) <www.publicadvocate.vic.gov.au/about-us/> at 28 June 2010.

97 *Guardianship and Administration Act 1986* (Vic) sch 3, cl 1(1).

98 *Guardianship and Administration Act 1986* (Vic) sch 3 cl 1.

99 *Human Rights Commission Act 2005* (ACT) s 12(1)(a).

100 *Human Rights Commission Act 2005* (ACT) s 14.

101 House of Representatives Standing Committee on Education and Training, Parliament of Australia, *Adolescent Overload? Report of the Inquiry into Combining School and Work: Supporting Successful Youth Transitions* (2009) Appendix E, 4.

102 *Human Rights Commission Act 2005* (ACT) ss 16–17.

103 *Human Rights Commission Act 2005* (ACT) s 17.

104 *Human Rights Commission Act 2005* (ACT) s 14(f).

105 *Human Rights Commission Act 2005* (ACT) s 29.

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

NEW SOUTH WALES—THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE

- 11.50 The NSW Commission for Children and Young People was established in 1998.¹⁰⁶ The Commission is an independent statutory office and reports annually to the Presiding Officer of each House of Parliament.¹⁰⁷ The Governor appoints the Commissioner for a term not exceeding five years and the Commissioner may be removed from office for misbehaviour, incapacity or incompetence.¹⁰⁸
- 11.51 The Committee on Children and Young People is a joint parliamentary committee that monitors and reviews the work of the Commission and reports its findings and recommendations to parliament.¹⁰⁹ The Committee also reports on trends and changes in services affecting children.¹¹⁰
- 11.52 The overarching role of the Commission is to promote the safety and wellbeing of children and young people.¹¹¹ The Commission's functions include:
- monitoring complaints
 - conducting special inquiries at the request of the Commission or the Minister
 - providing information and advice to assist children and young people
 - conducting, promoting and monitoring training, public awareness and research on issues affecting children.¹¹²
- 11.53 The Commission does not deal directly with complaints or concerns about individual children.¹¹³

THE NSW CHILDREN'S GUARDIAN

- 11.54 The NSW Children's Guardian was established to promote and safeguard the best interests of all children and young people in out-of-home care.¹¹⁴ The Children's Guardian also has a role to accredit designated agencies and monitor their responsibilities under the *Children and Young Persons (Care and Protection Act) 1998 (NSW)*.¹¹⁵
- 11.55 The Children's Guardian also has the authority to remove the responsibility for daily care and control of a child or young person from an authorised person,¹¹⁶ as well as the power to apply to the Children's Court at any time for the rescission or variation of any order made under the Act by the Court.¹¹⁷ The Children's Guardian is able to investigate individual complaints that relate to protected or otherwise vulnerable children.¹¹⁸

NORTHERN TERRITORY—CHILDREN'S COMMISSIONER

- 11.56 The Children's Commissioner for the Northern Territory was established in 2008 under the *Care and Protection of Children Act 2007 (NT) (CPC Act 2007)*.¹¹⁹ The Commissioner reports to the Minister for Child Protection.¹²⁰ The Commissioner is an independent statutory officer appointed by the Administrator for a period not exceeding five years.¹²¹ The Administrator may suspend the Commissioner on the grounds of misbehaviour or physical or mental incapacity¹²² and must terminate the Commissioner's appointment for reasons including bankruptcy.¹²³
- 11.57 The functions of the Children's Commissioner include investigating complaints about services provided to protected children and monitoring the administration of the CPC Act 2007 in relation to the protection of children.¹²⁴
- 11.58 The Commissioner is not subject to the direction of anyone in relation to the way in which the functions of the Commissioner are performed or the order of priority the Commissioner gives to investigations.¹²⁵

QUEENSLAND—COMMISSION FOR CHILDREN AND YOUNG PEOPLE AND CHILD GUARDIAN

11.59 The Queensland Commission for Children and Young People and Child Guardian was established in 2000.¹²⁶ The Commissioner or Guardian is an independent statutory officer appointed by the Governor¹²⁷ for a period not exceeding five years.¹²⁸ The Minister may remove the Commissioner from office for incapacity or misbehaviour.¹²⁹

11.60 The functions of the Commissioner include:

- a broad advocacy function for all children as well as children in out-of-home care and in the juvenile system
- investigation of individual complaints and systemic concerns
- seeking judicial review of decisions made by statutory child protection decision makers
- target audits of agency and individual compliance with legislation.¹³⁰

11.61 The Commissioner is also required to keep a register of child deaths and to this end chairs the Review and Prevention Committee.¹³¹

11.62 The Commissioner is not under the control or direction of the Minister and is directed to act independently in performing the functions and exercising his or her powers in a way that promotes and protects the rights, interests and wellbeing of children.¹³²

SOUTH AUSTRALIA—GUARDIAN FOR CHILDREN AND YOUNG PEOPLE

11.63 The South Australian Guardian for Children and Young People was established in 1993¹³³ and is an independent statutory officer appointed by the Governor for a period not exceeding five years.¹³⁴ The Guardian reports to the Minister for Families and Communities.¹³⁵ The Guardian may be removed from office upon the presentation of an address from both Houses of Parliament seeking the guardian's removal.¹³⁶

106 *Commission for Children and Young People Act 1998* (NSW) s 4.

107 *Commission for Children and Young People Act 1998* (NSW) s 23(1). See also New South Wales Commission for Children and Young People, *About Us* (2010) <<http://kids.nsw.gov.au/kids/about.cfm>> at 28 June 2010.

108 *Commission for Children and Young People Act 1998* (NSW) s 5(3)–(4).

109 *Commission for Children and Young People Act 1998* (NSW) s 28(1). See also Parliament of New South Wales, *Committee on Children and Young People* (2010) <www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/9B66CAD2DD408B1ECA256996001A32B3> at 28 June 2010.

110 *Commission for Children and Young People Act 1998* (NSW) s 28(1)(d).

111 *Commission for Children and Young People Act 1998* (NSW) s 10.

112 *Commission for Children and Young People Act 1998* (NSW) s 11.

113 *Commission for Children and Young People Act 1998* (NSW) s 16(1). See also New South Wales Commission for Children and Young People, *About Us*, above n 107.

114 *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 181(b). See also New South Wales Government, *The Children's Guardian, Welcome to the Children's Guardian* (2010) <www.kidsguardian.nsw.gov.au/> at 28 June 2010.

115 *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 181(c)(e).

116 *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 182. Notice in writing given to an authorised carer is required for the Children's Guardian to carry out this function.

117 *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 184.

118 House of Representatives Standing Committee on Education and Training, above n 101, 4.

119 *Care and Protection of Children Act 2007* (NT) s 259(1). The Northern Territory was the last Australian jurisdiction to establish a Children's Commissioner.

120 Office of the Children's Commissioner Northern Territory, *About Us* (2010) <<http://childrensCommissioner.nt.gov.au/aboutus.html>> at 28 June 2010.

121 *Care and Protection of Children Act 2007* (NT) s 285.

122 *Care and Protection of Children Act 2007* (NT) s 289(1). Other grounds include if the Commissioner were to claim bankruptcy and actions associated with this under s 289(6) of the Act.

123 *Care and Protection of Children Act 2007* (NT) s 289(6)(a).

124 *Care and Protection of Children Act 2007* (NT) s 260(a)(c).

125 *Care and Protection of Children Act 2007* (NT) s 262.

126 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 14.

127 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 26(1). See also House of Representatives Standing Committee on Education and Training, above n 101, 7.

128 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 27(2)–(3).

129 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 32(1)–(2).

130 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 17.

131 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) ss 143, 127(1).

132 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 22(1).

133 *Children's Protection Act 1993* (SA) s 52A(1).

134 *Children's Protection Act 1993* (SA) s 52A(3).

135 *Children's Protection Act 1993* (SA) s 52D(1)–(2). Department of Education and Children's Services (SA), *Children Under the Guardianship of the Minister* (2010) <www.decs.sa.gov.au/speced2/pages/childprotection/studentsInCare?reflag=1> at 28 June 2010.

136 *Children's Protection Act 1993* (SA) s 52A(5).

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

- 11.64 The Guardian’s remit is children and young people in out-of-home care. Its functions include:
- promoting the best interests of children and young people in out-of-home care
 - acting as an advocate, particularly for those children who have suffered, or are alleged to have suffered, sexual abuse
 - monitoring systemic complaints and advising the Minister
 - advising the Minister on the quality of service provision and whether the needs of such children and young people are being met.¹³⁷
- 11.65 In the exercise of its functions, the Guardian must act independently, impartially and in the public interest.¹³⁸ The legislation expressly provides that the Minister cannot control how the Guardian is to exercise the statutory functions and cannot give any direction with respect to the content of any report prepared by the Guardian.¹³⁹

TASMANIA—COMMISSIONER FOR CHILDREN

- 11.66 The Tasmanian Commissioner for Children was established in 2000¹⁴⁰ as an independent statutory officer who reports to the Minister for Health and Human Services.¹⁴¹ The Commissioner is appointed by the Governor for a period of no longer than three years,¹⁴² and may be removed from office by the Governor on the recommendation of the Minister for any sufficient reason.¹⁴³
- 11.67 The Commissioner has responsibilities for all children and young people, with a focus on vulnerable children, particularly those in the child protection or juvenile justice system.¹⁴⁴ The functions of the Commissioner include:
- advocating to increase public awareness of matters relating to the health, welfare, care, protection and development of children
 - providing recommendations and advice to government
 - encouraging the development of services and policies within the department to promote the rights of children and young people.¹⁴⁵
- 11.68 The Commissioner can investigate individual complaints when requested by the Minister.¹⁴⁶

WESTERN AUSTRALIA—COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

- 11.69 The Western Australian Commissioner for Children and Young People was established in 2007¹⁴⁷ as an independent statutory officer.¹⁴⁸ The Commissioner is appointed by the Governor for a period no longer than five years¹⁴⁹ and may, at any time, be suspended or removed from his office by the Governor on addresses from both Houses of Parliament.¹⁵⁰
- 11.70 The Commissioner’s responsibility is for all children and young people in Western Australia, with special focus on the interests and needs of Aboriginal children and young people, and those who are vulnerable or disadvantaged.¹⁵¹ The Commissioner’s broad functions include:
- providing advocacy through policy
 - promoting participation of children and young people in matters affecting them
 - research, monitoring and special inquiries

- reviewing laws, draft laws and policies relating to children and young people
- providing recommendations to executive government and non-government organisations.¹⁵²

11.71 The Commissioner does not deal with complaints about a particular child or young person.¹⁵³ The Commissioner monitors government agencies in their own task of dealing with complaints made by children and young people and noting any trends in complaints made.¹⁵⁴

11.72 The Commissioner is not subject to direction by the Minister or any other person in the performance of his or her functions,¹⁵⁵ except that the Minister is able to give written directions about the general policy to be followed by the Commissioner when exercising his or her statutory functions.¹⁵⁶

NEW ZEALAND—CHILDREN'S COMMISSIONER

11.73 The Children's Commissioner, formerly the Commissioner for Children, was established in 1989.¹⁵⁷ The Children's Commissioner was intended to act primarily as an accountability mechanism for the Department of Child, Youth and Family Services and report to the Minister to this end.¹⁵⁸

11.74 The Commissioner is appointed by the Governor-General for a term not exceeding five years¹⁵⁹ and may be removed from office by the Governor-General on the recommendation of the responsible Minister.¹⁶⁰

11.75 The Commissioner's functions include:

- personally investigating any decision or recommendation made in relation to any child
- establishing and promoting a complaints mechanism
- raising awareness of CROC
- advocating for children's interests, rights and welfare
- promoting children's participation in decision making affecting their lives
- enquiring into and reporting on any matter relating to children's welfare.¹⁶¹

11.76 In addition to these general functions, the Commissioner has specific functions in relation to the *Children, Young Persons and Their Families Act 1989* (NZ). These functions include:

- investigating decisions or recommendations made under the Act
- monitoring and assessing the policies and practices of the department
- encouraging the department to develop policies and services that promote the welfare of children and young people
- advising the Minister on any matter relating to the administration of the Act
- making recommendations on the operation of the Act.¹⁶²

- 137 *Children's Protection Act 1993* (SA) s 52C(1).
- 138 *Children's Protection Act 1993* (SA) s 52AB(1).
- 139 *Children's Protection Act 1993* (SA) s 52AB(2).
- 140 *Children, Young Persons and Their Families Act 1997* (Tas) s 78(1).
- 141 *Children, Young Persons and Their Families Act 1997* (Tas) s 83(1).
- 142 *Children, Young Persons and Their Families Act 1997* (Tas) sch 1, cl 1A.
- 143 *Children, Young Persons and Their Families Act 1997* (Tas) sch 1, cl 6. 'Sufficient reason' is not defined in the Act. The provision appears to give the Governor the discretion to decide what is sufficient reason.
- 144 House of Representatives Standing Committee on Education and Training, above n 101, 7.
- 145 *Children, Young Persons and Their Families Act 1997* (Tas) s 79(1).
- 146 House of Representatives Standing Committee on Education and Training, above n 101, 4.
- 147 *Commissioner for Children and Young People Act 2006* (WA) s 6(1).
- 148 House of Representatives Standing Committee on Education and Training, above n 101, 1.
- 149 *Commissioner for Children and Young People Act 2006* (WA) s 9.
- 150 *Commissioner for Children and Young People Act 2006* (WA) s 8(1).
- 151 House of Representatives Standing Committee on Education and Training, above n 101, 7.
- 152 *Commissioner for Children and Young People Act 2006* (WA) s 19.
- 153 *Commissioner for Children and Young People Act 2006* (WA) s 23(1).
- 154 *Commissioner for Children and Young People Act 2006* (WA) s 19(d)(e).
- 155 *Commissioner for Children and Young People Act 2006* (WA) s 25.
- 156 *Commissioner for Children and Young People Act 2006* (WA) s 26.
- 157 The commissioner was originally established under the *Children, Young Persons and Their Families Act 1989* (NZ), but was subsequently removed and placed under the *Children's Commissioner Act 2003* (NZ).
- 158 *Crown Entities Act 2004* (NZ) s 150. See also Gubb and Partners, *Children's Commission* (2004) Ministry of Education (NZ) <www.educationalleaders.govt.nz/Problem-solving/Education-and-the-law/Quasi-judicial-officers/Children-s-Commission> at 28 June 2010.
- 159 *Crown Entities Act 2004* (NZ) ss 28(1)(b), 32(1)(b).
- 160 *Crown Entities Act 2004* (NZ) s 39(1).
- 161 *Children's Commissioner Act 2003* (NZ) s 12(1).
- 162 *Children's Commissioner Act 2003* (NZ) s 13(1).

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

SCOTLAND—COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

- 11.77 Scotland's Commissioner for Children and Young People was established in 2003.¹⁶³ The Commissioner is appointed by the Queen¹⁶⁴ for a period not exceeding five years¹⁶⁵ and can be removed by a resolution of parliament if there is either a loss of confidence in the Commissioner's ability or willingness to carry out his or her role, or a breach of the terms of appointment.¹⁶⁶ The Commissioner reports annually to parliament on the exercise of his or her functions.¹⁶⁷
- 11.78 The Commissioner's primary function is to promote and safeguard the rights of children and young people.¹⁶⁸ These functions include:
- promoting awareness and understanding of children's and young people's rights
 - reviewing and assessing the law, policy and practice relating to this group
 - promoting best practice by service providers¹⁶⁹
 - publishing research on matters relating to this group.¹⁷⁰
- 11.79 The Commissioner has the power to carry out own motion investigations.¹⁷¹ This is limited to investigations into service providers to determine to what extent, and by what means, a provider considers children's rights, interests and views in making decisions that affect them.¹⁷² The Commissioner has no power to investigate individual complaints or matters 'for which there are established procedures, through existing statutory agencies and, ultimately, the Courts ... [and] matters reserved to the UK Parliament'.¹⁷³

ENGLAND—CHILDREN'S COMMISSIONER

- 11.80 The *Children Act 2004* (UK) establishes a Children's Commissioner for England.¹⁷⁴ The responsible Minister appoints the Commissioner for a period not exceeding five years.¹⁷⁵ The Children's Commissioner reports annually to parliament through the Secretary of State for Children, Schools and Families.¹⁷⁶
- 11.81 The Commissioner must promote awareness of the views and interests of children in England.¹⁷⁷ The Commissioner's functions include:
- advising the Secretary of State on the views and interests of children
 - researching the operation of complaints procedures relating to children and any other matter relating to the interests of children
 - publishing reports about any of these matters.¹⁷⁸
- 11.82 While the Commissioner is able to hold inquiries into children's individual cases if they have wider policy relevance, he or she must consult with the Secretary of State prior to commencing an inquiry.¹⁷⁹ Alternatively, the Secretary of State may direct the Commissioner to hold an inquiry into an individual case if it raises issues of relevance to other children.¹⁸⁰ The Commissioner is accountable to the Secretary of State, which has generated some concern.¹⁸¹ The lack of independence from government has resulted in questioning of the Commissioner's role in relation to the standards set out in CROC.¹⁸²

WALES—CHILDREN'S COMMISSIONER

- 11.83 The *Care Standards Act 2000* (Wales) establishes a Children's Commissioner for Wales.¹⁸³ The *Children's Commissioner for Wales Act 2001* (Wales) makes further provisions for the Children's Commissioner for Wales. The Commissioner is appointed for seven years, reports to the First Minister¹⁸⁴ and is required to table an annual report to the Welsh Assembly.¹⁸⁵

11.84 The Commissioner’s principal aim is to safeguard and promote the rights and welfare of Welsh children.¹⁸⁶ The Commissioner must review and monitor the operation of regulated children’s service providers.¹⁸⁷ The Commissioner also has the power to review individual cases if they have relevance to other children’s rights or welfare.¹⁸⁸

11.85 The Commissioner has the authority to consider and make representations to the Assembly about any matter affecting the rights or welfare of children in Wales.¹⁸⁹

ADDITIONAL FUNCTIONS TO BE PERFORMED BY THE CHILD SAFETY COMMISSIONER

11.86 As this chapter reveals, many other communities both within and beyond Australia have established a permanent independent body with a broad oversight and monitoring role in the area of child protection. The Child Safety Commissioner is an existing statutory authority that could become the body to perform these functions in Victoria. It would be necessary to make a number of changes to the governing legislation to give the Commissioner the authority to perform this task, and to secure an appropriate level, and appearance, of independence.

11.87 The Commission is not proposing that a broad scale whole-of-government children and young person’s commissioner be introduced in Victoria. Existing bodies created at the same time as the Child Safety Commissioner under the CWS Act 2005 have a whole-of-government approach to children’s issues. As previously discussed in this chapter, the Council provides independent and expert advice on policies and services that enhance the health, wellbeing, development and safety of children¹⁹⁰ and has a role in forward planning to assist departments across government.¹⁹¹ The Board ensures the coordination of government activities affecting children.¹⁹² The Commission has concluded that a broad-scale children and young person’s commissioner would involve significant duplication of roles in relation to Victorian children.

163 *Children and Young People (Scotland) Act 2003* (Scot) s 1(1).

164 *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) s 2(1), appointed on the nomination of parliament.

165 *Children and Young People (Scotland) Act 2003* (Scot) s 2(3).

166 *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) s 3(1)(b).

167 Under the *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) the Commissioner must report to Parliament annually on its functions (s 10) and at the conclusion of any investigations (s 11) and may lay before parliament any other reports the Commissioner considers necessary or appropriate (s 12).

168 *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) s 4(1).

169 ‘Service providers’ are defined in s 16 of the *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) as service providers providing services for children and young people, but not including a parent or guardian.

170 *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) s 4(2).

171 *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) s 7.

172 *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) s 7(1). The Scottish Commissioner for Children and Young People can carry out investigations only if the Commissioner, on available evidence, is satisfied on reasonable grounds that the matter is of significance to children and young people or particular groups: *Commissioner for Children and Young People (Scotland) Act 2003* (Scot) s 7(2).

173 Scottish Executive, *United Nations Convention on the Rights of The Child: A Report on Implementation of the UN Convention on the Rights of the Child in Scotland 1999–2007* (2007) 9.

174 *Children Act 2004* (UK) s 1(1).

175 *Children Act 2004* (UK) sch 1, cl 3(4)–(5).

176 *Children Act 2004* (UK) s 8.

177 *Children Act 2004* (UK) s 2(1).

178 *Children Act 2004* (UK) s 2(2).

179 *Children Act 2004* (UK) s 3(3).

180 *Children Act 2004* (UK) s 4(1).

181 See Liberty (UK), *Your Rights: Rights of Children in Domestic and International Law* (2008) <www.yourrights.org.uk/yourrights/the-rights-of-children-and-young-people/rights-of-children-in-domestic-and-international-law.shtml> accessed 28 June 2010.

182 Jane Fortin, *Children’s Rights and the Developing Law* (3rd ed, 2009) 53.

183 *Care Standards Act 2000* (Wales) s 72.

184 *The Children’s Commissioner for Wales Regulations 2001* (Wales) r 13(4)(a).

185 *Care Standards Act 2000* (Wales) sch 2, cl 8. See also *The Children’s Commissioner for Wales Regulations 2001* (Wales) r 15(1).

186 *Children’s Commissioner for Wales Act 2001* (Wales) s 1(2).

187 *Children’s Commissioner for Wales Act 2001* (Wales) s 4.

188 Children’s Commissioner for Wales, *Annual Review 07–08* (2008) 28.

189 *Children’s Commissioner for Wales Act 2001* (Wales) s 5(1).

190 *Child Wellbeing and Safety Act 2005* (Vic) s 10(1).

191 Department of Education and Early Childhood Development (Victoria), *Victorian Children’s Council*, above n 40.

192 *Child Wellbeing and Safety Act 2005* (Vic) s 15(b).

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

OVERSIGHT AND REVIEW OF THE CHILD PROTECTION SYSTEM

- 11.88 The Commission proposes that the Child Safety Commissioner should have additional responsibility for oversight and review of the child protection system. Oversight and review is fundamental to guaranteeing transparency and accountability of the child protection system.
- 11.89 The Child Safety Commissioner's current role is limited to specific areas of responsibility for children in the child protection system including child safety issues, monitoring of out-of-home care services and child deaths.¹⁹³ As discussed earlier, the Ombudsman has commented upon the limitations of the Child Safety Commissioner's role.¹⁹⁴ Some submissions received by the Commission suggested the need for a body with powers to audit and review the effectiveness of Victoria's child protection system and state-run children's services.¹⁹⁵ One submission argued that the limited nature of the powers vested in the Child Safety Commissioner under the CWS Act 2005 did not permit the Commissioner to exercise meaningful powers of review.¹⁹⁶ Further, the Kirby Report called for the introduction of a Children and Young Person's Commissioner to increase the accountability of the child protection system.¹⁹⁷
- 11.90 Children's commissioners in other Australian jurisdictions have a range of broad monitoring powers relating to the protection of children and their rights. The Commissioner for Children and Young People in Queensland monitors and reviews laws, policies and practices that relate to the delivery of services to children¹⁹⁸ or services that otherwise affect children.¹⁹⁹ The Commissioner for Children and Young People in Western Australia has a similar role, reviewing and monitoring practices and services affecting children's and young people's wellbeing.²⁰⁰ The Children's Commissioner in the Northern Territory has a role to monitor the administration of the legislative scheme that governs the protection of children.²⁰¹ In NSW, the Commissioner makes recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.²⁰²
- 11.91 In Victoria, there is a strong argument for giving a permanent independent body a broad oversight and monitoring role in the area of child protection. While caring for vulnerable children is a core state responsibility, it can involve compulsory state intervention in the fundamental unit of society—the family. As we have indicated elsewhere in this report, it is a challenging task to respect and balance the rights and responsibilities in section 17 of the Charter.²⁰³ Informed and independent oversight of the child protection system, coupled with ongoing advice to parliament about the system's strengths and weaknesses, are effective means of maintaining community confidence that an appropriate balance is being struck.
- 11.92 The Commission believes that in line with other jurisdictions in Australia, the Child Safety Commissioner's powers under the CWS Act 2005 should be broadened to include review and oversight of all aspects of the child protection system.

INVESTIGATION AND REPORTING ON THE *CHILDREN, YOUTH AND FAMILIES ACT 2005 (VIC)*

- 11.93 The Commission proposes that the government consider giving the Child Safety Commissioner statutory authority to investigate and report to the responsible Minister about the operation of the CYF Act 2005. This proposal is closely linked to the previous proposal relating to a broad oversight role for the Victorian child protection system. The Commission further proposes below that reports of this nature should be tabled in parliament.

- 11.94 Under current arrangements, the Child Safety Commissioner reports annually to the Minister, who must table the report within 21 sitting days.²⁰⁴ The Child Safety Commissioner does not have broad powers of investigation and reporting into any aspect of the operation of the CYF Act 2005 but only in relation to specific aspects of the Act or other functions conferred on the Child Safety Commissioner under legislation.²⁰⁵ At present, there is no institution with responsibility for systematic review of this important piece of legislation.
- 11.95 In 2003, the then President of the Children’s Court of Victoria, Judge Jennifer Coate, called for the creation of a children’s commissioner with the power to scrutinise legislation affecting children and young people so that it complies with CROC.²⁰⁶
- 11.96 The Commission believes that it would be beneficial for the Child Safety Commissioner to have broad powers to both investigate and make reports into the operation of the CYF Act 2005. This Act is central to the smooth operation of Victoria’s child protection system and to governing the relationship between the key institutions within the system. Victoria’s recent history suggests that unless an expert standing body has responsibility for oversight and review of the child protection system, including the operation of the Act, further reviews of the child protection system will probably continue to be necessary.

ADVOCACY FOR CHILDREN AND YOUNG PEOPLE

- 11.97 The Commission proposes that the Child Safety Commissioner should have the power to advocate for children and young people across government and throughout the community.
- 11.98 As presently expressed, the advocacy functions given to the Child Safety Commissioner relate to promoting child safe practices and providing services for children living in out-of-home care.²⁰⁷ Other Victorian bodies which have responsibility for children, such as the Council, the Board and the Ombudsman, do not have a broadly-stated advocacy power for children and young people across government and throughout the community.²⁰⁸
- 11.99 In May 2010 the Ombudsman noted that the Child Safety Commissioner does not have a role in advocating for individual children.²⁰⁹ However, some of the submissions received by the Commission suggested that a children and young person’s commission should not have a role in individual cases, saying that any commissioner should ‘have the responsibility of promoting rights of all children and young people at state level’.²¹⁰
- 11.100 Children’s commissioners in other jurisdictions have a much broader advocacy function. Commissioners in NSW,²¹¹ Queensland²¹² and Western Australia²¹³ have a role to advocate for the wellbeing of all children and young people. The significance of this function is enhanced by the power of those commissioners to report directly to a joint parliamentary committee.²¹⁴
- 11.101 In response, the Commission proposes that the Child Safety Commissioner should have the power to advocate for children and young people across government and throughout the community. To be effective, that role should not be limited to the child protection system and should cover all children and young people in Victoria within and outside the child protection area. The breadth of this function will enable the Child Safety Commissioner to link child protection-related issues to other matters in the Victorian community and across government policy which impact upon children, such as the criminal justice system, education and health issues. The Child Safety Commissioner’s role should not be to advocate on behalf of individual children but instead to focus on broader cohorts of Victorian children.

- 193 The functions of the Child Safety Commissioner have previously been outlined in this chapter under the heading ‘The Office of the Child Safety Commissioner’.
- 194 Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program*, above n 62, 15, 120–1; Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care*, above n 27, 21, 119, 121.
- 195 Submissions 36 (FLS), 41 (Australian Childhood Foundation), 45 (FCLC).
- 196 Submission 36 (FLS).
- 197 Freiberg, Kirby and Ward, above n 89, 30.
- 198 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 17(1)(i)(i).
- 199 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 17(1)(i)(ii).
- 200 *Commissioner for Children and Young People Act 2006* (WA) s 19(g).
- 201 *Care and Protection of Children Act 2007* (NT) s 260(c).
- 202 *Commission for Children and Young People Act 1998* (NSW) s 11(d).
- 203 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1) recognises that ‘families are the fundamental group unit of society and are entitled to be protected by society and the State’.
- 204 *Child Wellbeing and Safety Act 2005* (Vic) s 41.
- 205 *Child Wellbeing and Safety Act 2005* (Vic) s 19(f).
- 206 Silverii, above n 80, 28.
- 207 The functions of the Child Safety Commissioner have previously been outlined in this chapter under the heading ‘The Office of the Child Safety Commissioner’.
- 208 The functions of these agencies and bodies were discussed previously in this chapter under the heading ‘Relationship of OCSC with other children’s agencies and bodies’.
- 209 Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care*, above n 27, 121.
- 210 Submission 38 (VALS); similar claims were made in submissions 43 (VCOSS & YACVic), 45 (FCLC).
- 211 *Commission for Children and Young People Act 1998* (NSW) s 11(b).
- 212 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 17(g).
- 213 *Commissioner for Children and Young People Act 2006* (WA) s 19(a).
- 214 *Commission for Children and Young People Act 1998* (NSW) s 23(1); *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 83; *Commissioner for Children and Young People Act 2006* (WA) ss 48(4)(b), 49(1).

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

LIAISON WITH ABORIGINAL COMMUNITIES

- 11.102 The Commission proposes that the Child Safety Commissioner should have the power to liaise with Victorian Aboriginal communities in order to ensure that the Commissioner is able to effectively advocate for Aboriginal children. Section 12 of the CYF Act 2005 emphasises the importance of liaising with the Aboriginal community when making decisions or taking actions in relation to Aboriginal children.
- 11.103 In Western Australia, the Commissioner for Children and Young People must give priority to, and have special regard to, the interests and needs of Aboriginal children and young people.²¹⁵ Submissions supported this idea, and further suggested the creation of a separate Aboriginal Social Justice Commissioner²¹⁶ or a similarly resourced Aboriginal Safety Commissioner within the OCSC.²¹⁷ The Commission recognises the significance of consulting with Aboriginal agencies and representatives, and suggests that liaison with those key parties could be an explicit function of the Child Safety Commissioner. It seems desirable that a children's commissioner have the responsibility to advocate for all Victorian children.
- 11.104 The Commission believes that the Children's Koori Family Support Program is the appropriate vehicle for identifying the specific needs of Aboriginal communities in Victoria in relation to processes in the child protection system.²¹⁸ If the Child Safety Commissioner's role is broadened, the Commissioner should liaise with Victorian Aboriginal communities to ensure that he or she is able to effectively advocate for Aboriginal children.

PROMOTION OF CHILDREN'S AND YOUNG PEOPLE'S RIGHTS

- 11.105 The Commission proposes that the Child Safety Commissioner should have the additional responsibility to promote awareness of children's and young people's rights. That is not currently part of the role of the OCSC.
- 11.106 As discussed earlier in this chapter (see 'Previous reviews'), YACVic proposed the creation of a Victorian Children and Young People's Commission to protect and promote the rights of children and young people.²¹⁹
- 11.107 Submissions from both the Federation of Community Legal Centres and the Council to Homeless Persons supported the establishment of an independent statutory commission to advocate for and protect the rights of all children and young people at a state level.²²⁰

REPORTING TO PARLIAMENT ON THE CHILDREN, YOUTH AND FAMILIES ACT 2005 (VIC)

- 11.108 The Commission proposes that the Child Safety Commissioner should have the power to report to parliament on an annual basis and, additionally, to report to parliament when reporting to the Minister about the operation of the CYF Act 2005. This power would enable the Child Safety Commissioner to make both annual and special reports to parliament on the Victoria's child protection system. This power would bring the Victorian Commissioner in line with other jurisdictions in Australia.
- 11.109 The Commission does not propose that the Child Safety Commissioner have own motion investigative powers. The Child Safety Commissioner's existing powers of investigation make the additional coercive powers which accompany own motion investigations unnecessary. Under the CWS Act 2005 the Secretary of the Department and the person in charge of out-of-home care must provide the Child Safety Commissioner with assistance in the reasonable exercise of the OCSC's functions²²¹ and further, the Child Safety Commissioner is entitled to access records relating to investigations into out-of-home care.²²²

CONSULTATION WITH CHILDREN AND YOUNG PEOPLE

- 11.110 The Commission proposes that the Child Safety Commissioner should be required to consult children and young people about the performance of the Commissioner's functions. There is no existing requirement in the CWS Act 2005 for the Child Safety Commissioner to do this.
- 11.111 The children and young people consulted by CREATE Foundation on behalf of the Commission felt that their views were not always heard or appropriately represented within the child protection system.²²³ Involving children in matters that affect their wellbeing is an important development which helps to ensure children's self-determination in a manner consistent with article 12 of CROC. Article 12 provides that where a child is capable of forming his or her own views, states parties shall allow the child to express those views freely in all matters affecting him or her.²²⁴ These views are to be given due weight in accordance with the age and maturity of the child.²²⁵
- 11.112 The Commissioner in Western Australia is directed to consult children and young people from a broad range of socio-economic backgrounds and age groups,²²⁶ as well as encourage children and young people to participate in the Commissioner's decision making.²²⁷ In Queensland, the Commissioner must also consult children in ways that promote their participation in the Commissioner's decision making.²²⁸
- 11.113 The Children's Commissioners in South Australia,²²⁹ Tasmania²³⁰ and Western Australia²³¹ are required to establish advisory committees comprising children and young people to assist in the exercise of their various functions. In the ACT²³² and Queensland,²³³ the Commissioners have discretionary powers to establish Advisory Committees comprising children and young people.
- 11.114 The Commission proposes that consultation with children and young people should be incorporated into the structure of the Child Safety Commissioner. This may be through the creation of a standing advisory committee comprising children and young people as in South Australia, Tasmania and Western Australia or through regular consultation with children and young people as in Queensland and Western Australia. The requirement to consult children and young people should be included in the CWS Act 2005.

Proposal 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.

- 215 *Commissioner for Children and Young People Act 2006* (WA) s 20(1)(a)(i).
- 216 Submission 38 (VALS).
- 217 Submission 39 (VACCA).
- 218 See Chapter 7 under the heading 'Work of the Children's Court (Family Division) Koori Family Support Program'.
- 219 Youth Affairs Council of Victoria, above n 81, 4.
- 220 Submissions 44 (CHP), 39 (VACCA), 43 (VCOS & YACVic), 45 (FCLC).
- 221 *Child Wellbeing and Safety Act 2005* (Vic) s 21.
- 222 *Child Wellbeing and Safety Act 2005* (Vic) s 30.
- 223 CREATE Foundation, *Children and Young People in Care Consultation for the Victorian Law Reform Commission* (2010) 8.
- 224 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990).
- 225 *Ibid.*
- 226 *Commissioner for Children and Young People Act 2006* (WA) s 19(n).
- 227 *Commissioner for Children and Young People Act 2006* (WA) s 20(e)(ii).
- 228 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 23(1)(a).
- 229 *Children's Protection Act 1993* (SA) s 52EA(3).
- 230 *Children, Young Persons and Their Families Act 1997* (Tas) s 81(1).
- 231 *Commissioner for Children and Young People Act 2006* (WA) s 52(2).
- 232 *Human Rights Commission Act 2005* (ACT) s 19C(2).
- 233 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) ss 150(1)(b), 151(1)(b).

Option 5—Broadening the Role of the Office of the Child Safety Commissioner

STRENGTHENING THE INDEPENDENCE OF THE CHILD SAFETY COMMISSIONER

- 11.115 A statutory commissioner who monitors the operations of the child protection system should have, and should be seen to have, an appropriate level of independence.
- 11.116 In 2009 and 2010 the Ombudsman identified limitations to the role of the Child Safety Commissioner which it stated 'do not provide for the necessary independent scrutiny of the out-of-home care system'.²³⁴ The Ombudsman proposed a range of measures to increase the level of scrutiny and transparency in the out-of-home care system, the subject of his 2010 report.²³⁵ The principle of appropriate transparency and scrutiny of the out-of-home care system was supported by the Department in the Secretary's response to the report.²³⁶
- 11.117 In 2004, the Kirby Report suggested that a Children and Young Person's Commissioner was necessary to increase the accountability of the child protection system.²³⁷ As previously explained, a number of submissions to the Commission highlighted a lack of accountability within the current Department structure. The Federation of Community Legal Services focused on 'a lack of meaningful and independent oversight' of the Department²³⁸ and a lack of accountability 'for failures to provide appropriate support to families or to work in accordance with the principles outlined in the Act'.²³⁹ Other community legal centres echoed these views.²⁴⁰
- 11.118 The additional functions proposed for the Child Safety Commissioner will require independence from the Department of Human Services. Increased independence would complement the oversight provisions proposed previously in this chapter. In order to undertake oversight and review of the child protection system and review the operation of the CYF Act 2005, the OCSC must be at arm's length from the Department responsible for the daily operation of the system.

APPOINTMENT BY THE GOVERNOR IN COUNCIL

- 11.119 The Commission proposes that the Child Safety Commissioner should be appointed by the Governor in Council which reflects the appointment process for other heads of statutory bodies in this field.
- 11.120 At present, the Child Safety Commissioner is appointed and can be removed by the Premier.²⁴¹ Unlike the heads of other statutory bodies within the Human Services and Health portfolios, such as the Health Services Commissioner,²⁴² the Disability Services Commissioner,²⁴³ and the President of the Mental Health Review Board,²⁴⁴ the appointment is not made by the Governor in Council. The Public Advocate is also appointed by the Governor in Council.²⁴⁵ Children's Commissioners in every other Australian jurisdiction (except the Australian Capital Territory) and in New Zealand are appointed by the head of state in that jurisdiction.²⁴⁶

PERIOD OF APPOINTMENT

- 11.121 The Commission proposes that the Child Safety Commissioner should hold office for a period not exceeding five years.
- 11.122 Children's Commissioners in Western Australia, South Australia, Queensland, the Australian Capital Territory, New South Wales, the Northern Territory and New Zealand are appointed for terms not exceeding five years.²⁴⁷ The Victorian Public Advocate is appointed for a fixed term of seven years.²⁴⁸

11.123 The Commission proposes that the period of appointment for the Child Safety Commissioner should be fixed in the CWS Act 2005 at five years. That period is consistent with the period of appointment for Children’s Commissioners in almost all other Australasian jurisdictions. This period of tenure will give the Commissioner a level of autonomy that promotes independent monitoring of Victoria’s child protection system.

OTHER TERMS SIMILAR TO THOSE THAT APPLY TO THE PUBLIC ADVOCATE

11.124 The Commission proposes that the Child Safety Commissioner should be appointed and hold office on terms similar to those that apply to the Public Advocate with the exception of the term of appointment. The Office of the Public Advocate is a statutory body within the Attorney General’s portfolio with oversight and advocacy functions for people with a disability.

11.125 The Commission proposes that the provisions in schedule 3 of the *Guardianship and Administration Act 1986* (Vic) concerning the Public Advocate’s appointment, tenure (other than the term of office) and removal from office are an appropriate broad model for a Child Safety Commissioner with the additional functions outlined in this chapter.

REPORTING TO PARLIAMENT ON ACTIVITIES AND FINANCIAL OPERATIONS

11.126 The Commission proposes that the Child Safety Commissioner should be required to report to parliament on an annual basis about the Commissioner’s activities and financial operations.

ATTORNEY-GENERAL IS THE RESPONSIBLE MINISTER

11.127 The Commission proposes that the Attorney-General should be the Minister responsible for the Child Safety Commissioner.

11.128 Currently, the Child Safety Commissioner reports to the Minister for Community Services.²⁴⁹ In May 2010, the Ombudsman identified this function as one of the limitations of the OCSC’s current role.²⁵⁰ The Ombudsman argued that these limitations compromise the Child Safety Commissioner’s ability to provide independent scrutiny of the child protection system.

11.129 The Commission proposes that in order to maintain an arms-length relationship from the Department of Human Services, the Attorney-General would be the most appropriate Minister to have responsibility for the Commissioner.

Proposal 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.

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

234 Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care*, above n 27, 121.

235 *Ibid* 125.

236 *Ibid* 126.

237 Freiberg, Kirby and Ward, above n 89, 30.

238 Submission 45 (FCLC).

239 *Ibid*.

240 Submission 38 (VALS), 26 (FVPLS Victoria), 39 (VACCA).

241 Section 18 of the *Child Wellbeing and Safety Act 2005* (Vic) stipulates that the Child Safety Commissioner is to be employed under part 3 of the *Public Administration Act 2004* (Vic). Under s 12(2) of the *Public Administration Act 2004* (Vic) the Premier, on behalf of the Crown, may employ a person as a Department Head or Administrative Office Head.

242 *Health Services (Conciliation and Review) Act 1987* (Vic) s 5(2).

243 *Disability Act 2006* (Vic) s 14(2).

244 *Mental Health Act 1986* (Vic) sch 1, cl 1(a).

245 *Guardianship and Administration Act 1986* (Vic) sch 3, cl 1(1).

246 See discussion of each jurisdiction earlier in this chapter.

247 See discussion of each jurisdiction earlier in this chapter.

248 *Guardianship and Administration Act 1986* (Vic) sch 3, cl 1(1).

249 *Child Wellbeing and Safety Act 2005* (Vic) s 41(1).

250 Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care*, above n 27, 121.

Appendices

CONTENTS

- 424 Appendix A: Submissions
- 426 Appendix B: Consultations
- 427 Appendix C: Chronology of key child protection legislation and reviews
- 429 Appendix D: Recent Victorian reports
- 449 Appendix E: Selected reviews in other jurisdictions
- 460 Appendix F: The Department of Human Services child protection regions and offices
- 461 Appendix G: Child protection practitioner roles, classification and teams
- 463 Appendix H: Outline of five primary applications in child protection proceedings
- 466 Appendix I: Sections 10–14 of the CYF Act 2005
- 470 Appendix J: Current commencement proceedings
- 471 Appendix K: The pink form—conditions
- 473 Appendix L: DHS statement of grounds and summary of information form
- 478 Appendix M: Victoria Legal Aid grants of aid for representation in Children’s Court (Family Division) matters
- 482 Appendix N: Table 1: Protection of children in Australian jurisdictions
- 492 Appendix O: Part VII, Division 12A of the Family Law Act 1975 (Cth)
- 498 Appendix P: Jurisdictional tables (international)
- 505 Appendix Q: Convenor’s report
- 507 Appendix R: Constitutional considerations of new processes
- 509 Appendix S: Australian commissioners for children and child guardians
- 511 Bibliography

Appendix A SUBMISSIONS

SUBMISSIONS		DATE RECEIVED
1	Anonymous	16.02.10
2	Dr Michael S King	22.02.10
3	Mrs Jill Gaffney	03.03.10
4a	Confidential	04.03.10
4b	Confidential	04.03.10
5	Confidential	22.03.10
6	Confidential	22.03.10
7	Professor Cathy Humphreys	26.03.10
8	Angela Smith	30.03.10
9	Tim Smith	30.03.10
10	Anonymous	30.03.10
11	Victoria Legal Aid	30.03.10
12	Confidential	31.03.10
13	Anonymous	31.03.10
14	Ian Charles	31.03.10
15	Connections	31.03.10
16	Anonymous	31.03.10
17	Children's Court Clinic	31.03.10
18	SECASA	01.04.10
19	Joe Gorman	01.04.10
20	Confidential	01.04.10
21	Grandparents Victoria Inc.	01.04.10
22	Anchor Inc.	01.04.10
23	Confidential	01.04.10
24a	West Heidelberg Community Service Inc.	01.04.10
24b	Additional comments received from WHCSI	23.04.10
25	Law Institute of Victoria Ltd	01.04.10
26	Aboriginal Family Violence Prevention & Legal Service Victoria	01.04.10
27	Children's Protection Society	01.04.10
28	Anonymous	01.04.10
29	Anglicare Victoria	01.04.10
30	Centre for Excellence in Child and Family Welfare	01.04.10
31	Gatehouse Centre—Royal Children's Hospital	01.04.10
32	Springvale Monash Legal Service Inc.	01.04.10

SUBMISSIONS CONT'D		DATE RECEIVED
33	Youthlaw	01.04.10
34	Victoria Police	01.04.10
35	Family Relationship Services Australia	01.04.10
36	Fitzroy Legal Service	01.04.10
37	Child Safety Commissioner	01.04.10
38	Victorian Aboriginal Legal Service Co-operative Limited	01.04.10
39	Victorian Aboriginal Child Care Agency Co-Op Ltd	06.04.10
40	Australian Institute of Family Studies	06.04.10
41	Australian Childhood Foundation	06.04.10
42	Sarah Murray	07.04.10
43	VCOSS and YACVic	07.04.10
44	Council to Homeless Persons	07.04.10
45	The Federation of Community Legal Centres (Vic) Inc.	08.04.10
46	Children's Court of Victoria	09.04.10
47	Disability Discrimination Legal Service Inc.	12.04.10
48	The Victorian Bar	16.04.10
49	County Court	03.05.10
50	Anonymous	06.05.10
51	Anonymous	10.05.10

Appendix B CONSULTATIONS

CONSULTATIONS		DATE
1	Children's Court of Victoria Magistrates	11.02.10
2	Children's Court Clinic	15.02.10
3	Court Advocacy Unit	16.02.10
4	Department of Human Services—Statewide Child Protection Managers	19.02.10
5	Community Service Providers	22.02.10
6	Private Practitioners 1	23.02.10
7	Private Practitioners 2	24.02.10
8	Confidential	01.03.10
9	Barristers	03.03.10
10	Victorian Forensic Paediatric Medical Service	04.03.10
11	Federation of Community Legal Centres	10.03.10
12	Confidential	10.03.10
13	Department of Human Services Child Protection Workers Hume	11.03.10
14	Confidential	11.03.10
15	Koori Justice Unit - Project Steering Committee	15.03.10
16	Victorian Legal Aid	15.03.10
17	Victoria Police	16.03.10
18	Department of Human Services Child Protection Workers Gippsland	17.03.10
19	Confidential	17.03.10
20	Department of Human Services Community Care Managers	18.03.10
21	Confidential	19.03.10
22	Department of Human Services Child Protection Workers Southern	22.03.10
23	Dispute Resolution Convenors	23.03.10
24	Professor Cathy Humphreys	26.03.10
25	DHS Child Protection Workers—Eastern and North West	26.03.10
26	Dr Lynette Buoy—Centre for Excellence Child and Family Welfare	30.03.10
27	Aboriginal Family Violence Prevention Legal Service	31.03.10
28	Victorian Aboriginal Child Care Agency	01.04.10

Appendix C

CHRONOLOGY OF KEY CHILD PROTECTION LEGISLATION AND REVIEWS¹

Neglected and Criminal Children's Act 1864 (Vic)

Children Court Act 1906 (Vic)

Children's Welfare Act 1933 (Vic)

Children's Welfare Act 1954 (Vic)

Children's Court Act 1958 (Vic)

Children's Court Act 1973 (Vic)

Community Services Act 1970 (Vic)²

Committee of Enquiry into Child Care Services in Victoria, *Report* (1976) (the Norgard report)

Community Welfare Services Act 1978 (Vic)

(Australian) Law Reform Commission, *Child Welfare*, Report No 18 (1981)

Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) (the Carney report)

Children's Court (Amendment) Act 1986 (Vic)

Justice Fogarty, *Protective Services for Children in Victoria: An Interim Report* (1989)

Children and Young Persons Act 1989 (Vic)

Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993)

Children and Young Persons (Further Amendment) Act 1993 (Vic)

Children and Young Persons (Miscellaneous Amendments) Act 1994 (Vic)

Victorian Auditor-General's Office, *Special Report No 42 Protecting Victoria's Children: The Role of the Children's Court* (1996)

Victorian Auditor-General's Office, *Special Report No 43 Protecting Victoria's Children: The Role of the Department of Human Services* (1996)

Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997)

Children and Young Persons (Appointment of President) Act 2000 (Vic)

Jan Carter, *Report of the Community Care Review* (2000)

Public Accounts and Estimates Committee, Parliament of Victoria, *Report on the Review of the Auditor-General's Special Report No 43—Protecting Victoria's Children: The Role of the Department of Human Services* (2001)

Family Law Council, *Family Law and Child Protection: Final Report* (2002)

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

1 The reviews listed include those by James Wood (NSW) the ALRC, the ALRC and HREO Commission, and the Family Law Council.

2 Previously known as *Community Welfare Services Act 1970*, (Vic) previously known as *Social Welfare Act 1970* (Vic).

Appendix C

CHRONOLOGY OF KEY CHILD PROTECTION LEGISLATION AND REVIEWS

Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004)

Child Wellbeing and Safety Act 2005 (Vic)

Children, Youth and Families Act 2005 (Vic)

Jeanette Maughan and Andrea Dagleis, *An Evaluation of Pre-Hearing Conferences in the Family Division of the Children's Court of Victoria* (2005)

Boston Consulting Group, *Children's Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007)

James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008)

Wallis Consulting Group, *Survey of Participants and Convenors in Dispute Resolution Conferences at Melbourne Children's Court Report* (2008)

Courts Legislation Amendment (Judicial Resolution Conference) Act 2009 (Vic)

Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009)

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

Office of the Victorian Ombudsman, *Own Motion Investigation into Out of Home Care* (2010)

Appendix D RECENT VICTORIAN REPORTS

NORGARD COMMITTEE REPORT (1976)

BACKGROUND

D.1 A Committee of Enquiry chaired by Mr JD Norgard (the Norgard Committee) conducted one of the earliest modern reviews of the Victorian child protection system from 1974 to 1976. The Norgard Committee was appointed by the then Premier of Victoria Mr RJ Hamer, 'following various representations to the Premier made by people interested in the child welfare field'.¹

D.2 The Norgard Committee was asked to examine the procedures through which children were admitted to the care of the Social Welfare Department, and whether alternatives to wardship should be provided in protective applications.² The Norgard Committee concluded that

*much of the legislation and some of the procedures have their roots in the last century and are based on social and political thinking which is of doubtful relevance for the present day.*³

D.3 The Norgard Committee stated that child and family welfare

*cannot be evaluated in isolation: it must be considered in relationship to wider issues of justice, community values and societal changes, as well as in relation to public policies in such areas as health, poverty and education. Our broad policy has been to see the family and the community as a whole working as a partnership with the aim of promoting the welfare of the child within the family at all times.*⁴

RECOMMENDATIONS

D.4 The Norgard Committee noted that the child welfare legislation in 1976 (the *Social Welfare Act 1970* (Vic)) did 'not contain any clear rationale for official intervention in individual children's affairs', and that the grounds for a child's admission to state guardianship 'basically derive[d] from the nineteenth century'.⁵ The Committee recommended that several of the grounds for state intervention in the *Social Welfare Act 1970* (Vic) be considered for repeal, including the 'vagrancy clauses', the 'exposure to moral danger' ground and the grounds that the child 'is lapsing or likely to lapse into a career of vice or crime' (which the Committee likened to 'preventative detention').⁶

D.5 The Norgard Committee also recommended that Social Welfare Department officers should be authorised to 'investigate cases of alleged complaints of neglect or maltreatment, attempt remedial action and initiate legal proceedings as a last resort', and that police involvement in child protection proceedings should be phased out.⁷

The Children's Court

D.6 The Norgard Committee recommended that the Children's Court should have the power to make short-term custody orders to the state with parents retaining guardianship, and that a guardianship to the state order should only initially be for 12 months.⁸ The Norgard Committee also recommended that the relevant legislation should explicitly state that a child should not be admitted to state guardianship unless the Court 'is convinced that admission is the least harmful option for the child or is necessary to protect society'.⁹

1 Committee of Enquiry into Child Care Services in Victoria, *Report* (1976) 2.

2 Ibid 3, Term of Reference No 4.

3 Ibid 12.

4 Ibid 10.

5 Ibid 25.

6 Ibid 26.

7 Ibid 79, 87.

8 Ibid 28, 85.

9 Ibid 87.

Appendix D RECENT VICTORIAN REPORTS

- D.7 The Norgard Committee noted that the Children’s Court had been ‘widely criticised on various grounds’ in submissions.¹⁰ To address some of these criticisms, it recommended that:
- there should be ‘suitable accommodation’ at the Court for people to consult privately with social workers, police and legal representatives
 - hearings involving ‘offending adolescents’ should be heard at a different time to those concerning younger children
 - although children should not be legally represented at all Court hearings, they should be represented ‘whenever the Court is considering making a decision which would alter a child’s legal status’, or where there is a strong conflict between the interests of the parents and the interests of the child.¹¹
- D.8 The Norgard Committee also stated that ‘[t]he Children’s Court should be seen as a specialist jurisdiction and specific training courses should be made available to Magistrates’.¹²

OUTCOME OF THE REPORT

- D.9 Following the Norgard Committee’s report, the grounds for state intervention in the life of a child were altered. The grounds that the Norgard Committee had identified as no longer appropriate, such as homelessness, exposure to moral danger and lapsing into a career of crime, were removed.¹³
- D.10 Also, in accordance with the Norgard Committee’s recommendation, the period for which an initial guardianship to state order could have effect was restricted to 12 months, after which the Director-General could apply for an extension of the order for a further 12 months.¹⁴

REPORT OF THE CHILD WELFARE PRACTICE AND LEGISLATION REVIEW COMMITTEE (THE CARNEY COMMITTEE REPORT)

BACKGROUND

- D.11 In December 1982, the Minister for Community Welfare Services, Ms Pauline Toner, and the Attorney-General (and Premier), John Cain, established the Child Welfare Practice and Legislation Review Committee, chaired by Dr Terry Carney, to review child welfare legislation and practice in Victoria. This review resulted in the 1984 report *Equity and Social Justice for Children, Families and Communities*—a report of great importance for the development of Victoria’s child protection system. The Carney Committee provided a ‘blueprint for the development of child and family welfare services’ in Victoria, and draft legislation to implement the blueprint.¹⁵
- D.12 The Carney Committee stated in the introduction to the report that its review was ‘not the first attempt to reform child welfare practice and legislation in this State’.¹⁶ It noted that between 1950 and 1982, there had been nine major reviews of aspects of the Victorian child welfare system.¹⁷
- D.13 The Carney Committee made the comment, which is equally pertinent today, that
- The impartial observers of our child welfare history cannot escape the conclusion that changing political attitudes, changing economic circumstances, and changing social conditions have all substantially affected both the law, and the administration of the law, with respect to children and their families.*¹⁸

RECOMMENDATIONS

- D.14 To address concerns that Aboriginal children placed in out-of-home care were losing the connection to their culture and community, the Carney Committee recommended that

*placement of Aboriginal children away from their parents should be made in accordance with the 'Aboriginal child placement principle', which requires that preference be given to the extended Aboriginal family, then to the family community or to placement by an Aboriginal agency.*¹⁹

- D.15 The Carney Committee recommended that the grounds for state intervention in a child's life should be clarified, and defined in such a way as to require 'objective proof to be furnished to the courts that intervention is justified'.²⁰ The Carney Committee recommended six grounds upon which a child should be found to be 'in need of protection', with a new focus on the harm suffered, or likely to be suffered, by the child.²¹

- D.16 The Carney Committee recognised the need for a power of apprehension in relation to children at immediate risk, and recommended that

*where the authorised intervener carries out an investigation and discovers the child to be in circumstances falling within the definition of being in need of protection, or where there is substantial and immediate risk of physical harm to the child, the authorised intervener should have the power to apprehend the child and place him or her in safe custody.*²²

- D.17 Importantly, the Carney Committee stated that

*Safe custody is a drastic option and should be reserved for the protection of the child who is at immediate risk. It should not be allowed to become a routine or de facto placement option, usurping the rights of the family.*²³

- D.18 The Carney Committee recommended that safe custody be confined to a 48-hour period, with the Court having a power to extend it for a further seven days, and at a maximum an additional seven days thereafter.²⁴ The family, child or guardian would have a right to prompt judicial review of the decision to take the child into safe custody, by telephone if necessary.²⁵

Case planning

- D.19 The Carney Committee stressed that case planning responsibility should be assumed by the Department *prior* to court, rather than after the Court has determined that the child is in need of protection.²⁶ The Carney Committee recommended that prior to a court hearing, the Department worker should convene a case planning conference with all interested parties, including potential care providers, the family, an advocate for the family, and the child (where appropriate).²⁷

- D.20 The Carney Committee recommended that case planning conferences should be convened whenever court proceedings are contemplated, to 'explore possible alternatives to formal intervention'.²⁸ The Committee envisioned that a case planning conference would be 'a decision-making forum, rather than just an administrative procedure'.²⁹ The Committee recommended that legal advocates be excluded from case planning decisions.³⁰

- 10 Ibid 79.
11 Ibid 79–80.
12 Ibid 81.
13 *Community Welfare Services Act 1978* (Vic) s 19.
14 *Community Welfare Services Act 1978* (Vic) s 21.
15 Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 1, 1.
16 Ibid vol 2, 1.
17 Ibid.
18 Ibid 10.
19 Ibid 82.
20 Ibid 94.
21 Ibid 218. These grounds were adopted by the legislature in s 63 of the *Children and Young Persons Act 1989* (Vic), and substantially remain the current grounds for a protection application in s 162 of the *Children, Youth and Families Act 2005* (Vic).
22 Child Welfare Practice and Legislation Review, above n 15, vol 2, 227.
23 Ibid (citations omitted).
24 Ibid 227–8.
25 Ibid 266.
26 Ibid 232.
27 Ibid. The Carney Committee recommended that the Regional Deputy Manager of the Department be responsible for convening and chairing the conferences; that he or she should invite relevant experts or potential carers to attend; that a separate lay advocate be appointed for the child where there is a potential conflict of interests between the child and the parents, and that where Aboriginal children are involved, a member of the Aboriginal community must be present: at 299–301.
28 Ibid 298–9.
29 Ibid 299.
30 Ibid 317.

Appendix D RECENT VICTORIAN REPORTS

The Children's Court

- D.21 The Carney Committee recommended that the new legislation should stipulate a range of principles for the Children's Court to consider when determining protection applications, including:
- the need to give the widest possible protection and assistance to the family as the fundamental group unit of society, particularly while it is responsible for the care and education of children
 - the need to protect children from specific harms and to protect their rights and promote their welfare
 - court intervention should only be regarded as appropriate when other forms of intervention have been tried and failed or would not be appropriate in the circumstances
 - court proceedings should aim to minimise stigma attached to the child and family
 - where there is conflict between the interests of the child and some other person, the child's welfare and interests are the paramount considerations.³¹
- D.22 After receiving 'universal support' for the idea in submissions, the Carney Committee recommended the establishment of a Children's Court Family Division, 'with a distinct identity and a philosophy separate from the criminal jurisdiction'.³² It recommended that 'every effort should be made to ensure that Family Division hearings are held separately from the exercise of Young Offender jurisdiction of the Court'.³³
- D.23 The Carney Committee believed that the new Family Division's decision making could 'be vastly improved by including non-legal expertise on the bench', and that this could be done in such a way that the rights of the parties would not be prejudiced.³⁴ It accordingly recommended that the Family Division of the Children's Court be constituted by a multi-disciplinary panel of a magistrate or County Court judge, an expert in child and family welfare and someone with experience in community welfare.³⁵

Children's Court protection applications procedures

- D.24 The Carney Committee stated that
- there is much to be gained from allowing a mediation conference to take place under court auspice ... separate and distinct from court decision-making, with any discussions being excluded from subsequent court hearings.*³⁶

The Committee recommended that the Court be given the power to adjourn protection application proceedings at any time to refer the parties to the Court Liaison Officer for a mediation conference, and that generally, while lawyers would not be included in such conferences, the Court could grant leave for legal representatives to be present.³⁷

- D.25 The Carney Committee also recommended that families be legally represented in all protection proceedings, and that 'where there is a potential conflict between the child and the parents, the child should have the right to separate legal representation'.³⁸ It envisioned that the separate legal representative would 'convey to the court the wishes of the child, rather than an assessment of their "best interests"'. The latter is more properly the responsibility of the court'.³⁹

D.26 The Carney Committee recommended that the Family Division Court adopt a less formal, more inquisitorial process of determining protection applications, unbound by 'legal forms and ceremonies'.⁴⁰ It recommended that the Family Division be able to 'determine the manner of its own proceedings ... [and] inform and direct itself, on any matter, in such manner as it thinks just'.⁴¹ As part of the more 'active, fact-finding role' that the Committee proposed for the Family Division, the Court would have the power to directly question witnesses, counsel and advocates, and call for further information and advice.⁴²

Children's Court disposition options

D.27 The Carney Committee recommended that the Children's Court have a much wider range of 'graded' disposition options, which would 'range from minimum to maximum intervention in the life of the family', and would ensure that the Court could take the least interventionist option that is appropriate to secure the child's welfare and safety.⁴³

D.28 At the minimal intervention level, the Carney Committee recommended that the Court have power to endorse agreements reached between the parties, and between the family and a third party, such as a service provider, by way of giving recognition to undertakings.⁴⁴

D.29 At the intermediate range of intervention, the Committee recommended that a state agency should assume the primary responsibility for monitoring supervision orders; a role that was at the time performed by voluntary service providers.⁴⁵

D.30 At the maximum intervention level, the Carney Committee recommended that the Court have the power to:

- grant custody to a third party, with guardianship remaining with the parents
- grant custody to the state, with guardianship remaining with the parents
- grant both guardianship and custody to the state.⁴⁶

Avenues for appeal

D.31 The Carney Committee stated that it was 'inappropriate to make the Family Division of the Children's Court the all powerful watchdog over administrative decisions and actions'.⁴⁷ It recommended that 'an appeal to the court about administrative decisions is limited to those which *directly* affect the original court determination'—for example, where the Department fails to abide by a specific condition that a particular service be offered to a family.⁴⁸ The Committee recommended that all other decisions made by the Department be reviewable by the State Administrative Appeals Tribunal.⁴⁹

D.32 The Carney Committee also recommended that a court of appeal be established within the Children's Court itself, to hear appeals against decisions of the Family Division, other than on a question of law, in which case the appeal would still go to the Supreme Court.⁵⁰ The argument for this arrangement was that such appeals 'should be heard by an independent body with direct familiarity with the Children's Court jurisdiction', and that it would 'minimise delays and costs associated with appeals to the County Court'.⁵¹ The Committee envisaged that the appellate jurisdiction would be exercised by a judge of the Children's Court, or in special circumstances, a County Court judge.⁵²

31 Ibid 237. Some of these principles were adopted in s 87 of the *Children and Young Persons Act 1989* (Vic), and others were implemented in s 10 of the *Children, Youth and Families Act 2005* (Vic).

32 Child Welfare Practice and Legislation Review, above n 15, vol 2, 237.

33 Ibid 241.

34 Ibid 238.

35 Ibid 238–9.

36 Ibid 241.

37 Ibid 242.

38 Ibid 243.

39 Ibid.

40 Ibid 244.

41 Ibid.

42 Ibid.

43 Ibid 264.

44 Ibid 269.

45 Ibid 271.

46 Ibid 274.

47 Ibid 322.

48 Ibid.

49 Ibid.

50 Ibid 325.

51 Ibid 325, 485.

52 Ibid 325.

Appendix D RECENT VICTORIAN REPORTS

Addressing the reputation of the Children's Court

- D.33 The Carney Committee expressed concern about the reputation of the existing Children's Court, noting that one submission referred to 'the unfortunate impression, held by some, that a court for children is a lowly and uncongenial tribunal'.⁵³ To 'upgrade the status of the Children's Court', the Committee recommended that the Court be headed by a chief judge of an equivalent status to a County Court judge.⁵⁴
- D.34 The Carney Committee also recommended that magistrates, in addition to the usual qualifications, should have 'training in a social or behavioural science, experience with children, and personal qualities to fit them for work in the Children's Court jurisdiction'.⁵⁵

OUTCOME OF THE REPORT

- D.35 The legislature did not respond to the Carney Committee's recommendations comprehensively until 1989, when the *Children and Young Person's Act 1989* (Vic) was passed. It did, however, pass the *Children's Court (Amendment) Act 1986* (Vic), which, as discussed in the previous section, established separate Family and Criminal divisions in each Children's Court. The *Children's Court (Amendment) Act 1986* (Vic) also provided for the specific (and potentially exclusive) appointment of magistrates to the Children's Courts,⁵⁶ and gave Children's Courts the power to order preliminary conferences in Family Division proceedings, to 'provide an informal forum at which the parties may discuss matters in dispute and where possible reach agreement'.⁵⁷ The Act provided that if an agreement that the Court considered in the child's best interests was reached at these conferences, the Court could make an order to implement the agreement.⁵⁸

PROTECTIVE SERVICES FOR CHILDREN IN VICTORIA: INTERIM REPORT

BACKGROUND

- D.36 In August 1988, as part of his appointment as the inaugural Chairperson of the Victorian Family and Children's Services Council, Justice Fogarty was requested to enquire into the operation of Victoria's child protection system and to advise on measures to improve its effectiveness and efficiency.⁵⁹ In September 1988, Ms Delys Sargeant, Deputy Chairperson of the Council, joined Justice Fogarty in the preparation of the report.
- D.37 In February 1989, Justice Fogarty and Sargeant forwarded an interim report to the Minister because they were concerned that there were 'aspects of the child protection service in Victoria which are so urgent and fundamental that we should report on them quickly'.⁶⁰
- D.38 In the interim report's introduction, Justice Fogarty gave a damning indictment of the history of the child protection system in Victoria, stating that
- Statutory child protection services in Victoria are in an unsatisfactory state. This is the cumulative result of a series of wrong turns over the past twenty years ... during that period almost every mistake which could have been made has now been made.*⁶¹

RECOMMENDATIONS

D.39 Justice Fogarty recommended that statutory child protection should be constituted as 'a narrowly based emergency intervention service' for children at risk of harm, and should not be confused with long-term welfare programs.⁶² In relation to the appropriate definition of 'child abuse' that should attract state intervention, Justice Fogarty stated that

*The definition in the Children and Young Persons Bill, which is now before Parliament, of a child who is in need of protection is a step in the right direction with its emphasis upon the existence of or risk of **harm** as an essential ingredient.*⁶³

The Children's Court

D.40 Like the Carney Committee, Justice Fogarty recommended that child protection cases 'should be conducted by Magistrates who specialise in that field', and that specialist prosecutors should conduct the cases where police are involved.⁶⁴

D.41 Justice Fogarty noted that in consultations held during the report's preparation, many people raised concerns about Community Services Victoria's failure to provide timely reports to the Court in child protection proceedings, resulting in delays of several months before the case's final disposition.⁶⁵ His Honour accordingly recommended that the service provided by Community Services Victoria in the preparation of reports to the Court 'must be substantially upgraded as a matter of real urgency'.⁶⁶

PROTECTIVE SERVICES FOR CHILDREN IN VICTORIA: FINAL REPORT

BACKGROUND

D.42 In July 1993, Justice Fogarty completed a second report on Victoria's child protection system. The report was triggered by Daniel Valerio's murder and the Victorian Government's subsequent introduction of mandatory reporting.⁶⁷ In the terms of reference, Justice Fogarty was asked to 'examine the interface' between child protection services and the Children's Court.⁶⁸

D.43 His Honour emphasised that '[w]e cannot continue to have reviews in Victoria every few years'.⁶⁹

AN OVERVIEW OF THE CHILDREN'S COURT

D.44 Justice Fogarty went on to outline the problems that had arisen following the implementation of the Children and Young Persons Act 1989 (Vic) (CYP Act 1989), noting that under the new Act, the Children's Court and protection workers were placing too much emphasis on the child remaining with the family, and not enough on the right of the child to be protected.⁷⁰ His Honour recommended amendment to the CYP Act 1989 to

*make a clear statement that, whilst the Court is required to take into account a number of factors and give appropriate weight to protection of the family and the policy of the children remaining within the family, in the ultimate the paramount consideration is the protection and welfare of the child and that all other matters are subservient to that.*⁷¹

53 Ibid 403.

54 Ibid 404. The Carney Committee recommended that the chief judge be appointed for seven years, with the possibility of extension, by joint recommendation of the Minister for Community Welfare Service and the Attorney-General, in consultation with the chief judge of the County Court: at 404.

55 Ibid.

56 *Children's Court (Amendment) Act 1986* (Vic) s 4.

57 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 May 1986, 1676 (Mr C R T Mathews, Minister for the Arts).

58 *Children's Court (Amendment) Act 1986* (Vic) s 6.

59 Justice Fogarty, *Protective Services for Children in Victoria: An Interim Report* (1989) 2.

60 Ibid.

61 Ibid.

62 Ibid 6.

63 Ibid 53 (emphasis in original).

64 Ibid 9, 85.

65 Ibid 133.

66 Ibid 9.

67 Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993) 4.

68 Ibid 170.

69 Ibid 4.

70 Ibid 86–9.

71 Ibid 89.

72 Ibid 141.

Appendix D RECENT VICTORIAN REPORTS

D.45 Justice Fogarty observed that

*the magistrates, staff, lawyers and workers from the Department are carrying out their duties in increasingly overworked, crowded and under-resourced circumstances ... unless these issues are seriously addressed now, there will be a damaging reduction in the quality of work performed by the Court ... there is little point in building up the expertise of the statutory child protection service in this State if the tribunal which finally determines those matters finds itself unable to respond at a level which the community requires.*⁷²

D.46 In response to submissions from the Department of Health and Community Services (DHCS, the predecessor to DHS) that the Children's Court was or had become 'too legalistic', his Honour stated that such criticism stemmed from a failure to understand that

*A significant reason for the existence of the Children's Court is that it stands independent of the Department, the children and the parents and represents the community in the determination of these extremely difficult and delicate issues which are likely to have profound, perhaps permanent, effect on the lives of the young children involved. Consequently, it is necessary for the Court to be independent and to be seen to be independent, especially from the Department which is a party in every proceeding before it. It must have the confidence of the parents who come before it and the confidence of the community that it will act in an independent way in accordance with the legislation.*⁷³

D.47 Justice Fogarty conceded, however, that 'there seems to be no doubt that proceedings in the Children's Court have become more legalistic in recent years'.⁷⁴ His Honour attributed this mainly to the provisions of the CYP Act 1989, that had

*the effect of providing a greater spread of representation than had previously been the case. This was a conscious policy translated into legislation from the Carney Report. Its aim was to empower parents and protect children so that they would be able to have their say before orders were made. The consequence is that there are frequently three represented parties, namely the Department, child and one or both parents. The result is that the proceedings do assume a more legal framework and hearings take longer. However, the resolution of difficulties that arise as a consequence of that is not to be found in diluting the right to representation but by the Court taking greater control of its procedures and the relevance of evidence being called and thus over the length of hearings and delays.*⁷⁵

D.48 For the Court's part, his Honour noted that

*at time greater control could legitimately be exercised over the parameters of the material called in some cases and ... this, combined with practice directions and better listing procedures, could reduce the length of cases and delays.*⁷⁶

Training and professionalism in the Children's Court

D.49 Justice Fogarty commented on the inadequate training given to child protection workers, specifically in relation to the giving of evidence in the Children's Court.⁷⁷ His Honour noted that workers were anxious that lawyers and the Court did not respect their views, and that they were not familiar with court processes, procedures and evidential requirements.⁷⁸ In turn, his Honour noted Children's Court magistrates and lawyers were concerned that when it came to presenting evidence and explaining decisions, the workers were ill-equipped.

D.50 Justice Fogarty emphasised that ‘the question of professionalism on both sides is a major issue. It is important to remove that from the debate’.⁷⁹ He commented that

*At the highest level in the Department the independence and integrity of the Court must be accepted and policy and training must proceed upon that basis. At the protective worker level the problem ... is a consequence of a lack of knowledge of and training about the Children’s Court and its procedures ... All too often inexperienced workers go to the Court and when they encounter difficulties are inclined to blame the Court rather than their lack of knowledge and training. It is essential that protection workers are given more thorough training and that they see the Court in its true role, namely as part of an independent judicial system of the State and an independent body directed to the protection of children.*⁸⁰

D.51 His Honour also noted that

*the relationship between social workers, the advisory service, lawyers and Legal Aid is at times strained and ... this permeates the process, giving an unnecessary air of legalism and distracting the participants from the main issues.*⁸¹

73 Ibid 142–3.
74 Ibid 145.
75 Ibid.
76 Ibid 145–6.
77 Ibid 73.
78 Ibid.
79 Ibid 144.
80 Ibid.
81 Ibid 146.
82 Ibid 147.
83 Ibid 153.
84 Ibid 155.
85 Ibid 155–6.
86 Ibid 156.
87 Ibid 157–9.
88 Ibid 161.
89 Ibid 162.

RECOMMENDATIONS

Structure of the Children’s Court

D.52 Like the Carney Committee, Justice Fogarty noted that ‘the Children’s Court is not at times accorded the status within legal circles, the Department and perhaps the community that its work justifies’.⁸² His Honour echoed the Carney Committee’s recommendation that the Children’s Court be separated from the Magistrates’ Court and headed by a judge of County Court status, and that appropriately-qualified persons be appointed directly to the Court to reflect the Court’s specialisation and to improve its reputation.⁸³

Minimising delays in the Children’s Court

D.53 His Honour commented that the Children’s Court’s use of interim hearings as a ‘dry run’ for final hearings caused unnecessary delays.⁸⁴ To avoid duplication of evidence, his Honour recommended that magistrates engage in case management and confine the evidence presented in the initial hearing, or convert the initial hearing into the final hearing.⁸⁵ His Honour pointed out that the problem of duplication is exacerbated when different magistrates hear interim hearings and final hearings in the same matter.⁸⁶

D.54 To reduce delays of four to six months for contested matters, Justice Fogarty recommended that:

- pre-hearing conciliation conferences, which at that time were a pilot scheme, should be extended to become a permanent feature of the Court, with reference to the New Zealand family group conference (FGC) model⁸⁷
- the senior magistrate should utilise the power to give practice directions in relation to practice and procedure in the Court, which his Honour noted was a ‘major innovation in the new Act’⁸⁸
- funding should be granted to enable Children’s Court judgments to be made available in a permanent form, as this would ‘make a considerable difference to the quality of judgments and the status of the Court and have a strong influence on practice and expert knowledge’.⁸⁹

Appendix D RECENT VICTORIAN REPORTS

OUTCOME OF THE REPORT

- D.55 Following Justice Fogarty's final report, the *Children and Young Persons (Miscellaneous Amendments) Act 1994* was passed. This Act amended section 87 of the CYP Act 1989 to clarify that in making orders under the Act, the Court's paramount consideration should be the 'need to protect children from harm, to protect their rights and to promote their welfare'.
- D.56 Also, as a result of the pilot programs' success and in line with Justice Fogarty's recommendation, the decision was made to continue with pre-hearing conferences in the Children's Court.
- D.57 Justice Fogarty's recommendations that the Carney Committee's recommendations for the structure of the Children's Court be adopted were, however, not heeded until 2000, when the *Children and Young Persons (Appointment of President) Act 2000* (Vic) was passed.

AUDITOR-GENERAL'S SPECIAL REPORT NO 43: PROTECTING VICTORIA'S CHILDREN: THE ROLE OF THE DEPARTMENT OF HUMAN SERVICES

BACKGROUND

- D.58 In 1996, the Victorian Auditor-General, pursuant to section 16 of the *Audit Act 1994* (Vic), completed a two-year performance audit of the provision of child protection services by the Victorian Government and private sector services.
- D.59 This audit was, in part, prompted by a desire to assess the impact that the Department's introduction of mandatory reporting in 1993 had on the provision of child protection services.⁹⁰ The Attorney-General was particularly concerned about large increases in abuse and neglect notifications placing pressure on child protection services, and the high turnover of protective services staff.⁹¹
- D.60 In June 1996, the Auditor-General completed two reports: *Special Report No 43: Protecting Victoria's Children: The Role of the Department of Human Services*,⁹² and *Special Report No 42: Protecting Victoria's Children: The Role of the Children's Court*.⁹³ The latter report was never tabled in parliament or officially released to the public due to legal advice provided by the Solicitor-General that under the *Audit Act 1994* (Vic) the Auditor-General lacked the authority to audit a court. The report was, however, provided to the Victorian Government.⁹⁴

REPORT FINDINGS

- D.61 The Auditor-General's report on DHS was tabled in the Victorian Parliament on 20 June 1996. The report identified a number of weaknesses in DHS protective services, including the Department's involvement in protection application proceedings. The Auditor-General noted that the draft case plans presented to the Children's Court to indicate the DHS's planned course of action 'were often of poor quality and lacked the necessary detail to effectively address the protective concerns and the child's welfare'.⁹⁵
- D.62 The Auditor-General also commented on the poor quality or lack of evidence presented in Court by protection workers, which led to protection applications—particularly those brought on sexual abuse grounds—being unsuccessful 'because of poor Court presentations rather than their underlying validity'.⁹⁶ He noted that this

*appeared to flow from the fact that the protection worker who undertook the investigation and filed the application is usually not the worker who prepares the Protection application report and gives evidence in the Children's Court.*⁹⁷

- D.63 The Auditor-General also identified failings in, or resulting from, the CYP Act 1989, including what he called an ‘over-emphasis on family re-unification’, evidenced by DHS workers making repeated unsuccessful attempts ‘to re-unite children with dysfunctional families that had consistently exhibited no intention to meet their parental responsibilities’.⁹⁸
- D.64 The Auditor-General also noted that there had been a failure to achieve the CYP Act 1989 legislative intention of permanency planning for children’s stable and secure living arrangements,⁹⁹ demonstrated by the incidence of multiple placements and the large number of children in state care who were still in short-term placements after three years.¹⁰⁰

RECOMMENDATIONS

- D.65 The Auditor-General recommended the use of guardian *ad litem*s ‘to independently assess and advise Magistrates on what are considered to be the best interests of the child in terms of future placements’.¹⁰¹

REPORT OF THE COMMUNITY CARE REVIEW (THE CARTER REPORT)

BACKGROUND

- D.66 In 2000, the Minister for Community Services Christine Campbell commissioned the Community Care Review to examine several issues connected with the Youth and Family Services Redevelopment (YAFSR).¹⁰² YAFSR’s purpose was to re-engineer a group of government service models and programs mostly delivered by community services organisations in the non-government community-based sector.¹⁰³
- D.67 The Minister appointed Professor Jan Carter to undertake the Review process, supported by a reference group. Professor Carter published her report in September 2000. It included an examination of Victoria’s Child Protection Service, which was not technically part of the YAFSR, but did interact with it and community services organisations, and figured prominently in comments made to the review.

REVIEW FINDINGS

- D.68 In relation to children in foster care, Professor Carter stated that

*The relationship between the placement and support system, the child protection system, the Children’s Court and the legislation is uncoordinated and discontinuous. The Review was told that placements of unplanned length and repeated (‘revolving door’) placements were allowed to continue. The Foster Parents Association also drew attention to the lack of continuity between magistrates’ hearing of specific cases in the Children’s Court and the lack of consistency around an agency’s application for access to a child by his or her natural parents.*¹⁰⁴

- D.69 Professor Carter questioned the appropriateness of the ‘traditional child-welfare objective’ as opposed to a focus on supporting the family, stating that

It is no longer reasonable to advise or censure families about their child-rearing failures by using legislative based court action or removal after anticipated, suspected or confirmed child abuse and neglect, without paying serious attention to the vulnerability of the modern family that is stressed by economic, social and technological changes and lack of educational support ...

*... child protection policy has mostly supplanted the family policy of the mid-1970s to mid-1980s, which had in turn replaced the century-old child welfare policy. This has left a void: it is no agency’s job to promote the wellbeing of families.*¹⁰⁵

90 Victorian Auditor-General’s Office, *Special Report No 43 Protecting Victoria’s Children: The Role of the Department of Human Services* (1996) 29.

91 Ibid vii.

92 Ibid.

93 Victorian Auditor-General’s Office, *Special Report No 42 Protecting Victoria’s Children: The Role of the Children’s Court* (1996) (unreleased).

94 See Victorian Auditor-General’s Office, *Annual Report 1995–96* (1996).

95 Victorian Auditor-General’s Office, *Special Report No 43*, above 90, 84.

96 Ibid 194.

97 Ibid.

98 Ibid 238.

99 Ibid 227.

100 Ibid.

101 Ibid 241.

102 This program had been run by the Youth and Family Services Division of DHS between 1997 and 1999 under the Kennett Government: Jan Carter, *Report of the Community Care Review* (2000) 3.

103 Ibid.

104 Ibid 144–5.

105 Ibid 156–7.

Appendix D RECENT VICTORIAN REPORTS

D.70 Turning to the CYP Act 1989, which was not covered by the terms of reference but was considered by the Review to be central to its work, Professor Carter stated that

*The traditional 'child welfare' division of responsibility between the Children's Court (which makes the orders) and the Government (which implements them) is no longer working (if it ever did) in a diverse and fragmented substitute-care system.*¹⁰⁶

D.71 Professor Carter identified several important questions arising from the deficiencies of the CYP Act 1989, including:

- 'How can evidence based, well-researched and effective practice strategies (such as Family Group Conferencing) be included in legislation?'
- 'How can the interests of a child in care be protected? (The UK system of a having guardian *ad litem* requires consideration, as does the knowledge-based and specialist legal representation of each child).'¹⁰⁷

RECOMMENDATIONS

D.72 Professor Carter recommended that:

- the legislation around child protection and domestic violence be consolidated
- a framework for a mediation process between parties be created
- the definitions of child abuse be reviewed and a work plan be set out for the effective deployment of child protection resources
- a mechanism be provided for appealing decisions and hearing grievances.¹⁰⁸

D.73 Professor Carter accordingly recommended that the Minister for Community Services request the Attorney-General to review the CYP Act 1989

*and other relevant legislation, to examine international and national trends with a view to enacting legislation to secure safe, secure and stable environments for children and young people as well as protection from harm.*¹⁰⁹

THE PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE'S REVIEW OF THE AUDITOR-GENERAL'S REPORT

BACKGROUND

D.74 During 2000 and 2001, the Public Accounts and Estimates Committee (PAEC) undertook an inquiry into DHS's protective services to review progress made in implementing the recommendations made by the Auditor-General in 1996, and 'to follow-up outstanding or unresolved issues'.¹¹⁰ The PAEC published its report in November 2001.

RECOMMENDATIONS

D.75 In relation to the failings of the CYP Act 1989 identified by the Auditor-General, the PAEC concluded that the CYP Act 1989, 'despite its numerous amendments, does not reflect legislative developments interstate and overseas or contemporary thinking regarding child protection'.¹¹¹ With a view to amend the CYP Act 1989, the PAEC accordingly recommended that DHS examine developments in other Australian jurisdictions and overseas in relation to areas such as:

- family reunification
- the concept of permanent care

- the definition of when a child is in need of protection
- the principles for court decision making
- a framework for mediation between parties.¹¹²

D.76 The PAEC also recommended that DHS, in consultation with the Family Division of the Children’s Court, ‘look at ways of overcoming lengthy delays in decision-making’,¹¹³ following a complaint that the ‘adversarial nature of deliberations’ in that Division resulted in long delays in decision-making.¹¹⁴

D.77 In relation to ensuring that the child’s best interests were adequately represented in all decision making, the PAEC, following a suggestion by the Victorian Ombudsman, recommended that DHS

*review its practices regarding who is invited to advocate for children and young people in the protective care system (including case planning meetings), to allow scope for a broader range of people, such as grandparents or professionals who have been treating the child or young person, to advocate on behalf of, and in the interests of, the child or young person.*¹¹⁵

D.78 The PAEC also commented on the over-representation of Aboriginal children in the child protection system, particularly of those children in out-of-home care. It expressed concern that ‘a high proportion of indigenous children in the care system have no case plans, child care agreements or plans to return home’.¹¹⁶ The PAEC also received submissions highlighting the lack of compliance with the Aboriginal Child Placements Principles in the CYP Act 1989.¹¹⁷

D.79 To address these issues, the PAEC recommended that DHS, in consultation with Aboriginal Affairs Victoria and the appropriate Aboriginal peak agency:

- ‘develop strategies to reduce the number of Aboriginal children placed in out-of-home care, with the aim of improving access to a diverse range of support services for Aboriginal children and young people and their families’
- ‘develop and implement a case management framework for Aboriginal agencies placing Aboriginal children in out-of-home care’.¹¹⁸

PROTECTING CHILDREN: THE CHILD PROTECTION OUTCOMES PROJECT

BACKGROUND

D.80 In 2002, DHS initiated the Child Protection Outcomes Project (the Project) to review the statutory child protection service in Victoria. The Project was designed to identify the policies, legislation and practice that would be required to achieve the best possible outcomes for children and young people who are subject to statutory intervention, or for the care of those who are at high risk of entering the system. The Project was launched as part of a wider strategy outlined by the Community Care Division of DHS in its *Integrated Strategy for Child Protection and Placement Services*.¹¹⁹

ALLEN CONSULTING GROUP REPORT

D.81 In 2003, as the first stage of the Project, DHS commissioned the Allen Consulting Group (ACG) to review the Victorian child protection system (including data analysis) as well as local, national and international literature, and to propose directions for reform. The ACG report, entitled *Protecting Children: The Child Protection Outcomes Project*, was published in September 2003.

106 Ibid 163.

107 Ibid.

108 Ibid 165.

109 Ibid 167.

110 Public Accounts and Estimates Committee, Parliament of Victoria, *Report on the Review of the Auditor-General’s Special Report No 43—Protecting Victoria’s Children: The Role of the Department of Human Services* (2001) 7.

111 Ibid 65.

112 Ibid 66.

113 Ibid.

114 Ibid 62.

115 Ibid 156.

116 Ibid 170.

117 Ibid 166.

118 Ibid 170.

119 Community Care Division, Department of Human Services (Victoria), *An Integrated Strategy for Child Protection and Placement Services* (2002).

Appendix D RECENT VICTORIAN REPORTS

- D.82 In its report, ACG identified the increased demand for child protection services and the ‘changing characteristics and circumstances of vulnerable families and children’ as the impetus for the system’s review.¹²⁰
- D.83 ACG noted that the CYP Act 1989 was underpinned by the conception of statutory child protection as an emergency service. ACG questioned whether it was appropriate or effective to continue with the concept, given the steady increase in the numbers of notifications, substantiations—40 per cent of which were re-substantiations—children on care and protection orders and children placed in care since the enactment of the CYP Act 1989.¹²¹
- D.84 ACG did not examine the operation of the Children’s Court, as this was not within its terms of reference.
- D.85 ACG did, however, highlight the need for intermediate structures in the child protection system to sit between completely voluntary services and the coercive use of legal power. ACG stated that such an intermediate structure could be represented by an institution or a person in a particular role.¹²²
- D.86 ACG explained that
- the role of the intermediate level responses in child protection is to seek agreement with the family and other relevant parties on a plan, including necessary support measures, to keep the child safe and hence avoid a formal statutory child protection intervention and court proceedings.*¹²³
- D.87 Importantly, ACG stated that the intermediate structure needed to exist outside of formal legal processes, and that
- participation in these intermediate level processes would be voluntary for these families. Any decisions would require the agreement and cooperation of the family. However, equally as important, child protection officers would retain existing statutory powers to issue a Protection Application if they considered the child was not being adequately protected.*¹²⁴
- D.88 ACG discussed two possible options for intermediate level responses in Victoria: FGC, based on the models used in the ACT and New Zealand,¹²⁵ and Community Child and Family Support Panels, based on the Scottish ‘children’s hearings’.¹²⁶
- D.89 ACG concluded its report in the following terms:
- It is fourteen years since the formulation of the Children and Young Person’s Act. Since that time, mandatory reporting has been introduced, the number of notifications has significantly increased, there have been major changes such as deinstitutionalisation for people with an intellectual disability or a serious mental illness, the scale of substance abuse in the community has increased greatly, and two-thirds of substantiations of child protection notifications now concern children neglected or suffering from emotional abuse. The current legislation is out-of-date. Continuing with the idea of child protection as only an emergency response is inappropriate.*¹²⁷

KIRBY, WARD AND FREIBERG REPORT

- D.90 The second stage of the Project was a community consultation process. The Minister for Community Services appointed an independent Panel, chaired by Mr Peter Kirby and comprising Ms Lisa Ward and Professor Arie Freiberg, to test community reactions to the propositions in the ACG report.¹²⁸ The Panel completed its report in April 2004.

D.91 The consultation process revealed that there was broad agreement on the reform directions proposed in the ACG report, and the critical message that ‘the most effective response to support vulnerable families and protect children from harm involves an integrated, unified broad-based system of services which aims to promote child wellbeing and protect children’.¹²⁹

D.92 The Panel identified as a potential area for review the ‘multiple and overlapping jurisdictions of courts and tribunals’ in the context of the interconnected issues of child protection, juvenile offending, adult offending and family law. The Panel called for a review of the roles of, and relationship between, the family and criminal jurisdictions of the Children’s Court, the Magistrates’ Court and County Court, the Family Court, and the Victorian Civil and Administrative Tribunal (VCAT).¹³⁰

D.93 The Panel also recommended an investigation of VCAT’s capacity to review decisions relating to case planning issues, which tended to fragment and prolong child protection proceedings.¹³¹

D.94 The Panel found that there was ‘widespread support for the proposed development of a range of “intermediate” responses to bridge the divide between voluntary support and court-mandated service provision’, as the ACG report had proposed.¹³² The Panel accordingly recommended that intermediate or quasi-legal responses to children at risk be expanded to enable child protection workers to work together with families away from the legal system and for extended periods of time.¹³³

D.95 The Panel canvassed a number of options for responses at the intermediate level, and noted that one possible ‘immediate response’ could take the form of

*the development of case plans or voluntary agreements, possibly through Family Group Conferencing processes, but not exclusively so, which can then be submitted to the Children’s Court for approval. These could also be made either before or after a protection application, but prior to the making of a court order. The Court might maintain a supervisory role over these agreements.*¹³⁴

D.96 In relation to the need to ensure procedural fairness to families involved in the child protection system, the Panel stated that

*family group conferences, case planning and pre-hearing conferences are different facets of what should be a continuum of processes or forums for negotiation which should provide the foundations of the child protection system.*¹³⁵

D.97 In relation to the operations of the Children’s Court, the Panel commented on the number of submissions which argued that ‘the Children’s Court procedure is too adversarial and “proceduralised” and that the current model negatively affects parents and the relationships between parents and welfare agencies’.¹³⁶ The Panel made reference to Justice Fogarty’s observations in his 1993 report that

*senior people within the Department of Human Services adopted inappropriately critical attitudes of the court and legal structures generally and that this ethos permeated down to the workers. He noted the criticisms that the Court is regarded as too legalistic and that there were too many delays which adversely affected the interests of children and others.*¹³⁷

120 Allen Consulting Group, *Protecting Children: The Child Protection Outcomes Project* (2003) 1.

121 Ibid vi.

122 Ibid 56.

123 Ibid 57.

124 Ibid 84.

125 Ibid 85–6.

126 Ibid 87–8.

127 Ibid 93.

128 Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004) 1.

129 Ibid.

130 Ibid 35.

131 Ibid 36.

132 Ibid 16.

133 Ibid 38.

134 Ibid 39.

135 Ibid 41.

136 Ibid 40.

137 Ibid (citations omitted).

Appendix D RECENT VICTORIAN REPORTS

D.98 The Panel stated that the criticisms identified by Justice Fogarty continued, and made the observation that

The Children's Court and the Child Protection service are embedded in an adversarial legal system which has historical and cultural determinants. The professional orientations of the Court and the Child Protection service differ and might not ultimately be reconcilable. Their functions differ and, as Justice Fogarty noted, the Court is not an arm of the Department of Human Services.

*Nonetheless, the gap between them, whatever its size, can and should be reduced.*¹³⁸

D.99 To help reduce that gap, the Panel recommended that DHS improve the quality of its investigations and its presentation of cases in court, and that the Court consider moving away from the 'adversarial paradigm' towards a more proactive inquisitorial or case management approach.¹³⁹ The Panel also recommended that the Court experiment with a more problem-orientated approach to child protection cases, by taking a more active role in gathering relevant information about the needs of the child and the family, drawing on the experience of welfare professionals, and reviewing the progress of cases.¹⁴⁰

REFORM PROPOSALS

D.100 In September 2004, as the third stage of the Project, DHS published two papers outlining the proposed reforms to the policies and legislation governing child protection in Victoria.¹⁴¹ The proposed reforms included:

- consolidation of the CYP Act 1989 and the *Community Services Act 1970* (Vic)
- expanding the use of FGC as a means of diverting families away from court, and using mediation for young people in conflict with their families
- requiring a case plan be made prior to the issue of a protection application, to enable it to be used 'as a tool to encourage voluntary treatment and support options' and possibly to resolve matters without the need to go to court¹⁴²
- strengthening the participation of Aboriginal families and communities in decision-making processes
- legislating to require diversion of matters to alternative dispute resolution prior to a court hearing
- positioning pre-hearing conferences as a first mention before the commencement of the court process and extending the power of the Court to refer any type of application in the Family Division to a pre-hearing conference
- giving the Court the power to subpoena witnesses or documents in child protection proceedings
- introducing specialised training and potential accreditation of practitioners who represent children and young people in the Children's Court
- considering models of representation in the Children's Court that ensure that a child's best interests are adequately represented.

EVALUATION OF PRE-HEARING CONFERENCES

BACKGROUND

- D.101 The introduction of pre-hearing conferences in Children’s Court Family Division proceedings in 1993¹⁴³ was not accompanied by any legislative direction as to how such conferences should be conducted.¹⁴⁴ Although DHS published guidelines in 1993 to provide a basis for conducting these conferences, those guidelines had no legislative force.¹⁴⁵ In the absence of legislative guidance, convenors of pre-hearing conferences developed their own style of running such conferences, resulting in significant differences and procedural inconsistencies.¹⁴⁶
- D.102 In this context, in 2003 the President of the Children’s Court convened a Steering Committee to evaluate the pre-hearing conference process.¹⁴⁷ The President appointed Magistrate Jeanette Maughan and Ms Andrea Dagleis to review and evaluate the role and effectiveness of pre-hearing conferences in the Family Division.¹⁴⁸

REPORT FINDINGS AND RECOMMENDATIONS

- D.103 Maughan and Dagleis noted that the amendments to the CYP Act 1989 did not refer to or provide for any particular model of ADR to be used in the pre-hearing conferences.¹⁴⁹ They recommended the adoption of mediation as the ADR model for pre-hearing conferences in the Family Division.¹⁵⁰ They submitted that this model would be consistent with the provisions of the CYP Act 1989, specifically the definition of the role of the pre-hearing conference convenor, as well as the purposes for which parliament established the pre-hearing conferences.¹⁵¹
- D.104 More specifically, Maughan and Dagleis recommended the adoption of facilitative mediation in pre-hearing conferences, with some of the features of therapeutic and settlement mediation models.¹⁵²
- D.105 The authors emphasised the importance of families having access to support and advice before, during, and after pre-hearing conferences, and stated that legal representatives can provide such support.¹⁵³ They observed that ‘[a]ccess to legal advice can empower participants and give them more confidence to have a say’.¹⁵⁴
- D.106 Maughan and Dagleis identified various ‘barriers to conciliation’ in the pre-hearing conference process under the CYP Act 1989, including:
- inequality in participation, which often occurs when lawyers are adversarial and do not allow families to have a say or are aggressive towards the protective workers; Department of Human Services workers are not prepared to be flexible or to consider options to their proposals; families’ lack of knowledge of the process, and concern about breaches of the confidentiality provisions.*¹⁵⁵
- D.107 Maughan and Dagleis also noted concerns about the low level of remuneration for legal representatives to participate in pre-hearing conferences, which was said to discourage ‘good practice’ and was a disincentive to carry out detailed preparation and preliminary work for such conferences.¹⁵⁶ To address these issues, they recommended that ‘the appropriate bodies consider an increase in fees payable to legal representatives/counsel for pre-hearing conferences’.¹⁵⁷
- D.108 Maughan and Dagleis also noted a problem in the Melbourne pre-hearing conferences of legal practitioners coming to pre-hearing conferences for only a limited amount of time before leaving to attend to another matter.¹⁵⁸ The authors commented that this happened in a number of conferences they observed, and that this ‘blatant manipulation of time constraint set a “negative” tone for the conference and seemed to hamper the free participation of all the participants’.¹⁵⁹

138 Ibid.

139 Ibid.

140 Ibid 46.

141 Community Care Division, Department of Human Services (Victoria), *Protecting Children: Ten Priorities for Children’s Well-Being and Safety in Victoria* (2004); Community Care Division, Department of Human Services (Victoria), *Protecting Children: Ten Priorities for Children’s Well-Being and Safety in Victoria—Technical Options Paper* (2004). See also Office for Children, Department of Human Services (Victoria), *Protecting Children...The Next Steps* (2005).

142 Community Care Division, Department of Human Services (Victoria), *Technical Options Paper*, above n 141.

143 The relevant provisions of the *Children and Young Persons Act 1989* (Vic) were inserted in 1992, but did not come into operation until 1993.

144 Jeanette Maughan and Andrea Dagleis, *An Evaluation of Pre-Hearing Conferences in the Family Division of the Children’s Court of Victoria* (2005) 5.

145 Ibid.

146 Ibid 6.

147 Ibid.

148 Ibid.

149 Ibid 11.

150 Ibid 14.

151 Ibid 13–14.

152 Ibid 14.

153 Ibid 18–19.

154 Ibid 19.

155 Ibid.

156 Ibid 28.

157 Ibid.

158 Ibid 29.

159 Ibid.

Appendix D RECENT VICTORIAN REPORTS

D.109 Maughan and Daglis stated that it was important for legal representatives to recognise that the 'purpose and objectives of Pre-hearings [sic] require legal representatives to modify the conduct used in Court whilst maintaining their role as advocates offering legal advice'.¹⁶⁰

D.110 In terms of the protective workers' role in pre-hearing conferences, Maughan and Daglis noted the concerns expressed by Melbourne convenors and legal practitioners that

*too often workers do not have the authority necessary to make decisions that would lead to settlement and need to leave the conference to consult/ seek advice from their supervisors or senior staff who have not been privy to the deliberations in Pre-hearing conferences.*¹⁶¹

D.111 Maughan and Daglis also commented that, in relation to the pre-hearing conferences in Melbourne:

*it was disturbing that the problems each group of stakeholders, (the Convenors, the protective workers and the legal practitioners), were having with the other two groups, was a group experience. This indicated to us that the problems had become endemic to the process and were seriously undermining its value and efficacy. It was also apparent that the 'culture' of each group had an exacerbating effect on the other two groups resulting in increasing level of intolerance and absence of cooperation.*¹⁶²

D.112 Maughan and Daglis recommended that:

- Convenors should be given appropriate training in ADR processes, similar to that provided by Victoria Legal Aid (VLA) to Roundtable Dispute Management chairpersons, as well as regular ongoing professional development.¹⁶³
- DHS consider providing legal representation for its workers in pre-hearing conferences in order to achieve a 'common understanding of the legal arguments' and 'avoid workers having to be directly critical of the family during the meeting and therefore help maintain a positive relationship between the worker and the family'.¹⁶⁴
- The parties should identify the issues in dispute at the mention hearing, so that 'all parties have a clear understanding of why a pre-hearing conference is being held, and would ensure parties are well prepared to discuss and make decisions on the issues that have been identified once the Pre-hearing conference date arrives'.¹⁶⁵
- A pre-hearing conference coordinator position be created, which could be filled by a principal registrar at the Children's Court, to 'ensure uniform, consistent practices and procedures' for pre-hearing conferences statewide.¹⁶⁶ The coordinator would also be responsible for organising training for all new convenors.¹⁶⁷
- The Children's Court issue guidelines 'setting out the roles and responsibilities of legal practitioners and DHS workers in Pre-hearing conferences, consistent with the features of the model [of ADR] decided upon'.¹⁶⁸
- The President of the Children's Court issue a Practice Direction, giving the convenor authority to terminate a pre-hearing conference as a result of the conduct of one of the attendees, and report the reasons for termination to the Court.¹⁶⁹

OUTCOME OF THE REPORT

D.113 Some of the recommendations in the Maughan and Daglis’s report about ADR processes in the Family Division of the Children’s Court have been adopted in the provisions of the CYF Act 2005. The Act creates the option of two models of pre-hearing conferences—renamed ‘dispute resolution conferences’ (DRCs)—available in the Family Division: facilitative conferences or advisory conferences.¹⁷⁰

D.114 The CYF Act 2005 also defines the role of the convenor in both types of conferences,¹⁷¹ and sets out a list of who can attend a DRC, which includes a legal representative for parents and possibly the child, but not DHS.¹⁷² The Act also provides that DRCs are to be conducted in accordance with any guidelines issued by the Court.¹⁷³

BOSTON CONSULTING GROUP (BCG) REPORT ON THE CHILDREN’S COURT 2007

BACKGROUND

D.115 In 2007, the Department of Justice, at the request of the Children’s Court, commissioned the Boston Consulting Group (BCG) to investigate ‘recent and future growth in demand at the Children’s Court’, explore the resources necessary to respond to such growth, and identify means of increasing the productivity of the Court.¹⁷⁴ After discussions with magistrates, Court staff, DHS, Victoria Police, VLA and private practitioners and other stakeholders, BCG identified a set of options for improvements to the Court.¹⁷⁵

RECOMMENDATIONS

D.116 BCG’s report was completed in November 2007, and contained a number of recommendations to relieve the Court of some of the pressure of increased demand, including:

- the appointment of two new magistrates to the Court, and additional staff to service those magistrates
- relocation of pre-hearing conference (PHC) rooms out of court
- organising to use two old County Court courtrooms for Children’s Court hearings
- allocation of one courtroom as a courtroom for safe custody applications callovers and directions hearings.¹⁷⁶

D.117 BCG also recommended that Children’s Court magistrates’ time could be freed up by giving a judicial registrar responsibility for uncontested hearing matters such as uncontested adjournments, extensions and rollovers, and for conducting a 9.30 am callover court to ascertain what safe custody applications had come in overnight for hearing that day.¹⁷⁷

D.118 To improve ADR processes in the Children’s Court, BCG recommended that:

- the role of the PHC convenors be clarified, and their qualifications be reviewed
- the PHCs be run on a strictly confidential basis
- the role of advocates in PHCs be confined to supporting rather than speaking for clients, to make PHCs less adversarial
- a statewide PHC coordinator be appointed.¹⁷⁸

160 Ibid 30.

161 Ibid 33.

162 Ibid 63.

163 Ibid 44.

164 Ibid 52.

165 Ibid 55.

166 Ibid 57.

167 Ibid 58.

168 Ibid 66.

169 Ibid 69.

170 *Children, Youth and Families Act 2005* (Vic) s 217.

171 *Children, Youth and Families Act 2005* (Vic) ss 218–19.

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

173 *Children, Youth and Families Act 2005* (Vic) s 220.

174 Boston Consulting Group, *Children’s Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007) 1.

175 Ibid.

176 Ibid 2.

177 Ibid 38.

178 Ibid 43.

Appendix D RECENT VICTORIAN REPORTS

179 Ibid 46.

180 Ibid 50.

181 Ibid 62.

182 Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 54.

183 Ibid 55.

D.119 BCG also recommended that there be better use of directions hearings to determine issues still in dispute and ensure matters are ready for contest if necessary, and that contest dates should only be issued after a directions hearing has been held, so the magistrate can determine whether the matter is 'truly incapable of settlement'.¹⁷⁹

D.120 BCG also recommended changes to the listing of private practitioners' matters in the Children's Court, to prevent practitioners from appearing in multiple contests on the same day, and earlier briefing of barristers to increase preparation time before contests.¹⁸⁰

D.121 To increase the physical capacity of the Children's Court, BCG recommended a range of options, including:

- utilising free space in other Court buildings
- purchasing or renting office space or a nearby building
- partial decentralisation of the southern region cases to the Moorabbin Court
- decentralising the Family Division to suburban Courts
- creating a new purpose-built facility for the Criminal Division
- creating a new purpose-built facility in Melbourne or a suburb.¹⁸¹

OUTCOME OF THE REPORT

D.122 Following BCG's report in 2007, a new Children's Court was opened in Moorabbin. The Victorian Ombudsman noted that '[i]t was expected that the new Court would ease congestion in the Melbourne Children's Court and move approximately 23 per cent of the demand from the Metropolitan Region'.¹⁸²

D.123 Also, as recommended, a special mentions Court was established in the Children's Court to manage applications brought by safe custody, and additional magistrates (one acting) were employed in the Melbourne Children's Court.¹⁸³

AUSTRALIAN LAW REFORM COMMISSION REPORT NO 18: CHILD WELFARE

BACKGROUND TO THE REPORT

- E.1 On 18 February 1979, the Attorney-General requested that the Australian Law Reform Commission (ALRC) enquire into child welfare law and practice in the ACT. The ALRC ‘was asked to consider the rights and obligations of children, or parents and other persons with responsibility for children, and of the community’.¹ The ALRC was specifically asked to examine ‘the position of children at risk of neglect or abuse by their parents or caretakers’ and ‘the roles of welfare, education and health authorities, police, courts and corrective services in relation to children’.²
- E.2 The ALRC stressed that it had not ‘undertaken a national inquiry into child welfare law and practice’, but that ‘many of the issues which must be addressed in the Territory are the same as those being considered elsewhere in Australia and overseas’.³ The ALRC also commented that

*it seems that in many parts of the Western world child welfare policies are under continual review. The whole history of child welfare is a history of reform. We are never quite satisfied.*⁴

RECOMMENDATIONS IN THE REPORT

- E.3 The ALRC believed that there needed to be a ‘clear distinction’ between the procedures for dealing with juvenile offenders on one hand, and non-offenders on the other.⁵ The ALRC submitted that
- [a]s the grounds for intervention in the lives of members of each group are quite different, the methods employed for dealing with each should, as far as possible, reflect this difference.*⁶
- E.4 The ALRC stated that there were two principles that any new ACT child welfare legislation should reflect. The first was that ‘court action should be avoided wherever possible’, because:
- it is inappropriate to deal with personal and social problems through adversarial court procedures
 - court proceedings have a stigmatising and disturbing effect on families
 - resorting to such coercive measures tends to reduce parents’ cooperation.⁷
- E.5 The ALRC accordingly recommended that new legislation in the ACT ‘should provide a framework which limits resort to court action to those cases where it is essential or may be useful, and which facilitates the exploration of informal solutions’.⁸ The ALRC also noted, however, that it is ‘imperative that there be no interruption of parental rights contrary to the wishes of the parents without parents and child having an opportunity to be heard in court’.⁹
- E.6 The second principle that the ALRC recommended for the new legislation was that ‘where it is necessary to take a matter to court, the procedure employed should be distinctively different from that used for alleged child offenders’.¹⁰

1 (Australian) Law Reform Commission, *Child Welfare*, Report No 18 (1981) 1.

2 Ibid.

3 Ibid.

4 Ibid 3, quoting Professor A J Kahn.

5 Ibid 75.

6 Ibid.

7 Ibid 207.

8 Ibid.

9 Ibid 208.

10 Ibid.

Grounds

E.7 The ALRC recommended that

In order to erect a barrier to premature or unnecessary court proceedings it is recommended that, before a court can make a declaration that a child is in need of care, the court must be satisfied that the child falls within one of the definitions of a child in need of care...and that the child's situation is such as can be met only by way of a court order. Thus what is proposed is a dual test. Not only must the existence of an undesirable situation ('the primary ground') be established, but also it must be shown that this situation is not susceptible to an informal solution.¹¹

E.8 The ALRC argued that 'it is actual or potential harm to the child which should, in general, provide the basis for coercive state intervention'.¹² It accordingly recommended that the 'uncontrollable child' ground for intervention be replaced, one of the reasons being that

The parents may be extremely conscientious and do their best to control a child, but whether his behaviour does or does not stem from a failure or absence of control should not, under the principles proposed by the ALRC, be the sole determinant of whether intervention should occur. The existing definition of an 'uncontrollable' child should be replaced by a definition which clearly indicates that it is the actual or potentially harmful nature of the child's non-criminal behaviour which should provide the ground for intervention.¹³

E.9 However, the ALRC stated that the new ground 'must require the Youth Advocate to determine whether the harmful behaviour stems from a home situation'.¹⁴ The ALRC therefore recommended that the new ground for bringing care proceedings should be that the child

is engaging in behaviour that is, or is likely to be, harmful to him and his parents or his guardian are unable or unwilling to prevent him from engaging in that behaviour.¹⁵

Youth Advocate

E.10 The ALRC recommended the creation of a new independent statutory official, to be called the Youth Advocate, who would be responsible for the initiation of care proceedings.¹⁶ The ALRC envisaged that the Youth Advocate would act 'as a buffer between the agencies handling a case and the court,' because he or she would have the power to refuse to initiate court proceedings if, in a particular case, he or she was not satisfied that sufficient efforts had been made to reach an informal solution.¹⁷

E.11 The ALRC also recommended that a Standing Committee of the Children's Services Council be created. The Standing Committee would provide advice from the agencies working with the child and the family, which would assist the Youth Advocate to decide whether to initiate care proceedings in a difficult case.¹⁸

E.12 To address cases requiring immediate action, the ALRC recommended that police officers and authorised members of the Welfare Division be granted the power to take a child into custody immediately, if they had 'reasonable cause to believe that a child is in need of care and that his situation is such as to require that he be urgently taken into custody to safeguard his welfare'.¹⁹ Following the child's removal, the ALRC envisioned that the Youth Advocate would be immediately notified, and would be required to either order the immediate release of the child, or apply within 48 hours for an interim court order to secure the child's continued detention.²⁰

- E.13 The ALRC proposed that the Youth Advocate fill a variety of other roles. Once a decision to initiate proceedings had been made, the Youth Advocate would 'act as informant, ensure that the necessary evidence is assembled, and present the case in the Children's Court'.²¹ If a child was found to be in need of care, the Youth Advocate would then also provide advice on the appropriate disposition.²² The Youth Advocate would also be responsible for chairing court-ordered child care conferences (discussed below).²³
- E.14 If a child were made the subject of a residential or supervision order, the Youth Advocate would be responsible for monitoring his or her progress under that order.²⁴ The Youth Advocate would also have the power to bring a case back to court and seek a variation or revocation of an order if he or she was dissatisfied with a child's situation.²⁵

Court processes

- E.15 The ALRC recommended that when the Children's Court believes it is possible to 'find a solution without a court order',²⁶ it should have the power to adjourn care proceedings and order that a child care conference be convened.²⁷ The purpose of the conference would be 'to attempt to reach an agreement as to the care and assistance which should be provided for the benefit of the child'.²⁸ The child care conferences would be chaired by the Youth Advocate and attended by the child (if old enough), the parents or guardians, legal representatives (if the Court granted leave), and 'such of those persons working with the family as the court orders'.²⁹
- E.16 Statements made at the conference would be inadmissible in proceedings unless consented to by all the parties.³⁰ The ALRC proposed that the Youth Advocate would report the outcome of the child care conference to the Court, and the Court would decide whether to dismiss the application. If an agreement was reached at a child care conference, but subsequently broke down, the Youth Advocate could initiate further care proceedings.³¹
- E.17 The ALRC considered the make up of the decision maker in care proceedings. It argued that

*The grounds for intervention must be carefully proved, rulings made on disputed questions of fact, the rights and interests of parents and child must be represented, and, in some cases, coercive intervention sanctioned. In short, the legal aspects of the proceedings must be fully recognised. It is therefore recommended that the tribunal to which an application for a declaration that a child is in need of care is made should consist of a single legally qualified person.*³²

- E.18 It recommended that such matters should be heard by the ACT Children's Court, 'whose powers and procedures are specifically adapted to dealing with the young',³³ and which is presided over by a specialist magistrate.³⁴

Procedural aspects of care proceedings

- E.19 In terms of children's attendance at court for care proceedings, the ALRC recommended that children who were too young to understand the proceedings should not have to come to court.³⁵ The ALRC also recommended that courts hearing care proceedings

*should place special emphasis on informality, on making the proceedings comprehensible to the child and his parents, and on giving the child an opportunity to participate and to express his views.*³⁶

It suggested that, where appropriate, alternatives to formal courtroom settings, such as hearings in chambers, be considered to enable 'round-table informality'.³⁷

- 11 Ibid 220.
 12 Ibid 221.
 13 Ibid 227.
 14 Ibid.
 15 Ibid.
 16 Ibid 241.
 17 Ibid 242.
 18 Ibid 209.
 19 Ibid 232.
 20 Ibid 232–3.
 21 Ibid 251.
 22 Ibid 252.
 23 Ibid 218.
 24 Ibid 252.
 25 Ibid 283.
 26 Ibid 217–18.
 27 Ibid 218.
 28 Ibid.
 29 Ibid.
 30 Ibid.
 31 Ibid 218.
 32 Ibid 234.
 33 Ibid 240.
 34 Ibid.
 35 Ibid 254.
 36 Ibid.
 37 Ibid.

Appendix E

SELECTED REVIEWS IN OTHER JURISIDCTIONS

E.20 The ALRC stressed the need for flexibility in the care jurisdiction, and recommended that the legislation governing care proceedings ‘should make it clear that the child who is the subject of the proceedings must be consulted by the court if he is old enough to express an opinion’.³⁸

E.21 The ALRC commented on the ‘essential ambiguity of care proceedings’, stating that

*On the one hand the aim is to look after the interests of the child concerned, but, on the other, there will be occasions when the application is contested, and it must be recognised that the court’s primary task is to decide, on the basis of the evidence presented by the parties, whether the applicant has made out his case. It is therefore unhelpful to describe the proceedings as ‘non-adversary’. Nevertheless, while the adversarial framework should not be rejected, provision should be made for the use of modified procedures when these are appropriate.*³⁹

E.22 The ALRC accordingly recommended that the new legislation should provide that when hearing care proceedings, the ACT Children’s Court:

- shall not be bound by the rules of evidence or act in a formal manner
- may inform itself on any matter relating to the proceedings in such manner as it thinks fit
- may act upon any statement or document whether or not that statement or document would be admissible in evidence.⁴⁰

E.23 The ALRC noted that a ‘distinctive argument in favour of the representation of children in these proceedings is that it enables children to be independent of their parents’.⁴¹ It stated that the ‘role of the legal representative is to ensure that the child’s views are presented to the court and so to safeguard the child’s interests’.⁴²

E.24 The ALRC recommended that in the case of very young children, the magistrate should have the power to appoint a ‘next friend’ of the child, where he or she thinks it is in the child’s interests that one be appointed.⁴³ The ALRC suggested that the next friend

*would be able to speak for the child in court proceedings and, more particularly, give instructions to the child’s legal representative. The appointment of a next friend would enable the child’s representative to carry out his primary duty where the child is not sufficiently mature to express his views.*⁴⁴

E.25 Finally, regarding what should occur if the terms of a court order are not complied with, the ALRC stated that

*A failure by the parents or child to abide by the terms of the court’s order should not be treated as a breach, but as an indication that the order is not working or is not an appropriate one.*⁴⁵

The ALRC recommended that in all cases the child, his or her parents and the Youth Advocate should be permitted to make an application for the variation or revocation of an order.⁴⁶

OUTCOME OF THE REPORT

- E.26 Many of the ALRC's recommendations were implemented in the *Children's Services Act 1986* (ACT) (the CSA). The CSA distinguished between young offenders and children in need of care, and included a new ground for intervention, replacing the 'uncontrollability' ground as worded by the ALRC.⁴⁷ It contained a preference for non-intervention, in the form of the dual test for a court order proposed by the ALRC.⁴⁸
- E.27 The CSA created a Youth Advocate,⁴⁹ who was vested with the exclusive power to apply for a declaration that a child was in need of care.⁵⁰ The Youth Advocate was also charged with:
- receiving notifications of children suspected of being in need of care⁵¹
 - chairing child care conferences when the Court directed that such conferences be held⁵²
 - bringing applications to revoke, vary or replace existing care orders.⁵³
- E.28 The CSA also included a power to take a child into safe custody,⁵⁴ and provided that within 48 hours the Youth Advocate must either release the child or obtain an order from a magistrate permitting the continued custody of the child.⁵⁵
- E.29 The CSA granted the ACT Children's Court the power, if the parents consented, to appoint a next friend of the child, who had the power to bring or defend any application on the child's behalf.⁵⁶ The CSA also gave the Court the power to adjourn proceedings on its own motion to enable a child to obtain legal representation if it appeared to the Court that the child should be represented.⁵⁷
- E.30 In 1991, the functions of the Youth Advocate in care proceedings were transferred to the new 'Community Advocate'.⁵⁸ In 1994, amid concerns about the 'friction' between the Community Advocate and the Director of Family Services, all of the Community Advocate's functions in relation to care proceedings under the CSA were transferred to the Director,⁵⁹ in a bid to create 'a clear line of authority or responsibility ... for managing child protection services in the Territory'.⁶⁰

ALRC REPORT NO 84: SEEN AND HEARD: PRIORITY FOR CHILDREN IN THE LEGAL PROCESS

BACKGROUND TO THE REPORT

- E.31 On 28 August 1995, the then federal Attorney-General Mr Michael Lavarch asked the ALRC, in conjunction with the Human Rights and Equal Opportunity Commission, to enquire into and report on issues relating to children and young people in the legal process. The terms of reference asked the Commissions to examine the appropriateness of procedures, rules of evidence and models of advocacy in relation to children going through court processes.

RECOMMENDATIONS IN THE REPORT

Legal representation of children

- E.32 The Commissions' report, *Seen and Heard: Priority for Children in the Legal Process*, was released on 30 September 1997.⁶¹ In their report, the Commissions discussed options for the appropriate model of legal representation for children involved in care and protection applications in children's courts. The Commissions recommended that all children who are the subject of a care and protection application should be provided with a lawyer 'as early as possible'.⁶² They also recommended that '[c]ontact with the child should occur where and when it is comfortable for the child not merely where and when it is convenient for the representative'.⁶³

- 38 Ibid 254–5.
39 Ibid 257.
40 Ibid.
41 Ibid 261.
42 Ibid.
43 Ibid.
44 Ibid.
45 Ibid 284.
46 Ibid.
47 *Children's Services Act 1986* (ACT) s 71(d).
48 *Children's Services Act 1986* (ACT) s 80.
49 *Children's Services Act 1986* (ACT) s 9.
50 *Children's Services Act 1986* (ACT) s 78.
51 *Children's Services Act 1986* (ACT) s 103.
52 *Children's Services Act 1986* (ACT) s 82.
53 *Children's Services Act 1986* (ACT) s 88.
54 *Children's Services Act 1986* (ACT) s 73.
55 *Children's Services Act 1986* (ACT) s 75(2).
56 *Children's Services Act 1986* (ACT) s 166(1)–(2).
57 *Children's Services Act 1986* (ACT) s 167.
58 *Community Advocate Act 1991* (ACT).
59 *Children's Services (Amendment) Act 1994* (ACT).
60 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 May 1994, 1364 (Gary Humphries).
61 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).
62 Ibid 286.
63 Ibid 274.

Appendix E

SELECTED REVIEWS IN OTHER JURISDICTIONS

- E.33 The Commissions made recommendations about the appropriate model of representation for children

In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of the representation, the child's willingness to participate and ability to communicate should guide the representative rather than any assessment of the 'good judgment' or level of maturity of the child.⁶⁴

- E.34 The Commissions also recommended that

Where the child is too young or is unwilling to express a view to a lawyer the court may decide that representation is nevertheless necessary because of the position taken by the department or the likely need for continuing representation. In those cases the representative should advocate in accordance with an assessment of the best interests of the child.⁶⁵

- E.35 The Commissions also highlighted the need for training of legal representatives working with children, and recommended that

The practice of children's law in the Family Court and State and Territory children's courts should be developed as an area of specialisation. Children's representatives in all jurisdictions should receive appropriate training in children's development and cognition and in interviewing children. Legal aid grants should generally be restricted to lawyers accredited as qualified children's representatives. However, exceptions to this requirement should be made where there is good reason to do so.⁶⁶

Recommendations at a national level

- E.36 The Commissions also addressed the problems of the 'jurisdictional confusion' in relation to children that arises from the Commonwealth having family law jurisdiction, and the states and territories having child protection jurisdiction.⁶⁷ The Commissions noted that

The lack of co-ordination between the family law and care and protection jurisdictions and between the care and protection systems of each State and Territory was raised as a source of serious concern during the Inquiry. There was wide agreement that the current jurisdictional arrangements fail to serve the interests of many children in the family law and care and protection systems and may add to their disadvantage and distress.⁶⁸

- E.37 The Commissions discussed a number of options for minimising or removing these problems, including the vesting of some of the Family Court's powers in state children's courts.⁶⁹

- E.38 The Commissions also recommended that national standards for legislation and practice in care and protection systems be developed to ensure that the practice across the states and territories is consistent and reflects best practice.⁷⁰

Conferencing in care and protection jurisdictions

- E.39 The Commissions examined the models of family group conferencing and pre-hearing conferences used in care and protection processes, including those in Victoria. While they recognised the value of providing such forums for reaching agreement outside of court, the Commissions expressed concerns about the vulnerability of families involved in such conferences.⁷¹ The Commissions were also concerned about ascertaining the appropriate level of the child's involvement in such conferences, and the potential for the focus on the child's best interests to be lost in the process of negotiation and settlement.⁷²

E.40 The Commissions recommended that the procedure for all conferencing models in care and protection jurisdictions should be set down in legislation, and should require that:

- in family group and pre-hearing conferences the child's best interests should be the paramount consideration
- family members and children should have access to independent legal advice before participating in any conference
- children who are too young to participate or who wish to have additional support during the conference should be represented by a lawyer or advocate of their choice in these conferences
- convenors of family or pre-hearing conferences should have knowledge of and training in care and protection law, family dynamics and child development issues, so that they are aware of power imbalances between the participants at the conferences and are able to work to overcome these imbalances to arrive at a resolution in the child's best interests.⁷³

Court processes and jurisdiction

E.41 To address the delays that the Commissions found were common to care and protection matters in all jurisdictions, the Commissions recommended that

*The national care and protection standards should specify that children's court magistrates and judges should be active and managerial in their approach to care and protection cases and that the same magistrate or judge should manage a case from first listing, on an individual case management or single docket model.*⁷⁴

E.42 The Commissions noted that the definition of 'child' in the legislation in certain jurisdictions precluded courts making care and protection orders in relation to young people aged 16 or 17, 'even where there may be evidence of abuse or neglect'.⁷⁵ The Commissions stated that '[f]amily services departments should be able to respond to the needs of all children and young people who require care and protection'.⁷⁶ They accordingly recommended that in the child protection legislation in all Australian jurisdictions, a child should be defined as a person under the age of 18, and

*a court should be able to make orders for a young person aged 16 to 18 if it finds, after taking into consideration the wishes of the young person, that the young person is in need of care and protection.*⁷⁷

FAMILY LAW AND CHILD PROTECTION FINAL REPORT

BACKGROUND TO THE REPORT

E.43 In September 2002, the Child and Family Services Committee of the Family Law Council of Australia (the Council) published a report entitled *Family Law and Child Protection Final Report*. The report arose out of the Council's work on the interaction between state and federal systems when child protection issues arise in cases under the *Family Law Act 1975* (Cth) (FLA 1975). The Council was concerned about the ability of the Family Court of Australia and the Federal Magistrates Service to properly assess child abuse allegations that arose in the context of family law proceedings.

- 64 Ibid.
- 65 Ibid 286.
- 66 Ibid 290.
- 67 Ibid 355.
- 68 Ibid 356.
- 69 Ibid 372–6.
- 70 Ibid 429.
- 71 Ibid 439.
- 72 Ibid 439–40.
- 73 Ibid 442.
- 74 Ibid 447.
- 75 Ibid 461.
- 76 Ibid.
- 77 Ibid 463.

RECOMMENDATIONS IN THE REPORT

- E.44 The Council noted the ‘jurisdictional overlap’ that occurs as a consequence of child protection being a matter for state law and disputes concerning children falling under the federal FLA 1975.⁷⁸ This overlap manifests itself when child abuse allegations are made in the course of family law proceedings in the Family Court and a child protection application is brought in a state children’s court in relation to the same child.⁷⁹
- E.45 The Council made a number of recommendations to reduce problems caused by this jurisdictional overlap. One such recommendation was that state and territory children’s courts should be given the power in child protection proceedings to make long-term orders granting residence to one parent and prohibiting contact between the child and the other (abusive) parent.⁸⁰ The Council suggested that this could be achieved through amendments to the FLA 1975 and the relevant state or territory child protection legislation, and would remove the need for a separate application for such an order to be made to the Family Court, when a protection application was on foot.⁸¹

REPORT OF THE SPECIAL COMMISSION OF INQUIRY INTO CHILD PROTECTION SERVICES IN NSW (THE WOOD REPORT)

BACKGROUND TO THE REPORT

- E.46 In November 2007, the Honourable James Wood AO QC was commissioned by the NSW Government to determine what changes within the child protection system would be required to cope with future levels of demand once reforms, which had been initiated in 2002, were completed.
- E.47 The NSW Government commissioned the inquiry following the deaths of two children in October and November 2007, in circumstances in which both children or their siblings had been the subject of reports to the Department of Community Services (DoCS), and their respective parents had been charged in relation to the deaths.

RECOMMENDATIONS IN THE REPORT

- E.48 The Wood Commission published its three-volume report on 24 November 2008. The Wood Commission made a variety of recommendations for amendments to the provisions of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the NSW Act), including changes to the powers and processes of the NSW Children’s Court, and the test and processes used by DoCS to assess reports of children suspected to be at risk. Its recommendations focused on improving the professionalism and efficiency of the existing institutions and staff involved in the child protection system, rather than changing their roles or creating new bodies.

Threshold for reporting and investigation

- E.49 In order to reduce the number of reports made to DoCS to those children most likely to require state intervention, the Wood Commission recommended that the threshold for both voluntary and mandatory reporting should be raised.⁸² The Commission recommended that the NSW Act be amended to provide that a report should only be made to DoCS if the reporter suspects on reasonable grounds that a child or young person is ‘at risk of significant harm’.⁸³

E.50 The Commission also recommended that the number of investigations by DoCS of reports identifying a child or young person at risk of significant harm be limited to those children assessed as requiring a response within 24 hours, being at high risk, or under five years of age.⁸⁴ In all other cases, the family should be referred to the most appropriate local service to meet their needs.⁸⁵

Use of ADR

E.51 The Wood Commission recognised the value of utilising ADR decision-making models in the child protection system, and stated that it was 'of the strong view that ADR should be used before and during care proceedings'.⁸⁶ The Wood Commission stated that the presence of violence in child protection work 'should not operate to exclude ADR, rather those conducting it should have appropriate training'.⁸⁷ It accordingly recommended that adequate funding be provided to enable ADR to be used prior to and during care proceedings, in relation to the making of placement plans, contact arrangements, and other issues.⁸⁸

Evidential requirements

E.52 To reduce 'legalism' and move towards a more holistic approach to resolving care applications, the Wood Commission recommended the removal of the general requirements in relation to care proceedings in the Children's Court that DOCS file supporting affidavits and all material on which it relies at the beginning of the proceedings.⁸⁹ The Wood Commission instead recommended that

*Care applications by DOCS under ss 45 and 61 should be made by way of an application filed in the Court supported by a written report which succinctly and fairly summarises the information available to DOCS and contains sufficient information to support a determination that a child is in need of care and protection and any interim orders sought, without any requirement for the filing of any affidavit, unless ordered by the Court where the establishment is contested. The DOCS file or relevant portion of it should be made available to the parties.*⁹⁰

E.53 The Wood Commission also noted complaints that the section 45 requirement of the NSW Act that DoCS file an application with the Court within 24 hours of a child's emergency removal affected the quality of evidence presented.⁹¹ The Wood Commission noted that in this respect 'NSW seems to have one of the shortest time frames', and that the predecessor to the NSW Act permitted an application to be made within 72 hours.⁹² It recommended that the timeframe in section 45 be extended to 72 hours 'in order to properly put evidence before the Court'.⁹³ It also recommended that the Children's Court be given the power to order, on its own motion, that expert evidence be provided to it, in the form of reports from the Children's Court Clinic or otherwise.⁹⁴

'Adversarial' nature of care proceedings

E.54 The Wood Commission noted that it

*received a number of submissions stating that care proceedings are, or are increasingly becoming, 'adversarial', or that legal practitioners and DoCS were behaving in an 'adversarial' manner. It was not always clear what was meant by 'adversarial', and it seems likely that the term means different things to the different people who used it. The definition of the term is likely to cover everything from the mere testing of evidence in court, the presence of a number of legally represented parties, to combative, hostile and point scoring behaviour. It may relate to procedures, processes or the conduct of participants.*⁹⁵

78 Family Law Council, *Family Law and Child Protection Final Report* (2002) 86.

79 Ibid.

80 Ibid 81, 86.

81 Ibid 82–4.

82 James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 1, 185.

83 Ibid 197.

84 Ibid 383–4 (Recommendation 10.2).

85 Ibid.

86 Ibid vol 2, 489.

87 Ibid.

88 Ibid 491 (Recommendation 12.1).

89 Ibid 507.

90 Ibid 541 (Recommendations 13.2 and 13.3).

91 Ibid 508.

92 Ibid 509.

93 Ibid 509, 542 (Recommendation 13.4).

94 Ibid 462 (Recommendation 11.1(xv)).

95 Ibid 512.

E.55 The Wood Commission stated that it agreed that
*the model of a judicial officer balancing competing interests is not an appropriate one in this jurisdiction. However, it is also the case that the consequences of the decisions made in care proceedings on families and children are enormous. There should be testing of evidence, there should be legal representation and it is appropriate that both DoCS and representatives for children and families vigorously seek to obtain an outcome in the best interests of children. However, it is clear that practice and procedure in this area requires change and improvement, and recommendations to this end are made later in this chapter.*⁹⁶

E.56 It accordingly recommended that
*a code of conduct should be developed applicable to all legal representatives in care proceedings. Particular attention should be given to the training that they are required to undergo, using the training available in the family law jurisdiction as a guide. Further, specialist accreditation should be available.*⁹⁷

Changes to Court practice and qualifications of Court personnel

E.57 To improve the practice relating to the hearing of care applications in the Children's Court, the Wood Commission recommended that the Children's Court revise its practices relating to changing hearing dates, transferring proceedings between courts and listing callovers and mentions.⁹⁸ It also recommended a trial of a docket system in the Parramatta Children's Court for matters in the care and protection jurisdiction.⁹⁹

E.58 To raise the standing of the Children's Court and the level of its expertise in resolving care and protection matters, the Wood Commission recommended that a District Court judge be appointed as the Court's senior judicial officer,¹⁰⁰ and that Children's Court registrars be legally qualified and trained to perform ADR and to undertake procedural and consent functions.¹⁰¹

Changes to Court powers

E.59 To ensure that the Court's power to make a care order pursuant to section 71 of the NSW Act was not unduly restricted, the Wood Commission recommended that section 71 be amended to make clear that the grounds for making a care order were not limited to those enumerated in that section.¹⁰²

E.60 In relation to making decisions about contact, the Wood Commission recommended that the Court's power to make long-term contact orders be limited to those matters where the Court has accepted the assessment of the Director-General of DoCS that there is a realistic possibility of restoration.¹⁰³ The Wood Commission stated that

*where permanency planning does not include restoration, it is appropriate that decisions as to contact are made by DoCS or the designated agency to whom parental responsibility has been delegated. They can take account of changing circumstances as the child or young person grows older.*¹⁰⁴

E.61 However, in relation to restoration, the Wood Commission recommended that if a child or young person has been removed from his or her parent by order of the Children's Court, the decision to restore that child must be made by the Court, upon application by the person with parental responsibility, including the Minister.¹⁰⁵

OUTCOME OF THE REPORT

E.62 In response to the Wood Report, the NSW Government passed the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW) (the Wood Act). Most of the changes to the NSW Act came into force on 22 January 2010.

96 Ibid 514.

97 Ibid 532.

98 Ibid 542 (Recommendation 13.5).

99 Ibid 539, 543 (Recommendation 13.11).

100 Ibid 542 (Recommendation 13.9).

101 Ibid 543 (Recommendation 13.12).

102 Ibid 461 (Recommendation 11.1(viii)).

103 Ibid (Recommendation 11.1(x)).

104 Ibid 442.

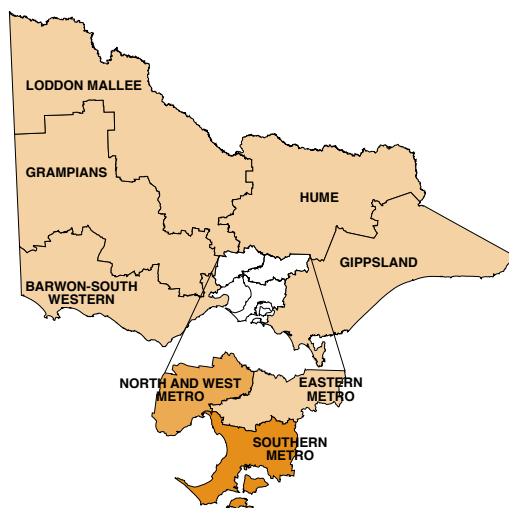
105 Ibid 462(Recommendation 11.1(xvii)).

Appendix F

THE DEPARTMENT OF HUMAN SERVICES CHILD PROTECTION REGIONS AND OFFICES

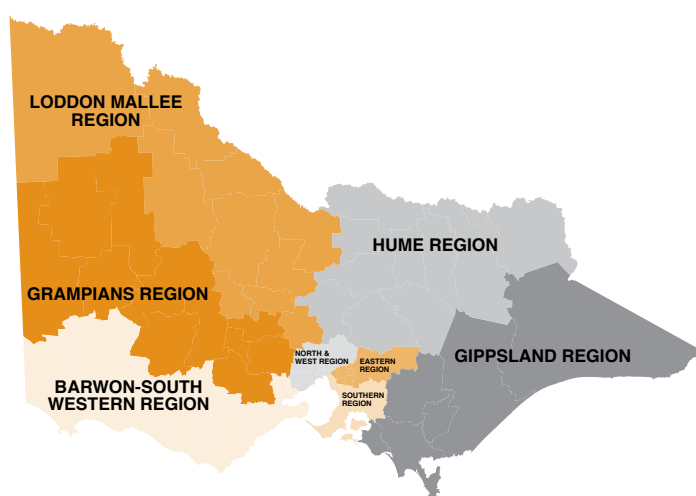
Metropolitan regions:

- Eastern (Box Hill)
- Southern (Cheltenham, Dandenong, Frankston)
- Northern and Western (Footscray, Preston).



Rural regions:

- Barwon South Western (Geelong, Hamilton, Portland, Warrnambool)
- Gippsland (Bairnsdale, Leongatha, Morwell, Sale, Warragul)
- Grampians (Ballarat, Horsham)
- Hume (Benalla, Seymour, Shepparton, Wangaratta, Wodonga)
- Loddon Mallee (Bendigo, Mildura, Swan Hill).



After Hours:

- Child Protection Emergency Service (statewide), 5 pm–8.45 am Monday to Friday, weekends and public holidays.

Appendix G

CHILD PROTECTION PRACTITIONER ROLES, CLASSIFICATION AND TEAMS¹

- G.1 Over 1000 child protection professionals are employed across the Child Protection Services' eight regional locations and central office. The predominant qualifications for practitioners are social work, welfare work and psychology. Child protection practitioners are part of the Victorian Public Service and have a distinct classification: CPW.
- G.2 The CPW classification has six levels, structured as follows:
- CPW 2: entry level for case management work
 - CPW 3: advanced child protection practitioners
 - CPW 4: team leaders who supervise the work of a team of between four and six child protection practitioners; court officers who help child protection practitioners prepare for court and attend court on their behalf
 - CPW 5: unit managers who supervise two or four team leaders and manage and plan a group of staff. CPW 5s chair case plan² meetings and have significant liaison responsibilities with senior staff in community service organisations
 - CPW 6: The regional child protection manager, who has management and oversight responsibilities for all regional staff (in some regions there are over 100 staff).
- G.3 In addition, there are some specialist roles. Specialist infant protective practitioners at the CPW 4 or 5 level provide advice and support to workers managing infants from birth to two years of age. Family group conference (FGC) convenors are CPW 5s who convene meetings seeking family participation in decision making regarding the care and protection of children. FGCs are attended by child protection caseworkers, family (including extended family), friends and professionals.
- G.4 Child protection practitioners generally work in teams with specific functions. Each region structures teams differently. In some locations, teams have designated functions, such as intake or initial investigation or specialist roles (such as working with adolescents or infants); in other areas teams may have a mix of functions. Common teams include:
- intake team (receives reports)
 - response or investigation team (undertakes the initial visit, determines if abuse allegations are substantiated, works with the family, and assesses risk and initiates court action if necessary)
 - adolescent team (are assigned to cases for children aged 13 to 17 years from investigation)
 - long-term children's team (initiates and supervises Children's Court protection orders, continually assesses the ongoing risk to the child, meets court requirements including report writing, supervises access, where necessary develops reunifications plans or ensures permanent substitute care if parental rights have been terminated, works with community agencies)
 - case contracting team (monitors and reviews best interests plans, provides consultancies to agencies and maintains responsibilities for ensuring cases meet legislative requirements such as plans and reviews)

¹ See Department of Human Services (Victoria), Protecting Victoria's Children: Child Protection Practice Manual, 'Child Protection Workforce—Structure and Roles', Advice No 1043 (23 April 2007), from CD-ROM provided at 23 March 2010.

² Case plans are required under s 167 of the Children Youth and Families Act 2005 (Vic) following the making of certain protection orders.

Appendix G

CHILD PROTECTION PRACTITIONER ROLES, CLASSIFICATION AND TEAMS

3 Department of Human Services (Victoria) *After Hours Child Protection Emergency Service—Regional Child Protection Service Interim Protocol* (April 2008), from CD-ROM provided at 23 March 2010, 10.

4 *Ibid* 11.

The After Hours Child Protection Emergency Service (After Hours Service)

G.5 The After Hours Child Protection Emergency Service (After Hours Service) is located at a secure site and is operational from 5 pm to 8.45 am Monday to Friday and on weekends.³ It is a statewide service that operates after hours for children who may be in need of an immediate child protection response. It is an emergency service only and a case that is accepted by the After Hours Service will be transferred to the appropriate region on the next working day.⁴

Appendix H

OUTLINE OF FIVE PRIMARY APPLICATIONS IN CHILD PROTECTION PROCEEDINGS

PROTECTION APPLICATION

H.1 A protection application is an application made to the Court for a finding that a child is in need of protection. This is the most common type of application, with 3034 applications being initiated in Victoria in 2008–09 out of the total 3048 primary applications initiated.¹ Only the Department of Human Services and the police² can make protection applications, but in practice, it is almost always the Department. See Chapter 3 for the protection application process, the basis for a finding that a child is in need of protection, and the protection orders that may follow from such a finding.

IRRECONCILABLE DIFFERENCE APPLICATION

H.2 An irreconcilable difference application is a very rare application brought by either a child or a child's custodian (such as a parent) for a finding that there is a substantial and presently irreconcilable difference between the adult and child to such an extent that the care and control of the child are likely to be seriously disrupted.³ Before an irreconcilable difference application can be filed with the Court, the applicant must attempt conciliation counselling by lodging an application for conciliation counselling with the Secretary.⁴ If the Court makes a finding of 'irreconcilable difference', it may then make a protection order, on the same basis as if it had made a finding that a child is 'in need of protection' under a protection application.⁵ DHS may be involved in the hearing with leave.⁶

PERMANENT CARE APPLICATION

H.3 DHS make permanent care applications on behalf of an approved person or persons who seek to have long-term custody and guardianship of a child.⁷ Proposed permanent carers may participate in the hearing with leave of the Court.⁸

H.4 A pre-condition to a permanent care order is that the child has not been in the parent's care for at least six months or for periods that total six months out of the last 12 months.⁹ The Court must also be satisfied that parents are unable or unwilling to resume custody and guardianship of the child, or that it would not be in the child's best interests for this to occur.¹⁰

H.5 The Court must be satisfied that the proposed carers are suitable, willing and able to assume custody and guardianship responsibility.¹¹ The child's wishes and feelings are to be taken into account and the Court must be satisfied that a permanent care order would promote the child's best interests.¹² A disposition report and a stability plan must be prepared before the Court can make a permanent care order.¹³

H.6 A permanent care order must include conditions concerning access with a child's parents and may, if the Court considers it to be in the child's best interests, include conditions for access with the child's siblings and other people significant to the child.¹⁴ A Court may include a cultural plan as a condition of a permanent care order.

H.7 Restrictions apply to making a permanent care order that places an Aboriginal child in the care of non-Aboriginal carers. For this to occur, there needs to be a disposition report stating that certain conditions have been met, including that the Secretary is satisfied that the order will accord with the Aboriginal Child Placement Principle.¹⁵ The Court must receive a report from an Aboriginal agency (such as the Victorian Aboriginal Child Care Agency) that recommends the making of the order,¹⁶ and the Court may require that a cultural plan be prepared for the child.¹⁷

- 1 Children's Court of Victoria, *Annual Report 2008–2009* (2009), Table 7, 20, Table 8, 21.
- 2 *Children, Youth and Families Act 2005* (Vic) ss 181, 240.
- 3 *Children, Youth and Families Act 2005* (Vic) s 259.
- 4 *Children, Youth and Families Act 2005* (Vic) s 260.
- 5 *Children, Youth and Families Act 2005* (Vic) s 274 and generally Part 4.9.
- 6 *Children, Youth and Families Act 2005* (Vic) s 259(5).
- 7 *Children, Youth and Families Act 2005* (Vic) s 320(1).
- 8 *Children, Youth and Families Act 2005* (Vic) s 320(2).
- 9 *Children, Youth and Families Act 2005* (Vic) s 319(1)(a).
- 10 *Children, Youth and Families Act 2005* (Vic) s 319(1)(b).
- 11 *Children, Youth and Families Act 2005* (Vic) s 319(1)(c), *Children, Youth and Families Regulations 2007* (Vic) reg 18.
- 12 *Children, Youth and Families Act 2005* (Vic) ss 319(1)(e), (f).
- 13 *Children, Youth and Families Act 2005* (Vic) s 322.
- 14 *Children, Youth and Families Act 2005* (Vic) ss 321(d), (e).
- 15 *Children, Youth and Families Act 2005* (Vic) s 323.
- 16 *Children, Youth and Families Act 2005* (Vic) s 323(b).
- 17 *Children, Youth and Families Act 2005* (Vic) s 323(c).

Appendix H

OUTLINE OF FIVE PRIMARY APPLICATIONS IN CHILD PROTECTION PROCEEDINGS

- H.8 A permanent care order will be suspended on the application (with the Secretary's prior consent) for relevant parenting orders under the *Family Law Act 1975* (Cth), and will expire on the making of parenting orders.¹⁸
- H.9 A permanent care order may be varied or revoked on application by a child, parent, permanent carer or the Secretary.¹⁹
- H.10 In 2008–09, the Court made five permanent care orders that did not flow directly from previous protection order proceedings, and 228 that followed from previous applications and orders.²⁰

TEMPORARY ASSESSMENT ORDER APPLICATION

- H.11 Temporary assessment order applications were introduced with the *Children Youth and Families Act 2005* (Vic) (CYF Act 2005) and came into effect on 1 October 2007. The order's purpose is to strengthen the Department's investigation powers.²¹ The impact of this new provision has been extremely slight: only nine temporary assessment orders were made in 2007–08, and no orders were made in 2008–09.²²
- H.12 DHS may apply for a temporary assessment order if they have a reasonable suspicion that a child is, or is likely to be, in need of protection and that further investigation and assessment is warranted, and that this investigation and assessment cannot properly proceed without an order.²³ DHS can bring this application with notice to parties and the child, or, with leave, without notice if this would be appropriate in the circumstances.²⁴ A temporary assessment order lasts for a maximum period of 21 days.²⁵ A parent or child may seek to vary or revoke an order made without notice.²⁶ There are specific matters that the Court must consider before making a temporary assessment order.²⁷
- H.13 Temporary assessment orders may give DHS power to enter premises where the child is living, interview parents and/or the child, authorise the medical examination of a child, and give any directions or impose any conditions that the Court considers to be in the child's best interests.²⁸ There are some qualifications to these powers. For instance, a medical examination must not proceed if a medical practitioner or psychologist is of the opinion that a child has sufficient understanding to give or refuse consent and refuses consent, and a person may refuse to answer questions in an interview if it might incriminate them or is subject to legal professional privilege.²⁹

THERAPEUTIC TREATMENT ORDER APPLICATIONS

- H.14 Therapeutic treatment order applications and therapeutic treatment (placement) order applications are new applications introduced with the CYF Act 2005 and came into effect on 1 October 2007. The Court may make one (or both) of these orders for children aged 10 to 14 years who have exhibited sexually abusive behaviours to ensure the child's access to or attendance at an appropriate treatment program.³⁰ DHS applies for this type of order and, prior to filing an application, must refer the case to the Therapeutic Treatment Board and consider the Board's advice.³¹ It appears that the Court does not have power to make a therapeutic treatment order on its own initiative.³²
- H.15 DHS must refer matters to the Therapeutic Treatment Board for advice when it receives a report that a child is in need of therapeutic treatment from a police officer or the Court.³³ In other cases, the Department exercises discretion as to whether the matter is referred to the Therapeutic Treatment Board.³⁴

- H.16 If a matter is referred to the Therapeutic Treatment Board for individual case advice, the Therapeutic Treatment Board must provide advice as to whether it is appropriate to seek a therapeutic treatment order.³⁵ It is not mandatory for the Department to follow advice of the Therapeutic Treatment Board, only 'to consider' the advice.³⁶
- H.17 If the Court makes a therapeutic treatment order, the child is required to participate in an appropriate therapeutic treatment program and any other conditions included in the order.³⁷ Any statements made by a child when participating in a therapeutic treatment program under a therapeutic treatment order are not admissible in any criminal proceedings in relation to the child.³⁸
- H.18 The Court may make a therapeutic treatment (placement) order if it makes or has made a therapeutic treatment order and it is necessary to make an order for a child's placement.³⁹ A therapeutic treatment (placement) order grants sole custody of the child to DHS and may include conditions.⁴⁰
- H.19 Therapeutic treatment (placement) orders may be made for up to 12 months and be extended once for a period up to 12 months.⁴¹ These orders may be varied or revoked.⁴²
- H.20 In 2008–09, the Children's Court made 12 therapeutic treatment orders and no therapeutic treatment (placement) orders.⁴³
- H.21 Established under section 339 of the CYF Act 2005, the Therapeutic Treatment Board comprises members appointed by the Governor in Council, on the recommendation of the Minister. Members are nominated by the Chief Commissioner of Police, one or more health services, DPP, and the Secretary of DHS.⁴⁴ As well as providing advice to DHS, the Board evaluates and advises the Minister on services available for children in need of therapeutic treatment.⁴⁵
- 18 *Children, Youth and Families Act 2005* (Vic) s 322.
- 19 *Children, Youth and Families Act 2005* (Vic) s 326.
- 20 Children's Court of Victoria, above n 1, 19, 22. It appears that the Children's Court categorise applications for permanent care orders as either primary or secondary depending on whether there were prior protection proceedings in relation to the child.
- 21 *Children, Youth and Families Act 2005* (Vic), 2nd reading speech, 6 October, 2005.
- 22 Children's Court of Victoria, above n 1, 19.
- 23 *Children, Youth and Families Act 2005* (Vic) s 228(1).
- 24 *Children, Youth and Families Act 2005* (Vic) s 229.
- 25 *Children, Youth and Families Act 2005* (Vic) s 236. Note that a temporary assessment order without leave may only be made for up to 10 days, but there are circumstances in which the court may extend for this order for up to 21 days: see s 236(4).
- 26 *Children, Youth and Families Act 2005* (Vic) s 323(c).
- 27 *Children, Youth and Families Act 2005* (Vic) ss 230, 231.
- 28 *Children, Youth and Families Act 2005* (Vic) ss 232(1), 233, 234.
- 29 *Children, Youth and Families Act 2005* (Vic) ss 233, 234.
- 30 *Children, Youth and Families Act 2005* (Vic) ss 244, 248, 252.
- 31 *Children, Youth and Families Act 2005* (Vic) s 245.
- 32 *Children, Youth and Families Act 2005* (Vic) ss 246, 248, 252, 349(2).
- 33 *Children, Youth and Families Act 2005* (Vic) sub-ss 245(2),(4), ss 185, 349(2).
- 34 *Children, Youth and Families Act 2005* (Vic) ss 185, 245(3).
- 35 *Children, Youth and Families Act 2005* (Vic) s 245(6).
- 36 *Children, Youth and Families Act 2005* (Vic) s 245(7).
- 37 *Children, Youth and Families Act 2005* (Vic) s 249).
- 38 *Children, Youth and Families Act 2005* (Vic) s 251.
- 39 *Children, Youth and Families Act 2005* (Vic) s 252.
- 40 *Children, Youth and Families Act 2005* (Vic) s 252.
- 41 *Children, Youth and Families Act 2005* (Vic) s 255.
- 42 *Children, Youth and Families Act 2005* (Vic) ss 257, 258.
- 43 Children's Court of Victoria, above n 1, 19.
- 44 *Children, Youth and Families Act 2005* (Vic) s 340.
- 45 *Children, Youth and Families Act 2005* (Vic) s 341.

DIVISION 2—BEST INTERESTS PRINCIPLES

10 BEST INTERESTS PRINCIPLES

1. For the purposes of this Act the best interests of the child must always be paramount.
2. When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.
3. In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—
 - a. the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;
 - b. the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;
 - c. the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;
 - d. the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances;
 - e. the effects of cumulative patterns of harm on a child's safety and development;
 - f. the desirability of continuity and stability in the child's care;
 - g. that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child;
 - h. if the child is to be removed from the care of his or her parent, that consideration is to be given first to the child being placed with an appropriate family member or other appropriate person significant to the child, before any other placement option is considered;
 - i. the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent;
 - j. the capacity of each parent or other adult relative or potential care giver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child;
 - k. access arrangements between the child and the child's parents, siblings, family members and other persons significant to the child;
 - l. the child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity;
 - m. where a child with a particular cultural identity is placed in out of home care with a care giver who is not a member of that cultural community, the desirability of the child retaining a connection with their culture;

- n. the desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities;
- o. the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;
- p. the possible harmful effect of delay in making the decision or taking the action;
- q. the desirability of siblings being placed together when they are placed in out of home care;
- r. any other relevant consideration.

DIVISION 3—DECISION-MAKING PRINCIPLES

11 DECISION-MAKING PRINCIPLES

In making a decision or taking an action in relation to a child, the Secretary or a community service must also give consideration to the following principles—

- a. the child’s parent should be assisted and supported in reaching decisions and taking actions to promote the child’s safety and wellbeing;
- b. where a child is placed in out of home care, the child’s care giver should be consulted as part of the decision-making process and given an opportunity to contribute to the process;
- c. the decision-making process should be fair and transparent;
- d. the views of all persons who are directly involved in the decision should be taken into account;
- e. decisions are to be reached by collaboration and consensus, wherever practicable;
- f. the child and all relevant family members (except if their participation would be detrimental to the safety or wellbeing of the child) should be encouraged and given adequate opportunity to participate fully in the decision-making process;
- g. the decision-making process should be conducted in such a way that the persons involved are able to participate in and understand the process, including any meetings that are held and decisions that are made;
- h. persons involved in the decision-making process should be—
 - i) provided with sufficient information, in a language and by a method that they can understand, and through an interpreter if necessary, to allow them to participate fully in the process; and
 - ii) given a copy of any proposed case plan and sufficient notice of any meeting proposed to be held; and
 - iii) provided with the opportunity to involve other persons to assist them to participate fully in the process; and
- i. if the child has a particular cultural identity, a member of the appropriate cultural community who is chosen or agreed to by the child or by his or her parent should be permitted to attend meetings held as part of the decision-making process.

DIVISION 4—ADDITIONAL DECISION-MAKING PRINCIPLES FOR ABORIGINAL CHILDREN**12 ADDITIONAL DECISION-MAKING PRINCIPLES**

1. In recognition of the principle of Aboriginal self-management and self-determination, in making a decision or taking an action in relation to an Aboriginal child, the Secretary or a community service must also give consideration to the following principles—
 - a. in making a decision or taking an action in relation to an Aboriginal child, an opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views;
 - b. a decision in relation to the placement of an Aboriginal child or other significant decision in relation to an Aboriginal child, should involve a meeting convened by an Aboriginal convener who has been approved by an Aboriginal agency or by an Aboriginal organisation approved by the Secretary and, wherever possible, attended by—
 - i) the child; and
 - ii) the child's parent; and
 - iii) members of the extended family of the child; and
 - iv) other appropriate members of the Aboriginal community as determined by the child's parent;
 - c. in making a decision to place an Aboriginal child in out of home care, an Aboriginal agency must first be consulted and the Aboriginal Child Placement Principle must be applied.
2. The requirement under subsection (1)(c) to consult with an Aboriginal agency does not apply to the making of a decision or the taking of an action under Part 3.5.
3. In this section *Aboriginal organisation* means an organisation that is managed by Aboriginal persons and that carries on its activities for the benefit of Aboriginal persons.

13 ABORIGINAL CHILD PLACEMENT PRINCIPLE

1. For the purposes of this Act the Aboriginal Child Placement Principle is that if it is in the best interests of an Aboriginal child to be placed in out of home care, in making that placement, regard must be had—
 - a. to the advice of the relevant Aboriginal agency; and
 - b. to the criteria in subsection (2); and
 - c. to the principles in section 14.
2. The criteria are—
 - a. as a priority, wherever possible, the child must be placed within the Aboriginal extended family or relatives and where this is not possible other extended family or relatives;
 - b. if, after consultation with the relevant Aboriginal agency, placement with extended family or relatives is not feasible or possible, the child may be placed with—

- i) an Aboriginal family from the local community and within close geographical proximity to the child's natural family;
 - ii) an Aboriginal family from another Aboriginal community;
 - iii) as a last resort, a non-Aboriginal family living in close proximity to the child's natural family;
 - c. any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community.
3. The requirements under subsection (1)(a) to have regard to the advice of the relevant Aboriginal agency and under subsection (2)(b) to consult with the relevant Aboriginal agency do not apply to the making of a decision or the taking of an action under Part 3.5.

14 FURTHER PRINCIPLES FOR PLACEMENT OF ABORIGINAL CHILD

Self-identification and expressed wishes of child

1. In determining where a child is to be placed, account is to be taken of whether the child identifies as Aboriginal and the expressed wishes of the child.

Child with parents from different Aboriginal communities

2. If a child has parents from different Aboriginal communities, the order of placement set out in sections 13(2)(b)(i) and 13(2)(b)(ii) applies but consideration should also be given to the child's own sense of belonging.
3. If a child with parents from different Aboriginal communities is placed with one parent's family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her other parent's family, community and culture.

Child with one Aboriginal parent and one non-Aboriginal parent

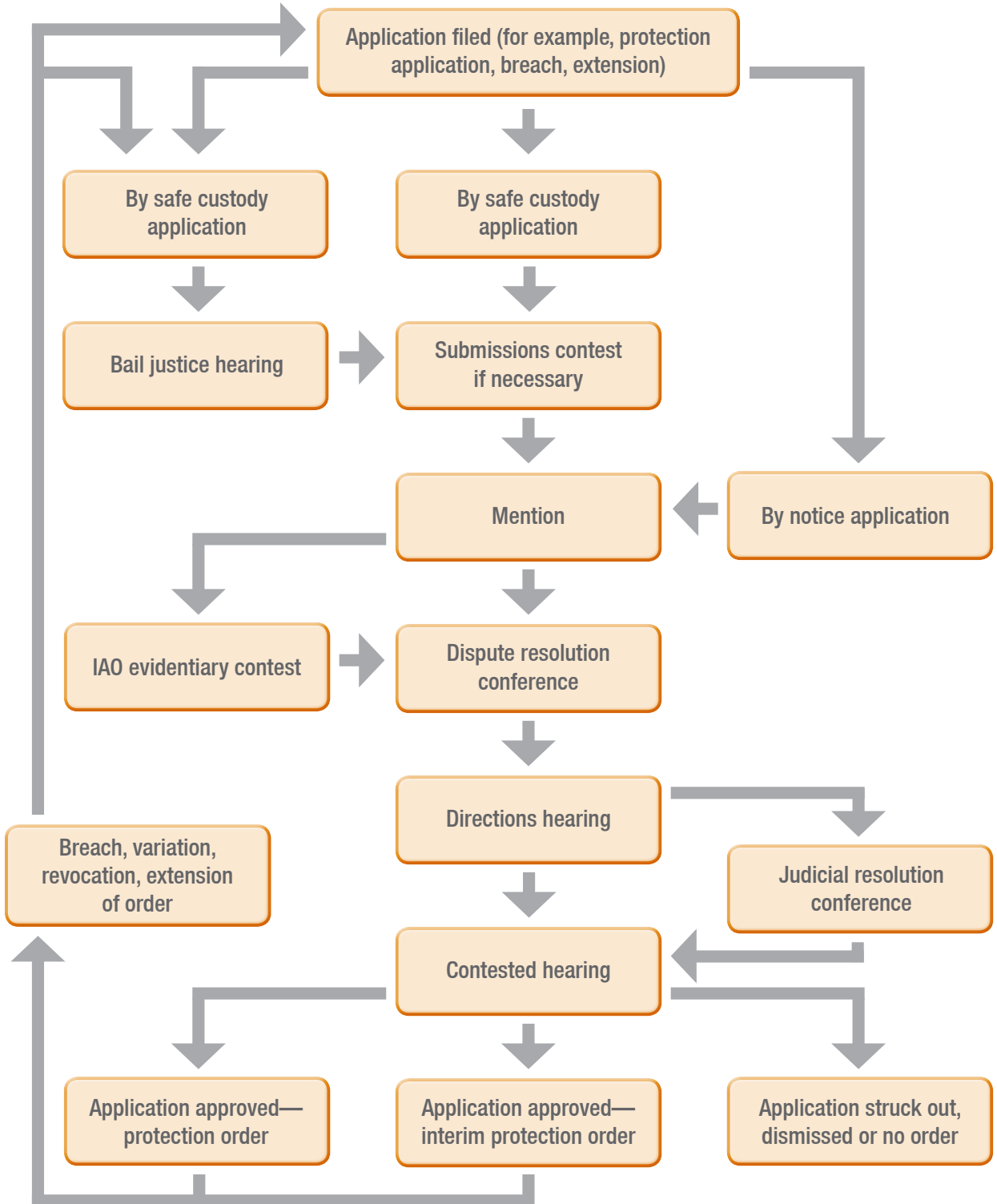
4. If a child has one Aboriginal parent and one non-Aboriginal parent, the child must be placed with the parent with whom it is in the best interests of the child to be placed.

Placement of child in care of a non-Aboriginal person

5. If an Aboriginal child is placed with a person who is not within an Aboriginal family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her Aboriginal family, community and culture.

Appendix J

CURRENT COMMENCEMENT PROCEEDINGS



Appendix K THE PINK FORM—CONDITIONS

CHILDREN'S COURT - FAMILY DIVISION CONDITIONS

CHILD(REN):-

1		VISITS & COOPERATION must accept visits from and cooperate with DoHS.
1		VISITS & COOPERATION must accept visits from and cooperate with DoHS.
2		SUPPORT SERVICES must accept support services as <i>[directed by/agreed with]</i> DoHS.
2		SUPPORT SERVICES must accept support services as <i>[directed by/agreed with]</i> DoHS.
3		COUNSELLING must go to counselling as <i>[directed by/agreed with]</i> DoHS and must allow reports <i>[about attendance]</i> to be given to DoHS.
4		FAMILY VIOLENCE COUNSELLING must go to family violence counselling as <i>[directed by/agreed with]</i> DoHS and must allow reports <i>[about attendance]</i> to be given to DoHS.
5		ANGER MANAGEMENT must go to a course on anger management as <i>[directed by/agreed with]</i> DoHS and must allow reports <i>[about attendance]</i> to be given to DoHS.
6		PSYCH ASSESSMENT AND/OR TREATMENT must go to a <i>[psychologist, psychiatrist, psychologist and/or psychiatrist]</i> as <i>[directed by/agreed with]</i> DoHS for <i>[assessment, treatment, assessment and treatment]</i> and must allow reports to be given to DoHS.
7		PAEDIATRIC ASSESSMENT & TREATMENT must <i>[take the child/allow the child to be taken]</i> to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DoHS.
8		ALCOHOL/DRUG TESTING must submit to random supervised <i>[alcohol, drug, alcohol and drug]</i> testing <i>[</i> <input type="text"/> <i>times per week]</i> or otherwise as directed by DoHS and must allow the results to be given to DoHS.
9		must submit to testing for <i>[alcohol, drug, alcohol and drug]</i> use as directed by DoHS and must allow the results to be given to DoHS.
10		must provide breath tests <input type="text"/> and must allow the results to be given to DoHS.
11		ALCOHOL/DRUG ASSESSMENT/TREATMENT must participate in assessment and/or treatment for <i>[alcohol, drug, alcohol and drug]</i> dependence as directed by DoHS and must allow reports to be given to DoHS.
12		ABSTINENCE must not <i>[drink alcohol, drink alcohol to excess, use illegal drugs, drink alcohol or use illegal drugs, drink alcohol to excess or use illegal drugs]</i> .
13		must not expose the child to the <i>[drinking of alcohol, use of illegal drugs, drinking of alcohol or use of illegal drugs]</i> .
14		must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
15		ACCOMMODATION must <i>[make best endeavour to]</i> find a suitable home.
16		must live where DOHS directs.
17		must live with <input type="text"/>
18		CHANGE OF ADDRESS must tell DoHS <i>[at least 24 hours before/within 24 hours of]</i> changing address.
19		CURFEW must not be away from home/placement between <input type="text"/> unless his/her parent or caregiver agrees or he/she is with his/her parent or caregiver.

Appendix K

THE PINK FORM—CONDITIONS

20		NO COHABITATION must not live or have contact with the <i>[mother and, father and]</i> child <i>[other than during access]</i> .
21		NO CONTACT must not have any contact with the child.
22		EXPOSING CHILD TO VIOLENCE must not expose the child to physical or verbal violence.
23		NO PHYSICAL DISCIPLINE must not hit or hurt the child for any reason.
24		NO THREATS/ASSAULTS must not threaten or assault DoHS staff.
25		CHILD'S HEALTH must take the child to the Maternal and Child Health Nurse as often as the nurse recommends.
26		must take the child to the doctor for regular check-ups as required by DoHS or the doctor and must allow reports to be given to DoHS.
27		SCHOOL The child must go to school every school day unless he/she is ill <i>[and a medical certificate is obtained]</i> .
28		must send the child to school every school day unless the child is ill <i>[and a medical certificate is obtained]</i> .
29		LIBERTY TO APPLY has/have the right to come to Court and ask the Court to change the order.
30		CHILDREN'S COURT CLINIC must go to the Children's Court Clinic for an assessment.
31		ACCESS may have access with the child <i>[for a minimum of</i> <input type="text"/> <i>]</i> at times and places as agreed between <input type="text"/>
32		may have access with the child <i>[for a minimum of</i> <input type="text"/> <i>]</i> at times and places as agreed between <input type="text"/> DoHS or its nominee will supervise access unless DoHS assesses that supervision is not necessary.
		OTHER

DATE: / /

FORM: STATEMENT OF GROUNDS¹																			
NAME OF CHILD																			
COMPLETE FOR ALL PROTECTION APPLICATIONS BY SAFE CUSTODY Copy of this form is given to lawyers representing the other parties																			
<p>Basic particulars of the grounds of application relevant to this case at this particular stage in the investigation. Each paragraph in this form represents the statutory grounds under section 162 of the Children, Youth And Families Act 2005 for making any application for children in need of protection.</p> <p>Instructions on completion of this form:</p> <p>Select the relevant paragraph and only tick the particular grounds relevant to your case based on your present information and belief. Fax to Moorabbin Court Advocacy Unit with Form B.</p>																			
<p>a. The child has been abandoned by his or her parents and after reasonable inquiries-</p> <p style="margin-left: 20px;">(i) the parents cannot be found; and</p> <p style="margin-left: 20px;">(ii) no other suitable person can be found who is willing and able to care for the child;</p> <p><input type="checkbox"/> Abandonment</p> <p><input type="checkbox"/> After making reasonable inquiries the parents cannot be found and no suitable person is willing and able to care for the child</p>																			
<p>b. The child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;</p> <p><input type="checkbox"/> Parent(s) deceased</p> <p><input type="checkbox"/> That there are reasonable grounds to believe that parent(s) incapacitated</p> <p>INSERT The possible nature of the incapacity is (eg. parent in mental health facility; parent incarcerated)</p> <p><input type="checkbox"/> After making reasonable inquiries no suitable person is willing and able to care for the child</p>																			
<p>c. The child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;</p> <p><input type="checkbox"/> There are reasonable grounds to believe that actual physical harm has occurred</p> <p><input type="checkbox"/> There are reasonable grounds to believe that there is a likelihood of physical harm</p> <p>Specify the nature of that harm:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%;"><input type="checkbox"/> Exposure to domestic violence</td> <td style="width: 50%;"><input type="checkbox"/> High risk-taking behaviour</td> </tr> <tr> <td><input type="checkbox"/> Failure to supervise</td> <td><input type="checkbox"/> Environmental neglect</td> </tr> <tr> <td><input type="checkbox"/> Threats</td> <td><input type="checkbox"/> Cumulative harm</td> </tr> <tr> <td><input type="checkbox"/> Left unattended</td> <td><input type="checkbox"/> Other (specify)</td> </tr> <tr> <td><input type="checkbox"/> High risk behaviours of a sibling, young person or other</td> <td></td> </tr> </table> <p>Alleged perpetrator:</p> <p><input type="checkbox"/> There is presently insufficient information to identify the perpetrator</p> <p><input type="checkbox"/> There are reasonable grounds to believe that the identity of the alleged perpetrator is:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%;"><input type="checkbox"/> Father</td> <td style="width: 50%;"><input type="checkbox"/> Sibling</td> </tr> <tr> <td><input type="checkbox"/> Mother</td> <td><input type="checkbox"/> Other Family Member</td> </tr> <tr> <td><input type="checkbox"/> Step Child/Parent</td> <td><input type="checkbox"/> House Resident</td> </tr> <tr> <td><input type="checkbox"/> Boyfriend/Girlfriend</td> <td><input type="checkbox"/> Other</td> </tr> </table>		<input type="checkbox"/> Exposure to domestic violence	<input type="checkbox"/> High risk-taking behaviour	<input type="checkbox"/> Failure to supervise	<input type="checkbox"/> Environmental neglect	<input type="checkbox"/> Threats	<input type="checkbox"/> Cumulative harm	<input type="checkbox"/> Left unattended	<input type="checkbox"/> Other (specify)	<input type="checkbox"/> High risk behaviours of a sibling, young person or other		<input type="checkbox"/> Father	<input type="checkbox"/> Sibling	<input type="checkbox"/> Mother	<input type="checkbox"/> Other Family Member	<input type="checkbox"/> Step Child/Parent	<input type="checkbox"/> House Resident	<input type="checkbox"/> Boyfriend/Girlfriend	<input type="checkbox"/> Other
<input type="checkbox"/> Exposure to domestic violence	<input type="checkbox"/> High risk-taking behaviour																		
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<input type="checkbox"/> Mother	<input type="checkbox"/> Other Family Member																		
<input type="checkbox"/> Step Child/Parent	<input type="checkbox"/> House Resident																		
<input type="checkbox"/> Boyfriend/Girlfriend	<input type="checkbox"/> Other																		

¹ **Statement of Grounds:** The "Statement of Grounds" form is completed by child protection workers for all **protection applications by safe custody** as it sets out the grounds for the application. The aim of the form is to provide preliminary information to the Court Advocacy Unit (CAU), Victoria Legal Aid (VLA) and the private legal practitioners to promote immediate and effective communications about protection applications by safe custody. It should be quick to complete as it involves ticking the relevant box/boxes under each paragraph that represent the statutory grounds of the CYFA 2005 Section 162 for making an application for children in need of protection.

d. The child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

- There are reasonable grounds to believe that the child **has been** the subject of actual sexual assault
- There are reasonable grounds to believe that the child **is likely to** suffer harm from sexual abuse

Specify the nature of that harm:

- | | |
|---|--|
| <input type="checkbox"/> Penetration | <input type="checkbox"/> Sexual exploitation |
| <input type="checkbox"/> Fondling/touching | <input type="checkbox"/> Sexual assault of sibling |
| <input type="checkbox"/> Child pornography | <input type="checkbox"/> Pregnancy |
| <input type="checkbox"/> Threats of sexual assault. | <input type="checkbox"/> Other (specify) |
| <input type="checkbox"/> Sexualised behaviours | |

Alleged perpetrator:

- There is presently insufficient information to identify the perpetrator
- There is presently preliminary information to identify the alleged perpetrator as:

<input type="checkbox"/> Father	<input type="checkbox"/> Sibling
<input type="checkbox"/> Mother	<input type="checkbox"/> Other Family Member
<input type="checkbox"/> Step Child/Parent	<input type="checkbox"/> House Resident
<input type="checkbox"/> Boyfriend/Girlfriend	<input type="checkbox"/> Other

e. The child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

- There are reasonable grounds to believe that the child **has been** the subject of emotional harm
- There are reasonable grounds to believe that the child **is likely to be** the subject of emotional harm

Specify the nature of that harm:

- | | |
|--|---|
| <input type="checkbox"/> exposure to domestic violence | <input type="checkbox"/> acting out behaviours |
| <input type="checkbox"/> high risk behaviours of child, a sibling, young person or other threats | <input type="checkbox"/> absconding or fear of returning home |
| <input type="checkbox"/> left unattended | <input type="checkbox"/> depression |
| <input type="checkbox"/> environmental neglect | <input type="checkbox"/> suicide attempt |
| <input type="checkbox"/> educational neglect | <input type="checkbox"/> self harm |
| <input type="checkbox"/> cumulative harm | <input type="checkbox"/> withdrawn |
| | <input type="checkbox"/> other (specify)..... |

f. the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or remedial care;

- There are reasonable grounds to believe that the child's physical development or health **has been** significantly harmed
- There are reasonable grounds to believe that the child's physical development or health **is likely to be** significantly harmed

Specify the nature of that harm:

- A denial or deprivation of medical, psychological or surgical treatment
- A failure of parent to follow through on medical professional advice/instructions
- Persistent (untreated) conditions (e.g. scabies, head lice, nappy rash, or other skin disorders)
- The child has failed to thrive
- Other (specify).....

Disclaimer

The content of this document does not constitute the basis of all the protective concerns and or evidence DHS intends to, or may seek to rely upon in proceedings before the Court. It is a tool to promote immediate and effective communications about DHS applications with other parties to proceedings. The accuracy of the content of this document is based upon information received and or observed by the child protection intervener(s) in this case. Such information may or may not be relied upon as evidence by DHS in any proceedings.

Unauthorised Use

This form is for the exclusive use of legal practitioners and court personnel in the administration of matters before the Court. Any unauthorised copying or distribution or other use of this document is prohibited without the express approval of DHS.

SUMMARY INFORMATION FORM²
COMPLETE FOR ALL SAFE CUSTODY APPLICATIONS
 This form is provided to all legal parties

Name of Child Protection worker bringing in the matter	
Region/Office	
Estimated time of arrival at Children's Court:	
Date and time of safe custody application	

Names of children/young person taken into safe custody	DOB

Name of Parents <i>(Note that step-parents and de-factos fall within definition of 'parent' under CYFA)</i>	DOB

Names of non-family members relevant to the safe custody application <i>(this is relevant to determine whether Victoria Legal Aid have previously represented such persons)</i>	

Names of Siblings <i>(including half siblings)</i>	DOB	Subject to Children's Court proceedings previously?
		Yes / No / Unknown
		Yes / No / Unknown
		Yes / No / Unknown
		Yes / No / Unknown
		Yes / No / Unknown

Who are you expecting to attend Court?		
<input type="checkbox"/> Father	<input type="checkbox"/> Mother	<input type="checkbox"/> Aunt
<input type="checkbox"/> De Facto (F)	<input type="checkbox"/> De facto (M)	<input type="checkbox"/> Uncle
<input type="checkbox"/> Paternal GM	<input type="checkbox"/> Maternal GM	<input type="checkbox"/> Other extended family
<input type="checkbox"/> Paternal GF	<input type="checkbox"/> Maternal GF	<input type="checkbox"/> No attendances

What application are you filing today?

² **Summary of Information:**

The "Summary of Information" form, which now replaces "Form B" as you may know it, is completed by child protection workers for **all safe custody applications**. Originally child protection workers completed Form B in two sections, section one for VLA that provided basic information and section 2 for DHS Court Advocacy Unit that provided information on the reasons for the safe custody application. Form B has been revised and now titled "Summary of Information" so that all the information will now be provided to legal representatives for other parties to further promote immediate and effective communications between parties.

Appendix L

DHS STATEMENT OF GROUNDS AND SUMMARY OF INFORMATION FORM

Protection application	<i>Which grounds:</i> a b c d e f	
Application for new IAO		
Application to breach	<i>Specify order/condition breached?</i>	
Application for urgent variation	<i>What is to be varied?</i>	
What Order are you seeking today?		
IAO	<i>Specify who are you seeking the IAO to today? If it is undecided write 'placement undecided'. Do not enter if the recommendation is that the placement is undisclosed.</i>	

	Yes (Notify Registry)	No
Do you anticipate any security issues at Court?	<i>What is the security risk?</i>	

Briefly outline why the child/young person was taken into safe custody	
<i>The details you provide in this section are based on the information you received and observed, information which may or not be relied upon as evidence by DHS in any legal proceedings and will not preclude different or additional information being relied upon</i>	
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	

Have parties been personally served a copy of the application? If no, explain why and any alternate attempts to inform parties of the application	
Mother	Yes / No
Father	Yes / No
Young Person 12 years and over	Yes / No
Other "parent" as defined in CYFA	Yes / No

Do you have documents/orders pertaining to the application? <i>(e.g. PA, Affidavit/Declaration of service, IAO from Bail Justice)</i>	Yes / No
---	----------

SIGNED	
DATE	

Disclaimer

The content of this document does not constitute the basis of all the protective concerns and or evidence DHS intends to, or may seek to rely upon in proceedings before the Court. It is a tool to promote immediate and effective communications about DHS applications with other parties to proceedings. The accuracy of the content of this document is based upon information received and or observed by the child protection intervener(s) in this case. Such information may or may not be relied upon as evidence by DHS in any proceedings.

Unauthorised Use

This form is for the exclusive use of legal practitioners and court personnel in the administration of matters before the Court. Any unauthorised copying or distribution or other use of this document is prohibited without the express approval of DHS.

Appendix M

VICTORIA LEGAL AID GRANTS OF AID FOR REPRESENTATION IN CHILDREN'S COURT (FAMILY DIVISION) MATTERS

INTRODUCTION

- M.1 The Victoria Legal Aid (VLA) *Grants Handbook* contains guidelines for applying for a grant of legal aid and the conditions of a grant in Children's Court (Family Division) matters.¹
- M.2 VLA may provide grants of aid, subject to merits and costs/benefits tests to:
- a child who is the subject of an application in the Family Division of the Children's Court, if required to be legally represented
 - a parent/guardian of a child
 - another party with a direct interest in the case (such as a close relative).²

CHILDREN

- M.3 If a child who is the subject of an application is considered mature enough to give instructions to a legal practitioner, VLA may grant assistance to the child.³ VLA proceeds on the basis that a child aged seven years or older will usually be considered to have sufficient maturity to instruct a lawyer.⁴
- M.4 If a child is under the age of seven years, VLA may grant assistance if the child is involved in a court hearing and:
- the magistrate hearing the case, a Children's Court duty lawyer employed by VLA, or a VLA-approved private practitioner duty lawyer believes that the child is mature enough to give instructions⁵
 - DHS believes that the child is mature enough to give instructions and has requested VLA to arrange legal representation.⁶
- M.5 If the Court requests legal representation for a child not mature enough to give instructions, VLA will usually grant assistance under the 'exceptional circumstances' provision under section 524(4) of the *Children, Youth and Families Act 2005* (Vic).
- M.6 Children granted assistance from VLA are allocated a VLA staff lawyer whenever possible. If there is a conflict of interest, VLA will allocate the case to a private practitioner who may be a duty lawyer and is a member of the 'Section 29A' Panel (discussed further below).⁷

PARENT, GUARDIAN OR PERSON WITH A DIRECT INTEREST

- M.7 VLA may grant legal assistance to a parent, guardian or other person with a direct interest in a child's life, such as a grandparent, subject to the means, merits and cost/benefits tests, discussed below.⁸
- M.8 Grants of legal aid may be provided where:
- the applicant opposes the:
 - proving of a protection application or a breach application
 - finding of an irreconcilable difference
 - variation or extension of an order⁹
 - the applicant seeks an order different to that which DHS has applied for, including an interim accommodation order¹⁰
 - the applicant is applying to retain the custody of the child where DHS is seeking to remove the child¹¹

- the applicant seeks to oppose or include a condition/s in an order concerning a substantive issue that will significantly affect the family's or applicant's lifestyle¹²
- A guardianship to Secretary or permanent care order is sought by DHS.¹³

M.9 In the absence of compelling reasons, VLA will not grant assistance to vary or revoke an order when there are no current proceedings on foot.¹⁴

M.10 VLA may limit the nature and extent of any legal assistance for a final contested hearing.¹⁵

MEANS TEST

M.11 The means test is a financial test that VLA uses to assess an applicant's ability to pay for legal services. The test involves measuring an applicant's income and assets against the estimated cost of obtaining the required legal services.¹⁶ The same means test is used nationally.¹⁷

MERITS AND COST/BENEFITS TEST

M.12 Section 24 of the *Legal Aid Act 1978* (Vic) specifies the circumstances in which legal assistance may be provided.¹⁸ When making a determination of whether to grant aid, there must be regard to the merits of the case.¹⁹

M.13 The costs/benefits test requires a practitioner to measure the case's likely cost against any benefit that may be achieved by granting legal assistance.²⁰ In determining whether to grant aid, the practitioner may take into account the detriment an applicant may suffer if legal assistance is not granted.²¹

SECTION 29A PANEL

M.14 In order to receive a grant of aid to represent a party in a Children's Court (Family Division) matter, private legal practitioners must be members of a panel established under section 29A of the *Legal Aid Act 1978* (Vic).

M.15 Section 29A panels are established for different classes of legal matters.²² Appointment to the Children's Court (Family Division) Panel is limited to five years, but panel members can be re-appointed.²³ Panel members consist of law firms rather than individual legal practitioners.²⁴ Panel members must have experience in the practice of legally aided matters in the Children's Court (Family Division).²⁵

M.16 Panel members use the simplified grants process to prove via a checklist that their requests for extensions of aid meet VLA merits tests and guidelines for funding. The objective of the simplified grants process is to implement a grants administration process that is streamlined, cost effective and collaborative.²⁶ While the legal practitioner effectively makes many important decisions regarding ongoing legal funding, the process is underpinned by a compliance system involving random audits by a team of compliance officers.²⁷

DUTY LAWYER SCHEME

M.17 This scheme is a subset of the section 29A Panel for Children's Court (Family Division) matters.²⁸ Both VLA lawyers and private practitioners act as duty lawyers who provide services to the public without charge.²⁹

1 Victoria Legal Aid, *Grants Handbook* <www.legalaid.vic.gov.au/fab.pol_handbook> at 20 May 2010.

2 Ibid [5.2–5.3].

3 Ibid [5.2].

4 Ibid.

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid [5.3].

9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid [2.2].

17 Ibid.

18 *Legal Aid Act 1978* (Vic) s 24.

19 *Legal Aid Act 1978* (Vic) s 24(4)(b).

20 Victoria Legal Aid, *Simplified Grants Process: Notes on VLA Guidelines* (June 2010) 78.

21 *Legal Aid Act 1978* (Vic) s 24(4)(a).

22 *Legal Aid Act 1978* (Vic) s 29A.

23 Victoria Legal Aid, *Children's Court (Family Division)* <www.legalaid.vic.gov.au/panels.htm> at 20 May 2010.

24 Ibid.

25 Ibid.

26 Victoria Legal Aid, *Victoria Legal Aid: Ninth Statutory Annual Report 2003–04* (2004) 17.

27 Ibid.

28 Victoria Legal Aid, *Grants Handbook*, above n 1, [1.3.3].

29 Ibid.

Appendix M

VICTORIA LEGAL AID GRANTS OF AID FOR REPRESENTATION IN CHILDREN'S COURT (FAMILY DIVISION) MATTERS

M.18 Private practitioners working on a duty lawyer scheme are paid by VLA at an hourly rate (\$143 per hour), for up to five hours per day in Melbourne's Children's Court, and up to six hours per day in all other courts. The period commences from when the solicitor is first required to attend court, until the solicitor leaves the court (excluding the lunch adjournment).³⁰ If a duty lawyer is allocated only one matter, the fee claimable may not exceed \$358 regardless of the length of time spent at court.

VICTORIA LEGAL AID LAWYERS

M.19 Lawyers employed directly by VLA appear as duty lawyers as well as providing ongoing representation for parents and children in Children's Court (Family Division) cases. Like private practitioners, VLA lawyers must seek a grant of aid to provide ongoing representation for a party that extends beyond an initial duty lawyer appearance. Unlike private practitioners, VLA lawyers are salaried employees of VLA and do not directly receive the fee provided in the grant of aid.

LUMP SUM FEES

M.20 VLA provides lump sum fees to private practitioners with a grant of aid for a client in the Children's Court (Family Division) in accordance with the following table:³¹

Preparation fee other than for extension of existing order	\$419
Preparation fee for extension of existing order	\$92
Pre-hearing conference [Dispute resolution conference]	\$239
Directions hearing	\$140
Appearance fee IAO	\$291
Interim contest—Day 1	\$578
Interim contest—Subsequent day	\$420
Final defended hearing—Daily fee	\$717
Settles at PHC or Directions—Preparation fee	\$332
Final defended hearing—Preparation fee	\$775

M.21 VLA will not allow claims for additional work except as provided for below:³²

- (i) VLA will pay for four Interim Accommodation hearings without any extensions of aid;
- (ii) In the event that the Interim Accommodation Order is continued by consent and without any substantial negotiation having taken place the Directions Hearing fee is payable;
- (iii) In the event that the application proceeds to an interim contest or defended hearing an extension of assistance is required;
- (iv) If the case is not heard on the day of the pre-hearing conference, VLA will pay an additional fee of \$239 for the attendance at the pre-hearing conference;
- (v) In the event that the pre-hearing conference extends beyond three hours a fee of \$420 is payable;
- (vi) No additional fee is payable for pre-contest mentions;

- (vii) *Where the Court requires the attendance of the parties at a Directions Hearing VLA will pay, \$140 for the attendance at the Directions Hearing;*
- (viii) *Where an Interim Accommodation Order Contested Hearing does not proceed to hearing or is not resolved by final Orders the fee of \$291 is payable;*
- (ix) *VLA will pay a preparation fee for final defended hearing as follows:*
- (a) *If the matter settles at the pre hearing conference or final directions hearing \$332. If the matter does not settle at the pre hearing conference or directions hearing; and*
 - (b) *If assistance is granted for final defended hearing \$775.*
- (x) *Fees for a second or subsequent day of hearing. Where the interim contest or defended hearing continues beyond one full day VLA will pay an additional fee for every day or part of a day beyond the first day of defended hearing in accord with the fees set out in the table below.*

30 Victoria Legal Aid, *Grants Handbook*, above n 1, 124.

31 Victoria Legal Aid, *Grants Handbook*, above n 1, [c 6, Fee Schedule 1].

32 *Ibid.* The Commission understands that VLA also allows a separate sum for appearance and preparation for judicial resolution conferences: email from VLA, 11 March 2010.

Appendix N

**TABLE 1: PROTECTION OF CHILDREN
IN AUSTRALIAN JURISDICTIONS**

	VICTORIA	NEW SOUTH WALES	SOUTH AUSTRALIA	WESTERN AUSTRALIA
Name of Act	<i>Children, Youth and Families Act 2005</i> (Vic)	<i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW)	<i>Children’s Protection Act 1993</i> (SA)	<i>Children and Community Services Act 2004</i> (WA)
What is the age limit for persons coming into the child protection jurisdiction?	persons under the age of 17 (s 3)	persons under the age of 18 (s 3)	persons under the age of 18 (s 6)	persons under the age of 18 (s 3)
Is there mandatory reporting?	yes (s 184)	yes (s 27)	yes (s11)	yes for suspected sexual abuse (s 124B)
Who investigates notifications?	Department of Human Services	Community Services Department	Department for Families and Communities	Department for Child Protection
Is there any pre-court ADR?	The Dept can hold a family group conference (FGC), but it is not required by the Act to do so.	The Director-General of the Dept is to ‘consider the appropriateness’ of using ADR to avoid Court (s 37), and care plans can be developed through ADR (s 38).	The Care and Protection Unit (which is independent of the Dept and annexed to the Youth Court) organises and convenes family care meetings (FCMs) (s 27).	On 9 November 2009, a pilot for pre-court ADR was commenced in the form of the ‘Signs of Safety’ mediation-based program for pregnant mothers and their families at the King Edward Memorial Hospital.
Do legal representatives attend the pre-court ADR?	no	no detail in the Act, other than the Director-General must give parents a reasonable opportunity to get independent advice before they enter a ‘parent responsibility contract’ (s 38A(4))	no, but a child advocate (not lawyer) must be appointed for an FCM (s 29(2)), and parents may have a support person (s 30(1)(e))	lawyers assist at the Signs of Safety Meetings
Can voluntary agreements be registered with the court (or are they binding in some other way)?	Registration of voluntary agreements is not provided for in the Act.	Care plans which are developed through ADR can be registered with the Court, and/or can form the basis for consent orders (s 38). See also the parental responsibility contracts (ss 38A–38G).	Agreements made at an FCM are not registrable or binding, but they can be considered by the Court and annexed to an order.	Registration of voluntary agreements is not provided for in the Act.

QUEENSLAND	NORTHERN TERRITORY	TASMANIA	AUSTRALIAN CAPITAL TERRITORY	FEDERAL (FAMILY LAW CHILDREN'S CASES)
<i>Child Protection Act 1999</i> (Qld)	<i>Care and Protection of Children Act 2007</i> (NT)	<i>Children, Young Persons and Their Families Act 1997</i> (Tas)	<i>Children and Young People Act 2008</i> (ACT)	<i>Family Law Act 1975</i> (Cth)
persons under the age of 18 (s 8)	persons under the age of 18 (s 13)	persons under the age of 18 (s 3)	persons under the age of 18 (s 12 and <i>Legislation Act 2001</i> (ACT) Dictionary Pt 1)	n/a
yes (<i>Public Health Act 2005</i> (Qld) Ch 5, Part 3, Div 5)	yes, 'universal' (s 26)	yes (s 14)	yes (s 356)	n/a
Department of Child Safety	Department of Health and Families	Department of Health and Human Services	Department of Disability, Housing and Community Services	n/a
Under the Act, the Dept must hold family group meetings (FGMs) to develop case plans (s 51H), and the Court will not make a child protection order unless an appropriate case plan has been filed with the Court (s 59). FGMs are run by the Dept.	Not currently (under a section that, at the date of writing, has not yet come into operation, the Dept can arrange for mediation conferences which can be held pre-court (s 49). See also the <i>Care and Protection of Children (Mediation Conferences) Regulations 2010</i> (NT) (the NT Regs) which also have not yet come into operation).	The Dept can arrange a family group conference (FGC) (s 30), which is run by an independent facilitator. An FGC must be convened if the Court orders it, or if the child or his or her family members request an FGC to review arrangements made by the Dept for a child (ss 39, 53).	The Chief Executive of the Dept may arrange for a family group conference (FGC) to be held (s 80), and if it does so must appoint a family group conference facilitator (s 78, 82). An FGC generally must be held to review a previous FGC agreement if the child or a participant in that FGC requests it (s 81).	Family dispute resolution is generally compulsory before a matter can be heard by a court. There are exceptions to this requirement, including cases of family violence or child abuse (s 60I).
yes for children and parents (s 51L (1)(e), (2))	neither the Act or NT Regulations address this, but it may be possible as reference is made to a participant attending the conference 'in person or by other means' (see reg 8(3)(a)(iii) of the NT Regs)	the separate legal representative of a child can attend if one has been assigned under s 59 (ss 34(5), 35(1)), the child has an advocate (s 32(3)), and the child and parents can have a support person (s 33(2))	no (s 83(4)), parties can have a support person (s 83(5)), but if an agreement is proposed at an FGC, parties must be given an opportunity to get legal advice (s 85(3)(a))	not usually: under policy guidelines (rather than legislation), lawyers can provide advice around the family dispute resolution process, but do not usually attend sessions
The Act does not provide for case plans to be registered, but a case plan can be endorsed by the Dept and then the Dept must 'support the implementation of the plan' (s 51T(d)).	Registration of voluntary agreements is not provided for in the Act.	The Act does not provide for case plans to be registered, but the Dept can approve FGC arrangements (s 37), and then must take action to implement and maintain those arrangements (s 38). FGC arrangements can also be incorporated into a care and protection order (see s 42(3)(b)).	The Dept can apply to register an FGC agreement (s 390(2)), and if registered by the Court (s 391), the agreement has effect as if it were a care and protection order (s 393). But an agreement that transfers parental responsibility to the Chief Executive of the Dept cannot be registered (s 76(2)).	Voluntary agreements can be registered with the courts as consent orders, (s 63DB) and have the same status as a court order. Unregistrable parenting plans can also be made (ss 63B–63C), which take precedence over earlier court orders (s 64D) and can be taken into account in subsequent court proceedings (s 65DAB).

Appendix N

TABLE 1: PROTECTION OF CHILDREN IN AUSTRALIAN JURISDICTIONS

	VICTORIA	NEW SOUTH WALES	SOUTH AUSTRALIA	WESTERN AUSTRALIA
Is the Dept responsible for making a plan for the child, and is there a right of review of that plan?	The Dept must make a case plan for a child within six weeks of a protection order being made (see generally Pt 4.3 Div 1). A child or his or her parent may apply to VCAT for a review of a decision in a case plan (s 333).	The Dept must present a plan to the Court setting out the Dept’s proposals for the child, before a final order is made (s 78). The Act does not provide a right of review, but a plan is only enforceable ‘to the extent to which its provisions are embodied in or approved by orders of the Children’s Court’ (s 78).	The arrangements for the child are made by the Dept through FCMs (ss 27–36), and reviewed through FCMs (s 33).	The Dept must prepare a care plan for a child in care (ss 39, 89). An application may be made for an internal review of a case plan by a case review panel (s 93), and subsequently a further review by the State Administrative Tribunal (s 94).
Is there an intermediary body between the investigator and the body bringing proceedings, or other safeguards?	no	no	no, other than the Care and Protection Unit—the Dept generally can’t file an application for a care and protection order unless it has attended an FCM run by the Unit (s 27)	no
Who brings the application for a protection order?	Department of Human Services	Community Services Department	Department for Families and Communities	Department for Child Protection
What is the length of time the Dept or police can have custody of child after emergency removal, before court or tribunal oversight or authorisation?	the child must be brought before the Court (or bail justice) within 24 hours after the child is removed (s 242)(3))	the Director-General of the Dept must make an application for a care order no later than 72 hrs after emergency removal (s 45)	the Minister has custody of the child until the end of the ‘next working day’ (s 16(5)) (so usually 24 hours but applications lodged on Friday are heard on Monday)	the Chief Executive Officer must make a protection application not more than two working days after the child is removed, and the Court must try to list it within three working days (s 38)
What are the types of grounds available under the Act for a protection application (including any ‘no fault’ ground)?	if parents abandoned the child, or are dead or incapacitated, or if child has suffered/ is likely to suffer significant harm as a result of physical injury or sexual abuse, or emotional or psychological harm, and parents have not protected, or are unlikely to protect the child (s 162)	the Court can make a care order ‘for any reason’, including ‘the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection’ (s 71)	if the child is ‘at risk’ (s 37), including if: there is a significant risk the child will suffer serious harm to his or her physical, psychological or emotional wellbeing’, or the child has been abused, neglected or threatened, or the child’s guardians are ‘unable’ to care for and protect the child (s 6(2))	if parents have abandoned the child, or are dead or incapacitated, or if the child has suffered or is likely to suffer harm and the parents are unable to protect him or her or to provide adequate care or effective treatment (s 28)

QUEENSLAND	NORTHERN TERRITORY	TASMANIA	AUSTRALIAN CAPITAL TERRITORY	FEDERAL (FAMILY LAW CHILDREN'S CASES)
The Dept must make a care plan for a child who is in need of protection and ongoing help (ss 51C–51T). There can be an internal review by the Chief Executive (ss 51V–51W), and certain decisions in a care plan can also be reviewed by the Queensland Civil and Administrative Tribunal (see sch 2).	The Dept has an obligation to develop a care plan (s 70) or interim care plan (s 76) as soon as practicable after a child is taken into the Dept's care. An application can be made for internal review by the Chief Executive Officer of the Dept (s 74).	The Dept makes arrangements for the care and protection of a child (but these can be made at an FGC and approved by the Secretary (s 37)). The Dept must convene an FGC if the child or family members request one to review the Dept's arrangements (ss 39, 53).	Care plans are made by the Chief Executive of the Dept (s 455), but before he or she can make a care plan, the Chief Executive must notify the child and parents and give them an opportunity to make submissions about its contents (s 457). There is no right of review of the care plan.	n/a
no	no	no	no, but the Public Advocate must be notified when a care and protection application is made, and can appear at the hearing (s 427 and <i>Court Procedures Act 2004</i> (ACT) s 74C)	n/a
Department of Child Safety	Department of Health and Families	Department of Health and Human Services	Department of Disability, Housing and Community Services	parenting orders can be sought by parents, the child, the grandparents or any other person concerned with the care welfare or development of the child (s 65C)
within eight hours after the child is taken into custody, the Dept must be granted a temporary assessment order or release the child (s 18)	the Chief Executive Officer of the Dept can take a child into provisional protection for no longer than 72 hours (s 53)	no emergency removal without Court authorisation or consent—authorised officer must get a warrant to remove a child for assessment and the Secretary can then have custody for 120 hours (ss 20–1)	can have custody without an order for 2 working days, or until next court day (s 410), but parents, child or Public Advocate can apply for an emergency action release order to have child returned (s 416–420)	n/a
if the child has suffered, is suffering, or is at an unacceptable risk of suffering harm, and does not have a parent able and willing to protect the child from the harm (s 10, and see the definition of harm in s 9)	if the child is suffering harm or exploitation; is abandoned; if the parents are dead or unable or unwilling to care for the child, or the child 'is not under the control of any person and is engaged in conduct that causes or is likely to cause harm to the child or other persons' (s 20)	if the child is at risk and a care and protection order should be made (or if arrangements should be incorporated in an order) (s 42) (s 4 sets out when a child is 'at risk', including if he/she has been/is being/is likely to be abused or neglected, or affected by family violence)	if past, present or risk of future 'abuse or neglect' of the child and no-one with parental responsibility is willing and able to protect the child (s 345); also if there is a 'serious or persistent conflict' b/n child and the people with parental responsibility (s 345(2)(a))	n/a

Appendix N

TABLE 1: PROTECTION OF CHILDREN IN AUSTRALIAN JURISDICTIONS

	VICTORIA	NEW SOUTH WALES	SOUTH AUSTRALIA	WESTERN AUSTRALIA
Is the child the subject of the application a party to proceedings?	no, but must be served with the application if 12 or older (ss 242(1), 243(2))	the child has a right to appear (s 98)	yes (s 46(1))	yes (s 147)
What body determines the application? (court/tribunal/panel)	Family Division of the Children’s Court of Victoria, presided over by a County Court judge	NSW Children’s Court, composed of District Court President, children’s magistrates and children’s registrars	Youth Court of South Australia, comprised of two District Court judges (one of whom is the Senior Judge) and two specialist magistrates	Children’s Court of WA, consisting of children’s magistrates and headed by a District Court judge
Does the body determining the application have jurisdiction to determine both family law and child protection matters?	no	no, except ability to make long term parental responsibility orders (s 79(1)(a))	no	Family Court of WA has limited dual jurisdiction, (<i>Family Court Act 1997</i> (WA) s 36(6)) but the Children’s Court does not
Is there any court-annexed ADR?	dispute resolution conferences (DRCs) (pt 4.7, div 2) and judicial resolution conferences (JRCs) (s 527A)	preliminary conferences conducted by Children’s Registrar (s 65) (and the Court can refer parties to independent ADR (s 65A))	court may convene a conference (s 42)	court ordered pre-hearing conferences (s 136)
Do legal representatives attend the court-annexed ADR?	yes for parents and children in DRCs (s 222) but not DHS, and yes for all parties in JRCs	yes at preliminary conferences (s 65(3))	yes for all parties, including the child (s 42(3))	yes for all parties (<i>Children and Community Services Regulations 2006</i> (WA) reg 14)
Are the convenors of the court-annexed ADR legally qualified?	not in DRCs (see s 227); JRCs are convened by the Children’s Court President or a magistrate	children’s registrars are legally qualified from 24 Jan 2010 (<i>Children’s Court Act 1987</i> (NSW) s 10A)	conference convenor is a judicial officer (s 42(2))	convenor is a judge, magistrate, or a person potentially not legally qualified (s 136 and reg 10 of <i>Children and Community Services Regulations 2006</i> (WA))
What is the level of procedural formality in the court hearings?	proceedings must be conducted ‘in an informal manner’ and the Court may ‘proceed without regard to legal forms’ and ‘inform itself ... in such manner as it thinks fit, despite any rules of evidence to the contrary’ (s 215)	proceedings in the Children’s Court are ‘not to be conducted in adversarial manner’ but with as ‘little formality and legal technicality and form’ as possible, and Court is not bound by the rules of evidence (s 93)	the Youth Court is ‘not bound by the rules of evidence but may inform itself as it thinks fit’ and ‘must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms’ (s 45)	proceedings are to be conducted with as little formality and legal technicality and as expeditiously as possible, in a way that ‘is sensitive to the child’s level of understanding’, and the Court is not bound by rules of evidence (ss 145–6)

QUEENSLAND	NORTHERN TERRITORY	TASMANIA	AUSTRALIAN CAPITAL TERRITORY	FEDERAL (FAMILY LAW CHILDREN'S CASES)
yes (see the definition of 'party' in sch 3 of the Act)	yes (ss 94, 125)	yes (s 64)	yes (s 700)	no
Children's Court (a specially constituted Magistrates' Court)	Family Matters Court, (division of the Local Court) constituted by a single magistrate (s 89)	Children's Division of the Tasmanian Magistrates Court (<i>Magistrates Court (Children's Division) Act 1998</i> (Tas) s 6)	Children's Court, constituted by a children's magistrate	Family Court of Australia, Federal Magistrates Court, Family Court of WA and State and Territory Magistrates' Courts
no	no	no	no	no, except for the Family Court of Western Australia (<i>Family Court Act 1997</i> (WA) s 36(6))
court-ordered conferences in contested child protection matters (ss 68–70)	court-ordered mediation conference (s 127)	court conferences, which can be held either before or during care and protection proceedings (s 52)	court-ordered meetings (ss 431(2)(a), 432)	no
yes for all parties, including the child (s 70)	yes for every party required to attend the conference (s 127(4))	yes for all parties, including the child (s 52(3))	yes, for all parties, including the child (s 432)	n/a
not necessarily (see <i>Children's Court Rules 1997</i> (Qld) r 19)	not prescribed in the Act (see s 49(5)) or the new <i>Care and Protection of Children Act 2007</i> (NT)	convenor is a magistrate or court officer (s 52(2))	can be a mediator providing community-based mediation services or a registrar of the Court (s 432)	n/a
the Children's Court is not bound by the rules of evidence, (s 105), the Court may appoint an expert to assist (s 107) and non-parties can make submissions (s 113)	proceedings in the Family Matters Court must be conducted 'with as little formality and legal technicality as the circumstances permit', and the Court is not bound by the rules of evidence (s 93)	the Court is not bound by the rules of evidence if it is satisfied that 'it would not be in the best interests of the child to be bound by those rules' and if so, it 'may inform itself in any way it considers appropriate'(s 63 and s 13 of <i>Magistrates Court (Children's Division) Act 1998</i> (Tas))	the Court must hear proceedings informally (s 712), is not bound by the rules of evidence and may inform itself as it sees fit (for example, it can admit hearsay evidence and submissions from non-parties) (s 716)	there are extensive provisions dealing with conduct of proceedings in the <i>Family Law Act 1975</i> (see Div 12A of Part VII, and s 97(3))

Appendix N

**TABLE 1: PROTECTION OF CHILDREN
IN AUSTRALIAN JURISDICTIONS**

	VICTORIA	NEW SOUTH WALES	SOUTH AUSTRALIA	WESTERN AUSTRALIA
Are children legally represented in court proceedings, and on what model (i.e. representation of the best interests of the child, or 'direct' representation on the child's instructions)?	The child is directly represented if the Court is of the opinion that the child is 'mature enough to give instructions (as a matter of practice this is taken to mean seven years old or older). If the child is not mature enough to give instructions, in exceptional cases he/she can have legal representation on a best interests model (s 524).	A lawyer for the child can be court-appointed, or otherwise appear with leave (s 99). The Act provides for two models: 'direct' (on instructions) if the child is capable of giving instructions, and 'independent' (see s 99D(b) for meaning) if the child is not. The Act contains a presumption that if under 12 a child is incapable of giving instructions, and if 12 or over is capable. The Court can also appoint a guardian ad litem (see ss 99–101).	The child must be represented unless he/she has made an informed and independent decision not to be represented, and if not 'capable' of giving instructions, the lawyer must act on the best interests of the child (s 48). The child must also be given an opportunity to give views personally to the court if capable of doing so, unless to do so would create an unacceptable risk to the child's wellbeing (s 48).	The Court may order a separate legal representative for the child, who must act on the child's instructions if the child has sufficient maturity and understanding to give instructions (court determines this) and wishes to give instructions, and in any other case must act in the best interests of the child (s 148).
Is the child required to appear at court?	yes (ss 242–3), unless the child is of 'tender years' (s 242(4))	only if the Court orders the child to appear under s 96, but the child has right to appear (s 98)	only if the child wants to give his or her views directly to the Court	no, but the child may be present if he or she wishes (s 149)
Are parents/guardians legally represented in court proceedings?	yes (s 524(1))	yes (s 98(1))	yes in practice, but the Act is silent as to this (except for s 42(3))	yes in practice, and implied in the Act
Do judicial officers hear both child protection and criminal matters?	yes	yes	yes	yes
Does the Act provide for assessment orders?	yes (see pt 4.8 div 1)	yes (see ss 52–9)	yes (see ss 20–5)	no
Does the Act provide for any court orders or powers not found in Victoria?	n/a	power to make order allocating parental responsibility to one parent to the exclusion of the other parent (s 79(1)(a))	order to prevent female genital mutilation (s 26B), and order of long-term guardianship to a parent to exclusion of other parent (s 38(1)(d)–(e))	no
What is the longest order available under the Act for protecting a child?	permanent care order (ss 319–321) or long-term guardianship to Secretary order (s 290)	order allocating parental responsibility (s 79)	guardianship order until the child is 18 (s 38(1)(d))	protection order (until 18) or (enduring parental responsibility) (ss 57, 60)

QUEENSLAND	NORTHERN TERRITORY	TASMANIA	AUSTRALIAN CAPITAL TERRITORY	FEDERAL (FAMILY LAW CHILDREN'S CASES)
A child can instruct a legal representative (s 108), or the Court can order a separate legal representative to represent the child's best interests 'regardless of any instructions from the child', and to present the child's wishes (s 110). The Court can grant leave for children of 12 years or older (who are legally represented and consent) to give evidence in child protection proceedings (s 112).	All parties (including the child) can be legally represented (s 101). The Court can appoint a separate legal representative for the child who must 'act in the best interests of the child regardless of any instructions from the child' and present the views and wishes of the child to the Court (s 146).	The child is to be legally represented unless he or she has made an informed decision not to be represented, and the Court can appoint a separate legal representative for the child (s 59 and <i>Magistrates Court (Children's Division) Act 1998</i> (Tas) ss 14–15). In practice the separate representative of the child acts on the child's best interests.	The child may have a lawyer and/or a litigation guardian (s 74E of <i>Court Procedures Act 2004</i> (ACT)). The representative must express the child's views and wishes to the Court, and inform the Court whether they are acting on the child instructions, or in their best interests, or both (s 74E). In practice, the child's lawyer will act on a best interests model, but will act on an older child's instructions if consistent with the child's best interests.	Independent children's lawyers (ICLs) are appointed where the court determines that the child's interests in the proceedings ought be independently represented (s 68L(2)). The 'best interests' model is used, whereby the ICL must form an independent view of what is in the child's best interests, and act in the best interests of the child (s 68LA).
no (implied in s 106), but the child has a right to appear (s 108)	the Court can order that child must attend (s 147(1)(a))	the child must be given an opportunity (but cannot be forced) to give his/her views personally to the Court (ss 56–8)	no, but the child has a right to participate in proceedings (<i>Court Procedures Act 2004</i> (ACT) s 74A)	no
yes (ss 108–9)	yes (s 101)	yes (s 14 <i>Magistrates Court (Children's Division) Act 1998</i> (Tas))	yes (s 709)	yes
yes	yes	yes	yes	n/a
yes, both temporary assessment orders (ss 23–36) and court assessment orders (ss 37–47)	yes (s 111), for 28 days (s117) but Dept must attempt to get parental consent first (s 113)	yes, for four weeks, with one possible extension of either four weeks or eight weeks (to hold an FGC) (s 22)	yes (ss 436–54) but note assessment can also occur under an appraisal order (see s 366)	n/a
ex parte temporary assessment orders (see ss 26, 30) and 'directive orders' (s 61(a)) (like an injunction against the parents)	ex parte temporary protection orders (see ss 103–10)	the Court can make a restraint order on an application for either an assessment order (s 23) or a care and protection order (s 43)	appraisal orders (s 372), emergency action release orders (ss 416–20), and interim and final domestic violence and protection orders (ss 459–60)	n/a
long-term guardianship order (ss 61–2)	'long-term parental responsibility direction' in a protection order (s 123)	guardianship to Secretary or one or two other persons until the child is 18 (s 42(4)(d))	care and protection order with a 'long-term' or 'enduring' parental responsibility provision (ss 479, 481)	n/a

Appendix N

TABLE 1: PROTECTION OF CHILDREN IN AUSTRALIAN JURISDICTIONS

	VICTORIA	NEW SOUTH WALES	SOUTH AUSTRALIA	WESTERN AUSTRALIA
Are there any specific principles or forums relating to Aboriginal children or addressing a child's cultural identity in the Act?	Aboriginal Child Placement Principles (ss 12–14, 323) and Aboriginal Family Decision Making (s 12(b)) (but this is rarely used)	Aboriginal and Torres Strait Islander self-determination, participation in decision-making, and Child and Young Person Placement principles (ss 11–13)	Aboriginal Child Placement Principles (ss 4(5), 5 and <i>Children's Protection Regulations 2006</i> (SA) reg 4)	ATSI Child Placement Principle (s 12), principles of self-determination (s 13) and community participation in decision making (ss 14, 81)
Is there any limitation on the duration of interim orders pending final disposition?	interim accommodation orders last 21 days (s 264), but there can be unlimited extensions (s 267)	emergency care and protection orders are capped at 28 days (s 46) (no limit for interim care orders in Act)	investigation and assessment orders are capped at 10 weeks (s 21(2)), and limitation on adjournments generally (see s 39)	no limitation on duration of interim orders made on adjournment (ss 132–3)
Who makes decisions as to the child's contact with the parents?	The Court can place a condition on an order that the child have a certain level of contact with the parents, except for guardianship to Secretary orders, under which the Dept decides.	The Court can make contact orders establishing minimum levels of contact to be provided for (s 86).	The Court can make an order as to access (s 38(1)(f)(i)) but in practice the order is usually that access is to be 'as decided between the Department and parents'.	The Court can include conditions as to contact on long-term orders ('enduring parental responsibility') orders (s 63).
In what forum are secondary applications (such as applications for the revocation, variation, or extension of a protection order) decided?	Applications for revocation (pt 4.9, div 12), variation (pt 4.9, div 11), and breach (pt 4.9, div 13) of protection orders are decided by the Court.	Applications for rescission or variation of care orders may be made only with leave of the Court (s 90), and are decided by the Court.	Applications for variation or revocation are made to and decided by the Court (s 40).	The Court decides revocation (s 67), variation (ss 51, 64) and extension (ss 49, 56) applications, and the Dept can apply for 'replacement' of an order (s 68).
What is the course of appeal from decisions and orders made by the court determining the protection application?	An appeal against a decision or order made by the President of the Court, or on a question of law, is made to the Supreme Court, and all other appeals are to the County Court (ss 328–9).	An appeal against a Children's Court order (except an interim order) can be made to the NSW District Court (s 91).	An appeal against an interlocutory judgment of a magistrate is made to the Senior Judge of the Youth Court, but all other appeals are made to the Supreme Court of South Australia (<i>Youth Court Act 1993</i> (SA) s 22).	Decisions of children's magistrate are appealed to the WA Supreme Court, and decisions of the President are the Court of Appeal (<i>Children's Court of WA Act 1988</i> (WA) ss 42–3)
Are there any unusual aspects of the Act (compared to Victoria)?	n/a	the Act includes presumptions of when a child is capable of giving instructions (ss 99B–99C)	the Act limits adjournments by requiring the hearing of an application must commence within 10 weeks after it is lodged (s 39)	the Act provides a power to keep a child under 6 in hospital (s 40) and to move child to a safe place (s 41)

QUEENSLAND	NORTHERN TERRITORY	TASMANIA	AUSTRALIAN CAPITAL TERRITORY	FEDERAL (FAMILY LAW CHILDREN'S CASES)
Child Placement Principle and requirement of consultation with and participation of a 'recognised entity' in decision making (ss 6, 83)	Aboriginal Child Placement Principles, and participation in decision making (s 12)	Aboriginal organisation to be consulted before decision as to child's residence is made (s 9)	Aboriginal Child Placement Principles (ss 10, 513)	recognition of an Aboriginal or Torres Strait Islander child's right to enjoy his or her culture (ss 60B(3), 60CC(3)(h))
court assessment orders last a maximum of 8 weeks (ss 47, 49) and adjournments cannot exceed four weeks in total (s 66(2))	temporary protection orders last 14 days (s 107), but there can be consecutive subsequent applications (see s 110)	assessment orders are capped at four weeks, with one four- or eight-week extension (s 22) and limit on adjournments (s 45)	length of interim care and protection orders not limited (s 433(3))	n/a
The Dept decides contact (s 87), but this decision can be reviewed by the Queensland Civil and Administrative Tribunal (see sch 2).	The Dept makes decisions as to contact in a care plan (s 70(2)(c)(ii)), but it has an obligation to provide for 'reasonable and appropriate' contact (s 135).	The Court can make orders providing for access (s 42(4)(e)).	The Court can make a care and protection order with a 'contact' provision providing for contact between the child and a person, or may authorise the Dept to decide contact (ss 422, 485).	The relevant court can make an order setting out 'the time a child is to spend with another of other persons' (s 64B(2)(b)).
The Court decides applications for variation, revocation or extension of a child protection order (ss 64–5).	The Court decides applications for extension, variation and revocation of protection orders (ss 136–7).	The Court decides applications for extension, variation, revocation, or suspension of care and protection orders (ss 44, 48).	The Court decides applications for extensions and amendments (s 466) and revocations (s 467) of care and protection orders.	N/A
An appeal against a decision of a Children's Court magistrate is made to the judge of Children's Court of Queensland, and an appeal from the judge is made to the Queensland Court of Appeal (s 117, sch 3).	An appeal against a decision of the Family Matters Court (other than a decision to grant a temporary protection order) is made to the NT Supreme Court (s 140).	An appeal against any order of the Children's Division of the Magistrates Court is made to the Supreme Court of Tasmania (<i>Magistrates Court (Children's Division) Act 1998</i> (Tas) s 20).	An appeal against a decision of the Children's Court is made to the ACT Supreme Court (s 836).	N/A
the Act provides a power to 'move child to a safe place' (s 21)	the Act confers a power on authorised officers to move a child to a safe place on temporary basis (ss 55–7)	the Act limits adjournments so that period between the lodging and hearing of an application does not exceed 10 weeks (s 45)	the role of the Public Advocate in care and protection proceedings, and emergency therapeutic protection (s 406)	n/a

DIVISION 12A—PRINCIPLES FOR CONDUCTING CHILD-RELATED PROCEEDINGS

Subdivision A—Proceedings to which this Division applies

69ZM Proceedings to which this Division applies

- (1) This Division applies to proceedings that are wholly under this Part.
- (2) This Division also applies to proceedings that are partly under this Part:
 - (a) to the extent that they are proceedings under this Part; and
 - (b) if the parties to the proceedings consent—to the extent that they are not proceedings under this Part.
- (3) This Division also applies to other proceedings between the parties that involve the court exercising jurisdiction under this Act if:
 - (a) the proceedings:
 - (i) arise from the breakdown of the parties' marital relationship; or
 - (ii) are a de facto financial cause; and
 - (b) the parties to the proceedings consent.
- (4) Proceedings to which this Division applies are *child-related proceedings*.
- (5) Consent given for the purposes of paragraph (2)(b) or subsection (3) must be:
 - (a) free from coercion; and
 - (b) given in the form prescribed by the applicable Rules of Court.
- (6) A party to proceedings may, with the leave of the court, revoke a consent given for the purposes of paragraph (2)(b) or subsection (3).

Subdivision B—Principles for conducting child-related proceedings

69ZN Principles for conducting child-related proceedings

Application of the principles

- (1) The court must give effect to the principles in this section:
 - (a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and
 - (b) in making other decisions about the conduct of child-related proceedings.Failure to do so does not invalidate the proceedings or any order made in them.
- (2) Regard is to be had to the principles in interpreting this Division.

Principle 1

- (3) The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.

Principle 2

- (4) The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

Principle 3

- (5) The third principle is that the proceedings are to be conducted in a way that will safeguard:
 - (a) the child concerned against family violence, child abuse and child neglect; and
 - (b) the parties to the proceedings against family violence.

Principle 4

- (6) The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

Principle 5

- (7) The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

69ZO This Division also applies to proceedings in Chambers

A judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate, who is hearing child-related proceedings in Chambers, has all of the duties and powers that a court has under this Division.

Note: An order made in Chambers has the same effect as an order made in open court.

69ZP Powers under this Division may be exercised on court's own initiative

The court may exercise a power under this Division:

- (a) on the court's own initiative; or
- (b) at the request of one or more of the parties to the proceedings.

Subdivision C—Duties and powers related to giving effect to the principles

69ZQ General duties

- (1) In giving effect to the principles in section 69ZN, the court must:
 - (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
 - (b) decide the order in which the issues are to be decided; and
 - (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and
 - (d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and
 - (e) make appropriate use of technology; and
 - (f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and
 - (g) deal with as many aspects of the matter as it can on a single occasion; and
 - (h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.
- (2) Subsection (1) does not limit subsection 69ZN(1).
- (3) A failure to comply with subsection (1) does not invalidate an order.

69ZR Power to make determinations, findings and orders at any stage of proceedings

- (1) If, at any time after the commencement of child-related proceedings and before making final orders, the court considers that it may assist in the determination of the dispute between the parties, the court may do any or all of the following:
 - (a) make a finding of fact in relation to the proceedings;
 - (b) determine a matter arising out of the proceedings;
 - (c) make an order in relation to an issue arising out of the proceedings.

Note: For example, the court may choose to use this power if the court considers that making a finding of fact at a particular point in the proceedings will help to focus the proceedings.

- (2) Subsection (1) does not prevent the court doing something mentioned in paragraph (1)(a), (b) or (c) at the same time as making final orders.
- (3) To avoid doubt, a judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate who exercises a power under subsection (1) in relation to proceedings is not, merely because of having exercised the power, required to disqualify himself or herself from a further hearing of the proceedings.

69ZS Use of family consultants

At any time during child-related proceedings, the court may designate a family consultant as the family consultant in relation to the proceedings.

Note 1: Family consultants have the functions described in section 11A. These include assisting and advising people involved in proceedings, and this assistance and advice may involve helping people to better understand the effect of things on the child concerned. Family consultants can also inform people about other services available to help them.

Note 2: The court may also order parties to proceedings to attend appointments with a family consultant. See section 11F.

Subdivision D—Matters relating to evidence

69ZT Rules of evidence not to apply unless court decides

- (1) These provisions of the Evidence Act 1995 do not apply to child-related proceedings:
 - (a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.
 - (b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);
 - (c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).
- (2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 1995* not applying because of subsection (1).
- (3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:
 - (a) the court is satisfied that the circumstances are exceptional; and
 - (b) the court has taken into account (in addition to any other matters the court thinks relevant):
 - (i) the importance of the evidence in the proceedings; and
 - (ii) the nature of the subject matter of the proceedings; and
 - (iii) the probative value of the evidence; and
 - (iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.
- (4) If the court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceedings, the court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.

- (5) Subsection (1) does not revive the operation of:
- (a) a rule of common law; or
 - (b) a law of a State or a Territory;
- that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.

69ZU Evidence of family consultants

The court must not, without the consent of the parties to the proceedings, take into account an opinion expressed by a family consultant, unless the consultant gave the opinion as sworn evidence.

69ZV Evidence of children

- (1) This section applies if the court applies the law against hearsay under subsection 69ZT(2) to child-related proceedings.
- (2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay.
- (3) The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).
- (4) This section applies despite any other Act or rule of law.
- (5) In this section:
 - child* means a person under 18.
 - representation* includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.

69ZW Evidence relating to child abuse or family violence

- (1) The court may make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order.
- (2) The documents or information specified in the order must be documents recording, or information about, one or more of these:
 - (a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;
 - (b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;
 - (c) any reports commissioned by the agency in the course of investigating a notification.
- (3) Nothing in the order is to be taken to require the agency to provide the court with:
 - (a) documents or information not in the possession or control of the agency; or
 - (b) documents or information that include the identity of the person who made a notification.
- (4) A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.
- (5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.

- (6) Despite subsection (5), the court must not disclose the identity of the person who made a notification, or information that could identify that person, unless:
 - (a) the person consents to the disclosure; or
 - (b) the court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice.
- (7) Before making a disclosure for the reasons in paragraph (6)(b), the court must ensure that the agency that provided the identity or information:
 - (a) is notified about the intended disclosure; and
 - (b) is given an opportunity to respond.

69ZX Court's general duties and powers relating to evidence

- (1) In giving effect to the principles in section 69ZN, the court may:
 - (a) give directions or make orders about the matters in relation to which the parties are to present evidence; and
 - (b) give directions or make orders about who is to give evidence in relation to each remaining issue; and
 - (c) give directions or make orders about how particular evidence is to be given; and
 - (d) if the court considers that expert evidence is required—give directions or make orders about:
 - (i) the matters in relation to which an expert is to provide evidence; and
 - (ii) the number of experts who may provide evidence in relation to a matter; and
 - (iii) how an expert is to provide the expert's evidence; and
 - (e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.
- (2) Without limiting subsection (1) or section 69ZR, the court may give directions or make orders:
 - (a) about the use of written submissions; or
 - (b) about the length of written submissions; or
 - (c) limiting the time for oral argument; or
 - (d) limiting the time for the giving of evidence; or
 - (e) that particular evidence is to be given orally; or
 - (f) that particular evidence is to be given by affidavit; or
 - (g) that evidence in relation to a particular matter not be presented by a party; or
 - (h) that evidence of a particular kind not be presented by a party; or
 - (i) limiting, or not allowing, cross-examination of a particular witness; or
 - (j) limiting the number of witnesses who are to give evidence in the proceedings.

- (3) The court may, in child-related proceedings:
- (a) receive into evidence the transcript of evidence in any other proceedings before:
 - (i) the court; or
 - (ii) another court; or
 - (iii) a tribunal;and draw any conclusions of fact from that transcript that it thinks proper; and
 - (b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

Note: This subsection may be particularly relevant for Aboriginal or Torres Strait Islander children.

- (4) The court must not, in proceedings under this Part in which the court is required to regard the best interests of the child as the paramount consideration, direct under:
- (a) subsection 126B(1) of the *Evidence Act 1995*; or
 - (b) a law of a State or Territory relating to professional confidential relationship privilege specified in the regulations;

that evidence not be adduced if the court considers that adducing the evidence would be in the best interests of the child.

Appendix P JURISDICTIONAL TABLES (INTERNATIONAL)

TABLE 2: PROTECTION OF CHILDREN IN OVERSEAS JURISDICTIONS

	NEW ZEALAND	ENGLAND	SCOTLAND*
Name of Act	<i>Children, Young Persons and Their Families Act 1989 (NZ)</i>	<i>Children Act 1989 (UK)</i>	<i>Children (Scotland) Act 1995 (Scot)</i>
What is the age limit for persons coming into the child protection jurisdiction?	persons under the age of 17, if not married or in a civil union (s 2)	persons under the age of 17; a care or supervision order cannot be made in relation to a child who has turned 17 (or 16, if married)(s 31(3))	for the purpose of children's hearings, generally persons under the age of 16 (s 93(2))
Is there mandatory reporting?	no, but anyone 'may' report (s 15)	not in the Act, but 'need to report' is emphasised as a matter of policy	yes (s 53)
Who investigates notifications?	the social worker or police officer who receives the report (s 17(1))	the local authority (LA) (s 47)	the reporter investigates referred matters (ss 53(1)(b), 56), however pre-notification investigations may be undertaken by the LAs or police in order to determine if referral to reporter is necessary (s 53(1)(a), 53(2))
Is there any pre-court ADR?	Family group conferences (FGCs) are generally compulsory before protection proceedings can be commenced, with certain exceptions (ss 70, 72).	There is no mandated pre-court ADR under the Act. In practice, the LA is responsible for convening a child protection conference if a child or young person in their area has been identified as in need of protection.	There is no mandated pre-hearing ADR under the Act. In practice, LAs convene multi-agency child protection case conferences (CPCC) where their investigations indicate there are concerns. CPCC's can then refer a matter to the reporter.
Do legal representatives attend the pre-court ADR?	child or young person may have their barrister or solicitor present (s 22(1)(h))	children are not represented until proceedings commence, but solicitors for other parties are permitted to attend	n/a
Can voluntary agreements be registered with the court (or are they binding in some other way)?	Voluntary agreements are not registered with court.	Registration of voluntary agreements is not provided for in the Act.	Registration of voluntary agreements is not provided for in the Act.

* In Scotland, children's hearings perform many of the relevant functions undertaken by courts in other jurisdictions. Accordingly, where 'court' is referred to in the table for Scotland, this should be understood as children's hearings. For further detail, see Chapter 5.

	NEW ZEALAND	ENGLAND	SCOTLAND*
Is the Dept responsible for making a plan for the child, and is there a right of review of that plan?	The Court has the power to direct that another person (such as a social worker) prepare a plan (ss 128–9). The plan is to cover matters such as objectives for the child and services to be provided (s 130) and the Court will fix a date for review of the plan (s 134).	This is not covered in the Act, but the child protection conference facilitated by the local authority aims to formulate a case plan.	This is not in covered in the Act, but in practice there is policy emphasis on local authority and multi-agency coordination and planning in all child matters, and case plans are developed in CPCCs.
Is there an intermediary body between the investigator and the body bringing proceedings, or other safeguards?	yes, care and protection resource panels must be consulted once an investigation has commenced and before an FGC is convened (ss 17(1), 21)	no	yes, most referrals are via social workers and police who initially investigate the matter to determine whether to refer to the reporter, and the reporter then investigates to determine if matter should go to a children’s hearing and, if so, initiates proceedings
Who brings the application for a protection order?	a social worker, police officer or any other person (with the leave of the court) may bring an application for a declaration that a child is in need of care and protection (s 68)	the LA or an authorised person can apply to the court for care and supervision orders (s 31)	the reporter refers matters to a children’s hearing (s 56(6)) (but note that where the grounds of referral to children’s hearing are disputed, the children’s hearing can direct the reporter to apply to the Sheriff’s Court for a finding as to whether the grounds are established (s 65(7)))
What is the length of time the Dept or police can have custody of child after emergency removal, before court or tribunal oversight or authorisation?	child or young person who is placed in the custody of the Chief Executive (ie removed with or without a warrant) is to appear before court within five days unless sooner released (s 45)	in exceptional circumstances, a child may be taken into police protection for a maximum of 72 hours, without a court order (s 46 (6))	only power for removal of child without a court order or approval by a justice of the peace is by a police officer, to a place of safety, for maximum 24 hours (s 61(5))

Appendix P JURISDICTIONAL TABLES (INTERNATIONAL)

	NEW ZEALAND	ENGLAND	SCOTLAND*
What are the types of grounds available under the Act for a protection application (including any 'no fault' ground)?	<p>grounds include:</p> <ul style="list-style-type: none"> if the child or young person is being/is likely to be harmed, ill-treated, abused or seriously deprived, or his or her development or physical or emotional wellbeing is being/is likely to be, impaired or neglected if 'the parents or guardians or other persons having care of the child are unwilling or unable to care for the child or young person' if the child or young person has behaved, or is behaving, in a manner that is /is likely to be harmful to the physical or mental or emotional well-being of the child or young or young person or to others and 'the child's or young person's parents or guardians, or other persons having the care of the child or young person, are unable or unwilling to control' (see s 14) 	<p>a court may only make a care or supervision order if it is satisfied:</p> <p>(a) that the child concerned is suffering, or is likely to suffer, significant harm; and</p> <p>(b) that the harm, or likelihood of harm is attributable to –</p> <p>(i) the care given the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or</p> <p>(ii) the child's being beyond parental control (s 31(2))</p>	<p>grounds for referring a child to a children's hearing include both care/protection grounds and offence grounds, care and protection grounds include the child being:</p> <ul style="list-style-type: none"> beyond control, or is falling into bad associations or moral danger likely to suffer unnecessarily or be impaired seriously in his health or development due to a lack of parental care the victim of particular offences, including sexual abuse, or behaving in such a way that special measures are necessary in the interest of the child or others (see s 52(2))
Is the child the subject of the application a party to the proceedings?	<p>no, the child being listed separately from other parties suggests no party status (s 341(2))</p>	<p>yes, this is implied from the fact that a guardian <i>ad litem</i> is automatically appointed for a child under the Act (s 41) (see also the <i>Family Proceedings Courts (Children Act 1989) Rules 1991</i> (UK) r 7(1) and sch 2)</p>	<p>child has a right to attend a children's hearing (s 45(1)) (with some exceptions (s 45(2)) and the child must be notified of a hearing (<i>Children's Hearings (Scotland) Rules 1996</i> r 6)</p> <p>child also has the right to appeal to a Sherriff's Court from a children's hearing decision (s 51(1))</p>

	NEW ZEALAND	ENGLAND	SCOTLAND*
What body determines the application? (court/tribunal/panel)	Family Court of New Zealand	Family Proceedings Court	children's hearing (each hearing is before a three-member tribunal, comprised of lay volunteers) the Sherriff's Court determines if the disputed grounds are established (ss 65(7), 68) and whether the matter remits to children's hearing for final disposition
Does the body determining the application have jurisdiction to determine both family law and child protection matters?	yes, protection applications heard in the Family Court of New Zealand	yes, the Family Proceedings Court has a combined jurisdiction encompassing both public (child protection) law and private (family) law matters (s 37)	no, children's hearings are a specific forum for applications relating to a child's welfare/protection/treatment (but the Sheriff's Court can hear both)
Is there any court-annexed ADR?	yes, a Family Court judge, the child, or any party or representative may ask for a mediation conference to be convened in the context of care and protection proceedings (s170(1))	no	no
Do legal representatives attend the court-annexed ADR?	yes for the child or young person (s 172(2)(b)), and, at the discretion of the presiding Family Court judge, any legal representative for a parent, guardian or person having care of the child or young person (s 172(2)(d)(i))	n/a	n/a
Are the convenors of the court-annexed ADR legally qualified?	every mediation conference is presided over by a Family Court judge (s 172)	n/a	n/a
What is the level of procedural formality in the court hearings?	not addressed in the Act	not addressed in the Act	children's hearings are non-adversarial, relatively informal and participatory; at each hearing sitting members must be a mix of genders (s 39(5)), and aim for a mix of age and backgrounds

Appendix P JURISDICTIONAL TABLES (INTERNATIONAL)

	NEW ZEALAND	ENGLAND	SCOTLAND*
Are children legally (or otherwise) represented in court proceedings, and on what model (i.e. representation of the best interests of the child, or 'direct' representation on the child's instructions)?	<p>The child must be represented by a barrister or a solicitor (s 159(1)).</p> <p>Representation is on a best interests model unless a conflict arises between the views of the child and the welfare/best interests of the child. If this conflict cannot be resolved, and the lawyer can only advocate for the child's views, another lawyer may be appointed to represent the child's best interests/welfare.</p>	<p>The child either</p> <ul style="list-style-type: none"> has his or her best interests represented by a guardian <i>ad litem</i>, who instructs a solicitor to put those interests to the Court, or is represented directly by a solicitor, if he or she has sufficient understanding to instruct a solicitor and wishes to do so, or if a guardian has not been appointed and the child does not have sufficient understanding to instruct a solicitor, has his or her best interests represented by a solicitor <p>(see s 41 and <i>Family Proceedings Courts (Children Act 1989) Rules 1991</i> (UK) r 12(1))</p>	<p>In certain circumstances, a children's hearing can appoint a legal representative and/or a safeguarder.</p> <p>A legal representative is appointed where required to ensure the child's effective participation or where secure accommodation is being considered (<i>Children's Hearings (Legal Representation) (Scotland) Rules 2002</i> r 3). This is on a direct instruction model where possible.</p> <p>A safeguarder, who may be legally qualified, is appointed to make recommendations to the hearing on the child's best interests (s 41).</p> <p>The Sheriff's Court can appoint state funded legal aid in certain circumstances for appeals from children's hearing decisions and relevant Sherriff's Court decisions (s 92). The Sherriff may also appoint a safeguarder (s 41).</p>
Is the child required to appear at court?	the Court can make an order for the child to attend (s 157)	the Court can make an order for the child to attend (s 95)	yes, except where it would be detrimental to the child's interests (s 45)
Are parents/guardians legally represented in court proceedings?	yes	yes	yes, a children's hearing appoints representatives where required to ensure the relevant persons effective participation (<i>Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009</i>), and a Sherriff's Court can appoint in certain circumstances (as per legal representation for children, above)
Do judicial officers hear both child protection and criminal matters?	no, Youth Court of New Zealand hears criminal matters separately (s 272)	no, Family Proceedings Courts do not deal with criminal offences	grounds of referral to a children's hearing include both care/protection and offence grounds (s 52(2))

	NEW ZEALAND	ENGLAND	SCOTLAND*
Does the Act provide for assessment orders?	no	yes, Court can make assessment orders (s 43(1))	Sherriff's Court can make assessment orders, on application by LA (s 55)
What is the longest order available under the Act for protecting a child?	guardianship order (s 110) which ceases to have effect only when child turns 20 or is adopted by someone other than his/her parents—whichever happens first (s 117)	care order (ss 31, 33–4) which continues until the child turns 18 (s 91(12))	a supervision requirement made by children's hearings does not continue for more than one year without variation or continuation by a review children's hearing (s 71(1)), and ceases to have effect when child turns 18
Are there any specific principles or forums relating to Aboriginal children or addressing a child's cultural identity in the Act?	yes; see, for example, s 13(g) and the provision for cultural and community reports (s 187)	no	no
Is there any limitation on the duration of interim orders pending final disposition?	an interim custody order is not to continue in force for more than 6 months (s 102(2)), but the Court can also make a custody order pending final determination of proceedings (s 78)	interim orders may last for 8 weeks beginning with the date on which the order is made (s 38(4))	when unable to dispose of a case a children's hearing can grant a warrant to place a child in a place of safety or secure accommodation for a maximum of 66 days (ss 66, 69(3)) the reporter may apply to the Sherriff's Court to extend a s 66 warrant (s 67)
Who makes decisions as to the child's contact with the parents?	The Court can, at the time of making a custody order or guardianship order in relation to a child or young person (or at any time after the making order, on the application or a parent or other person), make an order granting access to that child or young person to a parent or other person (s 121).	The Court may, on an application by the child, the LA that has care of the child, or the parents or guardians, 'make such order as it considers appropriate with respect to contact' between the child and any named person (s 34(2)–(3)). The Court may also make an order with respect to contact on its own motion when making a care order, or in any family proceedings in connection with a child who is in the care of an LA (s 34(5)).	When a children's hearing determines a child requires a compulsory measure of supervision, it has the power to make supervision requirements. These can determine the place the child is to live and conditions such as who they have contact with (s 69). A Sherriff's Court can make orders that affect access including parental responsibility orders which transfer appropriate parental rights and responsibilities to the LA for a specified period, while ensuring appropriate contact (ss 86–8).

Appendix P JURISDICTIONAL TABLES (INTERNATIONAL)

	NEW ZEALAND	ENGLAND	SCOTLAND*
In what forum are secondary applications (such as applications for the revocation, variation, or extension of a protection order) decided?	Applications to vary or discharge order made under the Act are made to, and decided by, the Court (ss 125–7). However, the Court may direct an FGC to be convened to consider matters relating to an application for the variation or discharge of an order (s 126A).	The Court determines applications for the variation or discharge of supervision or care orders, and can make orders: <ul style="list-style-type: none"> • varying or discharging a supervision order • discharging a care order • substituting a care order for a supervision order (s 39). 	Without variation or continuation, a supervision requirement does not continue for more than one year (s 71(1)). A review children’s hearing arranged by the reporter, determines if continuation, variation, further investigation or termination should occur (s 73(9)). A child or relevant person may require that a children’s hearing review an initial supervision requirement or reviewed requirement, after three months (s 73(6)).
What is the course of appeal from decisions and orders made by the court determining the protection application?	Where the Family Court finally determines proceedings, appeal is to the High Court (ss 341(1)–(2)). In relation to interlocutory or interim orders, a party to the proceedings, a child or young person in relation to whom the proceedings relate, or any other person prejudicially affected by the order may only appeal to the High Court with the leave of the Family Court (s 341(3)).	An appeal against a decision of the Court to make, or refuse to make, any order under the Act is to the High Court (s 94(1)). No appeal may be made against the making of, or refusal to make, an emergency protection order or against any direction given by the Court in connection with such an order (s 45(10)).	Appeals against decisions of a children’s hearing, including the granting of a warrant, can be made by the child or relevant person to the Sherriff’s Court within three weeks of the decision (s 51(1)). A sheriff’s decision can be appealed, either on a point of law or in respect of any irregularity in the conduct of the case, to the ‘sheriff principal’ (s 51(11)).
Are there any unusual aspects of the Act (compared to Victoria)?	<ul style="list-style-type: none"> • mandatory FGC • authorisation required before social worker can remove child 	<ul style="list-style-type: none"> • no order principle • child has tandem representation • lay magistrates sit in the Family Proceedings Court 	<ul style="list-style-type: none"> • children’s hearings are conducted by tribunals of lay volunteers from the community • children’s hearings deal with both juvenile justice matters and child protection matters • no order principle

**CHILDREN'S COURT OF VICTORIA
FACILITATIVE DISPUTE RESOLUTION CONFERENCE
CONVENOR'S REPORT**

Convenor: _____ **Date:** _____

Case name: _____

Type of proceeding: _____

Number of siblings listed for this conference: _____
(Please complete a separate report for each and attach unless the issues for each sibling were identical.)

Name of solicitor and counsel (if briefed):

For DHS _____

For mother _____

For father _____

For child(ren) _____

For other (specify) _____

For other (specify) _____

Persons that attended the conference:

Name	Connection to case

Results of conference: *(please tick)*

- Matter settled
- Interim settlement (IPO made)
- Matter not settled (contest confirmed)
- Matter adjourned

Reasons for adjournment:

If matter did not settle, were any issues resolved or agreed upon? Please describe:

Signed:

Convenor(s)

Appendix R

CONSTITUTIONAL CONSIDERATIONS OF NEW PROCESSES

INTRODUCTION

- R.1 As part of Option 2 in Chapter 8, the Commission proposes a number of changes to the processes used by the Family Division of the Children’s Court of Victoria in child protection applications. Implementing these proposals would require amending the *Children, Youth and Families Act 2005* (Vic) (CYF Act 2005). This appendix briefly considers whether there are any limits to the Victorian Parliament’s power to make the proposed amendments, most importantly in legislating to give the Family Division of the Children’s Court the power to conduct its proceedings in an inquisitorial manner.¹
- R.2 While the Victorian Parliament has a very broad power ‘to make laws in and for Victoria in all cases whatsoever’,² this power is subject to some limitations imposed by the Commonwealth Constitution. One of those limitations concerns the power of the Australian states to legislate in relation to their own courts. This limitation occurs because Chapter III of the Commonwealth Constitution establishes an integrated system of Australian courts under which the Commonwealth Parliament may make laws ‘investing any court of a State with federal jurisdiction’.³

THE NEED FOR ‘INSTITUTIONAL INTEGRITY’

- R.3 In 1996, the High Court decided that Chapter III of the Commonwealth Constitution imposes implied limits on the legislative capacity of state parliaments to make laws concerning the operations of state courts.⁴ This implied constitutional limitation on the states’ powers is often referred to as the *Kable* principle, in recognition of the case in which it was first explained.⁵
- R.4 The High Court has decided that
- State legislation which purports to confer upon ... a [state] court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.*⁶
- Further, in order for a body to be characterised as a court, ‘it must satisfy minimum requirements of independence and impartiality’.⁷
- R.5 The Children’s Court of Victoria is a state court that may be invested with federal jurisdiction now,⁸ or might be invested with federal jurisdiction at some time in the future.⁹ As such, it is important to consider whether it is beyond the Victorian Parliament’s legislative competence to give the Court the new functions and powers proposed in this report because they might substantially impair the Court’s institutional integrity.
- R.6 In her submission, Assistant Professor Sarah Murray of the University of Western Australia points out that the decision in *Kable*¹⁰ has been interpreted as meaning that ‘a quasi-separation of powers doctrine exists at State level’.¹¹ However, as Ms Murray states, it is clear that the constitutional limits imposed on the functioning of state courts are less onerous than those imposed on federal courts, as there is, in relation to the powers conferred on state courts, ‘a degree of institutional and procedural flexibility ... which may travel beyond the limits permissible in federal courts’.¹²

- 1 See Chapter 8, Proposal 2.14.
- 2 *Constitution Act 1975* (Vic) s 16.
- 3 Australian Constitution s 77(iii).
- 4 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- 5 See, for example, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 545 (Kirby J).
- 6 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 67 (Gleeson CJ).
- 7 *Ibid.*
- 8 As discussed in Chapter 8, there is debate about whether the Children’s Court of Victoria is a state ‘court of summary jurisdiction’ for the purposes of s 69J of the *Family Law Act 1975* (Cth) (FLA 1975) which would permit it to exercise some FLA 1975 jurisdiction in family law disputes involving children.
- 9 If the Children’s Court of Victoria is not currently vested with jurisdiction by s 69J of the FLA 1975, it is likely that the Commonwealth may amend the FLA 1975 at some time in order to give the Court that jurisdiction.
- 10 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- 11 Submission 42 (Sarah Murray).
- 12 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 (French CJ); Submission 42 (Sarah Murray).

13 See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 (Gummow J).

14 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 67 (Gleeson CJ).

15 (2006) 228 CLR 45.

16 *Ibid* 76.

17 (2004) 223 CLR 575, 600.

18 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 75 (Gummow, Hayne and Crennan JJ).

MEANING OF 'INSTITUTIONAL INTEGRITY'

- R.7 While the High Court has declined to identify all of those matters that may infringe the *Kable* principle because they impermissibly interfere with the 'institutional integrity' of a state court,¹³ various High Court members have given indications of those laws concerning state courts that may and may not be permissible.
- R.8 A central theme in the cases since *Kable* has been the requirement that state courts 'must satisfy minimum requirements of independence and impartiality'.¹⁴ Justices Gummow, Hayne and Crennan pointed out in *Forge v Australian Securities and Investments Commission*¹⁵ that an important reason for independence and impartiality is the capacity of state courts 'to administer the common law system of adversarial trial'.¹⁶
- R.9 When applying the *Kable* principle, however, it is the capacity of state courts to conduct an adversarial trial rather than the mandatory nature of those trials which is important. As Justice McHugh stated in an earlier case, 'nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts'.¹⁷

THE COMMISSION'S VIEWS

- R.10 The Commission believes it is highly unlikely that any of the proposed reforms to the procedures followed in the Family Division of the Children's Court would undermine the Court's 'institutional integrity'. The proposed options do not in any way compromise the Court's ability to operate in an independent and impartial manner, or to provide procedural fairness to the parties. They would not prevent the Children's Court from conducting an adversarial trial, even though they would encourage the use of more inquisitorial processes.
- R.11 An important aspect of the power vested in the Commonwealth Parliament by section 77(iii) of the Constitution to vest federal jurisdiction in state courts is that the body invested with the jurisdiction must be a 'court'.¹⁸ None of the proposals in this report interferes with the capacity of the Children's Court to continue to be characterised as a state court for the purposes of the Commonwealth Constitution.

Appendix S

AUSTRALIAN COMMISSIONERS FOR CHILDREN AND CHILD GUARDIANS

	AUSTRALIAN CAPITAL TERRITORY	NEW SOUTH WALES (NSW)	NORTHERN TERRITORY	QUEENSLAND	SOUTH AUSTRALIA	TASMANIA	VICTORIA	WESTERN AUSTRALIA (WA)
Name	ACT Children & Young People Commissioner	NSW Commission for Children and Young People	Children's Commissioner	Queensland Commission for Children and Young People and Child Guardian	Guardian for Children and Young People	Commissioner for Children Tasmania	Child Safety Commissioner Victoria	WA Commissioner for Children and Young People
Legislative base	Human Rights Commission Act 2005, and Human Rights Act 2004	Commission for Children and Young People Act 1998	Care and Protection of Children Act 2007	Commission for Children and Young People and Child Guardian Act 2000	Children's Protection Act 1993	Children, Young Persons and Their Families Act 1997	Child Wellbeing and Safety Act 2005	Commissioner Children and Young People Act 2006
Independence	Reports to the Minister	Reports to a Parliamentary Joint Committee	Reports to the Minister	Reports to a Parliamentary Joint Committee	Reports to the Minister	Reports to the Minister	Reports to the Minister	Reports to a Parliamentary Joint Committee
Reporting to Parliament	Required to table an annual report to Parliament Can table special reports to Parliament	Required to table an annual report to Parliament Can table special reports to Parliament	Required to table an annual report to Parliament Can table special reports to Parliament	Required to table an annual report to Parliament Can table special reports to Parliament	Required to table an annual report to Parliament Can table special reports to Parliament	Required to table an annual report to Parliament Can table special reports to Parliament	Required to table an annual report to Parliament Can table special reports to Parliament	Required to table an annual report to Parliament Can table special reports to Parliament
Appointment	The Commissioner is an independent statutory officer appointed by the Executive	The Children's Guardian is an independent statutory officer appointed by the NSW Governor	The Commissioner is an independent statutory officer appointed by the Administrator	The Commissioner/Guardian is an independent statutory officer appointed by the Queensland Governor	The Guardian is an independent officer appointed by the Governor of South Australia	The Commissioner is an independent statutory officer appointed by the Governor of Tasmania	The Commissioner is appointed by the Premier	The Commissioner is an independent statutory officer appointed by the Governor of Western Australia

Source: Standing Committee on Education and Training, Parliament of Australia, *Adolescent overload? Report of the inquiry into combining school and work: supporting successful youth transitions*, (2009).

Appendix S

AUSTRALIAN COMMISSIONERS FOR CHILDREN AND CHILD GUARDIANS

INTERNATIONAL COMMISSIONERS FOR CHILDREN

	NEW ZEALAND	SCOTLAND	ENGLAND	WALES
Name	Children's Commissioner	Scotland's Commissioner for Children and Young People	Children's Commissioner for England	Children's Commissioner for Wales
Legislative Base	<i>Children's Commissioner Act 2003</i> (NZ) (sections repealed by the <i>Crown Entities Act 2004</i> (CE Act 2004) (NZ))	<i>Commissioner for Children and Young People (Scotland) Act 2003</i> (Scot)	<i>Children Act 2004</i> (UK)	<i>Care Standards Act 2000</i> and <i>Children's Commissioner for Wales Act 2001</i>
Independence	reports to the Minister CE Act 2004 (s 150(1)(a)–(b))	reports to Parliament (ss 10–12)	reports to the Secretary of State (s 8(1))	reports to the First Minister
Reporting to Parliament	required to table an annual report to Parliament via the Minister (CE Act 2004 s 150(3)) can table special reports to Parliament	required to table an annual report to Parliament s 10(1) can table special reports to Parliament (ss 11–12)	required to table an annual report to Parliament via the Secretary of State (s 8(3)(a)–(b), (4))	required to table an annual report to Welsh Assembly
Appointment	the Commissioner is an independent Crown entity appointed by the Minister or Governor-General on Minister's recommendation (CE Act 2004 s 28(1)(a)(b))	the Commissioner is independent of government appointed by Her Majesty on the nomination of the Parliament (s 2(1))	the Children's Commissioner is appointed by the Secretary of State (sch 1, cl 3(1))	the Commissioner is an independent human rights institution appointed by the Welsh Assembly

Source: As noted and found in text in Chapter 11.

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