Mr. Anthony Walsh  
Legislative Council of Victoria  
Legal & Social Issues Committee  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002  
Via email only: Anthony.Walsh@parliament.vic.gov.au.

22 June, 2015

Dear Sir,

RE: Inquiry into the Children, Youth & Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015

By way of introduction, the majority of CCPA members have practiced in the Children’s Court of Victoria for more than a decade and have represented many thousand children, parents, carers and other interested parties. Many of our members are LIV accredited Children’s Law specialists and authorities in child welfare law.

On behalf of the Children’s Court Private Practitioners Association ("CCPA"), please find attached our submission to the Inquiry.

We make this submission on the basis that we collectively, operating daily and for many years within the current legislative framework, can readily identify the likely catastrophic outcomes for Victoria’s most vulnerable children and their families caused by the Children, Youth & Families (Permanent Care & other Matters) Amendment Act 2014.

Please do not hesitate to contact us if you require any further information or if you would like to hear evidence direct from our members in relation to our concerns.

Yours faithfully,

Isabelle Harrison  
LIV Accredited Specialist - Children’s Law  
Secretary  
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CHILDREN’S COURT PRIVATE PRACTITIONERS’ ASSOCIATION

Submission to Victorian Parliament’s Legal & Social Issues Committee’s Inquiry into the Children, Youth & Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015

In this submission, we make reference to the following:

Children, Youth & Families Act 2005 (‘the Principal Act’),

Children, Youth & Families (Permanent Care & other Matters) Amendment Act 2014 (‘the 2014 legislative reforms’)

and

Children, Youth & Families (Restrictions on Making Protection Orders) Bill 2015 (‘the 2015 Bill’)

The CCPPA is extremely concerned that the 2014 legislative reforms to the Principal Act, the most significant to the child protection framework in 25 years, arose without open and substantive consultation with significant stakeholders.

The CCPPA is extremely concerned that such 2014 reforms, which significantly reduce the powers of the Children’s Court of Victoria and drastically weaken protections of rights of Victoria’s vulnerable children and their families, have been driven by the Department of Health and Human Services (DoHHS), in the face of continued criticism of its care arrangements and decision-making by the Children’s Court of Victoria.

The CCPPA supports the reinstatement of section 276 of the Principal Act (through the 2015 Bill) but the CCPPA seeks further the reinstatement of the powers of the Children’s Court and the reinstatement of protections to the rights of Victoria’s vulnerable children and their families.
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A. PRELIMINARY CONSIDERATIONS FOR THE INQUIRY

i) The Children’s Court of Victoria - a Specialist Court

The Children’s Court of Victoria is one of the most important socio-legal institutions in Victoria’s community. The Children’s Court of Victoria deals with the most serious and difficult of legal and social matters; emotional, sexual and physical abuse of children, familial dysfunction, drug and alcohol abuse, family violence, children and parents with disabilities and entrenched poverty. On any given day, the Children’s Court will be asked to determine some of the most complex legal and factual decisions that could be asked of any court. The Children’s Court of Victoria is a court of specialist jurisdiction (Secretary to the Department of Human Services v Sanding [2011] VSC 42). The magistrates are highly trained, fully versed in child protection law, juvenile justice, social sciences and therapeutic jurisprudence (how the law is applied to assist and support recovery rather than punish). The Court and its magistrates preside over thousands of matters each year.

ii) Department of Health & Human Services – Role & Powers

Children and their families come before the Children’s Court when the Department of Health and Human Services (DoHHS) issue a protection application, either by emergency care (removing the child immediately) or by notice (a type of legal letter issued by the registrar, served on the family to attend the Court at a specified date). These applications are made on the basis of allegations that a child has suffered or is likely to suffer significant emotional harm, physical harm, sexual abuse, or neglect. Additional grounds are provided in circumstances of abandonment or if parents are deceased and incapacitated and no other suitable person is available.

DoHHS are statutory interveners, that is, they commence proceedings against the child and family on the basis of the allegations. The Court then has to determine, if the matter has been brought by emergency care, where the child is to be placed immediately and more generally, whether DoHHS has justified state intervention on the balance of probabilities. For any child and their family before the Children’s Court, the involvement of DoHHS is typically the most stressful and difficult point in their lives. The independence of the Court is therefore fundamental to a credible, functional child protection system.

As Bessant, Emslie and Watts (2012) point out:

“it is necessary for the [Children’s] Court to be independent and to be seen to be independent, especially from the DoHS which is the party in every proceeding before it. It must have the confidence both of the parents who come before it, and the confidence of the community that it will act in an
independent way in accordance with both the legislative and the constitutive principles of justice

For the Victorian community, many more families are increasingly subject to investigation and intervention by DoHHS. The number of protection reports received by DoHHS, being notifications in relation to the welfare of children, last financial year 2013-2014 was approximately 82,000. In 2010 – 2011 it was 55,700. Following upon investigation and substantiation by DoHHS of these notifications, DoHHS then issues a protection application. The increase in DoHHS child protection activity has flow-on effects for the Children’s Court.

The Children’s Court (2014, pp. 321) reported 12,215 primary and secondary applications in 2012-13, of which 3,804 were initiated primary applications. This was an increase of 303 on primary & secondary applications in 2012-13. However, 2012-13 was a year in which there had been an unprecedented 13.3% increase on 2011-2012 applications (Children’s Court 2013, Annual report, p.3). In Melbourne, 80% of DoHHS applications were initiated by emergency care 2013-14. The Children’s Court is then also dealing with applications to extend, to vary, to revoke existing protection orders and also family violence intervention orders for family violence. For example, in 2012-13 the Children’s Court finalised 2,725 complaints for an Intervention Order in addition to child protection applications. Hence, the Children’s Court has an extremely heavy workload. The workload is also unpredictable given the high use of emergency care by the DoHHS to initiate applications.

The power held by DoHHS to remove a child from his or her family and to then seek the continued removal is one of the most serious of any powers held by any state agency, akin to the power of incarceration. In our liberal democracy, the exercise of such power and ongoing care arrangements upon the exercise of that power must be the subject of judicial scrutiny at all times.


The Carney Review centrally examined the operation of Wardship Orders. At that time, Wardship Orders granted the state of Victoria full parental rights over the child, usually operated until the child was 18 years regardless of how old the child was when the order was made. These orders did not include conditions for contact with parents or siblings and there was no regular judicial oversight of the care received by children subject to these orders. The Carney Review found that children subject of Wardship orders often were mistreated.

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abused, homeless and were not properly supported or serviced by welfare authorities.

With a focus on children’s rights and having examined the often catastrophic outcomes for the children who were the subject of Wardship orders, it was the Carney Review which brought forth the progressive legislative framework Victoria enjoyed until the 2014 legislative reforms. The comprehensive recommendations of the Carney Review were substantially incorporated into the predecessor to the Principal Act, the Children & Young Persons Act 1989 (Vic). One of the most important aspects of the Carney Review recommendations was that the principle that the level of intervention by the state into the lives of Victoria’s vulnerable children must only be to the extent necessary should be enshrined into legislation, compelling decision-makers, being the then Department of Community Welfare Services and Children’s Court to consider this first in determining best interests of the child.

The Betrayal of Trust Inquiry (Victoria Parliament 2014), the Forgotten Australians Inquiry (Commonwealth Parliament 2004) and more recently, the Royal Commission Into Institutional Responses to Child Sexual Abuse, have all heard irrefutable testimony of the catastrophic consequences of untrammelled and un-checked power of state agencies when providing care to vulnerable children 4. While it may seem that contemporary state government agencies are beyond repeating such grievous harm, the ongoing revelations to the Royal Commission Into Institutional Responses to Child Sexual Abuse about the current vulnerability of children in out-of-home care demonstrate that judicial oversight of institutional care arrangements for children continues to be of fundamental importance.


In 2012, the Protecting Victoria’s Vulnerable Children Inquiry panel comprising the Honorable Philip Cummins, Professor Emeritus Dorothy Scott OAM and Mr Bill Scales AO, handed down their findings. The Cummins Inquiry was an extremely comprehensive and thorough inquiry into Victoria’s child protection system conducted over 10 months. It included 225 written submissions and 18 public sittings, 126 meetings, site visits and direct consultations, five focus groups and an online survey 5. DoHHS made written submissions (in confidence) and met with the panel.

Please find in Appendix A, the Terms of Reference, the key findings of all 23 chapters and the conclusion of the Cummins Inquiry by way of succinct overview. The CCPPA also recommends that particular regard be had by the Inquiry to Chapter 15, produced in full in Appendix B.


At Finding 16, Chapter 15 the Cummins Inquiry concludes:

“The role of the Children’s Court is to determine the lawfulness of the statutory intervention by the State and the appropriate order if a child is found to be in need of protection. Accordingly, the role of the Children’s Court is to determine:

- Whether a child is in need of protection;
- The appropriate remedy or order to enable the State to intervene in the child’s best interests;
- The length of the order (if appropriate to the type of order sought); and
- Conditions relating to child-parent contact or contact with siblings and other persons who are significant in the child’s life (if appropriate to the type of order sought) and conditions that intrude on individual rights namely the exclusion of individuals from a child’s life and drug and alcohol screening”. (emphasis added).

The CCPPA is concerned that the 2014 legislative reforms are said to be consistent with the recommendations of the Cummins Inquiry. However, the CCPPA respectfully points out that the 2014 legislative reforms do not accord with the recommendations of Cummins, particularly, in the following respects:

a) **Appropriate Remedies/Reunification:** Cummins clearly endorsed the continuation of the Court’s determination of when reunification should occur (‘whether a child is in need of protection’ and ‘the appropriate remedy or order to enable the State to intervene in the child’s best interests’). Cummins did not suggest any implementation of time-frames in which the Court could not contemplate reunification as is created by the 2014 legislative reforms;

b) **Contact/Access:** Cummins clearly endorsed the continuation of the Court’s power to make conditions on protection orders for contact/access for children with their parents and siblings. However this power is removed by the 2014 legislative reforms in Care by Secretary Orders and on Permanent Care Orders;

c) **Length of Orders:** Cummins clearly endorsed the continuation of the Court’s power to determine the length of the protection orders if appropriate to the order sought. However this power is removed by

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the 2014 legislative reforms in relation to Care by Secretary Orders which will automatically run for 2 years when the equivalent previous Custody to Secretary Order could be made for an initial period of up to 1 year and thereafter extended for up to 2 years at a time. Also, Family Reunification Orders cannot be made if certain time-frames are exceeded under the 2014 legislative reforms;

**d) Permanency:** Cummins recommended breaking down the barriers to permanent care orders being sought by DoHHS i.e. lack of support for permanent carers, if there was no chance of reunification with biological parents not expediting permanent removal of children from their family following upon a failure to meet arbitrary, retrospective, cumulative time-frames for reunification.

Overall, the CCPPA believes that the recommendations of the Cummins Inquiry should be followed to the extent that these apply to the operation of the Children’s Court of Victoria. The Cummins Inquiry was a recent, considered and systematic review. The Inquiry recommendations about the Children’s Court and the extensive evidence on which those recommendations were based lie in sharp contrast to the complete lack of consultation, which gave rise to the 2014 legislative reforms.
PART I: THE FAMILY AS THE FUNDAMENTAL GROUP UNIT OF SOCIETY

The family is the fundamental group unit of society and that it should have the widest possible protection and assistance. The intervention of the state into the lives of its citizens, particularly children and their families, ought only to be to the extent and length of time necessary. Although this should not require any restatement, the CCPPA is concerned that these fundamental principles are no longer at the forefront of legislative decision-making.

John Bowlby, the father of ‘attachment theory’ said “if a community values its children, it cherishes their parents” (Bowlby, 1951 p. 84). Often the Children’s Court is accused of being a ‘parents court’ but this allegation fails to incorporate the emotional and legal significance of a parent to a child. Dr. Patricia Brown, Director of the Children’s Court Clinic points out that ‘the wellbeing of a child attached to a parent demands that we attend to the parent also in order to help the child, the reciprocity in the attachment being axiomatic’. Justice Higgins in an ACT family law case, underscores the importance of the family unit:

“a family thought to be dysfunctional by welfare authorities may be a better alternative than imposed foster-care. Aboriginal families serve as a warning against too ready intervention” (1996 Fam L R 54569 at 551 – 2).

Before the Children’s Court, there are of course, some parents who cannot safely parent their children because they may have harmed those children irreparably or there are profound deficits in the parent’s mental or emotional functioning. In these cases, permanent placements must be identified by DoHHS and as quickly as possible. However, such cases do not comprise the majority of the matters before the Children’s Court.

The majority of matters that reach the Children’s Court involve families who are struggling to manage their children and themselves and require support and assistance to improve the quality of parenting and care. It is well established that families involved in child protection can experience family violence, mental health problems, and problems with alcohol or other substances. This is why the most frequent type of protective ground for

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7 as protected by s.17 of the Victorian Charter of Human Rights & Responsibilities 2006 (Vic)
8 Lecture to Swinburne University students, ‘Psychology Working Beside Law in the Best Interests of Children’ Dr. Patricia Brown, Director, Children’s Court Clinic of Victoria, 3/9/2014.
9 Lecture to Swinburne University students, ‘Psychology Working Beside Law in the Best Interests of Children’ Dr. Patricia Brown, Director, Children’s Court Clinic of Victoria, 3/9/2014.
10 Lecture to Swinburne University students, ‘Psychology Working Beside Law in the Best Interests of Children’ Dr. Patricia Brown, Director, Children’s Court Clinic of Victoria, 3/9/2014.
Children's Court Private Practitioners Association

child protection intervention is emotional abuse\textsuperscript{12}. Emotional abuse is the catch-all type that can account for difficulties children and parents experience in these situations as compared to an incident of deliberately causing harm or ongoing failure to protect children from physical harm or sexual abuse\textsuperscript{13}. In terms of the Index of Relative Socio-Economic Advantage and Disadvantage, children and families who lie on the lowest and second lowest scales, make up more than fifty (50\%) of substantiations across all States or Territory child protection departments in Australia\textsuperscript{14}.

Common stories for the children and their families are of those of profound difficulty, constrained by poverty, intergenerational disadvantage, and social dysfunction. The Court regularly sees examples like the following situations:

- Parents of children with disabilities who cannot access regular respite. The household becomes too difficult to manage, becoming completely unhygienic. They do not have the resources, finances, or skills to manage long-term without the assistance of the state;
- Parents in acute distress when say, their adolescent daughter has gone missing, absconded, for ten days at a time and she uses ice and engages in sexual activity;
- Parents who struggle with alcohol or drug use themselves and cannot manage their addictions, despite their efforts;
- Mothers who are terrorized by predatory partners where the existence of IVO’s does little to ameliorate or manage the risk. Children are removed from these Mothers if they give in one day and allow that partner, the father, to have contact with his children after his persistent harassment;
- Refugee families struggling with Australian laws and norms, and struggling to care for their children in circumstances of their own trauma, isolation, and language barriers;
- Indigenous families who have experienced generations of dislocation and poverty; and
- Families in regional areas where access to services is extremely limited, including mental health treatment, family violence support, housing, and rehabilitation.

The needs of these children and their families before the Children’s Court are hence complex and serious. Therefore, all legislative provisions must fundamentally permit the Children’s Court to take into account individual circumstances and complexity and most importantly to tailor any order or condition to that particular child’s and his or her families needs.

\textsuperscript{14} AIHW 2015 p. 76
i) FAMILY REUNIFICATION ORDERS (FRO’S)

The new FRO’s are extremely problematic from the perspective of the CCPPA as the Children’s Court is prohibited from determining when reunification is viable over and above a certain time frame. This prohibition substantially reduces the court’s powers and function as a specialist court. These new FRO’s do not allow the Court to determine, on a case-by-case basis in light of the complexity and idiosyncratic nature of every child and his or her family, whether reunification is viable.

Currently, pursuant to the Principal Act, final orders which contemplate reunification are called Supervised Custody Orders. These orders give custody to a specifically named carer, such an aunt or grand-mother and leave the parents as guardians. Everyone has the comfort of knowing whom is caring for the child and for how long. The Children’s Court can order these when the court determines that reunification is a viable prospect regardless of how long a child has been in out of home care.

However, Supervised Custody Orders as of 1 March, 2016, pursuant to Schedule 5 of the 2014 legislative reforms, are automatically converted to FRO’s which:

a) give DoHHS full parental rights save for the small comfort that the parents must agree with any long-term decision in relation to the child;

b) remove the ability of the Court to specify with whom the child is living, rather DoHHS can then move those children subject to a Family Reunification Order at any time;

c) can only be made if it does not have the effect of removing a child from a parent’s care for 12 months, calculated cumulatively and retrospectively. However, a further period of 12 months can be permitted if the Court is satisfied that there is ‘compelling evidence that a parent will resume the care of a child permanently during that 12 month period’.

Then, if the Court is prohibited from making a Family Reunification Order, then it will be forced to make a Care by Secretary Order which runs for a fixed period of 2 years and no less and has no conditions for contact. Hence, the possibility of reunification otherwise occurring is drastically reduced.

With these Family Reunification Orders, the CCPPA that those children or parents who have a disability, are victims of domestic violence, have mental health difficulties, those who are Indigenous, those who are homeless, those who have drug or alcohol dependence issue, those who have complex needs, those who live in rural areas will be disproportionately effected by the operation of these new Family Reunification Orders.

The disproportionate impact of the FRO’s on the above described children and their families will be a direct result of the fact that the Children’s Court
cannot take into account that difficult, entrenched issues cannot be overcome quickly and the calculation for the FRO’s will automatically close the door to reunification for thousands of Victorian children with their families.

1) Calculation of time for FRO’s - Example

The calculation is extremely problematic, the 12 and 24 month periods are determined on a cumulative, retrospective basis.

Case Study - Monica & Skye

For example, if a Mother, Monica has her 5 year old child Skye out of her care for 3 months in 2012 (because of mental health issues), 3 months in 2013 (because of domestic violence issues) and for 6 months in 2014 after she suffered a psychotic episode and was admitted to hospital, the Court cannot make an FRO contemplating reunification unless there is ‘compelling evidence that Monica will be able to permanently resume care of Skye within a further 12 month period’. However, that evidence may not be available at that time; the psychiatrists might say that it is unclear as to Skye’s prognosis. The child would then be placed on a Care by Secretary Order for 2 years with no security of court ordered contact about when Skye would see her Mother. Notwithstanding the protective concerns and periods of time Skye has spent out of Monica’s care, with say Monica’s mother, the observations of Monica with Skye were positive and Monica had safely cared for him for at least the first 2 years of his life.

2) Court prohibited from taking into account waiting lists for services when making FRO’s

The other extremely problematic aspect of FRO’s is the lack of availability of services in both the metropolitan areas but more so, in the rural and regional areas. Given the restrictive calculation in FRO’s, waiting lists cannot be taken into account by the Court in determining whether reunification should occur. The CCPPA is aware that the waiting list for many differing services such as family violence counseling, drug/alcohol counseling, parenting support groups ranges from three weeks to six months depending on the region or area in Victoria.

The Cummins Inquiry examined the issue of service provision and Chapter 9 provides a helpful summary of the tensions and complexity of service provision in Victoria. Cummins concludes:

“Once a child has been brought into the statutory system, DHS can improve the effectiveness of its services to improve outcomes for vulnerable children and families. The introduction of differentiated pathways will better recognize the vulnerability characteristics of children and their families requiring
statutory intervention and allow service responses to be tailored accordingly.\textsuperscript{15}

Notwithstanding, the concerns raised by the Cummins Inquiry in 2012, the CCPPA is particularly concerned by the Victorian Auditor-General Report of 2015 which concludes that two of the central DoHHS family support services, Child First and Integrated Family Services (IFS) are failing:

“Child FIRST and IFS are failing to provide effective services for vulnerable children and families. The increasing number of high-priority cases has made IFS less available to families who are ‘at risk’ and qualify for an early intervention response, and to professionals seeking to refer vulnerable children and families.

While the department is aware of the significant increase in the number and complexity of cases being referred to Child FIRST and IFS, it has not systematically analysed this demand or planned for early intervention services that can meet the needs of vulnerable children and families at different stages of their vulnerability. The current funding structure does not reflect the growth in the number and complexity of cases or the impact this has had on service providers’ capacity to meet the needs of vulnerable families\textsuperscript{16}.

Despite the clear evidence of difficulties with services throughout Victoria, the Court can no longer take into account as it can with Supervised Custody Orders, when making FRO’s:

a) the lack of provision of services by DoHHS or availability of services generally;
b) the lack of allocation of a protective worker who is available, ready willing and able to assist the family.

Please see in Appendix C a de-identified, formal complaint made in June, 2015 by a Mother to DoHHS in relation to the lack of availability of protective workers. The CCPPA acknowledges that protective workers do work extremely hard and do a valuable job but they are not adequately equipped on a resource basis to meet the needs of many families, particularly given the complexity of needs and the significant increase in number of families involved with DoHHS. Any period of time when a protective worker is not actively engaged with the family should not then count against the child and parent in terms of reunification.

\textsuperscript{15} Cummins p.182
3) **Amendment to 2015 Bill to rectify deficits in FRO’s**

The CCPPA seeks in the first instance, that time a child spends away from a parent’s care on an Interim Accommodation Order (IAO) not be included in the calculation for a FRO. Whilst an IAO is running there has been no finding of proof, that is there has not yet been a determination by the Court of the DoHHS case against the parent and a final order made. It is therefore unjust to include IAO’s in the calculation of a FRO.

However, if IAO’s must be included in the calculation of FRO’s, then the CCPPA seeks that the 12 month period be deemed to only commence to run when the Court is satisfied that the appropriate services have been implemented by DOHHS and there is a protective worker available for the family. Furthermore, the CCPPA seeks that the 12 month and 24 month periods be continuous not cumulative. The CCPPA also seeks that the Children’s Court retain the ultimate final discretion to extend the 12 or 24 month period if it believes it is in the best interests of the child. Finally, the CCPPA seeks that FRO’s be amended so that the Court can specify with whom the child is living during the course of the FRO so as to create stability for the child.

The CCPPA also seeks amendments to ensure that the DoHHS must comply with the service requirements of s.277 of the Principal Act if DoHHS seek to vary conditions on FRO so as to ensure a right to a fair hearing is maintained for children and their parents. The CCPPA seeks amendments to ensure that children are also represented at any application to revoke FRO’s or vary conditions on FRO’s as is the legal requirement for Supervised Custody Orders.
ii) THE REINSTATEMENT OF S.276 & ITS RELATIONSHIP WITH 2014 ABUSE IN CARE CASE

The CCPPA drew to the attention of the previous government to the case in June, 2014 when two young children in state residential care were subject to sexual and physical abuse. Please refer to Appendix D which includes ABC media articles, neatly summarizing the facts and findings in that case as the full judgment could not be produced to this Inquiry. In that case, the Magistrate, in refusing DoHHS’ application for a protection order, a guardianship order for these children (vesting full parental rights in DoHHS) and finding that the DoHHS had breached its duty of care in relation to these children, she relied principally on two legislative provisions:

a) the court’s ability to make an Interim Accommodation Order in the best interests of the child (s.287) rather than making an final order;

b) the court’s ability to refuse to make a protection order unless it was satisfied as to the provision of services (S.276).

The 2014 legislative reforms, introduced to parliament after the aforementioned case arose in the media, then included, differing from the original central aspects shown to lawyers in May, 2014, the following:

a) a prohibition on the court making an IAO if it could make a protection order (final order) (s.13(1) of the 2014 legislative reforms);

b) the repeal altogether of s.276 (s.17 of the 2014 legislative reforms).

The 2014 legislative reform’s interference the Court’s ability to conduct its proceedings by making IAO’s together with the wholesale repeal of s.276 is evidence that when the jurisdiction of the Court is invoked by DoHHS and the Court becomes the instrument of a constraint upon DoHHS power and decision-making, the role of the Court will be resented and challenged by those whose power is curbed.

The CCPPA also points out that s.276 is a very small, albeit important, aspect of the Children’s Court overall jurisdiction and powers. The CCPPA supports the reinstatement of s.276 but the CCPPA also supports further reinstatement of the broader powers of the Children’s Court.
iii) THE NECESSITY TO REINSTATEMENT THE COURT’S UNFETTERED ABILITY TO MAKE AN IAO

1) IAO’s – a fundamental aspect of court’s management of proceedings

S.262 of the Principal Act sets out the variety of circumstances in which the Court may make an IAO which includes the power of the Court to make such an order if a protection application is filed with the appropriate registrar (s.262(1)(b)) or the hearing by the Court of a proceeding in the Family Division is adjourned (s.262(1)(f)). There is further a very broad power set out in s.263(7) empowering the Court to make any condition on the IAO which the Court considers is in the best interests of the child.

The ability to make IAO’s and also extend such IAO’s is a fundamental day-to-day function of the Court; it is a significant part of its management of protection proceedings. An IAO sanctions who cares for the child and upon what conditions. The ability to make an IAO, that is to determine the placement of children, often on an urgent basis ensures that the Court is able to act in the best interests of the child as is the paramount consideration as set out in s.10(1) of the Principal Act.

The CCPPA is concerned that the new s.262(5A) could effectively deprive the Court of its ability to exercise its statutory function to manage and adjourn protection proceedings. On many occasions, the Court could make a protection order save for the fact that one party, for example, a parent does not consent to certain conditions on such an order and the matter has to be adjourned to a mediation for this issue to be further negotiated and resolved. If the Court is prohibited from adjourning matters and making an IAO to continue to keep the child safe, its ability to exercise such powers as a Court necessary to enable it to exercise its jurisdiction, is fundamentally and inappropriately impeded, and rights of those before the Court, such as the right to a fair hearing as enshrined in s.24 of the Victorian Charter of Human Rights & Responsibilities, are breached.

The CCPPA is not aware of any similar legislative provision directed to any other Court of civil or criminal jurisdiction.

2) The Court’s power to adjourn proceedings

As with any court, the Court must regularly adjourn matters to the next significant court date. As set out above, s.262(f) of the Principal Act gives the Court the power to make an IAO when the hearing of a proceeding in the Family Division is adjourned. The power to adjourn proceedings is found in s.530(1) of the Principal Act. The Court is required, when deciding whether to adjourn a proceeding as it considers necessary or just in the circumstances to have regard to subsections (8) to (10) of s. 530. When read together, the effect of these limitations on the power to adjourn is that the Court should not
adjourn proceedings unless it is the best interests of the child, or there is some other cogent or substantial reason to do so (s.530(10)).

3) **Importance of IAO’s given repeal of Interim Protection Orders**

It is particularly important that the Children’s Court retain the power to make an IAO as the power to make Interim Protection Orders, being shorter protection orders, previously used by the Children’s Court daily to test a course of action, have also been repealed by the 2014 legislative reforms.

iv) **THE RELATIONSHIP BETWEEN FRO’S & S.276**

The CCPPA is concerned that the reinstatement of s.276 is being touted as being able to ensure that the Children’s Court can defer the making of a final order (protection order) unless services have been appropriately sourced by DoHHS for the child and family. Unfortunately, in light of the new legislative framework of protection orders and in particular given the operation of FRO’s, s.276 will not permit the court to so defer the making of that order.

The only way in which the reinstated s.276 as per the 2015 Bill can effectively and meaningfully operate is if FRO’s are amended so that the Court can ultimately take into account any delay in the commencement of services and the availability of a protective worker in the calculation of time.

v) **‘Stability Planning and Permanent Care Project Report’ 2013**

The CCPPA is also aware that a case study of 1000 children in out of home care, entitled ‘Stability Planning and Permanent Care Project Report’ was produced by DoHHS in 2013 and allegedly the results of this case study justify the prohibition on the Court being able to make an order contemplating reunification after a child has been out of a parents care for 12 months or more, calculated cumulatively and retrospectively. To date, such a case study has not been released publicly so that there can be scrutiny of the methodology of analysis and findings. The CCPPA believe that until such time as there has been open consultation and a significant inquiry into outcomes for children in that case study, there should be a retention of the range of protection orders currently available under the Principal Act.
Part II: COURT ORDERED CONTACT – PROTECTING HUMAN RIGHTS OF CHILDREN

i) Cummins Rejection of Care by Secretary Orders

DoHHS submitted, *inter alia*, to the Cummins Inquiry that there should be a collapse all protection orders into two categories: the first, supervision orders which related to children remaining with their parents and secondly, care orders where DoHHS has full parental rights and there are no conditions able to made by the Court as to contact. However, the Cummins Inquiry rejected the DoHHS proposal and recommended the maintenance of the current range of protection orders with some simplification and new terminology. Despite the explicit rejection by the Cummins Inquiry, the 2014 legislative reforms create these new Care by Secretary Orders pursuant to which DoHHS have full parental rights and there are no conditions about to be made by the Court as to contact.

ii) No Conditions for Contact - Care by Secretary Orders – Breach of Human Rights for Children

Currently, Custody to Secretary Orders are made when a child is living out of a parents care. These orders give custody to DoHHS but guardianship remains with the parents. Most importantly, on Custody to Secretary Orders, the Court can currently make conditions about contact for a child with his or her parents or persons significant to the child. That the Court can order such contact accords with Article 8 and 9 of the United Nations Convention on the Rights of the Child (UNCROC), of which Australia is a signatory. The Court can also prohibit contact with certain persons and the Court can determine the length of the Custody to Secretary Orders.

Pursuant to the transitional provisions of the 2014 legislative reforms, Care by Secretary Orders will replace Custody to Secretary Orders which have been in place for two years or more. Automatically at 1 March, 2016, the conditions for contact will lapse and the order will run for a 2 year period and the Court cannot determine otherwise. However, Cummins specifically recommended that

“*Conditions relating to the long-term placement of a child with the Department of Human Services or a third party should be determined by the department, with the exception of a child’s contact with parents and others who are significant in the life of the child. Such contact should be determined by a court.*”

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19 Protecting Victoria’s Vulnerable Children Inquiry (2012, Key findings, Chapter 15.
The CCPPA believes that the inability of the Children’s Court to make conditions for and determine contact for a child on a Care by Secretary Order is one of the, if not the most significant matter before this Inquiry. The human rights and protection of thousands of extremely vulnerable children in out of home care are at risk if the Children’s Court cannot make conditions for contact with a person significant to that child.

In considering the catastrophic outcomes for those on ward-ship orders and generally the lack of sound institutional care even in recent times, contact for a child who is in out of home care, determined at a frequency and in such a manner as in their best interests, with their parent or sibling or grand-mother for example, serves three fundamental purposes:

(a) contact preserves and promotes the identity of the child as per the child’s human rights according to Article 8(1) of the United Nations Convention on the Rights of the Child which compels the state to ‘respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference’. Recently, there has been media publicity about the separation of siblings in out of home care, with only a small number being placed together. Please refer to an article and letter to the editor in The Age in June, 2015, contained in Appendix E. The ability of the Court to order and sanction sibling contact is fundamental to the preservation of those relationships;

(b) contact provides regular interface of the child with a person the child trusts, for e.g. an older sibling or grand-mother, separate from the providers of out-of-home care so that the likelihood of the child reporting any abuse or issues arising in their care, is far higher;

(c) regular contact allows for the possibility of reunification of a child with their parent if the Court determines that this is in the best interests of children. If we regard an existing primary attachment to a parent as something to add to in life, we would need logically to question practices (i.e. DoHHS often seeking to reduce contact and many contested hearings occur in relation to this issue) which seem to suggest an underlying belief that we have to break attachments in order to form a new attachment (for example to a permanent foster carer) 20.

The CCPPA is concerned that with the 2014 legislative reforms as a whole but most particularly in relation to Care by Secretary Orders, there is an unjustifiable relegation of significant, complex, legal decision-making from a specialist Children’s Court to administrative decision-makers who are likely to be, for the most, inexperienced over-worked protective workers who are constrained by issues of resourcing and bureaucratic views of child welfare.

20 Lecture to Swinburne University students, ‘Psychology Working Beside Law in the Best Interests of Children’ Dr. Patricia Brown, Director, Children’s Court Clinic of Victoria, 3/9/2014.
The determination of contact frequency and manner (i.e. supervised or not) is a complex matter as each child’s circumstances is different. Children’s Court magistrates have often heard hundreds of hours of cross-examination on clinical issues such as attachment, the magistrates are very aware of the emotional needs of the child together with the human rights of the child. If the magistrate wants to expand the clinical data upon which they make their judgment, they may call on their own experts at the Children’s Court Clinic for clinical reports\textsuperscript{21}. The determination of frequency and manner of contact is a significant aspect of the Court’s assistance to the child, part of the therapeutic jurisprudence of the Court. It is considered assistance, an exercising of legal judgment through an interpretation of children’s laws, rights and best interests. Such considered assistance is also often clinically informed and takes into account knowledge of the informal operations of DoHHS\textsuperscript{22}. The CCPPA believes it is utterly unacceptable to deny children the right to judicial determination of their contact arrangements and an avenue of redress if such contact does not then occur. DoHHS regularly fail to provide, in the experience of the CCPPA, contact even as court ordered. However, children and their families have the right to bring the breach of court ordered contact to the attention of the Children’s Court. This right is removed by the 2014 legislative reforms and the only avenue of redress for children and their families will have is to VCAT, appealing the administrative decision of DoHHS as to contact. Unfortunately, VCAT is not a court of specialist jurisdiction and furthermore, legal aid funding is unlikely to be available to ensure representation of children and their families in VCAT as opposed to the current funding arrangements for children and their families before the Children’s Court.

\textit{iii) Two year period of Care by Secretary Orders – Unjustifiable Interference with Court’s discretion}

The Court must be able to determine the length of the Care by Secretary Order rather that such orders running automatically for a two year period as created by the 2014 legislative reforms. Each child and family is different and moreover, there are regularly cogent and persuasive reasons to make shorter Custody to Secretary Orders, for example, for the Court to see how a child or parent progresses with services or whether DoHHS can provide a stable placement to the child.

The CCPPA is concerned that Care by Secretary Orders will become a default order within the new limited range of protection orders brought about by the 2014 legislative reforms and that this again, is an unnecessary interference with the Court’s ability to determine the remedy if the child is in need of protection.

\textsuperscript{21} Lecture to Swinburne University students, ‘Psychology Working Beside Law in the Best Interests of Children’ Dr. Patricia Brown, Director, Children’s Court Clinic of Victoria, 3/9/2014.

\textsuperscript{22} Lecture to Swinburne University students, ‘Psychology Working Beside Law in the Best Interests of Children’ Dr. Patricia Brown, Director, Children’s Court Clinic of Victoria, 3/9/2014.
iv) Case Studies – Chloe & Andrea

**Chloe**

Chloe had a lawyer when she was 7 and 8 years from 2011 to 2012.

Then the Cummins Inquiry of 2012 recommended that the age for representation of children on direct instructions be changed from 7 years to 10 years. In 2013, when the Principal Act was changed to reflect this recommendation, and so Chloe ceased to have a lawyer.

Here in 2015, Chloe is almost 11 years old. DoHHS have recently applied to extend the Custody to Secretary Order to which she is subject. The Custody to Secretary Order has already been running for two years.

Currently, Chloe has the right, pursuant to the contact conditions on the Custody to Secretary Order to see her Mum once per week on the weekend, unsupervised. She has been seeing her Mum in this way for over a year without incident but DoHHS want to reduce the contact to once per month because they say reunification is not viable even though the Mother has another older child in her care, and there is a permanent carer who wants Chloe to live with her indefinitely.

Chloe instructed her lawyer recently that she does not want a reduction in contact with her Mother; she loves going to see her with her sister, she wants overnights at the least with her Mum because she instructs:

‘Mum is like me, she gets me, I want to see her more even if I can’t live with her’.

Chloe’s lawyer had to recently explain to Chloe that as of 1 March, 2016, the Court will not be able to control how often she is able to see her Mum, only DoHHS can decide this and they say it should be once a month. Furthermore, the Care by Secretary Order will then automatically run for two years from 1 March, 2016 and her lawyer will not be able to do anything about that either. Chloe said to her lawyer, ‘that’s not right’.

There will be thousands of children in Chloe’s position.

**Andrea**

Andrea 20 years, has a child Ben who is 4 years and is Aboriginal. Andrea had Ben when she was 16 years and herself subject to a Custody to Secretary Order. Ben has been subject to a Custody to Secretary Order for the past two years, having been removed from Andrea’s care because of difficulties with housing, criminal behavior and lack of compliance with DoHHS. DoHHS were effectively the grandparents of Ben.

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23 Pseudonyms have been used to de-identify persons.
However, now in 2015, Andrea has stable housing, is engaged in study and is working well with DoHHS.

Pursuant to the conditions for contact on the Custody to Secretary Order, Ben can have contact twice per week all day with Andrea, unsupervised. The Court has also recently permitted Andrea overnight contact at the home of the paternal grandmother next month. By all accounts, there is a positive attachment and rapport between Andrea and Ben.

DoHHS seek to extend the Care by Secretary Order for a further 2 years and reduce Ben’s contact to once per fortnight.

On 1 March, 2015, unless the Court has fully reunified Ben with Andrea which is unlikely because the Children’s Court is cautious and would likely want to test any slowly overnight contact, the Custody to Secretary Order will automatically be converted to a 2 year Care by Secretary Order with no conditions for contact for Ben and Andrea. DoHHS will then have complete discretion as to the frequency and manner of contact and because DoHHS do not support reunification, despite her progress, contact is unlikely to even be maintained at once per fortnight.

There will be hundreds if not thousands of parents and children in Andrea and Ben’s position.

v) Conditions for Contact on Permanent Care Orders

Cummins also endorsed the Court’s ability to decide frequency of contact on permanent care orders but again, we see that changed. The CCPPA is concerned that the Children’s Court can only order up to four times per year in the first year of the operation of a Permanent Care Order.

Each child, their biological family and their permanent care family are different. It is the right of the child to have contact with their parent, sibling or other person significant to them and that right must be able to be protected by the Children’s Court.

Case Study – Samuel, Bella & her parents

This year, Samuel was placed on a Permanent Care Order to his maternal grand-parents. His Mother, Bella had suffered significant mental health issues from which she had fully recovered but appreciated that stability for Samuel was best served with her parents. In this matter, the Children’s Court ordered contact for Samuel with his Mother once per week. However, under the 2014 legislative reforms, the Court would be prohibited from ordering such contact in the best interests of that child. The CCPPA is concerned this prohibition amounts to a complete and inappropriate fettering of the Court’s role and will likely lead to outcomes which are not in the best interests of children.
The CCPPA seeks that the Children’s Court of Victoria’s power to determine the length of time and to place conditions contact on Care by Secretary Orders, replacing Custody to Secretary Orders, must be reinstated and so too must the Court’s ability to determine frequency of contact, without any cap, on Permanent Care Orders.

The CCPPA also seeks that if a permanent carer dies, a Care by Secretary Order is not the default order, rather there should be a return to court for all parties so that the Court can determine afresh care arrangements for the child, that child having a voice in such determination.
PART III: PERMANENCY & ADOPTION

i) Permanency - 5 years to permanent care applications

If reunification is completely unviable, as in the minority of cases described above, then permanent placements must be sought by DoHHS and permanent care orders ultimately secured.

The Cummins Inquiry found, *inter alia*, in Chapter 9:

“The Inquiry finds that the current average time taken for permanent care orders to be granted, when this is necessary to ensure a child’s safety and wellbeing, is too long. On average, it is five years between a child’s first report and a permanent care order….

The Inquiry considers there are too many barriers to timely, stable, long-term permanent care for vulnerable children. The Inquiry heard barriers included the lack of support for permanent carers, a perception that DHS or court processes are reluctant to fully implement permanent placement planning and the practical consequences of practitioners needing to plan for both reunification and permanency simultaneously*24*.

The CCPPA is concerned that the Children’s Court itself has been blamed for the above delay of five years and for the barriers to permanent care, notwithstanding that this was not the finding of the Cummins Inquiry. Furthermore, the CCPPA is concerned that this delay of five years to permanent care has been used to justify the limited, arbitrary time-frames for FRO’s.

Currently, DoHHS rarely rely on the truncated six month period if a child is out of a parent’s care, together with other factors, to bring a Permanent Care Order pursuant to s.317 of the Principal Act. DoHHS have had this power for many years under the Principal Act enacted in 2005. Cummins makes direct reference to such reforms which have not been relied upon by DoHHS:

“Put simply, the legislative reforms to the CYF Act have not achieved their desired objective of improving the likelihood that permanent care orders are made in a timely manner to improve outcomes for vulnerable children and young people. It should be noted that Chapter 10 makes recommendations addressing the lack of support measures that mean some carers are reluctant to apply for permanent care orders.*25*

Cummins recommended overall that the barriers to permanent care and adoption be removed to achieving the most appropriate and timely form of permanent placements only for children unable to be reunited with their biological family or to be permanently placed with suitable members of the

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extend family\textsuperscript{26}. The removal of such barriers to permanent care involve, \textit{inter alia}, seeking parental consent to adoption and reviewing the situation of every child in care who is appropriate stability timeframes to be determine whether an application for a permanent care order should be made\textsuperscript{27}. Such recommendation does not necessitate the new emphasis in the 2014 legislative reforms on the permanent deprivation of children from their families and removing the court’s powers to consider reunification.

ii) Adoption

Adoption should be a matter of last resort as it involves the severing of the legal ties of parent and child altogether. Unfortunately, in the legislative reforms of 2014 there is a new emphasis on adoption.

Sections 11 and 161 of the 2014 legislative reforms amend the Adoption Act 1984 (Vic) so that it is not just any child subject to a Guardianship Order (to be converted to Long-Term Care Orders) but also children who are subject to Care by Secretary Orders can also be put up by DoHHS for adoption. The CCPPA is concerned that whilst there have been very few adoptions arranged by DoHHS in the past five years, the 2014 legislative amendments in these respects, increase the number of children who could be put up for adoption, notwithstanding issues of parental consent pursuant to s.33 of the Adoption Act. It is important to note however that DoHHS can apply, pursuant to s.43 of the Adoption Act to have the requirement for parental consent dispensed with in certain circumstances, for example (ss.43(1)(f) if the parent ‘has such a physical or mental disability or is otherwise so impaired that the person would be unable to meet the needs of the child’.

Furthermore, the CCPPA is concerned by the list of new ‘permanency’ objectives in section 167 of the 2014 legislative reforms which must be included in a case plan of DoHHS and which the Court is now bound to take into account pursuant to s.276A.

These permanency objectives are listed in this order; Family Preservation, Family Reunification, Adoption, Permanent Care, Long-Term Out of Home Care.

To rank Adoption over and above Permanent Care or Long-Term Out of Home Care is regressive, fails to account for the recommendations of the state and federal forced adoption inquiries and is inappropriate in the Children Youth & Families Act which is, in section 10 of the Principal Act orientated around protecting the family as the fundamental group unit of society.

\textsuperscript{26} Protecting Victoria’s Vulnerable Children Inquiry (2012), Recommendation 23, Chapter 9.
\textsuperscript{27} Protecting Victoria’s Vulnerable Children Inquiry (2012).
PART IV: THE NECESSITY FOR REINSTATEMENT OF S.297

The CCPPA is concerned that s.295 (Matters to be taken into Account in relation to Extension of protection orders), s.296 (Duration of Extension) and s.297 (Limited Extension Pending Other Others) are all repealed by the 2014 legislative reforms.

Most particularly, s.297 enables the Court to direct, pursuant to s.297(1)(f) that DoHHS ‘to take steps to ensure that at the end of the period of the order a person other than the child’s parent applies to a court for an order relating to (i) the custody of the child; or (ii) the custody and guardianship of the child; of (iii) the custody and joint guardianship of the child. Pursuant to s.297(2) if the Court has given a direction to the Secretary under s.297(1)(f), the Secretary cannot apply for an additional extension to that order.

This is an important power for the Court, to be able to direct that DoHS initiate proceedings pursuant to which custody or guardianship to a person in either the Children’s Court or Family Court can be sought.

The importance of Court’s ability to determine the appropriateness of any extension and to limit the extension of orders affecting care and parental responsibility/guardianship is illustrated by a significant case before the Children’s Court in January 2012. This case involved four aboriginal children, whom were all subject to Guardianship to Secretary Orders. They had been living with their foster carer mother, as arranged by DoHHS since 2007 but DoHHS removed those in March, 2011 without any warning and DoHHS put the children in a residential unit with rotating staff. DoHHS removed the children because DoHHS did not agree with the foster carer’s views about school. The Court was extremely critical of the DoHHS decision to remove given that they saw as and called their foster carer their mother. Pursuant to s.297, the DoHS application to extend the children’s Guardianship to Secretary orders was granted but only for a limited time during which the DoHS were directed to bring an application for a permanent care order in favour of the foster carer and so the children were returned to their foster care mother’s care. Under the 2014 legislative reforms, which repeals s.297 altogether, the Children’s Court does not have such powers and therefore will be unable to ensure the best interests of children in similar circumstances.

The CCPPA seeks the reinstatement of s.297 or at the least, the inclusion in the new s.294 as created by the 2014 legislative reforms, of the Court’s ability to limit the extension of a Care by Secretary Order if there is a long-term placement available, by directing that DoHHS support that carer in obtaining parenting orders in the Family Court or Federal Circuit Court, hence creating stability for the child.
CONCLUSIONS:

The CCPPA is concerned that the 2014 legislative reforms fails to protect Victoria’s vulnerable children in the following ways:

a) significantly departing from the recommendations of the Cummins Inquiry, a systematic and thorough review;

b) removing the Court’s ability to determine when reunification can occur over and above arbitrary time-frames, calculated cumulatively and retrospectively regardless of what is in the best interests of the child in his or her individual case;

c) interfering with the Court’s ability to conduct its proceedings and make an IAO in the best interests of the child as it did in the highly publicized case of two children sexually and physically abused in state residential care in 2014;

d) removing the Court’s ability to make conditions for and determine contact frequency on Care by Secretary Orders in breach of the human rights of children, and prohibiting the Court from determining the length of those orders in the child’s best interests;

e) removing the Court’s ability to determine the frequency of contact on Permanent Care Orders in the child’s best interests;

f) removing the Court’s ability to limit DoHHS care in the best interests of the child as per s.297.

The CCPPA supports the 2015 Bill in so far as it properly reinstates s.276. However, the CCPPA seeks further that the 2015 also include reinstatement of the powers of the Children’s Court and protections of the rights of Victorian children and their families, particularly in relation to contact.

Please refer to Appendix F, the CCPPA draft of an amended version of the 2015 Bill including all of the amendments sought in this submission.
APPENDICES*


APPENDIX B: CHAPTER 15 OF THE CUMMINS INQUIRY

APPENDIX C: A MOTHER’S FORMAL COMPLAINT, JUNE 2015

APPENDIX D: ARTICLES FROM THE ABC IN RELATION TO 2014 ABUSE IN CARE CASE, JULY 2014

APPENDIX E: THE AGE ARTICLE & LETTER TO THE EDITOR – SIBLINGS IN CARE, JUNE 2015

APPENDIX F: CCPPA DRAFT AMENDED 2015 BILL.

* (provided as attachments to emailed submission).
Part 5: The law and the courts

Chapter 15:
Realigning court processes to meet the needs of children and young people
Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015

Legal and Social Issues Committee
Submission 13

Report of the Protecting Victoria’s Vulnerable Children Inquiry
Volume 1

January 2012

The Honourable Philip Cummins (Chair)
Emeritus Professor Dorothy Scott OAM
Mr Bill Scales AO
Terms of Reference

To inquire into and develop recommendations to reduce the incidence and negative impact of child neglect and abuse in Victoria, with specific reference to:

- The factors that increase the risk of abuse or neglect occurring, and effective prevention strategies.
- Strategies to enhance early identification of, and intervention targeted at, children and families at risk including the role of adult, universal and primary services. This should include consideration of ways to strengthen the capability of those organisations involved.
- The quality, structure, role and functioning of:
  - family services;
  - statutory child protection services, including reporting, assessment, investigation procedures and responses; and
  - out-of-home care, including permanency planning and transitions; and what improvements may be made to better protect the best interests of children and support better outcomes for children and families.
- The interaction of departments and agencies, the courts and service providers and how they can better work together to support at-risk families and children.
- The appropriate roles and responsibilities of government and non-government organisations in relation to Victoria's child protection policy and systems.
- Possible changes to the processes of the courts referencing the recent work of and options put forward by the Victorian Law Reform Commission.
- Measures to enhance the government's ability to:
  - plan for future demand for family services, statutory child protection services and out-of-home care; and
  - ensure a workforce that delivers services of a high quality to children and families.
- The oversight and transparency of the child protection, care and support system and whether changes are necessary in oversight, transparency, and/or regulation to achieve an increase in public confidence and improved outcomes for children.

The Inquiry will consider the above in the context of differences amongst Victorian children and families, such as metropolitan and regional location.

The Inquiry process

The Inquiry Panel will make recommendations and provide advice to the government regarding the immediate, medium and longer term priorities to strengthen Victoria's family, child protection and associated service systems, and improve outcomes for Victorian children at risk.

The Inquiry will focus on policy and the service system that supports government policy and the Panel will not consider or make recommendations regarding the circumstances of individual cases, nor review individual organisations.

The Inquiry Panel may request input from an Inquiry Reference Group on any matter it deems fit.

The Inquiry Panel will also utilise and reference previous reports and reviews, available literature, interstate and international experience and seek submissions from and consult with:

- Relevant experts;
- Service providers (universal, adult, family and child protection);
- Front line workers and managers;
- Families and children who have personally experienced child protection and out-of-home care services;
- Foster and kinship carers;
- Police and courts; and
- A broad range of government services (including early childhood, education, health and mental health, family violence and housing services).

The Inquiry Panel will provide a Report to the Minister for Community Services by 4 November 2011. The Report will be tabled in Parliament.

(The Inquiry was granted an extension of the reporting date to 27 January 2012).
Chapter 1: The Inquiry’s task

Key points

- The Inquiry was given broad Terms of Reference, making it critical to consult widely throughout Victoria to elicit a diversity of views for improving Victoria’s system for protecting vulnerable children.

- The Inquiry’s consultation processes were designed to maximise the opportunities for individuals and organisations to provide input. Over the course of some 10 months, 225 written submissions were received, 18 Public Sittings across Victoria were convened along with some 126 meetings, site visits and direct consultations, five focus groups and an online survey.

- The Inquiry recognised that consultation with vulnerable children and young people needed to be most carefully conducted. To ensure consultation was carried out in an appropriate manner, the Inquiry took specific actions to hear from children and young people and direct consultations were also conducted with parents and carers. Focus groups and an online survey were used to consult with children and young people who were in care or who had left care.

- A Reference Group for the Inquiry was established to provide advice on key issues, policy options and stakeholder engagement. The Reference Group met three times and greatly assisted the Inquiry to develop an understanding of the service system and the options for improvement.

- Another critical input was the specific consultations held with the child protection workforce, Aboriginal communities and workers representing culturally and linguistically diverse community organisations.

- The views and experiences of those living in rural and regional areas was an important consideration, and the Inquiry also took particular care to hear from those communities.
Chapter 2: Vulnerability and the impact of abuse and neglect

Key points

- Child vulnerability is difficult to measure and describe as it often results from a combination of factors affecting a child, their family and their environment.

- Vulnerability is not static as children and their families can be more or less vulnerable at different times and as different life events occur. However, there are specific factors that can accumulate to make a child more vulnerable, and these factors may change as a child develops.

- The Inquiry provides context for understanding vulnerability and examines the factors that increase the risk of child abuse or neglect occurring. The factors are placed in three categories:
  - parent/family or caregiver factors: history of family violence; alcohol and other substance misuse; mental health problems; intellectual disability; parental history of abuse and neglect; and situational stress;
  - child factors: the age and gender of the child; and health and disability factors; and
  - economic, community and societal factors: social inclusion and exclusion; and social norms and values.

- There is a strong correlation between vulnerability and the risk factors for child abuse and neglect and, in turn, a correlation with other socioeconomic factors. These interconnected factors need to be considered and addressed together.

- Approximately 65 per cent of families using Victorian government-funded early parenting assessment and skills development services have four or more risk factors, including mental illness, family violence, substance use, being teenage mothers, financial stress, and parental disability.

- The Inquiry finds that at the current rate of reporting to statutory child protection services, almost one in four children born in 2011 will be the subject of at least one report before they turn 18.

- The Inquiry finds that vulnerability and the risk factors associated with child abuse and neglect are concentrated in certain areas of Victoria and there is a correlation with social and economic disadvantage. This suggests the most effective focus of government activity is to tackle vulnerability of children and their families through locally based initiatives and services.

- Submissions to the Inquiry have shown the devastating personal costs of abuse and neglect. Estimates prepared for the Inquiry show that the total lifetime financial costs of child abuse and neglect for all abused and neglected children that occurred in Victoria for the first time in 2009-10 is between $1.6 and $1.9 billion.
Chapter 3: Victoria's current system

Key points

- The approaches adopted by governments to child protection issues reflect a wide range of historical, social, cultural and environmental factors.

- Victoria's approach, which is in line with other Australian states and major countries such as the United Kingdom, Canada and the United States, is based on balancing two key principles:
  - the rights and responsibilities of parents to care for their children and their right to privacy; and
  - if abuse or neglect is suspected, the rights of children to protection and the responsibility of government to intervene in the 'private' setting of the family.

- This approach varies from many European countries where there is a greater emphasis on the view that children are best cared for within their family and therefore centre on family unity and working with vulnerable families in caring for children;

- Significant changes have occurred in Victoria's approach to child protection since European settlement including:
  - the view as to what constitutes child abuse and neglect has widened significantly;
  - the role of the State has changed from non-intervention in the family to one of a high level of responsibility for protecting children seen to be at risk of abuse and neglect;
  - significant changes in the pivotal and significant role played by community service organisations; and
  - a growing emphasis on linking family support services to the statutory child protection service.

- The legislation for Victoria's statutory child protection system forms part of a broader framework of laws for Victorian children and young people covering child-focused, family-focused and community-focused laws.
Chapter 4: The performance of the system protecting children and young people

Key Points

- This chapter identifies the key measures for an objective assessment of the current system and observes that the comprehensive and robust data and research on the incidence of child abuse and neglect over time and reducing the impact of child abuse and neglect are not available.

- An overview is then provided of the partial performance information that is available on Victoria’s current system and the observations and recommendations contained in recent reports by the Victorian Ombudsman and the Victorian Child Death Review Committee.

- In this regard the chapter particularly notes:
  - the continued growth in reports of alleged child abuse and neglect over the past decade and the number of children and young people in out-of-home care;
  - the major geographical variations in child protection reports;
  - the recurring nature of interactions with the statutory child protection services for many families and young children; and
  - the unacceptable and growing over-representation of Aboriginal children in the number of Victorian children who are the subject of reports, substantiations, child protection orders and out-of-home care placements.

- Based on the available information and recent reports, a number of key challenges are identified including:
  - the growth, clustered and recurring nature of demand pressures;
  - the need for a broader and more integrated service system for vulnerable families and children;
  - the need for improved and consistent practice quality;
  - the importance of contemporary and appropriate legal processes;
  - the requirement need for an enhanced out-of-home care system;
  - the need to address over-representation of Aboriginal children; and
  - addressing major data and research deficiencies on key dimensions and impacts of Victoria’s services for vulnerable children and families.
Chapter 5: Major issues raised in submissions, Public Sittings and consultations

Key points

- The Inquiry received submissions from a wide range of individuals and organisations involved in different aspects of Victoria’s system for protecting children.

- Hearing from children and young people who have experienced Victoria’s system for protecting children was important to the Inquiry. The Inquiry also heard from the child protection workforce, people living in regional communities and people from Aboriginal communities and culturally and linguistically diverse backgrounds.

- The major issues raised in submissions, Public Sittings and consultations covered the following themes:
  - prevention and early intervention;
  - the role the Department of Human Services plays in the system for protecting children;
  - multidisciplinary approaches to serving the needs of vulnerable children and families;
  - out-of-home care and leaving care;
  - poor educational outcomes for children in the system, particularly those in residential care;
  - Aboriginal-informed programs and delivery of services;
  - culturally and linguistically diverse community issues;
  - child sexual abuse;
  - the adversarial nature of the Children’s Court of Victoria;
  - an industry-wide, professional children protection workforce with greater workforce development;
  - the community sector’s role in case management;
  - the adequacy of funding levels;
  - problems arising from current regulatory and governance arrangements;
  - service capacity and demand;
  - the use of research, data and systems in child protection practice; and
  - regional and remote challenges to service delivery.

- Detailed analysis of specific issues, along with discussion of the major reforms proposed by different submissions are located in subsequent chapters covering the different components of Victoria’s system for protecting children.
Chapter 6: A policy framework for a system to protect vulnerable children and young people

Key points

- Victoria's system for protecting vulnerable children operates in a complex policy and service delivery environment. In order to address this complexity in a coherent manner the Inquiry has adopted an overarching approach for structuring analysis and recommendations.

- The Inquiry's approach articulates and develops recommendations around a system for protecting vulnerable children that is focused on a child's needs.

- A systems approach examines all the factors that impact on the incidence of child abuse and neglect and issues arising from these. It then considers the context of how the service response of Victoria's policies and programs come together, interact with one another and function as a whole to protect vulnerable children and young people. Other approaches have also informed the Inquiry's analysis, including child rights and public health perspectives.

- A focus on a child's needs includes the broad range of support, care and guidance that all children must have in order to develop and thrive. The Inquiry considers that a child's needs go further than ensuring a child's safety from harm. Overall health, physical and emotional development and life skills are also important, so that a child can ultimately function as an independent adult.

- A child's immediate and long-term needs cover safety, health, development, education and the need to be heard. Many of the rights of a child can be seen in the Inquiry's definition of a child's needs, including protection from abuse and harm, provision of care and support, and, depending on the level of a child's maturity, participation in discussions that affect them.

- The Inquiry's eight policy principles provide a contemporary re-statement of the roles and responsibilities of children, families, government and the community. These principles have informed the Inquiry's recommendations for building a more effective system for protecting children.

- Three recommendations are made: introduction of a Vulnerable Children and Families Strategy; an accompanying performance indicator framework, reported on regularly to the public; and the use of area-based policy and program design and delivery for addressing vulnerability and protecting children and young people.
Chapter 7: Preventing child abuse and neglect

Key points

- Victoria has a strong infrastructure of universal services for infants, children and young people, including through maternal and child health, kindergarten and schools.

- While there are high participation rates for maternal and child health and kindergarten the most vulnerable children and families are often excluded from these services.

- There is a lack of definitive research and evidence linking universal services to the reduction of abuse and neglect, however, the Inquiry makes the assumption that increasing participation in universal services such as maternal and child health, kindergarten and schools, will have an overall impact on reducing abuse and neglect.

- Within the non-stigmatising nature of universal services there are further opportunities for preventative activities for vulnerable children and families.

- Antenatal services are well placed to identify and reduce the risks of child abuse and neglect.

- Parental alcohol abuse is a significant risk factor for child abuse and neglect.

- Further efforts to prevent child abuse and neglect need to include the:
  - targeting of future government investment in the early years to communities that have the highest concentration of vulnerable children and families;
  - provision of early support to vulnerable pregnant women and infants;
  - implementation of strategies to encourage greater participation by the families of vulnerable children in universal services;
  - examination of current funding and infrastructure arrangements for services such as kindergartens, maternal and child health services and community playgroups that operate in locations where there are high numbers of vulnerable children and families;
  - development of a consistent statewide approach for antenatal psychosocial assessment;
  - development of a universal parenting information and support program that can be delivered by maternal and child health services and schools in communities with high concentrations of vulnerable children and families, at key ages and stages across the 0 to 17 age bracket; and
  - development of a wide-ranging education and information campaign targeted to parents and caregivers for all school-aged children to prevent child sexual abuse.
Chapter 8: Early intervention

Key points

- Evidence from overseas shows that early intervention programs – when well designed and resourced – can be an effective method of improving outcomes for vulnerable children and young people, including reducing the risk of child abuse and neglect. Studies have also shown early intervention can be a more cost-effective investment in the long term than later interventions.

- Victoria has a substantial range of early intervention programs with the potential to support vulnerable children, young people and their families. These include early childhood programs, school supports, health services, community-based family services and specialist adult services. However, these programs do not combine to form a comprehensive, coherent and coordinated system of early interventions that address the diverse needs of vulnerable children and their families.

- Supporting vulnerable children and young people should be part of the core business of services in each of these sectors. While there are a number of promising practices, they are varied, not coordinated and not consistently adopted. The Inquiry recommends additional investment to support services to identify and respond to risk factors for child abuse and neglect.

- Existing data systems and practices within services do not allow Victoria to identify all vulnerable children and young people who could benefit from early intervention services.

- Child FIRST and the local Alliances of family services provide a basis for developing an accessible entry point to an integrated network of services to meet the full range of needs of vulnerable children and their families. However, the capacity of Alliances to deliver services that meet local needs is being undermined in several catchments because of a lack of suitable providers and because Alliances are not undertaking effective service planning.

- The Inquiry recommends that consistent governance arrangements be established across catchments to strengthen Alliances’ accountability for their performance. Accountability arrangements should be strengthened further by ensuring the Department of Human Services’ funding agreements with Alliance lead agencies clearly specify the community service organisation’s role and responsibilities, and include appropriate accountability and performance measures.

- There is an opportunity to expand upon the existing Alliances of family services and statutory child protection services to develop broader, more coherent Child and Family Service Networks encompassing specialist adult services, health services and targeted programs linked to universal services. This would support the provision of an integrated package of services that meets the full range of needs of vulnerable children and their families.

- The Inquiry recommends that the legislation governing relevant services should establish the accountabilities and responsibilities of services to act in the best interests of children and young people, and to prioritise service delivery to vulnerable children, young people and their families.

- Specialist adult services and health services should be supported to develop child-and family-sensitive practices that address the needs of vulnerable children and their families.
Chapter 10: Meeting the needs of children and young people in out-of-home care

Key points

- Currently around 5,600 Victorian children and young people are placed in various forms of home-based and residential care.

- The major trends and structure of Victoria’s out-of-home care include:
  - an annual growth over the past decade of 4 per cent in the number of children and young people in care driven by the increase in the time children and young people are spending in care;
  - Aboriginal children and young people now represent one in six Victorian child and young people being placed into care;
  - one in eight Victorian children and young people entering out-of-home care are infants;
  - a significant expansion in the proportion of kinship care placements offsetting a decline in foster care placements;
  - marked regional variations in the proportion of children and young people being placed in care; and
  - 30 per cent of children and young people placed in care in 2009-10 had been placed in care previously.

- There are major and unacceptable shortcomings in Victoria’s out-of-home care system including placement instability and poor educational outcomes for children and young people in out-of-home care.

- The Government should, as a matter of priority, establish a comprehensive five year plan for Victoria’s out-of-home care system. The core objectives of this plan should be to:
  - reduce over time the growth in the number of Victorian children and young people in out-of-home care to the overall growth in Victorian children and young people;
  - improve the quality and stability of out-of-home care placements; and
  - improve the education, health and wellbeing outcomes for children and young people placed in care, including by ensuring their therapeutic needs are met.

- Implementation of this plan will require a comprehensive and sustained long-term strategy and significant investment.
Chapter 11: The experiences of children and young people when leaving out-of-home care

Key points

- The Inquiry was asked to investigate the quality, structure and functioning of out-of-home care including transitions and improvements to support better outcomes for children and families.

- Around 400 young people leave out-of-home care annually following the expiry of their guardianship or custody order. The limited evidence and research available suggests a significant proportion experience major issues in the transition to independent living and have long term negative life outcomes.

- The Children, Youth and Families Act 2005 included for the first time a legislative responsibility for the Secretary of the Department of Human Services for the provision of transition and post-care services to assist the transition of young people under the age of 21 years to independent living.

- In recent years the Department of Human Services has developed and implemented specific leaving care and post-care services and programs and further funding was allocated in the 2011-12 Budget, including provision for the new Leaving Care Employment and Education Access Program.

- However, contemporary and comprehensive research and information on the experiences of Victorian young people leaving care and their access to, and impact of, leaving care and post-care services are not available.

- The limited research available suggests three factors are critical to achieve better post out-of-home care outcomes: improving the quality of care; a more gradual and flexible transition from care including access to stable accommodation arrangements; and more specialised after-care supports.

- A number of submissions to the Inquiry referred to the need for the legislative provisions to reflect the broader community trend where the majority of young people remain with their parents until their early 20s.

- The Inquiry makes a number of recommendations including:
  - the urgent need to gather information on current post-care experiences and the access to and impact of current arrangements;
  - the Secretary of the Department of Human Services should have the capacity to extend out-of-home care placements on a voluntary and needs basis to young people beyond 18 years;
  - enhancing current leaving care arrangements including stable initial accommodation arrangements and the level, range and integration of leaving care and post-care assistance; and
  - consideration in the medium-term of extending post-care assistance on a needs basis to the age of 25 years.
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Chapter 12: Meeting the needs of Aboriginal children and young people

Key points

- The history of Aboriginal communities in Victoria directly impacts on Aboriginal children and families today. Past actions by government and non-government agencies have impacted negatively on Aboriginal families and the result is a continuing experience of trauma in the Aboriginal community.

- The Inquiry has found that outcomes for vulnerable Aboriginal children and their families are generally poor and significant improvement is required in the performance of systems intended to support vulnerable Aboriginal children and families. There is a need to develop specific Aboriginal responses to identify different ways to improve the situation of vulnerable Aboriginal children in Victoria.

- Improving outcomes for Aboriginal children requires active, focused and intense effort across all areas of government activity and within Aboriginal communities. The Inquiry endorses the Victorian Indigenous Affairs Framework and associated structures as the primary mechanism to drive action across government on the broad range of risk factors associated with Aboriginal children being at greater risk of abuse and neglect. Building on the Inquiry’s earlier recommendation for area-based policy and program design, the Inquiry recommends more detailed monitoring of the Victorian Indigenous Affairs Framework should be developed and reported on at the operational level.

- As many vulnerable Aboriginal children and families will continue to receive a range of services from mainstream providers, Aboriginal cultural competence should become a feature of the Department of Human Services’ standards for registering community service organisations. Additionally, culturally competent approaches to family and statutory child protection services for Aboriginal children and young people should be expanded.

- The numbers of Aboriginal children involved with Victoria’s statutory child protection services and out-of-home care systems continues to rise and is unacceptably high. As part of the recommended Commission for Children and Young People, the Inquiry recommends the creation of a dedicated Aboriginal Children’s Commissioner or Deputy Commissioner, to bring an increased focus to improving outcomes for vulnerable Aboriginal children in Victoria across all service systems.

- The adoption of a comprehensive 10 year plan for delegating the care and control of Aboriginal children removed from their families to Aboriginal communities is also recommended. Such a plan will enhance self-determination and provide a practical means for strengthening cultural links for vulnerable Aboriginal children.
Chapter 13: Meeting the needs of children and young people from culturally and linguistically diverse communities

Key points

- Victoria’s multicultural society consists of more than 230 countries from around the world. Some migrant families experience challenges in parenting, and in trying to adapt to Australian norms and laws.

- Research indicates that there are cultural, structural and service-related barriers that ethnic minority families experience when they migrate to a new country. Migrants can experience hardships and stressors that can impinge on their ability to provide good care for their children.

- These factors are compounded by the challenges of parenting in a new culture. Many culturally and linguistically diverse families may not understand or necessarily agree with all of Australia’s law and norms about gender equality, child rearing and parenting.

- There is a lack of data about culturally and linguistically diverse children and young people and their interaction with Victoria’s system for protecting children.

- It is important to develop culturally appropriate policies and programs that uphold the rule of law in Victoria and Australia, yet recognise the importance of the values, beliefs, culture and background of different communities. There is a need to better integrate migrants through positive parenting and education programs about Australian culture and norms.

- Victorian child protection services intervene when child abuse and neglect is suspected. It is important that the family services and child protection workforce is culturally competent when managing these interventions with culturally and linguistically diverse communities.

- The Inquiry recommends that data be collected to help determine whether services currently provided are culturally appropriate. Recommendations are also made about including issues relating to culturally and linguistically diverse children in the Council of Australian Governments’ national framework.
Chapter 14: Strengthening the law protecting children and young people

Key points

- Abused children are not adequately protected as they should be by the law. The crimes of child physical abuse and child sexual abuse should be recognised in the Children, Youth and Families Act 2005, and processed, as the crimes they are.

- Child abuse is a 'hidden crime', in that it is under-reported and under-prosecuted.

- There should be a stronger legislative link between the child protection and criminal justice responses to child physical and sexual abuse and serious neglect. Forensic child protection and Victoria Police investigators should be continuously trained in interviewing and evidence gathering, particularly when seeking evidence from a child or young person.

- The available data in Victoria does not provide a clear picture of the factors that influence the progress of each stage of the criminal justice process. This impedes the reporting and prosecution of child physical and sexual abuse and neglect.

- The mandatory reporting scheme is an important part of the legal framework protecting children from abuse. It is important that all mandated groups in the Children, Youth and Families Act 2005 are progressively gazetted to report abuse, that they are appropriately trained, and that the system is adequately resourced to ensure it can cope with an increase in reports. Mandatory reporting should continue to be evaluated, preferably at both the national and state levels. There should also be ongoing monitoring of the Working with Children Act 2005 to ensure organisations are complying with the legislation.

- State prescribed criminal reporting provisions, such as a reporting duty for ministers of religion and members of religious organisations, can overcome private and institutional hurdles to the reporting of child abuse.

- A formal investigation by government into how to best address criminal abuse of children in Victoria by religious personnel is justified and is in the public interest. Any such investigation should possess the necessary powers to compel the attendance of witnesses and the production of documentary and electronic evidence.

- Caution should be exercised in relation to the enactment of any new 'failure to protect' offence in relation to family members, particularly in situations of family violence. Consideration should be given to the better application and enforcement of section 493 in the Children, Youth and Families Act 2005.

- Children and young people aged under 18 should be capable of being the subject of a protection application under the Children, Youth and Families Act 2005.

- There is room to improve the interaction between the Commonwealth family law system, the State child protection system and State family violence laws including the way in which agencies and services interact with each other.

- Filicide is a most grievous crime and particularly so when committed as an act of spousal punishment or spousal revenge. The Inquiry considers that the appropriate sentencing standard for filicide committed with the intention of punishing the child's other parent or of denying that parent contact with the child or for spousal revenge is life imprisonment with no minimum term. There is a need to study the various cases across Australia to discern the factors likely to lead to acts of filicide and the early warning signs that can alert the relevant professionals who interact with parents and caregivers.
Chapter 15: Realigning court processes to meet the needs of children and young people

Key points

- Where a child is at the centre of a legal process, the law and its institutions should encourage the child's voice to be heard as much as possible. This can be done by formally recognising the child as a party to the protection proceedings in their own right, ensuring they are heard in all proceedings either through the child providing instructions to an appropriately trained and accredited children's lawyer or, where they do not have the capacity to provide instructions, by an appropriately trained and accredited lawyer representing the best interests of the child. However, a child should not be required to attend court unless the child has the capacity to understand the proceedings and expresses a desire to attend court.

- There are immediate opportunities to improve the court experience of children and their families by decentralising the Melbourne Children's Court and by improving existing court facilities to be more child and family friendly.

- The current legal processes under the Children, Youth and Families Act 2005 should be modified to promote a more collaborative problem-solving approach to protection applications with a focus on child-centred agreements. The Inquiry supports in-principle three of the five options raised in the Victorian Law Reform Commission's Protection Applications In The Children's Court: Final Report 19. These are Option 1, which proposes new structured and supported processes for achieving appropriate child-centred agreements; Option 2, which proposes a range of legislative reforms with respect to the protection application processes, case docketing and child legal representation; and Option 4, which proposes that the Victorian Government Solicitor's Office represent the Department of Human Services in protection matters.

- The Inquiry has not commented on every recommendation by the Victorian Law Reform Commission but has focused on those reforms the Inquiry considers fundamental to realigning current court processes to meet the needs of children. In some instances, the Inquiry has disagreed with, or proposed a modification to, the approach proposed under the Victorian Law Reform Commission's reform options.

- There are a number of protective orders available under the Children, Youth and Families Act 2005 that serve different purposes but may lead to overlapping outcomes. Some orders are rarely used under the Act. The current range of orders should be reviewed with a view to removing those orders that are rarely used and consolidating those that may produce overlapping outcomes. The goal should be simpler and more easily accessible statutory child protection laws.

- A specialist Children's Court should be retained in the statutory child protection system. The scope and purpose of its role should be focused on: determining the lawfulness of the State's intervention in the life of a child; the appropriate remedy once the court has determined a child is in need of protection; and the conditions that affect a child's right to contact with their parents and others who are significant in the life of the child. The Court should be established and continued under a separate Children's Court of Victoria Act.

- Conditions relating to the long-term placement of a child with the Department of Human Services or a third party should be determined by the department, with the exception of a child's contact with parents and others who are significant in the life of the child. Such contact should be determined by a court. Any disputes over departmental decisions should be subject to ordinary administrative review processes.
Chapter 16: A workforce that delivers quality services

Key points

- The child protection and family services workforce operates in a complex environment, dealing with some of the most difficult and complex cases of serious child abuse and neglect.

- Different components of the workforce contribute to protecting vulnerable children. They include:
  - a government workforce that is primarily focused on statutory child protection;
  - a community sector workforce that delivers a range of out-of-home care and intensive family services;
  - volunteers and households that support the family services activities and provide the vital foster and kinship care segments of the out-of-home care system; and
  - a wide range of other professions that interact with vulnerable children.

- While there are different issues affecting these components of the workforce, there is a set of key common issues that affect the workforce, including:
  - the need for increased skills and professional development;
  - the need to address issues with recruitment and retention; and
  - the need for clear pay structure and career pathways.

- There are a number of ongoing policy developments that may address some of the issues affecting the child protection and family services workforce, including reforms to the Department of Human Services structure of statutory child protection services and the equal remuneration case currently before Fair Work Australia.

- The Inquiry considers that a number of workforce issues can be addressed by improving the professionalisation of the child protection workforce via a process that is qualification-led.

- Two recommendations are made in relation to the education and professional development needs of the workforce, including the need for a training body to oversee development of an industry-wide workforce education and development strategy and the need for greater cultural competence training.
Chapter 17: Community sector capacity

Key points

- Community service organisations have long played and continue to play a critical role in responding to and providing services to vulnerable families and children.

- Reflecting the changes over time in Victoria’s approach to vulnerable children and families, the Government provides funding and is dependent on community service organisations to deliver critical services and interventions. In particular, community service organisations play the major role in providing out-of-home care and family services.

- Over time, government funding to community service organisations has increased significantly and represents the dominant source of funding for many community service organisations. The current pattern of Department of Human Services funding indicates a small number of community service organisations receive a significant proportion of the funding for family services and placement and support services, while a large number of community service organisations receive relatively small amounts of funding.

- The Inquiry considers that the structure and capacity of community service organisations needs to be strengthened if Victoria’s approach to vulnerable children and families is to be improved and the broad strategic directions outlined in this Report are to be effectively implemented.

- The Inquiry also considers that the Government should adopt an updated and clearer framework for its relationship with the community sector in line with its policy leadership and accountability role.
Chapter 18: Court clinical services

Key points

- A statutory clinical service that provides expert advice during child protection proceedings has an important role in assisting vulnerable children and their families, carers and decision-makers to understand the child’s health and wellbeing needs during a traumatic time in their lives.

- There is an ongoing need for a statutory clinical service; however the current clinical service model should be reformed. The current governance, quality assurance, structure, statutory processes and location of the Children’s Court Clinic does not meet the needs of vulnerable children and their families. In particular, the current model is failing children and families from regional Victoria.

- There are divided views as to the quality of current clinical assessments and the performance of the current Children’s Court Clinic, but there is insufficient research or data to support an Inquiry finding on this aspect.

- A newly created statutory clinic should consist of a clinic board of eminently qualified professionals with a range of expertise to coordinate and monitor the provision of future clinical services. The Inquiry considers the new board should determine the most effective arrangements for the delivery of services.

- The ultimate goal is for the new statutory clinical service to undertake a broader role within the statutory child protection system by assisting the Department of Human Services and parents to reach agreement early on proposed interventions by the Department of Human Services without first requiring a court order.

- As an immediate priority a statutory board should be established and responsibility for the current Clinic transferred from the Department of Justice to the Department of Health. The current Clinic should be physically relocated from the Melbourne Children’s Court to another location to remove it from a litigious environment to one that is more child and family friendly.

- Under the guidance of the new board, there should be an increase in the level of statutory clinical services provided in rural and regional Victoria either at the child’s home or from easily accessible, child-friendly facilities.
Chapter 19: Funding arrangements

Key points

- There is evidence of increasing demand for services in all areas of statutory child protection and family services. These increases have been driven by a variety of longer term factors, including changes to the Children, Youth and Families Act 2005, a broadening of the definition of abuse and neglect, the introduction of mandatory reporting, as well as population increases.

- Funding for statutory child protection and family services is not explicitly linked to past or projected demand for these services.

- The Inquiry has identified a strong geographical component to vulnerability in Victoria. While the Department of Human Services already allocates funding based on a formula that incorporates a measure of disadvantage, there is no consistent approach to the regional distribution of statutory child protection and family services funding.

- The current system of funding community service organisations is predominantly service-performance based, where community service organisations are provided with funding to provide a level of services output, based on a uniform unit price.

- Community service organisations have requested more flexibility in their funding, advocating for some form of outcomes or client-centric funding.

- The flexibility of service funding and a fair and appropriate basis for service funding are critical to the future effective, innovative and robust provision of services to vulnerable children and families.
Chapter 20: The role of government agencies

Key points

- Tackling vulnerability before it manifests in child abuse and neglect requires a sustained and dedicated level of effort from all relevant government agencies. Stronger accountability mechanisms are required to ensure these agencies treat the often complex and challenging needs of vulnerable children as a priority.

- Where child abuse or neglect is reported to the Department of Human Services or a child is in the care of the State, agencies must not abrogate their responsibilities for those children to the Department of Human Services.

- Departments and agencies must move beyond vague and imprecise notions of joined-up government and work together more effectively if there is to be a strategic and effective response by government to the needs of vulnerable children. This requires a new sophisticated level of inter-agency coordination.

- This chapter suggests two distinct principles for the role of government agencies:
  - each department or agency needs to be held accountable for the delivery of their particular services to vulnerable children and young people; and
  - the relevant departments and agencies need to work together to coordinate activities, where it makes sense, and is achievable.

- A number of recommendations are made in this chapter to address these two key messages and ensure government agencies better meet their commitments to vulnerable children. The key issues addressed in the recommendations include:
  - better accountability can be achieved by a Commission for Children and Young People reporting publicly on government performance in addressing vulnerability;
  - the Department of Education and Early Childhood Development should be given responsibility for the educational outcomes of children in out-of-home care;
  - the Department of Health should be given responsibility for the health outcomes of children in out-of-home care;
  - better agency accountability can be achieved with the oversight of a specific purpose Committee of Cabinet on Children's Services;
  - coordination of government services can be improved with a stronger and clearer role for the Children's Services Coordination Board, including coordination of area-based activities; and
  - the Victorian Children's Council needs its role strengthened and clarified to ensure that it is effective.
Chapter 21: Regulation and oversight

Key points

- Regulation and oversight are essential functions in the system for protecting Victoria’s vulnerable children and young people. External scrutiny of service delivery can provide independent assurance that services are well managed, safe and fit for purpose, and that public money is being used properly.

- The Department of Human Services’ (DHS) current approach to regulating community service organisation (CSO) performance does not do enough to identify, address and prevent the major and unacceptable shortcomings in the quality of out-of-home care. In seeking to reduce the regulatory burden on CSOs, DHS has failed to maintain an adequate level of external scrutiny of CSO performance. In particular, it is unacceptable that:
  - all CSOs are subject to the same cycle of one independent external review every three years, regardless of their performance; and
  - there is no program of unannounced inspections to act as a quality assurance mechanism to prevent incidents or concerns from arising.

- The Inquiry recommends that DHS should adopt a risk-based approach to the regulation of CSO performance.

- Given that DHS relies on CSOs to deliver services that are central to DHS achieving its core objectives, the Inquiry recommends that DHS retain responsibility for the regulation and monitoring of the CSOs, provided this function is independent and subject to independent oversight.

- The Inquiry considers there to be insufficient independent oversight of Victoria’s system for protecting vulnerable children. The Child Safety Commissioner has limited powers and functions compared with commissioners and guardians in other states and territories.

- The Inquiry recommends that the Government establish a Commission for Children and Young People. The new Commission would oversee and report to ministers and Parliament on all laws, policies, programs and services that affect the wellbeing of vulnerable children and young people. The Commission would replace the existing Child Safety Commissioner, but retain the Commissioner’s current roles and functions. The Commission would also assume the powers currently granted to the Ombudsman under section 20 of the Children, Youth and Families Act 2005.

- The data reported by DHS and external agencies do not provide the basis for a comprehensive assessment of the performance of child protection, out-of-home care and family services, in particular with regard to their effect on the incidence and impact of child abuse and neglect. The Inquiry recommends improved public reporting to help ensure government agencies are accountable for their actions, and to support continuous improvement in individual services and across the sector.

- The Child Safety Commissioner and the Victorian Child Death Review Committee make an important contribution to overseeing the system through reviewing child deaths. However, the Inquiry recommends that the current two-stage review arrangements be streamlined into a single process undertaken by the proposed Commission for Children and Young People.
Chapter 22: Implementation and prioritisation

Key points

- The Inquiry has made 90 recommendations on measures to reduce the incidence and negative impact of child abuse and neglect in Victoria in ten major system reforms areas.

- The reform areas are:
  - a Vulnerable Children and Families Strategy – a whole-of-government vulnerability policy framework with the objective of focussing on a child’s needs (overseen by government through a Cabinet sub-committee);
  - clearer departmental and agency accountability for addressing the needs of vulnerable children, in particular, health and education;
  - an expanded Vulnerable Children and Families Services Network;
  - an area-based approach to co-located intake with clear accountability for decision making on statutory intervention;
  - strengthening the law and its institutions;
  - out-of-home care funding and services aligned to a child’s needs;
  - improved community sector capacity, with clearer governance and regulatory framework;
  - a strengthened regulatory and oversight framework;
  - a plan for practical self-determination for guardianship of Aboriginal children in out-of-home care and culturally competent service delivery; and
  - a sector-wide approach to professional education and training and a greater development and application of knowledge to inform policy and service delivery.

- The recommendations and reforms will generate significant change in the broad systems to protect Victoria’s children. What is important in reform of this nature is to maintain a balance between the changes that will drive and sustain the reform efforts while attending to the areas identified by the Inquiry as requiring immediate or urgent attention.

- The implementation of these recommendations require many parts of the Victorian Government and government funded community service organisations to work together and share responsibility to protect Victoria’s vulnerable children.

- It will be important that the impact of the recommended system changes are monitored, evaluated and reported upon.
Chapter 23: Conclusion

Child abuse and neglect have a devastating impact on the lives of children. The Inquiry has presented system-level evidence of the extent of the problem but has also heard the experiences of children and young people involved with child protection, their families and foster and kinship carers. The Inquiry has also heard from adults who experienced state care as children.

The Inquiry has concluded that prevention and early intervention are essential to avoid the long-lasting permanent trauma and poor outcomes for many individuals who experience abuse or neglect. At a system level, the Inquiry has also concluded that, over time, it is more effective for government to invest in prevention and early intervention, than to continue to increase investment in child protection and family services or to absorb the lifetime costs to society of child abuse and neglect.

The past 20 years have seen a large number of reviews and inquiries seeking improvements in the policy and service delivery framework put in place by government for protecting Victoria’s vulnerable children. The Victorian Ombudsman has presented a number of major reports to Parliament highlighting concerns about various aspects of statutory child protection services and the provision of out-of-home care. Significant changes have been made over that period, but changes have also been made incrementally in response to issues. It is tempting to see each issue as requiring a separate solution. This Inquiry had the benefit of a wide Terms of Reference which enabled identification of common risk factors, examination of a wide range of pertinent issues and facilitated a holistic response.

The number of reports of concern made about children and young people to the Department of Human Services (DHS) stands at 55,000 for 2010-11 and is expected to continue to rise.

The number of children and young people in out-of-home care has also increased over the past decade and this has been driven by an increase in the amount of time children are spending in care when it is not safe for them to return to their birth families.

Child abuse and neglect can occur in any family in Victoria, but the Inquiry has found that child vulnerability is particularly visible in certain geographic areas, especially in regional areas. Additionally, Victoria’s Aboriginal children and young people have markedly higher interactions with the statutory child protection system.

The Inquiry has heard that vulnerable children and their families from culturally and linguistically diverse backgrounds have difficulty interacting with family service providers and statutory child protection services when their cultural and religious differences are not understood.

The extent of their involvement with child protection and family services is not known, due to a lack of data. This has inhibited the development of recommendations by the Inquiry in relation to children, young people and families from culturally and linguistically diverse backgrounds.

The Inquiry considers that the recommendations set out in this Report will equip Victoria’s system for protecting children to become:

• More focused on meeting the needs of children and young people in Victoria’s system for protecting children, including those placed in out-of-home care, through family services and through specialist adult services whose clients may be parents and, importantly, how their needs and views are addressed through processes related to the Children’s Court;

• More responsive to families needing parenting support and guidance;

• More forward-looking over time as the Vulnerable Children and Families Strategy is developed, new information systems are developed and better data is collected and demand-based funding models are developed and implemented;

• More accountable, with the responsibilities of government agencies, and as the role of NGOs and the focus and function of a broader range of government-funded services in reducing and addressing vulnerability becoming clearer. A new Commission for Children and Young People holds key agencies to account for their performance; and

• More transparent as more information is released publicly by DHS about the child protection system.

The Report concludes that there has been a significant failure to recognise the crimes of child physical and sexual abuse. The Report shows the way forward for this recognition, for holding perpetrators responsible, and for the protection of vulnerable children from these crimes.
The 10 major system reforms (see Figure 23:1) contain major changes to address the contributing factors to child abuse and neglect and the potential for increased prevention through effective, coordinated early interventions. This requires a whole-of-government strategic approach, driven at Cabinet level by government, supported by a strengthened Children's Services Coordination Board and overseen by a Commission for Children and Young People. The implementation of the Inquiry's recommendations requires many parts of Victorian Government, its departments and agencies, and government funded CSOs to work together and share responsibility to protect Victoria's vulnerable children.

Figure 23.1 Major system reforms for protecting children through a system that prevents and responds to child abuse and neglect

<table>
<thead>
<tr>
<th>System goals</th>
<th>Major system reforms</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Reducing the incidence of child abuse and neglect</td>
<td>1. Vulnerable Children and Families Strategy: A whole-of-government vulnerability policy framework with the objective of focusing on a child’s needs (overseen by government through a Cabinet sub-committee)</td>
</tr>
<tr>
<td>2. Reducing the impact of child abuse and neglect including addressing the immediate and long-term needs of the child: * Safety * Health * Developmental * Education and * To be heard</td>
<td>2. Clearer departmental and agency accountability for addressing the needs of vulnerable children, in particular, health and education</td>
</tr>
<tr>
<td>3. Over time reducing the growth in the number of children and young people in out-of-home care into line with the overall growth of Victoria’s population of children and young people</td>
<td>3. Expanded Vulnerable Child and Family Service Networks</td>
</tr>
<tr>
<td>4. Clear and transparent public accountability</td>
<td>4. An area-based approach to co-located intake with clear accountability for decision making on statutory intervention</td>
</tr>
<tr>
<td></td>
<td>5. Strengthening the law and its institutions</td>
</tr>
<tr>
<td></td>
<td>6. Out-of-home care funding and services aligned to a child’s needs</td>
</tr>
<tr>
<td></td>
<td>7. Improved community sector capacity with a clearer governance and regulatory framework</td>
</tr>
<tr>
<td></td>
<td>8. A strengthened regulatory and oversight framework</td>
</tr>
<tr>
<td></td>
<td>10. A sector-wide approach to professional education with greater development and application of knowledge to inform policy and service delivery</td>
</tr>
</tbody>
</table>
The recommendations proposed cover a spectrum of areas, ranging from strengthening early intervention services, to more collaborative problem solving approach to protective concerns in the Children’s Court, to the way reports of concern about children are handled and referred by DHS, to funding mechanisms for out-of-home care service delivery and workforce reforms.

For these reforms to be successful, they will rely on the foundations found in all effective service systems. These foundations include strong leadership, clear accountability mechanisms for reporting on progress against objectives, adequate levels of resourcing and a skilled and stable workforce.

Skilled staff are required not only in child protection services but also in related family, health and legal services and sectors. An effective workforce is supported through change or reform, provided with appropriate professional education and an operating environment that promotes collaboration.

The reforms will also require the willing collaboration of community service organisations with enhanced capacity to engage with the new service environment outlined in the recommendations.

Collaboration is also a major focus for how DHS and other departments must operate in the future. All agencies and departments across government that provide services to children and families must accept their particular responsibility and be held to account for the ways in which they work together to more effectively address the needs of Victoria’s vulnerable children.

Victoria relies heavily on its community sector for delivery of a wide range of services for vulnerable children and young people. A future system for protecting children will build community sector capability and provide a clear and transparent accountability and regulatory framework to promote responsive and high quality service delivery.

The Inquiry observed first-hand the dedication and commitment of those individuals involved in working with vulnerable children and their families, sometimes on a voluntary basis, to improve their experiences and chances in life. These individuals reflect the powerful role that community and families can play in supporting and protecting our vulnerable children.

The resilience of our communities and family and friendship networks can ultimately make the difference between a family that is struggling to meet the needs of its children, and one that can cope with and manage what might seem like intolerable and insurmountable challenges. The Inquiry recognises the role of the community and emphasises that the nature of child abuse and neglect is a problem that society and government share responsibility for addressing.

The problems seen by DHS and statutory child protection services are an indicator of the complex difficulties experienced by some Victorian families that cut across social, economic and cultural boundaries. Successfully addressing these issues will demand commitment by the many other portfolios of government including health, education, justice and housing. These problems cannot be tackled solely by the child protection system. The recommendations contained in this Report acknowledge this and propose a more holistic framework for better responding to child abuse and neglect.

At the heart of the Inquiry’s recommendations, is a focus on meeting the needs of Victoria’s vulnerable children and young people. Adopting such a focus will be critical for ensuring the success of a lasting reform agenda to address child abuse and neglect of Victoria’s most vulnerable citizens.
Chapter 15: Realigning court processes to meet the needs of children and young people

Key points

• Where a child is at the centre of a legal process, the law and its institutions should encourage the child’s voice to be heard as much as possible. This can be done by formally recognising the child as a party to the protection proceedings in their own right, ensuring they are heard in all proceedings either through the child providing instructions to an appropriately trained and accredited children’s lawyer or, where they do not have the capacity to provide instructions, by an appropriately trained and accredited lawyer representing the best interests of the child. However, a child should not be required to attend court unless the child has the capacity to understand the proceedings and expresses a desire to attend court.

• There are immediate opportunities to improve the court experience of children and their families by decentralising the Melbourne Children’s Court and by improving existing court facilities to be more child and family friendly.

• The current legal processes under the Children, Youth and Families Act 2005 should be modified to promote a more collaborative problem solving approach to protection applications with a focus on child-centred agreements. The Inquiry supports in-principle three of the five options raised in the Victorian Law Reform Commission’s Protection Applications In The Children’s Court: Final Report 19. These are Option 1, which proposes new structured and supported processes for achieving appropriate child-centred agreements; Option 2, which proposes a range of legislative reforms with respect to the protection application processes, case docketing and child legal representation; and Option 4, which proposes that the Victorian Government Solicitor’s Office represent the Department of Human Services in protection matters.

• The Inquiry has not commented on every recommendation by the Victorian Law Reform Commission but has focused on those reforms the Inquiry considers fundamental to realigning current court processes to meet the needs of children. In some instances, the Inquiry has disagreed with, or proposed a modification to, the approach proposed under the Victorian Law Reform Commission’s reform options.

• There are a number of protective orders available under the Children, Youth and Families Act 2005 that serve different purposes but may lead to overlapping outcomes. Some orders are rarely used under the Act. The current range of orders should be reviewed with a view to removing those orders that are rarely used and consolidating those that may produce overlapping outcomes. The goal should be simpler and more easily accessible statutory child protection laws.

• A specialist Children’s Court should be retained in the statutory child protection system. The scope and purpose of its role should be focused on: determining the lawfulness of the State’s intervention in the life of a child; the appropriate remedy once the court has determined a child is in need of protection; and the conditions that affect a child’s right to contact with their parents and others who are significant in the life of the child. The Court should be established and continued under a separate Children’s Court of Victoria Act.

• Conditions relating to the long-term placement of a child with the Department of Human Services or a third party should be determined by the department, with the exception of a child’s contact with parents and others who are significant in the life of the child. Such contact should be determined by a court. Any disputes over departmental decisions should be subject to ordinary administrative review processes.
Chapter 15: Realigning court processes to meet the needs of children and young people

15.1 Introduction

In developing recommendations to reduce the incidence and negative impact of child neglect and abuse in Victoria, the Inquiry was asked to consider the structure, role and functioning of the statutory child protection system and the interaction of the courts with government departments and agencies. The Inquiry was also asked to consider possible changes to the processes of the courts referencing the work of, and options put forward by the Victorian Law Reform Commission (VLRC) in its *Protection Applications In The Children’s Court: Final Report 19*. Briefly, the options for reform raised by the VLRC were:

- **Option 1** – New structured and supported processes for achieving appropriate child-centred agreements;
- **Option 2** – A range of legislative reforms to the *Children, Youth and Families Act 2005* (CYF Act) with respect to the way protection applications were brought before the Children’s Court, the way children are represented at court, and the way matters are heard at court;
- **Option 3** – The creation of a new Office of Children and Youth Advocate to provide independent representation of children at all stages of the protection process and to convene the new pre-court conference model proposed by the VLRC;
- **Option 4** – Reforming the representation model for the Department of Human Services (DHS) to enable the Victorian Government Solicitor’s Office (VGSO) to represent the department; and
- **Option 5** – Strengthening the current statutory oversight and reporting powers of the Office of the Child Safety Commissioner (OCSC).

Along with the written and verbal submissions made to the Inquiry on the Children’s Court of Victoria (Children’s Court) and the Victorian Civil and Administrative Tribunal (VCAT), the Inquiry also considered the Victorian Ombudsman’s *Own motion investigation into the Department of Human Services Child Protection Program* Report (Ombudsman’s 2009 Report).

The Ombudsman’s 2009 Report was the catalyst for both the VLRC report and the creation of the Victorian Government’s ‘Child Protection Proceedings Taskforce’ and its 2010 Report (Taskforce report). The Taskforce comprised the Secretaries of the Department of Justice (DOJ) and DHS, the President of the Children’s Court, the Child Safety Commissioner and the Managing Director of Victoria Legal Aid (VLA).

**The Children’s Court of Victoria**

While the Inquiry notes the role of the Supreme Court of Victoria and VCAT in relation to statutory child protection processes, the Children’s Court was the focus of submissions to, and consultations by the Inquiry. The Inquiry therefore has largely confined its recommendations regarding the courts to the Children’s Court. In doing so, the Inquiry consulted with the President and the magistrates of the Children’s Court.

There were a range of views expressed to the Inquiry about the operation of the Children’s Court by parents, carers, DHS staff, members of the legal profession, and community service organisations (CSOs). However, the Inquiry identified key (and, for the most part, common) issues arising in all these sources of information. These covered jurisdictional, process, environmental, institutional and cultural aspects of the Court, and fall into three categories that form the bases of the Inquiry’s consideration of court processes in this chapter:

- **Accessibility of the Court for children and young people, and their families** (discussed in section 15.3);
- **Adversarialism and the court environment** (discussed in section 15.4); and
- **Structural and statutory reforms in and of the Court** (discussed in sections 15.5 and 15.6).
15.2 An overview of the Children’s Court, court processes and key orders

Within the Australian legal framework, the High Court of Australia and the state and territory Supreme Courts have a broad, supervisory duty to protect the interests of children (Secretary, Department of Health and Community Services v. JWB and Another (1991) 175 CLR 218). In Victoria the CYF Act vests that role in the Children’s Court. The Children’s Court hears matters concerning children except in the context of family law disputes. These are heard in the Family Court of Australia or in the Federal Magistrates Court of Australia.

The Children’s Court is headed by a President who holds the position of a County Court judge and comprises a number of full-time and part-time Magistrates. The Court sits on a full-time basis as the Melbourne Children’s Court with a dedicated court building in Melbourne. It also currently sits at the Moorabbin Justice Centre and, on designated days using common court facilities administered by the Magistrates’ Court, across regional Victoria.

As noted in Chapter 3, the Family Division of the Children’s Court hears applications from DHS under the CYF Act for determining whether a child is in need of protection and for the granting of various protective and other orders related to children. The court processes are initiated through ‘protection applications’. Protection applications are made when DHS believes, following a report and investigation, that a child is in need of protection. There are two ways in which a protection application can be made:

- ‘By notice’ – under section 243 of the CYF Act, where a notice is issued by a Registrar of the Court on application by DHS, to the parent(s) and the child or children requiring them to appear in court for the hearing of the application; and
- ‘By safe custody’ – under sections 241 and 242 of the CYF Act, where it is inappropriate to follow the notification process, DHS or Victoria Police act to remove the child from his or her parents or caregivers and take the child into ‘safe custody’. This can be done with or without a warrant obtained from a magistrate or from a bail justice. A comprehensive description of the various applications and associated processes appears in chapter 3 of the VLR report and on the Children’s Court’s website (Children’s Court of Victoria 2011, chapter 5) and consideration of proposed reforms to this process is in section 15.5.4.

Figure 15.1 depicts the current process for initiating, negotiating and determining protection applications before the Family Division of the Children’s Court.

If the Court has determined, on hearing a protection application, that a child is in need of protection, it can grant a number of protective and related orders under the CYF Act at the request of DHS. The key types of orders are set out in Table 15.1.

The Inquiry considers the protection application processes and the range of statutory orders available under the CYF Act in section 15.5.

The Children’s Court is more than a place where orders are made. It is a forum in which a child’s voice can be heard, and where parents and DHS come to state their cases. The Court is also a physical environment in which legal and child protection professionals, magistrates, and children and their families interact.

Not all child protection matters go to court. In 2008-09, for example, less than 3 per cent of primary applications by safe custody and notice lodged in the Children’s Court reached the stage of a ‘contested hearing’ between DHS and the parents before a magistrate (Children’s Court submission no. 2, pp. 28-29). Nevertheless, as noted by the OCSC submission:

... the prospect of [contested] proceedings and the belief as to how they will be resolved casts a long shadow over child protection practitioners and vulnerable children and families (p. 12).

The current concerns around the processes, the decisions, the environment, and the perceived culture of conflict and disrespect between professionals within the court environment are acknowledged by the Inquiry.
Figure 15.1 Current process for child protection applications to the Family Division of the Children’s Court

Source: Inquiry analysis
<table>
<thead>
<tr>
<th>Order type</th>
<th>Summary of order effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Temporary Assessment Order</td>
<td>To allow DHS to undertake an investigation where it reasonably suspects a child is in need of protection and in circumstances where the parents do not cooperate.</td>
</tr>
<tr>
<td>Interim Accommodation Order</td>
<td>To enable a child to be placed with either a parent or another person or organisation on a temporary basis until the main or primary application by DHS is finalised.</td>
</tr>
<tr>
<td>Interim Protection Order</td>
<td>To test the appropriateness of a particular course of protective action before a final course of action is determined.</td>
</tr>
<tr>
<td>Undertaking</td>
<td>To require a parent or a person with whom a child is living to agree to do or refrain from doing certain things. This may include any condition the Court thinks appropriate. A protection application need not be proven by DHS for an undertaking to be entered into.</td>
</tr>
<tr>
<td>Protection Order Undertaking</td>
<td>To require a parent or a person with whom a child is living to agree to do or refrain from doing certain things. This may include any condition the Court thinks appropriate. A protection application must first be proven by DHS.</td>
</tr>
<tr>
<td>Supervision Order</td>
<td>To direct that a child remains in the care and custody of his or her parents. This arrangement is supervised by DHS for a certain period of time with any conditions the Court determines.</td>
</tr>
<tr>
<td>Custody to Third Party Order</td>
<td>To place a child in the care and custody of a named person that is not DHS or a community service organisation for a limited period of time.</td>
</tr>
<tr>
<td>Supervised Custody Order</td>
<td>To transfer a child to the care of a person other than his or her parent for a limited period of time. The ultimate goal of this order is reunification of the child with his or her parents.</td>
</tr>
<tr>
<td>Custody to Secretary Order</td>
<td>To place the child into the custody of the Secretary of DHS for a limited period of time. DHS determines where the child should live (either with a community service or foster carer). Reunification with the child’s parents is not the ultimate goal of this order.</td>
</tr>
<tr>
<td>Guardianship to Secretary Order</td>
<td>To grant the custody and guardianship of the child exclusively to the Secretary of DHS for a limited period of time. The Court has no power to impose conditions on the order as the Secretary effectively exercises the rights of the parents.</td>
</tr>
<tr>
<td>Long-term Guardianship to Secretary Order</td>
<td>To grant the custody and guardianship of a child who is 12 years and over exclusively to the Secretary of DHS. This order may last until the child turns 18 years of age. Both the child and the Secretary need consent to the order being made.</td>
</tr>
<tr>
<td>Permanent Care Order</td>
<td>To grant the custody or guardianship of the child exclusively to a person or persons named in the order (not being the child’s parent or the Secretary of DHS). This order may remain in force until the child turns 18 years of age or is married. It is available where the child’s parent, or the child’s surviving parent, has not had the care of the child for at least six months (or for periods totalling six months) of the last 12 months.</td>
</tr>
</tbody>
</table>

Source: Inquiry analysis
Chapter 15: Realigning court processes to meet the needs of children and young people

15.3 Children and the Children’s Court: making the Court and the legal system more accessible and more sensitive to the needs of children

15.3.1 A child’s right to be heard in child protection proceedings

Applications in the Family Division involve important decisions about children and young people’s lives. It is a matter of policy, law and human rights that children have an opportunity to have their voices heard in matters that affect them (DOHS v. Sanding [2011] VSC 42 Bell J).

The Inquiry heard from many stakeholders as to how children’s voices are best represented in court processes. Some options submitted to the Inquiry focused on broader system reforms to reflect children’s needs, such as:

• Developing advisory committees, committees of management, service planning and service reviews, and through the resourcing and supporting of the establishment of family advocacy and self-help groups (Centre for Excellence in Child and Family Welfare, Melbourne Public Sitting);

• Better equipping intake officers and child protection practitioners with interviewing and assessment skills (UnitingCare Gippsland submission, p. 16); and

• Providing cultural training for child advocates (Bendigo and District Aboriginal Co-Operative, Bendigo Public Sitting).

Other submissions suggested options for reform targeted at incorporating the individual child into specific decisions that concern them such as:

• Using ‘less adversarial processes’ in order to properly hear the child’s voice (Connections UnitingCare, pp. 3, 15; OCSC, attachment c.);

• Appointing an independent Children’s Court advocate (Youth Affairs Council of Victoria, p. 18); and

• Giving age-appropriate explanations of court decisions to children (Goddard et al. Child Abuse Prevention Research Australia, p. 2).

The child as a party to protection proceedings

In Victoria children do not formally have the status of a party in relation to a child protection matter. In jurisdictions such as Western Australia, South Australia, Queensland, the Northern Territory and the Australian Capital Territory children are a party to protection proceedings and in most of those jurisdictions the status of the child being a party to the proceedings is linked to an entitlement to legal representation (VLRC 2010, p. 317).

The Inquiry endorses the proposal that a child who is the subject of a protection application be a party to the proceeding, regardless of the child’s age (VLRC 2010, p. 317). This would require legislative amendment. In reviewing the legislation, consideration should be given to:

• Any negative effect that the usual court processes might have on children (for example, the service of certain documents detailing allegations could cause a child some distress); and

• Any conflicts of interest that may arise through the legal representation of both child and parent as parties to the proceedings.

Recommendation 53 of this chapter addresses this issue.

Representing the child in proceedings and capacity

Across Australian jurisdictions, the way in which children are represented by lawyers in child protection matters depends on whether a child is considered capable of understanding the issues and directing a lawyer as to the child’s wishes. This is known as ‘capacity to give instructions’. In most Australian jurisdictions and in England and in New Zealand capacity is not defined by reference to age in the legislation. In some states in the United States, the legislation specifies ages from between 10 years and over to 14 years and over (Hughes 2007).

In Victoria a child is represented by a lawyer (generally a VLA-employed or VLA-funded lawyer) if it is considered that the child is old enough to give instructions to the lawyer on their views (s. 525(1) of the CYF Act). This is known as a ‘direct representation model’. In 1999 the Victoria Law Foundation, in conjunction with the Children’s Court Clinic, developed guidelines for lawyers. These guidelines suggest that a child may be mature enough from the age of seven to give instructions to a lawyer, although every child will be different. Compared with other jurisdictions, this threshold is low and should be raised to be broadly consistent with other jurisdictions.
In New South Wales children under the age of 12 years are presumed to be incapable of giving instructions, unless it is shown otherwise. Children aged 12 or over are presumed capable of giving instructions unless shown otherwise (Children and Young Persons (Care and Protection) Act 1998).

The capacity of the child to provide instructions is subject to various factors pertinent to that child including factors such as development of cognitive ability, age, trauma experienced, and the levels of stress or anxiety they may experience when facing a court event and a lack of understanding of court processes (Block et al. 2010, pp. 660-661).

Further ‘situational factors’ to be highlighted are: the ways in which interviews with children are conducted to elicit their views and understanding of the issues, and addressing anxiety about the impact their accounts might have on familial relationships (Best 2011, pp. 23-24); risk that a child may experience interview fatigue if interviewed too many times by too many people or that their wishes may not represent their best interests (Commission for Children and Young People and Child Guardian 2009, p. 9) and the relational aspect between the child representative such as a lawyer and the child including the lawyer’s own perception of the child and their competence (Cashmore & Bussey 1994, pp. 319-336).

As will be discussed below, the Inquiry considers that a child or young person should not be required in court unless they wish to attend, and have the capacity to understand the proceedings. Of course, there may be instances where the child’s presence in court is unavoidable. In those cases, in line with the Inquiry’s proposed simpler system, and endorsing the recommendation in the VLRC report, the Inquiry considers that the current combination of a direct representation model and a best interest model should continue.

The Inquiry considers, on balance, that the age of seven set out in the Victorian Law Foundation guidelines is too low a threshold as one of the guiding factors in assessing capacity. The Inquiry also considers that the New South Wales threshold of 12 years may unduly preclude, if not disenfranchise, children capable of providing instructions from being heard in proceedings. Acknowledging that there is no precise answer to this issue, the Inquiry considers that a more appropriate threshold of 10 years should be set in the legislation. However, recognising that various factors will determine a child’s capacity to give instructions in the particular circumstances of the proceedings, the Inquiry supports the development of updated guidelines to assist decision-makers to assess capacity. Recommendation 54 of this chapter addresses these points. These guidelines should be reviewed periodically by the proposed Commission for Children and Young People to ensure their currency.

Representation of children by lawyers or others

There is no uniformity of rules relating to the representation of children in matters affecting them across Australian jurisdictions. A summary of the various approaches can be found in the VLRC report (VLRC 2010, appendix n, pp. 488-489.) The VLRC report and a number of submissions to the Inquiry commented on the possibility of introducing alternative models for the representation of children by lawyers (Connections UnitingCare submission, p. 12; Ms Tainton, VLA, Geelong Public Sitting; VLA submission no.1, pp. 15-16; VLRC 2010, pp. 325-331).

In South Australia a child must be represented in all child protection matters, unless they make an ‘informed and independent decision’ not to be represented. Children are represented on a direct representation model where they are mature enough, or otherwise on a best interests model.
In Western Australia the Children’s Court may order a separate legal representative to act on the direct instructions of the child if the child is mature enough (determined by the Court on a case-by-case basis) and wishes to give instructions, and in any other case, on the best interests of the child. This approach is endorsed in the VLRC report, which also contains a comprehensive comparison of various Australian and international representation models (VLRC 2010, pp. 325-331).

In New South Wales where the child is not capable of providing instructions, an independent legal representative may be appointed and, in special circumstances, a ‘guardian ad litem’ may also be appointed to provide instructions to the independent legal representative (see box). A guardian ad litem, literally ‘litigation guardian’, is an adult appointed by a court or by law to stand in the shoes of another person who is incapable of representing him or herself as a party to the proceedings and to provide instructions to the lawyer.

While the Inquiry considered the merits of appointing child specialists to instruct on behalf of infants and children incapable of providing instructions, the Inquiry considers on balance that introducing a guardian ad litem system would entail an additional and expensive process in the statutory system without a demonstrable benefit over and above the use of properly trained and accredited lawyers. Accordingly, the Inquiry concludes that specialist lawyers should represent children in child protection proceedings either on a direct representation basis, where a child has capacity to give instructions, or on a best interests basis, where a child does not have capacity (see Recommendation 53).

The Inquiry considers that the accreditation and training process for specialist lawyers must involve a substantive component on infant and child development, child abuse and neglect, trauma and child interviewing techniques in order to be able to assess capacity. Training requirements for independent children’s lawyers in the statutory child protection system should be aligned with the training required of, and provided to, independent children’s lawyers practising in the family law jurisdiction.

### Guardian ad litem appointments in New South Wales

Section 100 of the New South Wales Children and Young Persons (Care and Protection Act) 1998 (the Act) enables the NSW Children’s Court to appoint a guardian ad litem (guardian) for a child or young person when there are special circumstances to warrant the appointment and the child or young person will benefit from the appointment.

A guardian is responsible for instructing (not representing) in legal proceedings for a person, where that person is:

- Incapable of representing him or herself;
- Incapable of giving proper instructions to his or her legal representative; and/or
- Under legal incapacity due to age, mental illness or incapacity, disability or other special circumstances in relation to the conduct of the proceedings.

The NSW Department of Attorney General and Justice (DAGJ) established a panel structure for people eligible for appointment as a guardian in particular proceedings pursuant to an order of a court or tribunal. A panel was developed to provide guardians for Children’s Court matters but it is understood this service has expanded to assist people with incapacity in all NSW courts.

It is understood that at present there are approximately 12 appointments under this panel structure mainly based in the Sydney metropolitan area, but the NSW Government is seeking to recruit statewide to provide guardians across the state. Guardians are required to apply to DAGJ for the position and if successful are appointed for three year terms. They are required to undergo a Working with Children Check. For appointments, the desired qualifications or experience are:

- Qualifications in social, health or behavioural sciences or related disciplines, or equivalent experience;
- Mediation, advocacy and decision making skills;
- Ability to communicate effectively with various professionals and family members;
- Basic knowledge of legal proceedings and the legal process; and
- Knowledge of issues affecting children and young people, people with illness, disability or disorder that may affect their decision-making capacity.

The NSW Government has also published a Guardian Code of Conduct and a Schedule of Fees depending on the activity required of the guardian.
Children attending court

Although reports, consultations and submissions argued that a child’s voice must be incorporated into proceedings in the Children’s Court, and that representation is a critical part of this, there was a broad consensus that children should not attend court unless it is absolutely necessary. For example, CREATE Foundation recommended that children under 13 years should not attend Court (CREATE Foundation submission, p. 13). The Law Institute of Victoria noted that children’s attendance at court is not always desirable, particularly at the later stages of a case, but that they should be given the option of attending if they wish and as is appropriate to their level of maturity (Law Institute of Victoria submission, p. 7; appendix, p. 6).

Unlike other states and territories, in Victoria, children are required to appear at court if it is a protection application by safe custody, unless they are of ‘tender years’ (s. 242, CYF Act). If the application is by notice the Secretary of DHS may issue a notice directing the child and the child’s parent to produce the child to appear at the application and failure to comply could result in the issue of a warrant to take the child into safe custody (s. 243, CYF Act). The CYF Act allows a child to be served a copy of the protection application if over 12 years of age and the child is not a party to the proceeding.

With the exception of the Northern Territory, across Australia a child who is the subject of child protection proceedings is not required, but has the right to, appear in matters that affect the child. In New South Wales and the Northern Territory, the court may order the child to appear. A summary of the state and territory provisions can be found in the VLRC report (VLRC 2010, appendix n, pp. 488-489).

In the federal family law system children are not present at court for proceedings (although they may attend to visit family members). Under section 100B of the Family Law Act 1975 (Cwlth), there is no right of appearance for children in a family law proceeding unless a court order is made and the Inquiry notes that the Family Court and Federal Magistrates Court do not generally consider it appropriate for children to be at court (Family Law Courts 2011).

The Children’s Court submitted that, although children should be represented in matters before the Court, children should not be required to attend Court unless the child has the capacity to understand the proceedings and has expressed a wish to be at court (Children’s Court submission no. 2, p. 41). The Inquiry visited the Children’s Court and witnessed the crowded corridors of the Family Division, with parents, workers, lawyers and children and the stressful environment for all concerned.

Consistent with this approach it is expected that VLA-funded lawyers will be made available to take instructions from the child in a suitable location, preferably the location at which they are being cared for, and not at court. While the Inquiry appreciates that in certain circumstances a court meeting is unavoidable the Inquiry considers it inappropriate for any court building to be used, as a matter of practice, as a de facto office by legal practitioners in this jurisdiction. A court is no place for a child or young person.

Recommendation 53

The Children, Youth and Families Act 2005 should be amended to provide that:

- A child named on a protection application should have the formal status of a party to the proceedings;
- A child who is under 10 years of age is presumed not to be capable of providing instructions unless shown otherwise and a child who is 10 years and over is presumed capable of providing instructions unless shown otherwise;
- A child who is not capable of providing instructions should be represented by an independent lawyer on a ‘best interests’ basis; and
- Other than in exceptional circumstances, a child is not required to attend at any stage of the court process in protection proceedings unless the child has expressed a wish to be present in court and has the capacity to understand the process.

Recommendation 54

The Victorian Government should develop guidelines to assist the court, tribunal, or the independent children’s lawyer to determine whether the child is capable of giving direct instructions and to provide criteria by which the presumption of capacity can be rebutted.
15.3.2 The environment at the Melbourne Children’s Court

Facilities in the Family Division have been roundly criticised as being ‘cramped, crowded and uncomfortable ... not conducive to resolving what are deeply private sensitive and anxiety-provoking issues’ (Anglicare Victoria submission, p. 38). Both the VLRC report and the Taskforce report identified a number of issues with the environment of the Children’s Court. These comments are acknowledged by the Children’s Court (Children’s Court submission no. 2, p. 31; Victorian Government 2010a, p. 27; VLRC 2010, pp. 354-357).

These criticisms accord with the Inquiry’s observations of the current environment at the Family Division of the Melbourne Children's Court. The environment is simply not conducive to productive outcomes for children and their families. Improving it should be a priority reform for the Victorian Government. The Inquiry considers that an adequately funded court decentralisation program (discussed further in section 15.3.3) should drive reforms on this issue.

The Children’s Court advised the Inquiry that it expects to hear DHS Eastern region child protection applications in two designated court rooms at the newly developed William Cooper Justice Centre (Children’s Court submission no. 2, p. 32). This should alleviate some of the burden on the over-crowded Melbourne court.

The Inquiry notes that, compared with the Family Division, the Criminal Division has a much lower volume of cases before it and rooms may be available for hearing Family Division matters. The Children’s Court advised the Inquiry that where Children’s Courts in regional Victoria do not have the infrastructure to be able to offer separate locations to each Division, the Court aims to keep the two Divisions separate through scheduling of different session times or days for hearings. The Children’s Court further advised that, in recent times, the Melbourne Court now utilises one Criminal Division courtroom for the hearing of Family Division matters and, in times of high demand, intends to use these rooms for hearing Family Division matters.

The Inquiry understands that there are reasons for the physical division of the Melbourne Court into Family and Criminal divisions, such as the security concerns that are attached to the processes of any criminal court, and as a way of addressing the unfortunate and historical conflation of child protection with criminal law. In consultations, the Children’s Court observed that the separation of the divisions protects Family Division parties from the potential violence and hostility of those attending the Criminal Division and that the constant presence of law enforcement in the Criminal Division could be upsetting for already distressed Family Division clients. However, given the volume of matters before the Melbourne Children’s Court, the Inquiry notes that the hearing of matters in the Criminal Division, if appropriately managed, may be an appropriate short-term solution to the stretched resources of the Family Division.

15.3.3 Decentralisation of the Family Division of the Children’s Court: meeting the needs of children in regional Victoria

The Children’s Court sits at a number of locations in metropolitan and regional Victoria. However, the Family Division sits daily only in the Melbourne Children’s Court and the Moorabbin Justice Centre. The Melbourne Children’s Court deals predominantly with protection matters from the DHS North and West Metropolitan region and Eastern Metropolitan region, while the Moorabbin Court deals with matters from the DHS Southern Metropolitan region (unless there is a security risk or one of the parties is in custody in which case the matter would be heard at the Melbourne Children’s Court). Magistrates sit as the Children’s Court at other locations on set days as announced in the Government Gazette.

Although the Family Division has a presence in metropolitan and regional Victoria, infrequent sittings at the various court locations can mean that matters relating to children in outer metropolitan and regional Victoria must be heard in the Melbourne Children’s Court. For example, where a matter has a ‘return date’ that does not fit in with the Court’s sitting dates in the relevant region, or where there is not enough time in the sitting day to hear all matters from that suburb or region. In those cases, parties and, in many cases, children are required to travel into the city to have the matter heard.
Even where a child is not required to attend court, they and their siblings require care when their parents attend. If this care cannot be obtained it is likely that the child will accompany their parents. Reducing this outcome, and making the Children's Court more accessible for families should be a priority reform for the Victorian Government. Supervised play areas and recreational areas for older children should be developed at all courts in which children may be present.

Submissions to the Inquiry discussed the need for the Children's Court to ‘decentralise’ and sit with greater frequency in suburban and rural courts. The Taskforce report made similar recommendations, with the proviso that regional court facilities be refurbished appropriately to accommodate children and families. That report also noted that the courts could be appropriately serviced by VLA and private lawyers acting for families and children. The Children's Court itself acknowledges that some matters currently heard in the Melbourne court should be heard in regional courts but is particularly concerned that there are no suburban courts with the capacity (or facilities) to hear Family Division cases (Children's Court submission no. 2, p. 32). Table 15.2 shows the proportion of children under child protection orders by the region in which they live.

Table 15.2 Protective orders issued, by location of child, 2009–10

<table>
<thead>
<tr>
<th>Child location (DHS region)</th>
<th>Location of children: protection orders issued in 2009–10 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barwon-South Western</td>
<td>11%</td>
</tr>
<tr>
<td>Eastern Metropolitan</td>
<td>12%</td>
</tr>
<tr>
<td>Gippsland</td>
<td>9%</td>
</tr>
<tr>
<td>Grampians</td>
<td>7%</td>
</tr>
<tr>
<td>Hume</td>
<td>9%</td>
</tr>
<tr>
<td>Loddon Mallee</td>
<td>13%</td>
</tr>
<tr>
<td>North and West Metropolitan</td>
<td>24%</td>
</tr>
<tr>
<td>Southern Metropolitan</td>
<td>15%</td>
</tr>
<tr>
<td>Interstate/overseas</td>
<td>Less than 1%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Source: Information provided by DHS

Decentralisation of the Family Division of the Court to a higher-volume metropolitan location would ease the pressure on the Melbourne Children’s Court. The Victorian Government should provide the appropriate level of funding to the Children’s Court to enable it to commence its decentralisation process in the immediate to medium term and to recruit and/or relocate specialist magistrates from the Melbourne court to these areas. The process should be mindful of the special needs of clients of the Family Division. For example, care should be taken to limit the crossover of Family Division matters with criminal matters in general courts (where specialist Family Division facilities are not being established), and counselling support should be available.

The Inquiry supports recommendations 10 and 11 of the Child Proceedings Taskforce, which note that DOJ should, in improving the physical environment of the Children’s Court, consider the amenity of courts for children and other court users and be guided by the principle that the Children’s Court should operate on a decentralised model. The Inquiry is not proposing the establishment of new dedicated Children’s Court facilities for each DHS region. Based on demand, decentralisation would mean scheduling more sitting days for the Family Division in locations outside the Melbourne CBD for those DHS metropolitan and regional areas with high demand. It would also mean adapting, where possible, existing Magistrate’s Court facilities or other customised facilities to enable the Family Division to sit as a separate court.

Recommendation 55

The Children’s Court should be resourced to decentralise the Family Division by offering more sitting days at Magistrates’ Courts or in other customised facilities in those Department of Human Services regions with high demand. Existing court facilities should be adapted as appropriate to meet the needs of children and their families.
15.3.4 Decision making processes by the Children’s Court

Submissions on decision making by tribunals

Some submissions argued that the Children’s Court as a body is inherently inflexible, and that a new model of child protection proceedings is necessary to properly meet the needs of children and young people involved in the statutory protection system (Anglicare Victoria, pp. 37-38; The Salvation Army, p. 24). In its submission to the VLRC, the Children’s Court argued that a tribunal structure is inappropriate for the decisions made in the Children’s Court and reiterated those concerns to the Inquiry (Children’s Court submission no. 2, appendix 1). These concerns are discussed later in this section.

The Centre for Excellence in Child and Family Welfare proposed a combination of ‘Local Area Children and Young Persons Tribunals’. The tribunals would consist of panel members appointed by the Attorney-General to deal with orders not relating to custody or guardianship. Higher magnitude orders would remain with the Children’s Court (Centre for Excellence in Child and Family Welfare submission, p. 29). A variation on this model was proposed by Connections UnitingCare, whereby the local area panel would make recommendations about the appropriate form of intervention, and submit this recommendation to the court for consideration (Connections UnitingCare submission, p. 12).

The OCSC recommended the establishment of a central ‘Children’s Safety and Wellbeing Tribunal’. The tribunal would be independent of the VCAT and would oversee eight regional tribunals supported by DOJ infrastructure. It would replace the Children’s Court and would consist of a registrar and a panel of three members from a pool of members with diverse skill-sets (OCSC submission, attachment 2).

The Scottish panel model

In Scotland a children’s hearing system convenes specialist volunteers on a case-by-case basis to decide protection and juvenile justice applications. This model was advocated by a number of community welfare bodies. A modified Scottish model was proposed by the joint submission by Anglicare Victoria, Berry Street, MacKillop Family Services, The Salvation Army, Victorian Aboriginal Child Care Agency (VACCA) and the Centre for Excellence in Child and Family Welfare (Joint CSO submission), under which a standing panel with a mix of full-time specialist panel members would be established, supplemented by volunteers on a case-by-case basis (Joint CSO submission, pp. 53-54). Others expressed support for a multidisciplinary expert panel-based or tribunal model instead of a court (CatholicCare submission, pp. 20-21; VACCA submission, p. 7). The purpose of a multidisciplinary model is to promote a non-legalistic child welfare solutions-focused hearing system when determining protection applications.

In its 2011 Interim Report, the United Kingdom’s Family Justice Review discussed the potential for expanding the Scottish model of panels to child protection matters in England. The review noted that, while a combination of court and panel hearings may lead to quicker and more flexible decisions, the cost of such a model has been felt in the lack of consistency in panel decision making. The review also found that, because panels were required to review supervision requirements for care arrangements, children may have been experiencing a heightened sense of impermanence to their care arrangements. The review concluded that introducing a panel system in England and Wales would not offer sufficient advantage over a court-led process, and rejected suggestions for a tribunal system on similar grounds (Family Justice Review 2011, pp. 116-117).

Pursuant to its terms of reference, the VLRC considered the Scottish model for resolving statutory child protection disputes. The VLRC did not, however, make any recommendations in relation to whether the model should be adapted for use in the Victorian statutory child protection process. The Inquiry understands that this is linked to the VLRC’s view that non-judicial determination models are inappropriate for the resolution of child protection disputes due to constitutional complexities, common law principles, and the nature of the rights of the parties involved (VLRC 2010, pp. 208-212). As will be discussed further in this section, the Inquiry agrees with this assessment.
Tribunal models in the Victorian statutory child protection system

The Inquiry also received submissions commenting that judicial, rather than non-judicial, member oversight was an appropriate or necessary safeguard in balancing and determining children’s and families’ rights (Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLSV), p. 9; Mr Fanning, p. 4; Victorian Forensic Paediatric Medical Service, p. 19; VLA submission no. 1, p. 4).

In principle, the Inquiry found no legal impediment to the statutory creation of a tribunal-based model. Victoria already uses tribunals such as VCAT to determine legal rights. In the Commonwealth sphere, there are tribunals such as the Administrative Appeals Tribunal and Fair Work Australia. These tribunals may comprise both judicial and non-judicial members that interpret and apply legislation and make binding, yet reviewable, decisions.

While VCAT’s flexibility makes it an attractive option for dispute resolution, the Inquiry finds that a tribunal model is not the appropriate legal model for the determination of the lawfulness of State intervention in child protection matters and determining fundamental rights such as the alteration of a child’s relationship with his or her parents. However, VCAT will have a greater role in reviewing the administrative decisions of DHS if the Inquiry’s proposal to realign the role of the Children’s Court in the statutory child protection system is implemented (see Finding 14 and Recommendation 64).

Child protection matters are not simple disputes between private parties. They involve a fundamental State intervention in family relationships. In Australia, the role of the courts is to provide independent oversight of administrative or executive decision making. This is known as the ‘separation of powers’ between the executive and the judiciary. It is pertinent to observe that currently in all Australian jurisdictions policy makers have determined through legislation that a specialist court should determine protection applications in the statutory child protection framework.

Another consideration is how a tribunal would interact under the legislative arrangements for recognising orders under the Commonwealth Family Law Act 1975 and family violence legislation. As noted in the VLRC report, a further and significant difficulty with a tribunal deciding child protection matters is that VCAT is not a ‘court’ under Chapter III of the Australian Constitution and is therefore incapable of exercising Commonwealth powers such as those under the Family Law Act. The Children’s Court has also flagged the difficulties arising when a tribunal has jurisdiction to issue protection orders under the CYF Act, but the courts have jurisdiction to make orders under the Family Law Act, the Family Violence Protection Act 2008, or the Personal Safety Intervention Orders Act 2010. The introduction of a tribunal model would have negative ramifications for an already fractured system of federal and state laws.

The Victorian Civil and Administrative Tribunal

VCAT was established under the Victorian Civil and Administrative Tribunals Act 1998.

It is headed by a Supreme Court judge and Vice Presidents who are County Court judges. The tribunal also consists of full-time, part-time and sessional non-judicial members with a range of backgrounds and expertise. All members are Governor-in-Council appointees for five-year terms.

VCAT sits in three divisions: the Administrative Division; the Civil Division; and the Human Rights Division. Within each division are specialist subject lists ranging from health and privacy, to mental health, to residential tenancies to planning and environment and guardianship. In 2010-11, 86,890 cases were lodged with VCAT of which 86,015 were finalised and VCAT used 95 hearing venues (VCAT 2011, p. 5).

VCAT is based in Melbourne but conducts hearings around Victoria using suburban and regional Magistrates’ Court buildings, the Neighbourhood Justice Centre (NJC) in Collingwood, community centres and hospitals (particularly in the Guardianship and Mental Health lists if participants were unable to attend a VCAT venue). VCAT notes that it has sought to improve access by trialling twilight hearings to 7.00 pm at the NJC, piloting Saturday morning hearings in Broadmeadows and increasing service delivery by permanently locating staff at regional locations such as Bendigo, Geelong, Mildura and Moe with the aim of expanding to Ballarat, Wangaratta and Warrnambool (VCAT 2011, pp. 12-13).

VCAT currently plays a relatively small role within the statutory child protection system. It can review case plans prepared by DHS and review decision relating to information recorded on the DHS central register under sections 331 and 333 of the CYF Act when internal review processes have not resolved the dispute. These matters are considered within the General List of the Administrative Division. In 2009 VCAT reviewed 12 case planning decisions by DHS (VLRC 2010, p. 103) and in the 2010-11 financial year, nine applications were lodged with the Tribunal (Inquiry VCAT consultation).
Chapter 15: Realigning court processes to meet the needs of children and young people

15.4 Adversarial character of statutory child protection legal processes

‘Adversarialism’ means different things to different people (Victorian Government 2010a, p. 19). This means that the perception that the Children’s Court is ‘overly adversarial’ can be difficult to comprehensively address. At its simplest, ‘adversarialism’ refers to the traditional common law method of presenting a case in court rooms that requires parties, not the judge, to define the issues in dispute, investigate their alleged facts and test each other’s evidence through arguments put to the court. Adversarial principles are incorporated into Australian law through tradition, rules of evidence, and rules of civil and criminal procedure.

The adversarial system can be contrasted with the European inquisitorial system, where the judge or arbitrer is responsible for advancing the matter. However, both adversarial and inquisitorial systems ‘reflect particular historical developments rather than … strict practices’, and ‘no country now operates strictly within the prototype models of an adversarial or inquisitorial system’ (Australian Law Reform Commission (ALRC) 2000, p. 101). Furthermore, adversarial processes do not prevent the judge from managing a court and the fact-finding process. As noted in a paper presented at a conference hosted by the Australian Institute of Judicial Administration in May 2010:

In a well-designed justice system the question should not be whether the judge should manage the fact-finding process, but rather, when and how? (Cannon 2010, p. 10).

General criticisms of the adversarial system are that it does not account for resource imbalances that may be present between the parties, that it encourages lengthy trials, and that it concentrates on ‘proof’ rather than ‘truth’ (King et al. 2009, p. 3).

15.4.1 Adversarialism and the Children’s Court

Almost all submissions commenting on the Children's Court considered whether the current adversarial model of litigation is appropriate in statutory child protection matters. Many of the submissions, including that of the Children’s Court submission no. 1 (p. 47), called for an expanded use of alternative styles of litigation, such as the ‘Less Adversarial Trial’ (LAT) Family Court model.

A submission from the Centres Against Sexual Assault (CASA) argued that the effect of contest-driven dispute was that evidence and recommendations of child protection practitioners are discredited by lawyers for the parents, and that informed advice as to the best interests of children can be discarded (CASA Forum, p. 11). On the other hand, some submissions doubted whether an adversarial approach to a dispute is necessarily at odds with the best interests of the child (AFVPLSV, p. 5).

As mentioned above, adversarial processes are incorporated into Australian law through tradition, and rules of evidence and procedure. In relation to the Children’s Court, section 215(1)(d) of the CYF Act states that the Family Division ‘may inform itself on a matter in such manner as it thinks fit despite any rules of evidence to the contrary’. The VLRC notes that the Children’s Court has taken a narrow interpretation of this provision, and that this narrow interpretation has prevented the exercise of more inquisitorial approaches to the admission of evidence by magistrates (VLRC 2010, pp. 90-91). The Court did not comment on this matter in its submissions to the Inquiry.

The Inquiry considers that, ultimately, a contest-driven culture will remain unless the judicial officer in charge of the hearing sets the expectations of how parties and lawyers should conduct their cases.

‘Docketing’ of cases

One method of encouraging a more inquisitorial approach to the admission of evidence and the management of matters through the court process is the use of a ‘docket’ system. A docket system simply assigns a matter to one judicial officer who is then responsible for monitoring the matter through the system. In the Family Division, in simple terms, this would mean ‘one child, one magistrate’.

The benefit of a docketed court system is that magistrates become familiar with a child’s individual circumstance. This may increase consistency in decision making relating to a child, and reduce the potential for issues to be re-litigated. The Inquiry also notes that a docketing system would assist in addressing concerns raised in submissions and
consultations going to the amount of time child protection practitioners and community service officers spend in preparing for and attending court. For example, a submission from community service provider Ozchild noted that community service workers sometimes spend long periods at the court waiting to be called as witnesses, which has a significant impact on workload management and resources (Inquiry DHS consultations; OzChild submission, p. 18; Victorian Alcohol and Drug Association submission, p. 12).

The possibility of introducing a docket system was supported by the VLRC, although the VLRC noted that the Court would require support in piloting or otherwise introducing the system, and may be difficult in cases requiring emergency or short-term orders (VLRC 2010, p. 307-11).

In its submission to the Inquiry, the Children’s Court considered that a form of docketing is being developed for matters involving Aboriginal families, and matters involving sexual abuse allegations. While matters would not be assigned to individual magistrates, matters would be assigned to specialist lists, which would allow for greater consistency and case management in matters of this kind. Specialist lists are a way by which courts can organise the various cases that come before them grouped around the specific subject matter of the case. These lists allow court resources (including judges or magistrates, court registry staff and other support staff) to be better organised and practised in managing the court process for those cases from their commencement at court to completion of hearing. The proposed creation of specialist ‘Koori’ and ‘Sexual Abuse’ case lists in the Family Division are discussed in greater detail in section 15.5.3. The Children’s Court generally supported the introduction of a docketing system to the Family Division but considered that the introduction of such a system would need to be properly investigated and resourced, and particular attention given to how this would operate in regional Victoria (Children’s Court submission no. 2, pp. 46-47).

The Less Adversarial Trial model

A much-discussed alternative to the contests-driven culture for child protection applications is the LAT model of the Family Court. Under Division 12A of the Family Law Act, judges of the Family Court use inquisitorial methods to focus on the issues and arrangements that are in the best interests of the child. This is set out in Principles 1 and 2 of Division 12A (section 69ZN of the Family Law Act):

- Principle 1 – 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 – The court is to actively direct, control and manage the conduct of the proceedings.

Section 69ZX of the Family Law Act sets out the Children’s Court’s general duties and powers relating to evidence, such as giving directions and making orders about the matters in relation to which the parties may give evidence and how such evidence should be given. The LAT model allows parties to speak directly to the judge and requires the judge (rather than the lawyers) to determine how the trial will run, for example, by limiting evidence to what the judge thinks is relevant to the issues in dispute (Family Court 2011, p. 2).

Evaluations of the model in the Family Court have shown an increase in satisfaction with outcomes, particularly a greater contentment with the process and better emotional stability for children after court (Family Court of Australia 2011). The Inquiry also notes that both the Children’s Court and the Law Institute of Victoria support the adoption of such a model (Children’s Court submission no. 1, p. 47; Law Institute of Victoria submission, attachment 1, p. 9).

The VLRC found that the conduct of matters under Division 12A of the Family Law Act is an excellent model. The Inquiry agrees and considers that the model should be adapted for inclusion in the CYF Act. The Inquiry endorses the VLRC report’s recommendations regarding the LAT model of the Family Court (VLRC 2010, pp. 314-317). The Inquiry notes that the VLRC is of the view that a docketing system should support such a case management approach.

The Inquiry recommends that the Children’s Court be empowered, through legislative amendment, to conduct matters in a manner similar to the way in which the Family Court of Australia conducts matters under Division 12A of the Family Law Act. This is a medium-term recommendation that would be assisted by the evaluation of a pilot docketing system in appropriate court locations across Victoria.

**Recommendation 56**

The Children’s Court should develop a case docketing system that will assign one judicial officer to oversee one protection matter from commencement to end. In order to evaluate the effectiveness of the system, the system should be piloted at an appropriate court location. The Department of Justice should support the Children’s Court to establish the system.
Recommendation 57
The Children’s Court should be empowered under the Children, Youth and Families Act 2005 to conduct hearings similar to the Less Adversarial Trial model used by the Family Court under Division 12A of the Commonwealth Family Law Act 1975.

15.4.2 Court culture
Submissions to the Inquiry and Panel consultations reinforced the findings of previous reports that the Children’s Court environment, particularly in the Melbourne Children’s Court, is stressful for children and young people, their families, their carers, child protection practitioners, lawyers, and other professionals involved in the statutory child protection process.

The Inquiry makes recommendations in this chapter that aim to reduce children and young people’s exposure to the Children’s Court more generally, and at properly directing matters away from the currently chaotic corridors of the Melbourne Children’s Court. In relation to the tension between child protection practitioners, lawyers and the Court, the Inquiry notes that stakeholders acknowledge that the culture between DHS, magistrates, private practitioners and VLA could be more collaborative, informed and respectful (Children’s Court submission no. 1, p. 45; Children’s Court submission no. 2, p. 32; Inquiry DHS Metro Workforce forums and consultations; Inquiry consultation with Law Institute of Victoria; Victorian Government 2010a, p. 26; VLA submission no. 1, pp. 5-6; VLA submission no. 2, p. 2; VLRC 2010, pp. 233-235; Victorian Ombudsman 2009, pp. 56-59).

The adversarial process itself is notoriously exacting on the already stretched resources of child protection practitioners. As one submission put it, ‘few people speak well when under attack’ (Humphreys & Campbell submission (b), p. 3). The Inquiry considered submissions that argued that child protection practitioners should be, but are not, treated as expert witnesses in the current adversarial process. The Inquiry, in consultations with child protection practitioners, received almost universal input that at the Children’s Court at Melbourne, but not elsewhere, they were not treated with respect by some magistrates, and often not by the legal profession. The Humphreys and Campbell submission (b) (p. 3) reflected this input, noting a ‘court culture where denigration of child protection practitioners is part of the process’. The Children’s Court, and the legal practitioners in it, do not agree with this input.

Child protection practitioners as witnesses
There are two elements to the role of child protection practitioners as witnesses in Children’s Court proceedings. First, witnesses should always be treated with proper courtesy in giving evidence. There is no place in a court, or in legal conference, for bullying, sarcasm or denigration. Second, the legal categorisation of a witness as an expert. As to this, the foundational principle is that a matter is appropriate for expert evidence if it is relevant, is beyond the competence of ordinary people, and requires special skill, knowledge or training. A witness is received as an expert if they are so qualified. Child protection practitioners, as a category, fulfil these criteria. Identifying and assessing the risk to a child’s safety in the child’s living arrangements is a key specialist task in child protection work. This involves collecting data, assessing it, and forming proper judgments about how the capacity of the parents or householders and the issues in the child’s environment interact and will interact, and in turn how they are impacting, and will impact, upon the child’s safety. This specialist skill is acquired through academic study and professional training, internal specific training in risk assessment, professional supervision and on-the-job experience. This is properly regarded by the law as expertise.

There are two further considerations.
Under section 215(1)(d) of the CYF Act the Family Division of the Children’s Court ‘may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary’. It is speculative whether this facilitative provision has had an unintended consequence of blurring the perception of child protection practitioners as the expert witnesses that in law they are. Second, child protection practitioners need to understand that testing, properly conducted and judicially controlled, of their evidence is both appropriate and necessary. In this respect, it is essential that child protection practitioners receive relevant and sufficient training in court process, both to assist the court and in fairness to themselves. The sufficiency of such training is important and should be a component of the training services provided by the new training body discussed in Chapter 16. Importantly, the completion of an accredited training course as contemplated in Chapter 16 should operate to qualify child protection practitioners as expert witnesses in the assessment of the current and future safety of a child in their living arrangements. The Inquiry also notes and supports current initiatives in this regard, including the Victorian Child Protection Legal Conference conducted in Melbourne in June 2011 under the auspices of VLA, DOJ and DHS.
The Inquiry considers that the Children’s Court has a responsibility to ensure witnesses experience the court process in a way that minimises the stress that even experienced child protection professionals have reported that they feel in court. The Inquiry acknowledges the Children’s Court submission no. 2 (p. 9) that the experience of child protection practitioners is also influenced by a range of factors, including their work environment and a lack of training in court processes. Nevertheless, the Children’s Court has a responsibility to all witnesses to ensure that they understand court processes. The Inquiry notes that this responsibility extends to conference convenors and will be increasingly important with the adoption of less adversarial trial reforms.

Professional culture at court

Some submissions saw the experience of child protection practitioners as at least partly the result of a disjunction between the Court and the DHS approach to reunification and parental access. The Court was typically characterised as promoting higher levels of parental access than DHS. Proposed action to address this issue was the mentoring of regional magistrates (Foster Care Association of Victoria submission, p. 15) and training of magistrates in the impact of trauma, problematic attachment and cumulative harm on child development (OzChild submission, p. 19). Reforms aimed at improving this culture canvassed by submissions, consultations and previous reports include:

- Reporting ‘bad behaviour outside the courtroom’ to the judicial officer handling the case, to the President of the Children’s Court, and or to the relevant professional bodies, such as the Law Institute of Victoria, the Legal Services Commissioner or the Bar Council (Children’s Court submission no. 2, p. 32). In consultations, the Inquiry heard that such complaints are rarely received by the appropriate body or office;
- Funding the Children’s Court to appoint a director who, along with other Court staff, will manage behaviour in the corridors of the Court (VLRC 2010, p. 361);
- Increased and formalised collaborative training to foster professional understanding (Victorian Government 2010a, pp. 33-35). Chapter 16 sets out the Inquiry’s findings in relation to strengthening workforce capability.

Through its consultation with the OCSC and the Inquiry’s Reference Group, the Inquiry heard that the first step required to establish a more collaborative and respectful culture is the development of a common language between professionals involved in child practice, including child protection practitioners and lawyers (Eastern Region Family Violence Partnership submission, p. 1).

The Inquiry considers these conferences could be held more regularly with a view to implementing a more structured and accredited professional development program for both professions and could be part of the responsibilities of the new sector-wide training body proposed in Chapter 16.

- Developing a process for accreditation of lawyers working in the Children’s Court (Children’s Court submission no. 2, p. 32). The Inquiry notes that this accreditation program is currently in development and supports this positive step taken by the government and the Law Institute of Victoria;
- A revised fee structure for private practitioners to provide incentives for lawyers to see children away from court (Victorian Government 2010a, p. 22);
- The introduction of accredited training of conference convenors (VLRC 2010, pp. 218-219);
- The expansion of the panel of lawyers practising at the Melbourne Children’s Court (Children’s Court submission no. 2, p. 32); and
- Increased training of child protection practitioners in court preparation, privacy and Appropriate or Alternative Dispute Resolution (ADR) processes (Victorian Government 2010a, pp. 33-35).
The Inquiry endorses the measures outlined above and considers that specialisation training for legal professionals should be replicated with appropriate adaptations for magistrates sitting in the various locations of the Children’s Court. Such training could usefully be developed with the courts, the Judicial College of Victoria and with the assistance of experienced professionals including from the Victorian Bar, the Law Institute of Victoria, DHS Principal Practitioners and the new statutory clinical board proposed in Chapter 18 and is addressed by Recommendation 58.

The issue of monitoring and the conduct of legal professionals was raised in the Melbourne Public Sitting of 28 June 2011. The Inquiry notes that there are three categories of legal professionals who work for or are associated with VLA in Children’s Court matters: duty lawyers, in-house lawyers and private practitioners, who sit on a Children’s Court practitioner panel that is convened under section 29A of the Legal Aid Act 1978.

In a submission to the Inquiry, VLA noted that it is not possible to exercise the same degree of control over the conduct of the 24 private legal practitioners who comprise the VLA’s Children’s Court panel as it does over the duty lawyers and in-house VLA lawyers (Ms Judy Small, VLA, Melbourne Public Sitting). However, the VLA submission also noted that a code-of-conduct (following a recommendation in the Taskforce report) being developed for all practitioners in the Children’s Court was close to being settled and proposed for implementation in 2012.

Although private practitioners may be removed from panels (section 30(10) Legal Aid Act 1978), according to VLA this has rarely occurred as legal professionals are reluctant to complain about their colleagues, and reports of poor behaviour are often too vague to proceed with disciplinary action (Ms Judy Small, VLA, Melbourne Public Sitting). The Inquiry appreciates that lawyers may be hesitant to report conduct that may be fuelled by overwhelming caseloads and stressful environments. Nevertheless, lawyers are under professional obligations to maintain an appropriate standard of conduct under the Legal Profession Act 2004 and the Professional Conduct and Practice Rules 2005. Legal professionals and stakeholders in the Children’s Court are aware that clients within the Court are among the most vulnerable and disadvantaged members of the community and may be unlikely or unable to pursue complaints regarding conduct that falls short of acceptable professional levels. Complaints in relation to conduct that exacerbates the tensions of an already stressful environment can, and should, be made to the Victorian Legal Services Commissioner and, where relevant, to VLA.

In consultations, the Inquiry also heard that the workloads of VLA private practitioners are excessive. This is due in part to the fact that the pool of professionals on the Children’s Court Panel is quite small and that the current levels of remuneration for practitioners in this jurisdiction are low - both factors impact on the quality of service (Ms Judy Small, VLA, Melbourne Public Sitting). The Inquiry also notes that the family law jurisdiction is often viewed as a more attractive area of practice for lawyers compared with the Children’s Court jurisdiction. The Inquiry draws attention to the desirability of increasing the pool of practitioners sitting on the VLA Children’s Court Panel, but notes that this will be difficult unless the current, relatively poor levels of remuneration offered to professionals operating in the Court is addressed.

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It is desirable that there be an increase in the current pool of legal practitioners sitting on the Victoria Legal Aid Children’s Court Panel while consideration is given to improving the current levels of remuneration offered to lawyers practising in the Children’s Court jurisdiction.

**Recommendation 58**

Appropriate training in infant and child development, child abuse and neglect, trauma, and child interviewing techniques should be developed and provided to lawyers practising in the Children’s Court jurisdiction and in the Victorian Civil and Administrative Tribunal, having regard to the training offered to independent children’s lawyers in the family law jurisdiction. This training should be a prerequisite for any lawyer seeking to represent a child on a direct representation or best-interests basis in proceedings before the Children’s Court and should be an accredited course.

Appropriate education should be provided to judicial officers exercising the jurisdiction of the Children’s Court and members exercising the jurisdiction of the Victorian Civil and Administrative Tribunal. The Victorian Government should consult with the relevant professional organisations and also seek the assistance of the Judicial College of Victoria in developing an appropriate professional education program.
15.4.3 Legal representation of the Department of Human Services in child protection proceedings

The VLRC report noted concerns about the ability of the Court Advocacy Unit (CAU) of DHS to effectively represent DHS in child protection proceedings. Based on the VLRC’s consultations the report noted the following concerns:

- A conflicted role for DHS as it was both assisting children and families and then also initiating proceedings and seeking intervention orders (effectively switching from collaborative to adversarial);
- The current role of child protection practitioners included performing the type of work a solicitor would perform such as filing court documents and drafting affidavits; and
- The sometimes poor relationship between CAU lawyers and child protection practitioners particularly when CAU’s legal advice was disregarded or CAU lawyers were forced to make untenable arguments to court (VLRC 2010, pp. 388-389).

As part of its reform options, the VLRC report proposed that the VGSO represent DHS and conduct child protection cases on behalf of the State in the Children’s Court (VLRC 2010, option 4, p. 398). The benefits of using the VGSO as identified by the VLRC included:

- VGSO’s independence from the department;
- VGSO lawyers’ litigation and case management experience; and
- The respect for the VGSO among the judiciary and members of the profession (VLRC 2010, p. 394).

The VLRC qualified this recommendation by considering the possible use of a ‘mixed representation’ model if service capacity was compromised. The VLRC proposed that DHS could be represented in the metropolitan areas by the VGSO, by private law firms contracted through the Government Legal Services Panel (a panel of 20 law firms that are contracted to provide a range of services to government departments in various specialties of law), and by members of the CAU.

The VLRC also noted the mixed representation model would need to take account of the different representation practices in metropolitan and regional areas given VGSO and panel law firms only service DHS metropolitan areas and DHS consider continuing arrangements with private solicitor firms in the regional areas or consider whether VGSO solicitors should be posted to regional areas (VLRC 2010, pp. 398-399).

The Inquiry has heard that there are difficulties with the current arrangement for DHS representation in some regional areas. For instance, a complaint raised by VLA was that in the Wimmera region child protection practitioners either had to represent the department themselves or use local private practitioners which in turn reduced the pool of available lawyers to represent children or families (VLA, Horsham Public Sitting).

The Inquiry has also received submissions in support of VLRC’s Option 4 (Children’s Court no. 1, pp. 5-6; Federation of Community Legal Centres (Victoria), pp. 20-21; Youthlaw, p. 5).

DHS advised the Inquiry that it has recently restructured its legal services section. The CAU has been re-titled as the Child Protection Litigation Office (the CPL Office) to better reflect the nature of the case management and representation that is undertaken by that new unit and its central role within the DHS child protection program. Importantly, the CPL Office has also entered into arrangements for solicitors from the VGSO to be seconded to the department.

The Inquiry notes that while this arrangement should help ease the current burden on child protection practitioners appearing in regional courts and cover any shortfall in the capacity of the VGSO to represent DHS in all protection proceedings across the state in the immediate term, this arrangement does not fundamentally resolve the conflict of interest issue that has been raised by stakeholders.

In view of the steps that have already been taken by DHS and the VGSO to train and use VGSO solicitor advocates in child protection proceedings, the Inquiry recommends that, in the medium to long term, the VGSO represent DHS in all child protection proceedings before the Children’s Court and at VCAT across the state. VGSO solicitors should also brief barristers engaged to represent DHS in contested hearings. A clear delineation between DHS staff and their legal representatives in contested proceedings is considered by the Inquiry to be a long-term benefit with respect to strengthening relationships between families and child protection practitioners, the more efficient conduct of a matter at court and to improving the relationships between the legal practitioners who practise in this jurisdiction.

However, the Inquiry considers there to be an ongoing role for in-house lawyers from the CPL Office. The in-house lawyers can play a valuable role in representing DHS at the new pre-court Child Safety Conferences canvassed in section 15.5.1 and in other pre-court negotiations where appropriate. In light of these proposed changes, the Inquiry considers the office should be renamed.
The Department of Human Services Child Protection Litigation Office

This recently created office is led by a newly appointed Assistant Director, Litigation who reports to the Director of DHS Legal Services. It is understood at present that there are 33 staff consisting of 25 lawyers, four paralegals and four administrative staff.

The structure of the CPL Office has been organised into four units: East, South, North, and West, each of which is responsible for the child protection work flowing from the corresponding regional offices of DHS. A unit is overseen by a unit manager to ensure files are properly allocated and to oversee any ‘inactive files’. The members of each unit share responsibility for all the cases for their designated region, cover all court appearances, take urgent calls and do whatever is required to work in partnership with their region.

It is understood that senior lawyers in each of the units visit their designated regions to advise and support and, where possible, train groups of child protection practitioners in the regional offices. This allows legal issues to be discussed and addressed from the earliest point of statutory intervention, and enhances the quality of preparation of the matters that proceed to court. DHS advises that it anticipates a reduction in the number of instances where matters that have been listed before the court need to be withdrawn or rescheduled for want of more thorough legal preparation. DHS advises that there has been strong support from child protection practitioners and the staff of the CPL Office for the move to a regionally organised structure.

A rotating pool of four or five solicitor advocates seconded from the VGSO support the DHS solicitors. The primary role of the VGSO advocates is to handle many of the urgent safe custody applications and mentions that would otherwise have been briefed to barristers. The VGSO advocates are also allocated matters from each of the regions. DHS advises that as a result the CPL Office is no longer as reliant on briefing barristers for more straightforward applications and for urgent applications by safe custody.

The retainer arrangement with the VGSO is being reviewed on an annual basis. DHS advises that the intention is to continue this arrangement pending the next review in March 2012.

Recommendation 59

The Victorian Government Solicitor’s Office should represent the Department of Human Services in all child protection proceedings in the Melbourne Children’s Court and other metropolitan and regional Children’s Court sittings and at the Victorian Civil and Administrative Tribunal. Department of Human Services lawyers should represent the department at the pre-court conferencing stage.

15.5 Structural and process reforms for protection applications and the Children’s Court

The impact of legal proceedings on child protection practitioners has been made clear to the Inquiry as discussed in section 15.4.2. The broader impact of current court and legal processes under the CYF Act on the capacity of DHS to manage caseloads has also been highlighted in previous reviews of the statutory child protection system. For instance, the Taskforce report observed that protection applications by safe custody were likely to require more mentions at court than protection applications by notice and that safe custody applications were increasing as a proportion of overall applications. Cases were therefore taking longer to resolve and this conclusion was supported by analysis from the Boston Consulting Group (BCG). The BCG analysis indicated that while in 2002-03 around 19 per cent of primary applications were still pending resolution after six months, in 2008-09 this figure had increased to 31 per cent (Victorian Government 2010a, p. 18). This increase has had dual impact on both the resources of the Children’s Court and on DHS.

The Children’s Court itself has acknowledged the difficulty with time delays based on the number of applications it deals with, noting that in 2009-10, it resolved 46.8 per cent of primary applications within three months of the first hearing and 77.8 per cent of cases within six months of the first hearing but a significant proportion of cases involved the issuing of interim protection orders, which require the court to adjourn proceedings for three months before they can be finalised. The Children’s Court further noted that in the small percentage of cases that proceed to contest the time delay between the date of a dispute resolution conference and date of final contest had doubled from nine weeks in 2002-03 to 18 weeks by the end of July 2011 (Children’s Court submission no. 2, p. 13).

Accordingly, a number of structural reforms are canvassed in the following sections to help divert as many cases away from the court environment as appropriate and to clarify the role of the Children’s Court in the statutory child protection system.
In summary, the reforms relate to:

- Early conferencing: pre-court conferencing;
- Early conferencing: conferencing as part of the court process;
- Specialist lists;
- Commencement of protection applications by DHS;
- Reviewing the current range of statutory protection orders under the CYF Act; and
- Realigned court processes for statutory child protection proceedings.

### 15.5.1 Early conferencing: pre-court conferencing

One of the key reforms canvassed in the VLRC report is the proposal for a new system for determining protection application outcomes. The reform would be based on a conferencing process built on ‘a graduated range of supported, structured and child-centred agreement-making processes’ (VLRC 2010, p. 214). At the centre of this reform would be a mandated early conference (in appropriate cases), once a protection application is initiated.

The driving principle behind early conferencing is to ensure that protection concerns can be discussed and agreement reached on outcomes that are based on the views of the child or young person, their families, carers, DHS and those whose expertise may assist the parties to reach agreement in a non-court and ‘non-adversarial’ setting. A criticism raised with the Inquiry by the Children’s Court is that parties often will only seriously start talking with each other about resolving protection concerns in the court building. The VLRC noted the majority of protection matters are informally settled at court (VLRC 2010, p. 209). Every submission to the Inquiry that commented on the use of ADR processes supported the use of conferencing, in appropriate circumstances, to resolve protection concerns early. The Inquiry commends this principle.

The Family Group Conference model

The VLRC proposed a model based on the New Zealand Family Group Conference system promoting an early conferencing process and set out in some detail the critical aspects it believed was necessary for a similar Family Group Conference model to work in Victoria. The Inquiry notes that DHS currently conducts Family Group Conferences, although as stated by the VLRC and submissions to the VLRC, these are not mandated by the CYF Act, are not part of DHS statewide practice and are held in small numbers (VLRC 2010, pp. 238–239). The critical features of the Family Group Conference model proposed by the VLRC were:

- To entrench Family Group Conferences following commencement of a protection application as the general rule under the CYF Act unless exceptional circumstances existed (such as refusal to attend by a family member, convenor considers a Family Group Conference to be inappropriate, or where an emergency exists necessitating the matter being taken to court);
- To allow Family Group Conferences to be conducted in a three-stage process being: detailed information sharing between parties at the start of the conference; a time for private family deliberation during the conference; followed by the coordinator seeking the family group’s agreement with the referral source (being DHS) on whether a child is in need of protection and if so, an appropriate strategy to address the need;
- To permit a wide group of people to attend the Family Group Conference including the child, parents, carers, extended family, professionals and members of that family’s community with an interest in the child and the family to be determined by the conference coordinator in discussion with the parties;
- To require conference coordinators to be independent of DHS and the Court and to be accredited with appropriate qualifications and training (the VLRC considered VLA as suitable for developing and running the Family Group Conference model based on its experience in running the Roundtable Dispute Management program in the family law jurisdiction);
- To allow parties, particularly parents, access to legal representation and advice at the Family Group Conference; and
- To facilitate Family Group Conferences to be held at suitable locations around metropolitan and regional areas across the state, that are not at courts, and possibly using departmental facilities (VLRC 2010, chapter 7).

The Family Care Conference model

The Children’s Court proposed to the Inquiry an alternative early conferencing model of Family Care Conferences based on the South Australian Youth Court practice. The critical difference would be that the Court Conferencing Unit would run the conferences and it would borrow on the current New Model Conferencing (NMC) practices that were being piloted in the Melbourne Children’s Court through 2010-11. The advantages that the Court proposed a Family Care Conference would have over the Family Group Conference were: the independence of the Court as a facilitator; the similarity of the Family Group Conference to the pre-hearing NMCs currently run by the Court once a matter is in court; and the benefit of
utilising an established process with practice standards with an existing body and infrastructure rather than creating a new body to run the Family Group Conference process (Children’s Court submission no. 1, pp. 37-38).

**Signs of Safety Conference model**

Another model that the Inquiry considered was the Signs of Safety (SOS) conferencing model that is in operation in Western Australia. This model was endorsed by the Taskforce in its report. The SOS model occurs once protective applications have been filed with the Children’s Court and is a pre-hearing conference. It requires all parties to meet at a venue outside the court to discuss the protective concerns and proposals held by the Western Australian Department of Child Protection. The parties are legally represented but lawyers do not play an advocacy role in these conferences. The conferences are co-convened by a senior mediation accredited lawyer from Legal Aid Western Australia and a senior social worker from the Department of Child Protection. The conference uses a strengths-based approach to dispute resolution and adopts the SOS framework and language that both lawyers in this jurisdiction and child protection practitioners are trained to use.

The SOS conference model underwent a pilot phase in Western Australia and was evaluated in 2011. That evaluation found the SOS conferencing model to be successful, noting in particular that there was a high level of engagement with the pilot, cancellations of planned conferences were rare, that conferences had resulted in clear time and court savings, and had the confidence of the judiciary. The evaluation also noted that there were a lack of skilled and independent facilitators for the meetings and a lack of preparation often resulted in time delays or unclear expectations of participants at the conferences (Howieson & Legal Aid Western Australia 2011, pp. 9-11).

**The Inquiry’s proposed model**

Having considered the detailed analysis in the VLRC report and the comments of DHS and the Children’s Court, the Inquiry proposes the following for a new pre-court conference process.

- **DHS to continue with Family Group Conferences** – The Inquiry notes that Family Group Conferences are currently conducted by DHS as an earlier intervention practice. The Inquiry believes the current model of department-run Family Group Conferences should continue as they are aimed at helping at-risk families with a view to averting a formal statutory child protection process. DHS should be adequately resourced to conduct Family Group Conferences in a more consistent and coordinated manner across the state.

- **New statutory Child Safety Conference prior to court** – The CYF Act should mandate a conferencing process that occurs prior to court where possible and where appropriate. If an application has commenced through safe custody which, drawing on the VLRC report, the Inquiry proposes should be re-termed as an ‘emergency removal’, then the matter should still proceed, where appropriate, to a pre-court conference. It is important that this statutory mechanism be used to divert appropriate cases away from court.

There are circumstances in which a statutory pre-court conference would be inappropriate. These circumstances should be stated in the CYF Act. Consistent with the Inquiry’s proposals in Chapter 9 for new statutory child protection processes in response to serious reports of abuse, such as physical or sexual abuse and family violence, it is likely to be inappropriate for protective concerns based on such allegations to be dealt with through a pre-court conference. In other cases, the conference might be deemed inappropriate on a case-by-case basis due to safety or security concerns. It may also be inappropriate where the parties agree due to the circumstances that such a conference would serve no purpose (for example, where a voluntary agreement has already been entered into at a DHS-convened Family Group Conference, or where the parties agree that a court order is more appropriate due to the parent’s inability to comply with a voluntary agreement).

This new statutory conference could be named ‘Child Safety Conference’ to distinguish this from the current non-mandatory Family Group Conference convened by DHS and to reinforce the focus on the safety of the child. As the Child Safety Conference is intended to divert matters from court, administrative responsibility for the implementation of these conferences should be with DHS and not with the Children’s Court. However, due to the proposed structure and conduct of these conferences as discussed below, DHS would be required to enter into an implementation agreement with VLA.

**Structure and conduct of a Child Safety Conference** – The Inquiry agrees with the principles put forward by the VLRC for the conduct of these conferences, which include: broader group participation; lawyer-assisted resolution; and use of appropriate and transparent conference practice standards. This early stage conference is designed to keep children, parents and other interested parties away from a court setting by achieving outcomes that are focused on the child’s safety and wellbeing.
The Inquiry recommends that the conference adopt an aspect of the Western Australian SOS conference model, namely that the conference be co-convened by two convenors from VLA and DHS. In Western Australia, the co-convenors are a senior lawyer from Legal Aid Western Australia who is accredited in mediation and a senior social worker from the Department of Child Protection (DCP). A similar approach should be taken with the use of senior practitioners from VLA and DHS who have appropriate experience and qualifications in child protection and in mediation practice. However, the Inquiry is mindful of the concerns that may arise for the parties and indeed the convenors on the matter of independence. In order to ensure separation between the convenors and the parties and to minimise any perceptions of bias or identification with the parties, the Inquiry recommends that the convenors should be:

- Accredited in mediation and ADR practice;
- Appointed for fixed terms for the exclusive purpose of convening Child Safety Conferences; and
- As far as is possible, be based near the conference venues.

The benefit of this proposal is that government can draw on existing professionals to conduct these conferences and it does not require the creation of new statutory offices for conference convenors or a separate organisation to host the conferences. Accordingly, the Inquiry does not consider there to be a need for an Office of Children and Youth Advocate to convene these statutory conferences as proposed in Option 3 of the VLRC report.

As these conferences are intended to occur outside a court context the Inquiry does not agree with the recommendation by the Children’s Court that the Court Conferencing Unit take responsibility for convening these conferences.

**Hosting of conferences: metropolitan and regional areas** – The Inquiry agrees with the VLRC that existing VLA facilities at the Dispute Roundtable Management program could be utilised to facilitate these conferences in Melbourne, while DHS facilities could be considered for hosting conferences in outer metropolitan or regional areas. However, the Inquiry recommends that where existing facilities are to be used, and those facilities are not currently configured for conferencing, they should be modified to ensure they provide appropriate child and family-friendly environment and are set aside for the predominant purpose of facilitating the conferences. VLA and DHS would need to coordinate the allocation and availability of conference convenors to facilitate conferences across the State.

This approach would also better enable the Children’s Court and its conferencing unit to manage the proposed expansion of its current NMC services to other metropolitan areas and to regional courts.

**Setting standards** – Conference practice standards should draw on the SOS and NMC practice standards, with the basic structure and standards of the conference to be specified in the CYF Act. The Inquiry has viewed the ‘strengths-based’ conferencing practices that apply in both SOS and NMC conferences and considers these to be an effective way of drawing out the voice of children and their parents and allowing them to meaningfully engage to find solutions that would support their family.

**A joint collaborative approach** – Fundamental to the success of this conferencing model is the desire to collaborate by all practitioners and professionals involved with the conference. This clearly depends on the successful implementation of the training reforms discussed in section 15.4.3 and in Chapter 16.

### 15.5.2 Early conferencing: conferencing as part of the court process

Currently, the CYF Act allows the Court to refer a protection matter to a Dispute Resolution Conference (DRC). The Act enables a conference to be either: facilitative (where the parties with the assistance of convenors are encouraged to reach agreement on the action that is in the best interests of the child); or advisory, where the convenor considers and appraises the matters in dispute and provides a report to the Court on the facts of the dispute and possible outcomes (ss. 217 – 219, CYF Act).

The CYF Act already empowers the Children’s Court to order the attendance of parties other than DHS and the parents including the child, other relatives of the child, if the child or parent is Aboriginal a member of their Aboriginal community with their agreement, or in the case of a child from an ethnic or culturally and linguistically diverse background a member of that child’s community, or if the child or parent has a disability, an advocate for the child or parent (s. 222).

DRC convenors are Governor-in-Council appointments on the advice of the Attorney-General although the Inquiry notes the Children’s Court has recommended to the Victorian Government an amendment to the CYF Act to allow convenors to be appointed by the President of the Court due to the administrative burden on the Court associated with preparing Governor-in-Council appointment documentation (Children’s Court submission no. 2, p. 13). The Inquiry understands that this proposal is to be addressed by the Victorian Government.
New Model Conferences

Following the Taskforce report in 2010, the Children’s Court, in conjunction with DHS and VLA developed its NMC program.

NMCs are currently held for protection matters at the Melbourne Children’s Court arising from the DHS North and West Metropolitan region while traditional DRCs continue to be conducted by court registrars in Moorabbin and other regional courts. NMCs are held either at the VLA Roundtable Dispute Management (RDM) building or at the Melbourne Children’s Court building. The Court advises that NMCs will be expanded for cases arising from Southern and Eastern Metropolitan DHS regions once facilities at the William Cooper Justice Centre in central Melbourne are made available (Children’s Court submission, no. 2, p. 33).

The Children’s Court issued detailed Guidelines for New Model Conferences, which took effect from 31 January 2011. In summary, the guidelines:

• Set out when the Court is likely to order a NMC with, as a general rule, cases unlikely to resolve expeditiously being referred for a NMC at the second mention;

• Require parties to undertake information exchange at least seven days prior to the NMC;

• Require the NMC to maintain a child focus and to hear the voice of the children directly or indirectly through the child’s lawyer;

• Set out the responsibilities and role of the convenor as well as the parties during an NMC;

• Stress that lawyers are there in a non-adversarial capacity and to represent their client in a problem-solving environment; and

• Encourage families and relevant community members to be involved to contribute to a resolved outcome rather attending to advocate for any one party (Children’s Court submission no. 1, appendix c). The Inquiry notes that NMCs are currently held at the VLA’s RDM building and at the Melbourne Children’s Court building. The NMCs work on a strengths-based approach to allow the parent and the child or young person, if present, to ‘take ownership’ of their situation and to express their views throughout the conference. The legal representatives for the parents do not take an advocacy role at the conference but speak for their clients as needed and formalise negotiated outcomes. The facilities at the RDM building, a dedicated conferencing facility, are superior to the Children’s Court conferencing facilities. The Inquiry notes the RDM building is predominantly used for family law conferences and the constraints on the court’s ability to hold all NMCs off-site due to operational delays with the facilities at the William Cooper Justice Centre.

An issue of concern, as is acknowledged by the Children’s Court in its submission, is the extraordinarily high rate of NMC cancellations. From the statistics provided by the Court close to 40 per cent of scheduled NMCs do not take place on their listed date (Children’s Court submission no. 2, p. 35). The Children’s Court’s submission notes that cancellations have occurred for various reasons including the convenor, a party or representative from DHS being unavailable, a party being ill, a case not being ready or a Family Violence Intervention Order has been issued preventing the NMC from taking place.

Subsequent data provided to the Inquiry by the Children’s Court indicated that from August 2010 to October 2011, of the 77 NMCs cancelled prior to the date of the conference:

• 53 per cent of cancellations were due to a party (other than DHS) being unavailable (reasons unspecified) or being ill;

• 13 per cent of cancellations were due to the case not being ready to proceed;

• 9 per cent of cancellations were due to DHS being unavailable;

• 8 per cent of cancellations were due to a convenor being unavailable; and

• 17 per cent of cancellations were due to other reasons.
The data also showed that for the same time period, of the 92 conferences that were cancelled on the day of the conference:

- a concerning 84 per cent of cancellations were due to a party (other than DHS) failing to attend (reasons unspecified) or due to illness;
- 8 per cent of cancellations were due to a party not having a lawyer or the case not being ready to proceed;
- 1 per cent of cancellations were due to DHS failing to attend; and
- 7 per cent of cancellations were due to other reasons (Inquiry consultation with Children's Court).

The Children's Court has advised that it is considering strategies to address this problem by allowing the conference intake officer to focus engagement with the parents, the sending of SMS reminders to conference participants, and also possibly listing a directions hearing one week prior to the scheduled conference to ensure it is ready to proceed on the date (Children's Court submission no. 2, p. 36). While the Inquiry considers the need for a directions hearing might add a further process burden, the Inquiry supports these initiatives by the Court.

The Inquiry considers that the legal representatives of the parties should bear greater responsibility in ensuring that their clients are able and willing to attend on the day. For instance, every time a client fails to attend a NMC, resulting in a cancellation without 24 hours prior notice, the Court may require the legal representative to explain to the magistrate why their client did not attend and what steps they took to secure their client's attendance. If those steps were inadequate, the Court should be communicating its concern to VLA. VLA should implement fee penalties for lawyers who fail to take adequate steps to ensure their client’s attendance at the NMC, and lawyers who repeatedly fail to do so should not be engaged. This aspect should also be addressed in the code of conduct being proposed for practitioners in 2012.

The Inquiry also supports the proposals being developed by the Children's Court and DOJ in consultation with the Aboriginal community to use Aboriginal co-convenors for NMCs involving Aboriginal families and the creation of a specialist sub-committee to enable children to better participate in the NMC process. The Inquiry notes that this should be done in the context of the principle, which is supported by the Children’s Court, that children should not be involved with the Court unless they express a desire and it is in their interests to do so. The Inquiry understands an evaluation process of the NMC program is currently being undertaken on behalf of the Court.

Recommendation 60
Protection concerns should be resolved as early as possible using a collaborative problem-solving approach with a child-centred focus and minimising where possible, the need for parties to go to court. This means that:

- The Department of Human Services should, where appropriate, use voluntary Family Group Conferencing as a matter of practice to prevent matters from reaching the protection application stage;
- Where a matter has reached the protection application stage, parties must try to resolve the protective concern, where appropriate, through a statutorily mandated Child Safety Conference set out in the Children, Youth and Families Act 2005; and
- Where a matter is before the Children’s Court, parties should, where appropriate, go through a New Model Conference and the Children’s Court should be supported to implement this model of conferencing across the state.

Finding 15
The Inquiry notes an evaluation of the Children’s Court New Model Conference is being undertaken. The Inquiry generally supports the structure and process of the New Model Conference but is concerned with the current levels of cancellation due to non-attendance at these conferences.

Recommendation 61
Victoria Legal Aid should implement fee penalties for lawyers who fail to take adequate steps to ensure their clients’ attendance at a New Model Conference and lawyers who repeatedly fail to do so should not be engaged by Victoria Legal Aid. This should also be addressed in the code of conduct being proposed for practitioners in 2012.
Chapter 15: Realigning court processes to meet the needs of children and young people

15.5.3 Specialist lists

Child sexual abuse allegations in protection matters

There is a need for children and young people who may have been the subject of sexual abuse to be treated with particular care. When these children are the subject of a protection application by DHS it is important for their safety and wellbeing that the protection application is resolved as expeditiously as possible in the Family Division of the Children’s Court. Submissions to the Inquiry have called for better court processes to expedite protection applications in the Family Division that involve an allegation of sexual abuse through the creation of a specialist list (OCSC, attachment c, pp. 9-10), with regard to the provision and testing of evidence (VLA submission no. 1, p. 19) and specialist training for magistrates hearing such matters (Humphreys & Campbell (b), pp. 4-6). As discussed in section 15.4.1, specialist lists assist the court to organise its resources and develop specialist expertise, based on the subject matter of the case, to better manage a case from commencement through to completion of hearing.

The issue arises in the context of a low rate of substantiations of sexual abuse, an issue that is discussed in Chapter 14, where the Inquiry recommends amendment to the CYF Act to make clear the standard of proof is the balance of probabilities and no further qualifications be added to that test. A model that has been raised by stakeholders and was considered by the VLRC was the Magellan program used in the Family Court and Federal Magistrates Court for family proceedings where allegations of abuse of children have surfaced (see box). The Children’s Court has indicated its strong support for the creation of a specialist list and notes its ongoing work with the assistance of a cross-disciplinary working group to develop a suitable model for implementation in the Family Division (Children’s Court submission no. 2, p. 42). The Inquiry supports this work.

The Magellan case management program

The Magellan program was piloted in the Melbourne Registry of the Family Court in 1998 and has subsequently been implemented in all states and territories where the Family Court sits except in Western Australia, which has a state-based Family Court. That court runs its own specialist program called Columbus.

The program involves:

- A specialist team within the court registry that comprises one or two specialist judicial officers and dedicated staff to deal with cases involving sex abuse allegations;
- A steering committee comprised of key interagency stakeholders; and
- Interagency cooperation between police, child protection services, hospitals, private lawyers, community centres and counselling services (VLRC 2010, p. 161).

Some of the key aspects of the program are:

- A focus on children involved in the dispute;
- A judge leading and managing the proceedings from commencement to end and within tightly managed timeframes;
- A designated court-ordered independent children’s lawyer for every child that is funded by legal aid (Family Court, Information Sheet).

The VLRC noted that recent reviews of the Magellan program identified the following benefits of the program since its introduction into the Family Court:

- The length of time to resolve matters was reduced through fewer court events and a reduction in dispositions times;
- There was greater inter-agency collaboration and involvement; and
- Potentially lower levels of distress for the children involved (VLRC 2010, p. 161).
Koori list in the Family Division

Another area in which the care outcomes for a vulnerable sector of our community should be strengthened is the creation of a supportive and collaborative legal environment for Aboriginal children and youth who might be in need of care and protection. The over-representation of, and the particular issues facing, Aboriginal children in the statutory child protection system has been discussed in Chapter 12. One of the major themes for improvement from that chapter is the better take-up of Aboriginal Family Decision Making processes outside of the court environment and is the subject of Recommendation 34 in Chapter 12.

The Inquiry heard calls for the establishment of a specialist Koori list in the Family Division based on the Koori Court in the Criminal Division of the Children’s Court to better meet the needs of Aboriginal children and their families in the court system (AFVPLSV submission, p. 23; VLA submission no. 1, p. 19). The strengths of such a list are:

- The creation of a space and environment for Aboriginal children and their families and potential carers to be heard in a culturally appropriate manner
- The training of magistrates to oversee the list;
- The provision of continuity with respect to cases; and
- The incorporation of aspects of the earlier conferencing or problem solving model that has been proposed by the VLRC and is supported in principle by the Inquiry.

Consultation with the Children’s Court and stakeholders indicates that not all aspects of the Koori Court model can be translated into the Family Division, particularly with fully contested hearings, but considers that a trial list could be piloted at a suitable court location or locations to assess its level of success.

The Children’s Court is currently working to investigate options to improve the processes for Aboriginal children and families at court (Children’s Court submission no. 1, p. 22) and is seeking to develop a specialist list. It noted that it has sought, and not received, funding from the Victorian Government to appoint a Koori Support Program Manager as part of a DOJ sponsored Koori Family Support Program which has been ongoing since mid-2009 (Children’s Court submission no. 2, p. 41). The program was established to consider various non-adversarial Aboriginal specific strategies at pre-court, court and post-court stages (VLRC 2010, p. 30).

The Inquiry endorses the work of DOJ, the Children’s Court and key stakeholders to develop and implement specialist Sexual Abuse and Koori lists in the Family Division. A pilot program could be run in the Melbourne Children’s Court or another suitable court location to evaluate the effectiveness of the lists.

Recommendation 62

The Children’s Court should establish specialist Sexual Abuse and Koori lists in the Family Division. The court should be resourced to create and implement these lists as a matter of priority. To ensure these lists are suitable for implementation across the state, a pilot could be run in the Melbourne Children’s Court or another suitable court location.

15.5.4 Commencement of protection applications by DHS

The VLRC proposed a new way of commencing applications (VLRC 2010, Option 2). Under this option, all protection applications would commence by notice. However, the VLRC proposed that where a protective concern was formed, DHS would commence a formal action by requesting a Family Group Conference rather than filing an application at court. The VLRC considered that only in exceptional circumstances should DHS seek to remove a child by safe custody or, as termed by the VLRC, through an ‘emergency removal’. Even where an emergency removal was required, the VLRC proposed that DHS should first obtain an ‘emergency removal order’ from the Court and if a child was removed without an order, the protective intervener should apply to the Court for an order within one working day of the removal (VLRC 2010, pp. 297-300).

The Inquiry supports the principle of commencing protection applications by notice but considers that such a reform proposal must also be flexible to reflect the nature of child protection intervention. A matter that links the court process to statutory child protection intervention is the way in which protection applications are brought by DHS to the Children’s Court. The Inquiry notes the significant increase in the proportion of protection applications brought by safe custody compared with applications by notice from 2002-03 to 2010-11 (see Figure 15.2).
The Inquiry received submissions on the increasing proportion of protection applications made by safe custody as compared with those made by notice, and the impact of this trend on the court’s ability to meet the needs of vulnerable children in a timely and efficient manner. The following reasons were suggested for the rise in applications by safe custody:

- An increase in DHS workload (Children’s Court submission no. 1, p. 17);
- DHS is focusing on the hard cases (Children’s Court submission no. 2, p. 22);
- DHS ‘continues to focus on ‘event’ based interventions rather than intervening earlier to support the family’ (Children’s Court submission no. 2, p. 23);
- DHS is seeing more children and families with increasingly complex, multiple needs and this results in a higher incidence of crisis events (Inquiry consultation with DHS);
- Applications by safe custody are given priority at court (Inquiry consultation with DHS); and
- Legal advice is given that there is insufficient evidence for an application that would have proceeded by notice. A crisis event then triggers the safe custody application process (Inquiry consultation with DHS).
The VLRC also noted in its report that from consultation with child protection practitioners, applications by safe custody offered benefits that were not readily obtainable with an application by notice, such as it was the only way to get the court to make an order immediately and to attach conditions. The VLRC noted:

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 (VLRC 2010, p. 290)

Given the variety of reasons put to the Inquiry, and acknowledging a statutory child protection system that is currently subject to significantly increasing demand, the Inquiry considers that mandating all protection applications to commence by notice would not properly reflect the range of circumstances that may give rise to a protection application. In all matters, the safety of the child must remain the paramount concern.

The Inquiry considers with the sum of recommendations proposed by the Inquiry for changing the current statutory child protection system in Chapter 9 and court processes in this chapter there should be less of an emphasis on obtaining court orders except in those cases that require a significant intervention.

In future, when DHS files a protection application by notice, following the current process in the CYF Act, the Act will require the parties to attend a Child Safety Conference as part of the earlier statutory intervention process proposed in section 15.5.1. The Child Safety Conference is the process by which the parties can discuss protective concerns and what actions should be taken. The process of filing a protection application by notice with the court will allow tracking of how often a statutory intervention requiring a decision by the court is required after this conferencing process.

Clearly, protection applications requiring an emergency removal will continue to be required where the child’s safety is at risk. However, once the immediate safety concern has been met, the parties and the court may decide that a Child Safety Conference is the most appropriate mechanism for resolving protective concerns if the immediate safety concerns have passed.

The Inquiry does not support the creation of new classes of orders (being emergency removal orders, interim care orders and short-term assessment orders) as proposed in Option 2 of the VLRC report. This would be inconsistent with Inquiry proposal to reduce the current range of orders and simplify the process (see sections 15.5.5 and 15.5.6 below). The Inquiry also considers that it is appropriate to retain the current 24 hour time limit in section 242 of the CYF Act when there is an emergency removal, particularly as a child or young person would no longer be required to attend court and the VGSO is to represent DHS in all child protection proceedings.

15.5.5 Reviewing the current range of statutory protection orders under the Children, Youth and Families Act 2005

The law and legal institutions should be simple and accessible to children and young people. In order for this to occur, the legislation should be clear as to when different institutions and decision makers should be engaged to meet the needs of children. The Inquiry considers that a court should not be involved in case management and case planning particularly in rapidly changing situations. There are other bodies with expertise more suited to case planning, provided that they are guided by transparent principles and practice, are accountable and are appropriately monitored.

Chapter 21 proposes new oversight and regulation mechanisms and processes to ensure that this occurs.

Further, the system of statutory orders should allow sufficient flexibility for DHS and the parties to best meet the needs of children. The current range of orders and the conditions that may be attached to these can lead to protracted negotiations or disputes that do not serve the interests of children and do not enable DHS to act quickly to protect children. The Inquiry is concerned about the number of court events that are currently attached to each protection application including changes to orders and disputes over conditions.

Current orders and conditions attached to orders

With that in mind, the Inquiry examined the current range of protection orders that DHS may seek from the court under the CYF Act from the protective intervention stage to the final order stage under Parts 4.8 to 4.10 of the Act. A summary of the 12 key orders or enforceable agreements is in section 15.2 (see Table 15.1). The Inquiry does not include secondary orders such as Therapeutic Treatment Orders and Therapeutic Treatment Placement Orders as part of this discussion.

Figure 15.3 illustrates the orders most frequently the result of protection applications before the Court in 2009-10 and 2010-11. As previously noted in Chapter 9, the number of orders issued below does not reflect the number of children as more than one order may be made with respect to any one child or young person.

The total number of Interim Accommodation Orders issued in 2009-10 was 10,392 orders and in 2010-11 was 9,726 orders. The total number of final protective orders, issued in 2009-10 was 5,780 orders and in 2010-11 was 6,336 orders. Interim Accommodation Orders made up the majority of orders issued in 2009-10 and in 2010-11 followed by Supervision Orders and Custody to Secretary Orders.
The conditions attached to the orders will vary depending on the type of order sought by DHS, the particular circumstances of the child and their family and what type of matters DHS seek to address through its intervention. With the exception of Guardianship to Secretary Orders, where no conditions can be imposed by the Court, a list of standard conditions has been developed by the Court in consultation with key stakeholders that may be attached to various protection and related orders.

These conditions are contained in a Standard Conditions on Family Divisions Orders form or the ‘Pink Form’ (reproduced in VLRC 2010, appendix k, p. 471). There are 31 types of conditions outlined on the form and include:

- Visits from and cooperation with DHS;
- Accepting support services;
- Counselling;
- Anger management;
- No cohabitation or contact with child (other than during access);
- Psychological or psychiatric assessment and/or treatment;
- Paediatric assessment and/or treatment;
- Alcohol/drug assessment or testing;
- Abstinence from drugs or alcohol;
- Curfew on a child or young person;
- No physical discipline of child;
- Not exposing a child to violence;
- No threats to or assaults of DHS staff;
- Child’s health check-ups or assessments – either with a doctor or with a Maternal and Child Health Nurse; and
- Attendance at school.

The form is used as part of negotiating conditions on court orders on a daily basis in the Children’s Court. The form is filled in by the legal representative for DHS once negotiations with the parties are complete and it is then tendered to the court as part of the ‘minutes’ of consent. DHS should typically seek conditions in the best interests of a child based on the particular circumstances of the case and the order being sought. The use of the standard form does not preclude DHS or another party requesting other conditions (such as respite care) in the child’s best interests based on considerations in section 10 of the CFY Act.

Protection orders in other jurisdictions
The Inquiry considered the comparable categories of care and protection orders available under the equivalent statutes in certain other Australian jurisdictions (see Table 15.3).
### Table 15.3 Principal categories of care and protection orders in other Australian jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Types of orders</th>
</tr>
</thead>
</table>
| New South Wales     | • Emergency Care and Removal Orders  
                     • Examination and Assessment Orders  
                     • Interim Care Orders  
                     • Other Interim Orders  
                     • Orders accepting Undertakings  
                     • Supervision Orders for 12 months  
                     • Order Allocating Parental Responsibility (to either one parent or to the Minister or to another specified party)  
                     • Contact Orders (with condition on frequency and duration, supervision or denying contact). |
| South Australia     | • Investigation and Assessment Orders  
                     • Undertakings (12 months)  
                     • Custody Orders to various parties (12 months)  
                     • Guardianship Orders to the Minister or other parties (12 months)  
                     • Guardianship Orders to the Minister or other parties (to 18 years).  
                     The Children’s Court is empowered to make ancillary orders to complement these primary orders. |
| Queensland          | • Temporary Assessment Orders  
                     • Court Assessment Orders  
                     • A generic category of Child Protection Orders with different specified functions such as:  
                       – undertakings;  
                       – contact;  
                       – supervision;  
                       – custody to the Chief Executive or custody to a suitable person a member of the child’s family but not being the parent;  
                       – short term guardianship to the Chief Executive; and  
                       – long term guardianship to the Chief Executive or to a suitable person being a member of the child’s family, or a suitable third party. |
| Western Australia   | • Supervision Orders  
                     • Time limited Protection Order (placement with Chief Executive Officer for up to two years)  
                     • Protection Order (placement with Chief Executive Officer, to the age of 18 years)  
                     • Special Guardianship Order (placement and parental responsibility with a person who is not the parent or the Chief Executive Officer, to the age of 18 years). |

Source: Inquiry analysis
The Inquiry considered in some detail the statutory child protection scheme in Western Australia. Under the Children and Community Services Act 2004 (CCS Act) the Children’s Court of Western Australia is empowered to make four primary types of protection orders:

- A supervision order allowing a child to remain with their family where parents retain responsibility (with any conditions ordered by the court);
- A time-limited protection order being a maximum two year placement with the Chief Executive Officer (CEO) of DCP (with no provision for conditions);
- An order placing a child with the CEO of DCP up to the age of 18 years (with no provision for conditions); and
- A special guardianship order placing a child with parental responsibility with someone other than the CEO of DCP or the parents up to the age of 18 years, with the only condition attached being the level of parental contact.

For reporting purposes, DCP categorises time-limited protection orders where a child is placed with DCP and an order placing a child with DCP up to the age of 18 as ‘care orders’ (as the child is in the care of the CEO of that department). DCP categorises supervision orders and special guardianships orders as ‘non-care orders’ (as the child is with a parent or third party). In 2010-11, DCP made 847 new protection applications of which 613 resulted in care orders and 61 non-care orders for a total of 674 new orders being made by the Children’s Court (DCP 2011a, p. 22).

In respect of all these orders DCP is required to file a plan for how the child’s wellbeing will be managed during the order. Critically, there are no ‘breach of conditions’ provisions in the CCS Act requiring parties to return to the court. The only course available to the parties unhappy with the level of compliance with an order is to return to court to seek a discharge of the order. Every other decision by DCP with respect to the administration of the order can be subject to an internal DCP administrative review process (a Case Review Panel) or further review by the Western Australian State Administrative Tribunal, but not the court.

The Western Australian Children’s Court may also make interim orders (section 133) with a broad discretion about what conditions that interim order may cover, noting that it is time limited and in force until parties return to court at a later date.

Generally, the range of orders in child protection legislation in different states serve similarly broad purposes: allowing the court to ensure the child’s immediate safety on an interim basis; undertakings by parents; allowing the child to reside with one or both parents but with State supervision; transferring the care and custody of the child from the parents to another party for a specified time; or transferring care and guardianship of the child to another party until they reach the age of 18 years. The CYF Act is more prescriptive in relation to the scope and functions of the various orders that the Act provides.

Comments to the Inquiry on current orders under the Children, Youth and Families Act 2005

Very few submissions to, or consultations with, the Inquiry commented on the current range of orders under the CYF Act. The key bodies that commented to the Inquiry were the Children’s Court and DHS. The Children’s Court expressed the view that, with the exception of Temporary Assessment Orders and Custody to Third Party Orders that ‘are used sparingly and seem to serve no current purpose’, the current range of orders under the CYF Act were generally appropriate (Children’s Court submission no. 2, pp. 39-40).

DHS provided the Inquiry with two options for simplifying the current range of orders. The first option was to collapse all orders into a generic category of ‘Protective Orders’. Under this option, the court would make a protective order that would cover the following matters:

- The placement of a child with a person or organisation (such as parent, suitable person, out-of-home care service, secure welfare or declared parent baby unit or hospital);
- The custody of the child (for example, with parent(s), DHS, another suitable person such as kinship carer or an Aboriginal agency);
- The guardianship of the child (for example, with parent(s), DHS, another suitable person such as a kinship carer or an Aboriginal agency);
- The level of DHS involvement (whether DHS should remain involved); and
- The length of the order.

Under this option DHS would attach a case plan to the protective order but there would be no conditions attached to the order.
The second option proposed by DHS would realign court orders to relate only to the care and supervision of children. There would be two categories of orders:

- A ‘Care Order’ would involve the transfer of legal guardianship or custody to DHS or non-government agency, permanent carer or a suitable third party such as a kinship carer. The court would determine the length of the order and to which party guardianship or custody of the child is given. While a case plan would be attached to the order, there would be no conditions attached to the order. Due to the significance of the intervention, these orders would be sought as a last resort.

- A ‘Supervision Order’ would involve the child remaining under the responsibility of their parents or possibly a kinship carer while DHS is authorised to supervise or direct the level and type of care to be provided to the child. The court would determine the length of the order and a case plan will be attached to the order. However, there would be no conditions attached to the order (Inquiry consultation with DHS).

Proposed modification of orders under the Children, Youth and Families Act 2005

While the Inquiry is attracted to the options proposed by DHS for a simpler structure for orders, the Inquiry also considers that the role of the court should extend to determining those conditions that:

- Fundamentally alter the relationship between parents and their children or between children and siblings or other people significant in children’s lives; and

- Might be considered more intrusive on an individual’s rights.

The types of conditions that would fall in this category are conditions relating to child-parent or child-sibling contact, exclusion of individuals from a child’s life, or conditions that involve the parents or caregivers undergoing some form of treatment or drug and alcohol screening.

To that end, the Inquiry considers the Western Australian scheme as instructive for minimising the role a court plays in care or case planning. This approach would not, however, signal a fundamental transformation to the current scheme in the CYF Act.

What this means for the current scheme of orders is:

- Maintaining the status quo with respect to shorter term orders - Supervision Orders, Undertakings and Interim Orders, that is, the Court determines all conditions and the length of order;

- Maintaining the status quo with respect to Short Term Guardianship to Secretary Orders and Long Term Guardianship to Secretary Orders, that is, the Court does not determine conditions;

- Modifying the current Permanent Care Order so that the Court can only make conditions on child-parent contact, sibling contact and contact with other people who are significant in the life of the child (removes power to make condition on incorporating a cultural plan for Aboriginal children);

- Modifying the current Custody to Secretary Order so that a Court can only make a condition concerning child-parent contact, sibling contact and contact with other persons who are significant in the life of the child and the length of order; and

- Modifying the current Supervised Custody Order so that a Court can only make a condition concerning child-parent contact, sibling contact and contact with other persons who are significant in the life of the child and the length of order.

However, the Inquiry considers the current range of orders can be better grouped using the terminology proposed by DHS under its Option 2. To reflect their temporal application, orders should be classified as ‘Interim Orders’ (to the point a protection application is proven) and ‘Final Orders’ (on proof of the protection application).

Further, those orders that involve the removal of a child from both parents should be termed ‘Care Orders’ and those that involve the child remaining with one or both parents should be termed ‘Supervision Orders’.

In view of the key stakeholder comments provided to the Inquiry, the Inquiry considers that a consolidated system of orders would include:

- Removing Temporary Assessment Orders and Custody to Third Party Orders as specific categories of orders from the Act on the basis that these are rarely, if ever used;

- Creating a generic category of ‘Interim Order’ which may cover a broad range of matters including those currently provided for by Interim Accommodation Orders and Temporary Assessment Orders; and

- Renaming Interim Protection Orders as either a ‘Temporary Supervision Order’ or ‘Temporary Care Order’ depending on whether the child remains with one or both parents while testing the suitability of the proposed protective action.

The remaining protective orders would be organised as shown in Table 15.4.
Table 15.4 Consolidated categories of orders under the *Children, Youth and Families Act 2005*

<table>
<thead>
<tr>
<th>Non-supervision/non-care</th>
<th>Supervision</th>
<th>Care</th>
</tr>
</thead>
<tbody>
<tr>
<td>Undertakings (without supervision)</td>
<td>Undertakings (with supervision)</td>
<td>Temporary Care Order</td>
</tr>
<tr>
<td>Temporary Supervision Order</td>
<td>Custody to Secretary Order</td>
<td></td>
</tr>
<tr>
<td>Supervision Order</td>
<td>Supervised Custody Order</td>
<td></td>
</tr>
<tr>
<td>Guardianship to Secretary Order (short and long term)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Permanent Care Order</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Inquiry analysis

The Inquiry recognises that a number of stakeholders are concerned with the ability of DHS to consistently make the right decisions or set the right conditions when intervening. The Inquiry also notes that the VLRC proposed that the Children’s Court be given concurrent jurisdiction with VCAT to hear case planning reviews (VLRC 2010, p. 344). However, the Inquiry considers, in view of its proposed reforms to DHS practices, the governance and oversight mechanisms, and the quality of the workforce, that DHS should have the future capacity to determine those conditions that do not fundamentally alter the relationship between children, their parents and other people who are significant in the life of the child or do not fundamentally intrude on individual rights.

**Review of conditions set by the Department of Human Services**

The CYF Act currently requires the Secretary to prepare and implement procedures for internal reviews of DHS decisions and a copy of the procedures to be given to children and parents (s. 331). In practice the review is done by a regional manager. Once that review process is completed a child or parent may apply to VCAT (s. 333).

As noted in section 15.3.4, VCAT currently has a small role in the current statutory scheme where it decides case planning reviews. If DHS is to play a greater role in setting conditions to orders, similar to the legislative scheme in Western Australia, it is feasible that more DHS decisions will be reviewed by VCAT.

While the Inquiry was unable to consider the resource implications for VCAT arising from an increase in reviews of DHS decisions, it wishes to note the following two matters for consideration and implementation by the Victorian Government.

Any case planning reviews are currently heard within the General List of the Administrative Division of VCAT. Given the specialist nature of child case planning decisions the Inquiry considers that the legal framework supporting children will be bolstered if VCAT, subject to future case demand, establishes a specialist Child Protection List. The Inquiry also considers that members on that list should have appropriate qualifications and experience in child abuse and neglect and in child health and wellbeing.

A related matter is a change to the representation model for parents and children who may be affected by case planning reviews at VCAT. The Inquiry notes that if parents or children require assistance for representation at VCAT reviews, they must seek special consideration under the current legal aid guidelines, as VLA does not routinely fund VCAT reviews (VLRC 2010, p. 342). This is an access to justice concern. The legal aid guidelines administered by VLA should be amended to enable children and parents who seek review of DHS decisions at VCAT to be eligible to legal aid representation without requiring special consideration.
Finding 16
The role of the Children’s Court is to determine the lawfulness of the statutory intervention by the State and the appropriate order if a child is found to be in need of protection. Accordingly, the role of the Children’s Court is to determine:

• Whether a child is in need of protection;
• The appropriate remedy or order to enable the State to intervene in the child’s best interests;
• The length of the order (if appropriate to the type of order sought); and
• Conditions relating to child-parent contact or contact with siblings and other persons who are significant in the child’s life (if appropriate to the type of order sought) and conditions that intrude on individual rights namely the exclusion of individuals from a child’s life and drug and alcohol screening.

Recommendation 63
The current scheme of protective orders under the Children, Youth and Families Act 2005 should be simplified. This can be achieved by reviewing the scope and objectives of each order and their current utility. Consideration should be given to:

• Removing Custody to Third Party Orders as a category of order from the Children, Youth and Families Act 2005;
• Removing Temporary Assessment Orders as a category of order from the Children, Youth and Families Act 2005;
• Creating a general ‘Interim Order’ which could incorporate the current functions of an Interim Accommodation Order and a Temporary Assessment Order;
• Renaming ‘Interim Protection Order’ as either a ‘Temporary Supervision Order’ or ‘Temporary Care Order’; and
• Consolidating the current range of protection orders into categories of ‘Interim’ and ‘Final’ orders and into categories of ‘Care’ and ‘Supervision’ orders while maintaining the range of purposes that the various orders currently serve.

Recommendation 64
A specialist Child Protection List should be created in the Victorian Civil and Administrative Tribunal in order to hear any reviews of decisions by the Department of Human Services on conditions. The Victorian Civil and Administrative Tribunal should be resourced to ensure that the members who would determine disputes within that specialist list have appropriate qualifications and expertise in child abuse and neglect and child health and wellbeing. The current legal aid guidelines should be amended to enable parties who seek a review of decisions by the Department of Human Services at the Victorian Civil and Administrative Tribunal to be eligible to obtain legal aid representation without requiring special consideration.

15.5.6 Realigned court processes for statutory child protection proceedings

The Inquiry has recommended a reduction in the range of statutory orders and a redefinition of the Children’s Court’s role. The Inquiry has also recommended an increased emphasis on earlier conferencing to minimise, where possible, the need for parties to go to court to resolve their disputes. In section 15.2, the Inquiry sets out the current processes for determining protection applications (see Figure 15.1). Figure 15.4 depicts the Inquiry’s proposed process for statutory intervention by DHS.

Process where the Department of Human Services issues a protection application by notice

Figure 15.4 outlines the following stages:

• The parties are mandated by the CYF Act to attend a new Child Safety Conference, unless it is inappropriate according to the Act. DHS puts forward a case plan with its proposed conditions.
• If there is agreement at the conference, the plan becomes a signed agreement (however, the plan does not necessarily have to be signed at the conference if, for example, the DHS proposed plan changes as a result of negotiations). The parties retain copies of the agreement. There is no court involvement.
• If there is agreement at the conference, the plan becomes a signed agreement (however, the plan does not necessarily have to be signed at the conference if, for example, the DHS proposed plan changes as a result of negotiations). The parties retain copies of the agreement. There is no court involvement.
• If there is no agreement on DHS proposed conditions or if there is a future dispute over the conditions, parties can seek an internal review through an internal case review mechanism administered by DHS. If there is no resolution following the case review mechanism, the review of the decision will be by VCAT.
Figure 15.4 Proposed protective intervention and application processes

Source: Inquiry analysis
Process where the Department of Human Services immediately acts to remove child – a protection application by emergency removal

Figure 15.4 outlines the following stages:

- The child is removed and DHS will bring an application to court within 24 hours as is currently the case under the CYF Act. The terminology for the CYF Act should, consistent with the findings of the VLRC, be updated to remove any criminal connotations associated with the issuing of warrants and undertaking protection applications by safe custody. A warrant should be re-titled an ‘Emergency Removal Order’ and the process should be renamed as an ‘Emergency Removal’. However, the Inquiry does not agree with the substantive process reforms recommended by the VLRC in relation to emergency removals proposed under its Option 2.

- The Children’s Court may decide to dismiss the application or issue an Interim Order covering interim accommodation and other matters that are necessary to ensure the child’s safety and wellbeing and the situation at the parents’ or primary caregivers’ home. The Inquiry does not agree with the VLRC recommendation to create further specific categories of orders in relation to emergency removals as proposed under its Option 2. If the Court has issued an interim order or the emergency has passed and DHS believes the protection concerns still exist, the parties must attend a Child Safety Conference (unless it is inappropriate). DHS puts forward a case plan with proposed conditions.

- If there is agreement at the conference, a copy of the signed plan is filed with the Court, and if appropriate, the Interim Order is discharged and the protection application is settled. If there is disagreement on DHS proposed conditions in the case plan then parties can seek an internal review through the DHS case review panel or if unhappy with review decision, seek further review by VCAT.

- If there is no agreement on outcomes including the type of order that DHS might seek, then the protection application is revived or remains on foot and DHS proceeds to seek a final order from the Court.

- During the mention stage, the Court may decide that the matter could be resolved by further conferencing. As is currently the case, the Court will decide whether the matter be referred for negotiation through a NMC that is convened by the Court Conferencing Unit.

- If there is agreement at the NMC as to the order and, depending on the type of order, the attached conditions, an order by consent is made by the Court.

The matter does not proceed to contested hearing.

- If there is no agreement, the matter proceeds to a contested hearing which, as proposed by the VLRC and the Inquiry, should now follow the LAT model.

- If there is a dispute over conditions then, depending on the type of order sought and whether or not the dispute is over contact between a child and parent/ sibling/significant others, the dispute would be over an administrative decision by DHS that can be resolved by an internal DHS case review mechanism and finally by VCAT.

15.5.7 Court of record

It has been suggested to the Inquiry that making the Children’s Court a ‘court of record’ would enable a body of case law to be developed to inform decision making within the system (Australian Childhood Foundation submission, p. 6). The Inquiry notes that the Perth Children’s Court (s. 5, Children’s Court of Western Australia Act 1988), the Children’s Court of New South Wales (s. 4, Children’s Court Act 1987), and the Youth Court of South Australia (s. 5, Youth Court Act 1993) are established as ‘courts of record’ under their legislation.

Due to the specialist nature of the Children’s Court and the utility of its decisions for child protection practitioners and other professionals, the Inquiry also considers that in addition to making transcripts available, the Children’s Court should be supported to publish its decisions. The Court has indicated to the Inquiry that it does not object to this occurring noting that all proceedings are currently published in de-identified form on its website (Children’s Court submission no. 2, pp. 40-41).

The Court has also stated that the types of decision that should be published for citation purposes are those that raise points of principle and are not fact-specific decisions (based on the Court of Appeal decision in R v. Smith [2011] VSCA 185 at [32, 33]). The Inquiry agrees that the type of decision of the Court that should be published is one that involves more than the application of settled principles to facts. However, the Inquiry also considers that the Court should make transcripts of all its hearings and decisions available to the public subject to the restrictions of section 534 of the CYF Act.
Recommendation 65
The Children, Youth and Families Act 2005 should be amended to confirm the status of the Children’s Court as a court of record. The Children’s Court should be appropriately resourced to enable decisions to be published on the Children’s Court’s website in de-identified form. Transcripts should also be made available to the public in de-identified form.

15.6 The enactment of a separate Children’s Court of Victoria Act

The Inquiry has previously considered and concluded that a specialist Children’s Court is an important part of a statutory child protection system that meets the needs of children. It is appropriate and necessary for a judicial body to determine the lawfulness of State intervention in child protection matters and to determine fundamental rights such as the alteration of a child’s relationship with his or her parents and siblings.

At present the Children’s Court is formally constituted in the CYF Act. However, it is towards the end of the Act where the Court’s existence is affirmed in section 504(1) which states:

There continues to be a court called “The Children’s Court of Victoria”.

At a fundamental level, the Inquiry considers that it is appropriate to signify the status and character of the Children’s Court as a part of the separate judicial arm of the State by having a separate Act relating to it. This legislative arrangement applies to the Children’s Courts in all other states and the Inquiry considers it should apply in Victoria. It also applies to all other Victorian courts.

There are currently numerous substantive references to the Children’s Court throughout the CYF Act before the provisions relating to the Court itself are found. A new Act would enable the rationalisation of the manifold sections embedded through miscellaneous parts of the CYF Act into a coherent unity. It would bring clarity and transparency to the functions and operations of the Court. It would facilitate the removal of DHS, a major litigant before the Court, from the administration of the legislation that supports the Court. As Mr Justice Fogarty correctly observed in his 1993 report Protective Services for Children in Australia:

... 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 that it will act in an independent way in accordance with legislation (Fogarty 1993, pp. 142-143).

The Inquiry records the undoubted fact that the Children’s Court is independent, and considers the legislative framework should reflect that independence.

Finally, the creation of a separate Act for the Children’s Court would facilitate placement of the administration of the Court in the Courts Executive Service, or if applicable DOJ, as is the case with all other Victorian courts. Currently, the Children’s Court is the only Victorian court whose legislation is administered by two ministers – the Minister for Community Services and the Attorney-General – and by two Departments, DOJ and DHS. A separate Act would address this anomaly.

The Inquiry is conscious that the present placement within the CYF Act of the provisions relating to the Children’s Court reflects both historical development and the proper need for the Court to function within the complex of provisions for support and protection of children and young persons. The Inquiry reaffirms that need but considers that the need can be fulfilled by an appropriately drafted separate Act, reflecting the Court’s relevant but separate part in the complex of provisions of support and protection for children and young people.

 Accordingly, the Inquiry recommends:
• The creation of a separate Act entitled ‘The Children’s Court of Victoria Act’;
• The Act contain the current provisions in the CYF Act relating to the Children’s Court, appropriately modified; and
• Appropriate revision of the CYF Act consequent upon removal of the provisions relating to the Children’s Court.

The Inquiry is conscious that this task would be a substantial legislative exercise. However, the Inquiry considers that both jurisprudential and practical considerations warrant that exercise.

The Inquiry further considers that the other legislative and administrative reforms recommended in this Report, including those relating to DHS and the Children’s Court Clinic in Chapter 18, should not be treated as dependent upon the recommendations in this section being considered or implemented. Many of those reforms are time critical and should not be delayed by the implementation of Recommendation 66.
Recommendation 66

A new Children’s Court of Victoria Act should be created and that Act should contain the current provisions in the Children, Youth and Families Act 2005 relating to the Children’s Court, appropriately modified. The Children, Youth and Families Act 2005 should be revised consequent upon removal of the provisions relating to the Children’s Court.

15.7 Conclusion

The Inquiry has focused on those areas in the statutory child protection system in which a child and their family’s experience of the legal process can either be avoided, where appropriate, or made less traumatic. Those areas are: simplifying the legislation and the overall court processes; enhancing the experience of children, their parents or caregivers and all those with an interest in the safety and wellbeing of the child or young person in the legal system; and providing the best opportunity for the voices of children and young people to be heard.

In doing so, the Inquiry acknowledges the significant body of work that informed the VLRC reform options for court processes in the statutory child protection system. The Inquiry also notes the steps that have already been taken by key institutions, agencies and professional bodies to improve the current court environment, the relations between lawyers and child protection practitioners, and acknowledges the substantial resource commitment required from the Victorian Government to implement these reforms.

Nonetheless, the Inquiry considers that the implementation of the proposed reforms outlined in this chapter, particularly in relation to: giving a child a voice at court; placing greater emphasis on collaborative problem solving processes to resolving protection applications through process and training changes; and decentralising the court, will ensure that vulnerable children and their families will be afforded every opportunity to be heard and to build a more respectful and collaborative dialogue with DHS to ensure the best interests of these children are met.
APPENDIX C:

FORMAL COMPLAINT BY A MOTHER TO DoHHS IN JUNE, 2015

Child Protection was called to my sons school last Tuesday (2/6) after the teacher noticed marks on my sons neck and he had a cut lip. It is alleged that my husband grabbed him by the t-shirt and took him outside and then hit my sons head on the car bonnet several times. All denied by my husband. The next day, we attended court (3/6) and my 4 children were placed back in my care, with my husband out of the house. (I have not been accused of anything!) My complaint is that since last Wednesday (3/6), Child Protection failed to notify my emergency carer that I could collect the children. (What if I wasn’t given the children back, and just told her i was?). Secondly, My husband was given 3 supervised visits per week at court; Fridays, Sundays and Mondays. I called Child Protection twice last Thursday (4/6) and once on Friday (5/6) to organise this as it was coming into the long weekend and my children were asking to see their father. My emergency carer received a call back after initially calling, and was told by [the Protective Worker] to sort out with me times of supervision and advise. We had dinner at my emergency carers on Friday night with my husband, and had a McDonalds breakfast on Sunday. After still not hearing from DHS on Sunday I called the emergency child protection number on Sunday. After being on hold for 1 hour and 17 minutes, I was finally answered by a call centre lady. She advised that [the Protective Worker] had put NO notes on the file and that access for my husband wasn’t approved. She advised not to let my husband see my kids on the Monday. She said she would flag a case note to [the Protective worker and her Team Manager] to call me back... Still waiting. My third complaint is that at court on Wednesday (3/6) [the Protective Worker] advised that DHS are there to support my family. .. Yet I have NOT heard from them since. I called twice again today (11/6) and left messages... that’s 6 times in total. Still NO response! DHS have removed my husband from our home and left us to pick up the pieces for 3 weeks until we are back in court. My husband is the primary carer and my family and normality doesn’t function without him. My 4 children are completely distressed and not coping. They constantly ask for their father. The way I have been treated is appalling. My priority is my children and seeing them distressed is heartbreaking. The behaviour of DHS have given my 9 year old complete power in my house and his behaviour has deteriorated. He is out of control. I am a mother begging for help for my little boy and DHS haven’t delivered on any promise. The system is letting my 4 children down and as a tax payer, I am screaming for assistance. I just want help for my boy. On top of all that, Child Protection were supposed to take my boy for a forensic medical last Thursday and failed to do so. That is a HUGE oversight and one which could prove costly. It is their job to investigate allegations and they have not done so adequately.
Children were sexually abused in a care home due to negligence by Anglicare, says the Victorian Government

By the national reporting team's Dan Oakes

Updated Thu 3 Jul 2014, 11:20am

Anglicare was negligent in its treatment of children at a residential care facility where sexual and physical abuse were rife, according to the Victorian Government.

The ABC reported last night that children in the care of the Department of Human Services were subjected to horrifying sexual and physical abuse by older children at Victorian residential care facilities.

The details emerged in a number of court cases where parents were trying to regain guardianship of their children from the department, which contracts out the running of residential care units to organisations such as Anglicare.

The court cases laid bare a failure by the department and Anglicare to protect the children. Carers and department staff failed to pass on information to police, psychologists and parents, and failed to properly supervise the children in the units.

When the worst of the abuse was revealed earlier this year, an urgent independent investigation was begun into the running of one particular unit.

The Minister for Community Services, Mary Wooldridge, told the ABC the investigation had found it was the right decision to take the children from their parents, but there was negligence on the part of Anglicare.

"It's clearly a horrendous situation, and it's always devastating and unacceptable when there's issues of sexual assault in relation to children in the care of the state," Ms Wooldridge said.

"My view is that there have been mistakes made along the way in terms of managing the care of these children.

"Particularly for Anglicare, there was negligence in relation to the staffing and the supervision that were provided in relation to the children."

However, Ms Wooldridge conceded that as the children's guardian, the Department of Human Services bore ultimate responsibility for the protection of the children.

"The department has a responsibility to ensure the care of children ... it is a combination of both the community sector organisation providing the care and the oversight of the department that is meant to ensure the safety and wellbeing of children."

My view is that there have been mistakes made along the way in terms of managing the care of these children.

Minister for Community Services Mary Wooldridge

Government report recommends changes to Anglicare's training

The report on events at the residential care unit contained 15 recommendations for Anglicare and 12 for the Department of Human Services.

The Anglicare recommendations relate to staffing, training, communication and reporting of critical incidents, while the recommendations for the department are broader and should be implemented statewide, according to the report.

Ms Wooldridge said Anglicare, which runs 16 residential care units in Victoria, has agreed to independent monitoring of the implementation of the report's recommendations.

"There are actions that are happening as a result of these incidents, not only so that the organisation assures me that that is the case, but also so that we have independent oversight to assure that as well," she said.

Ms Wooldridge said the Government had overhauled the reporting system in the residential care network at large, which she said had previously been haphazard and vague.

The Government has also indicated it will transform all residential care units into "therapeutic" units, with better-trained, higher-paid staff. However, the unit where the abuse took place was already a designated "therapeutic" unit.

"Despite the fact that additional funding was provided, the care didn't actually change," Ms Wooldridge admitted.

Anglicare Victoria chief executive Paul McDonald said the organisation was "devastated" by what took place at the unit at the centre of the claims and was implementing all the recommendations in the review.

However, he said the Department of Human Services was responsible for placing children of widely varying ages and different genders in the units.

"We need to look at the way children are placed in these units. At the moment, I think the way they're placed is simply reckless. As a provider we have no say in the right mix, which children get placed with which children, in any of our residential care units. I think any provider of residential care needs control over that," Mr McDonald said.

"I think we need to make single-sex units a mainstream factor of the system and not the exception. We need to control age range and gender mix."

Mr McDonald also called for a wider review of the entire residential care system.

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- Man charged after alleged abuse of children in state care
- Investigation promised into exploitation of kids in state care by paedophile rings
- Paedophile gangs targeting children in state care for sexual abuse


First posted Thu 3 Jul 2014, 6:47 am
DHS head Gill Callister breached duty of care to vulnerable children, Victorian court finds

By the National Reporting Team's Dan Oakes
Updated Thu 24 Jul 2014, 7:25am

The public servant responsible for wards of the state breached her duty to care for some of Victoria’s most vulnerable children, a court says.

The case of two children sexually abused while in care, revealed by the ABC earlier this month, has trigged calls for the Government to urgently reform the state’s child protection system.

The siblings, both aged under 10, were taken from their mother in 2011 after allegations that she physically abused them.

They were placed in separate units, where they were both allegedly raped by older children and witnessed the physical and sexual abuse of others.

In an interim ruling on who should have custody of the children, the court described their case as a “horror story”, and said the secretary of the Department of Human Services (DHS), Gill Callister, bore some responsibility for what happened to the siblings.

"It is clear from the terrible things that have happened to [the children] in care that the secretary is in fundamental breach of her duty of care to each of them," the court heard.

The court also noted that it was an offence to take action that resulted in a child in state care suffering harm from physical or sexual abuse, or to fail to take action to prevent the same.

"Proceedings for this offence may only be brought after consultation with the secretary. This probably excludes the secretary as a person who may be charged," the court said.

Court found lack of supervision of contracted agents

The court was also scathing about the evidence of other departmental staff members, saying one “consistently obfuscated in her answers”.

It also lamented the lack of supervision of the agencies that run the residential care units.

"I heard no evidence about the oversight of the contracted agents by the DHS," the court said.

"No-one from the DHS who gave evidence would acknowledge it was their role to monitor the care provided to those children by the agencies."

A police investigation into the alleged assault of one child by staff members was undermined by the DHS giving incorrect information about the incident.

"[Police] were clearly misdirected by the DHS and this significantly impacted their investigation," the court said.

Details of the case have emerged during 12 months of court hearings.

Evidence was given that the department and agency carers failed to pass on information about the abuse to police, psychologists and family members of the children.

The court has also strongly criticised the DHS for withholding documents, including incident reports detailing the abuse suffered by the children.

Minister still has confidence in head of DHS

Despite the court’s criticism, Minister for Community Services Mary Wooldridge said she still had confidence in Ms Callister.

"The secretary, with her department, is working hard to deliver the Government’s reform agenda for vulnerable families,” Ms Wooldridge said in a statement.

"They seek to ensure the protection and wellbeing of children who have been abused or neglected by their parents and respond quickly if further issues arise while in the care of the secretary.”

Ms Callister also declined to be interviewed, but a spokeswoman said in a statement that the department was carefully reviewing the court’s findings.

"At the outset, let us express our deep concern about the experiences of these two children - and our clear resolve that we continue to improve the system to ensure the safety and wellbeing of the very vulnerable and traumatised young people in our care,” she said.

She said the department had hired former Australian public service commissioner Lynelle Briggs to monitor the implementation of recommendations that came from an independent review of the residential care unit where the worst abuse occurred.

Ms Briggs will also review communication between the department and other professionals who come into contact with children in care, another area where the court was scathing of the DHS.

The spokeswoman said that under a five-year plan announced by Ms Wooldridge earlier this year, the department was reviewing the circumstances of every child in out-of-home care to determine the best type of care for each child.

The children at the centre of the case will remain in the custody of the department, under strict conditions, until it can be decided where they should live permanently.

Do you know more about this story? Email investigations@abc.net.au

More on this story:

- Siblings' sexual abuse highlights flaws in Victorian state care
- Exploitation of kids in state care by paedophile rings to be investigated
- Criminal gangs enticing children in state care into prostitution
- Man charged after investigation into sexual abuse of children in state care


First posted Wed 23 Jul 2014, 6:00pm
Siblings often separated in foster and residential care, Create Foundation report shows

Daniella Miletic
Published: June 14, 2015 - 6:55PM

Russ was 14 the last time he saw his little brother.

It was the day he was moved into a group home, the last resort for teenagers when the system cannot keep them in foster homes. Russ told his brother, "I will be back tonight".

"I haven't seen him since," he says.

More than a third of children in foster care in Australia are separated from all their siblings when they move into child protection, an alarming new report has revealed.

The study – based on interviews with 1160 children across the country living in state, kinship and foster care – shows that most lose touch with at least one sibling.

At 21, Russ has now lost touch with everyone in his family, including an older brother and sister. It's complicated, like all families that fell apart, but his enduring wish is simple: to see his little brother again. He waits and hopes his brother will come looking for him one day.

"My favourite memories are just kicking the footy," Russ says. "It's something I wish I could do today: go to the park and kick the footy, or take him to the footy, find out who he barracks for."

The Create Foundation, a body that provides rare insight into the feelings of children in out-of-home care, set out to examine how many children were being placed in homes without their siblings. It found that siblings were all able to live together in only 29 per cent of cases.

Children who were placed with some but not all of their brothers and sisters comprised 35 per cent of those interviewed. The remaining children were separated from all siblings.

The children surveyed wanted most of all to keep connections with siblings, saying that was even more important than contact with parents. Siblings had the best chance of staying together when family members – usually grandparents – took in children under kinship care arrangements, according to the report. Children sent to residential care – as Russ was – were most likely to be separated from all their siblings.

Report author Dr Joseph McDowall said the study showed the need to keep vulnerable siblings together, or at least in regular contact.

"A sibling relationship is a relationship for life ... it doesn't end when the child turns 18," Dr McDowall said.

Keeping large sibling groups together is "particularly difficult", Paul McDonald, the chief executive of one of state's largest foster agencies, Anglicare Victoria, says.

"The other challenge is that often children [from the same family] come into the system at different times."

A Department of Health and Human Services spokesman, Mike Griffin, said: "Where possible, siblings are placed
together in out-of-home care. When this is not possible, contact between siblings is promoted and supported through regular get-togethers."

But Russ isn't even sure he'd recognise his brother now.

"Even walking past in the street, if I knew what he looked like today, it'd be good to see him."

We are mug punters

Peter Hatcher believes Australians are “thinking citizens who know the big risks the country faces, and want political leadership in dealing with them” (Online, 156). This is because in answering questions in a Lowy poll, Australians think solar will eventually be our primary energy source, and we should do something about climate change. I think the results of the last federal election would be a more accurate indicator of the level of “thinking” of which our citizens are capable.

Faced with a choice of climate change acceptance or climate change denial, they chose denial. Faced with a choice of extra money for students in need or for students with wealthy parents, they chose the latter. Faced with a choice between a government that navigated Australia through the worst global financial crisis since the Great Depression to the praise of the IMF, Nobel Prize-winning economists and world leaders, or a government that relentlessly talked down the economy causing extensive damage to both business and consumer confidence, they chose damage. I could go on. Australians are mug punters Peter.

Martin Davis, Waratah Bay

More wind, less gas

Geoff Perston (Letters, 15/6) asserts that the “fumes” emerging from the Loy Yang power stations are only water vapour and implies the power stations are benign. The Loy Yang emissions of carbon dioxide and other gases are reportedly more than 14 million tonnes annually, while the very inefficient Hazelwood emits even more. Just because you can’t see carbon dioxide and sulphur dioxide doesn’t mean they aren’t there. Yes, the stations generates a lot more power than the Macarthur wind farm. But the logical conclusion is that we need a lot more wind farms.

Tony Dawson, Armadale

Roads to extinction

Not a week goes by that we don’t hear about another species nearing extinction in Victoria. Unfortunately, the legislation designed to protect what few native habitats and species we have left has been gradually watered down. The Victorian Native Flora and Fauna Guarantee Act 1988 is a case in point. In the past decade, successive governments have allowed planning authorities and road makers to remove large areas of pre-European roadside forests. It appears VicRoads has been given permission to destroy hundreds of ancient red gums and associated woodland on the Western Highway. This activity is set to continue along other major and minor roads under the guise of “making our roads safer”. We need to improve roads but we can take a more sensitive approach. We must stop this senseless destruction of our natural and cultural heritage.

Sur Dean, Lake Wendouree

Care for kids in care

For children in care, the sibling relationship is one of particular importance. (“Siblings lose contact in a system of separation”, 156). Siblings offer them something they have lost: continuity of family, a sense of identity and the unconditional love mixed with rivalry unique to the sibling relationship. Other countries have responded decisively to prevent the experiences of children and young people like Russ. One of the notable differences in Australian out-of-home care, particularly in Victoria, is the lack of policy. Guidelines and legislation to ensure siblings are not separated in care; that there are adequate resources to ensure carers are willing to take sibling groups; and, critically, that the rights of siblings are recognised at law. In Britain and the US there have been radical changes to child welfare legislation in regards to sibling co-placement as a right and mandated contact where co-placement is not possible in extreme circumstances.

Not only does such legislation not exist in Victoria, but proposed changes to the Children, Youth and Families Act will make sibling contact less likely. Given children and young people’s vulnerability, do we not owe them robust legislation and judicial oversight that protects their real “best interests”?

Trish McCluskey, director, Borry Street Gippsland

Move with the times

Tim Smith defends the Lord’s prayer as an “ancient tradition” (Online, 156). Traditionally, women couldn’t vote or stand for parliament, and they’re still second-class or non-citizens in the Christian churches. Is this the ancient tradition Mr Smith is defending? I thought government decided matters on evidence, not history.

Janine Truter, The Basin

Don’t slug community

It is not surprising the Property Council of Australia is attacking stamp duty (The Age, 15/6). But what the community should be outraged at is the council’s suggestion that this revenue stream be recouped by increasing the rate of GST or broadening its base. The amount of stamp duty reflects the value of that property, which in turn reflects the quality of the local amenity, infrastructure, services, streetscape and so on, all paid for by the community through local and state taxes. It is therefore reasonable that the new owner of this property should contribute, through stamp duty, to the cost of this valuable amenity. The alternative proposal, to increase or broaden GST, would have the whole community, including those for whom this property is unattainable, carrying the cost of the loss of this contribution.

Patricia Lele, Kew
Children Youth & Families Act (Restrictions on the Making of Protection Orders) Bill 2015 – (Amendments/changes made in bold)

Children Youth & Families Act (Permanent Care & Other matters) Amendment Act 2014 ("Amending Act")

Children Youth & Families Act 2005 ("Principal Act")

1 Purpose – [To reinstate the Court's powers & reinstate s.276]

The main purpose of this Act is to substitute the provision of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 that amends the restrictions on the making of protection orders under the Children, Youth and Families Act 2005.

2 Commencement

This Act comes into operation on the day after the day on which it receives the Royal Assent or 1 March 2016 whichever is the earlier.

3 Restrictions on the making of protection orders

For section 17 of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 substitute—

'17 Restrictions on the making of protection orders
In section 276(2) of the Principal Act, for "the custody of his or her parent" (wherever occurring) substitute "the care of the child's parent".'

4 Repeal of amending Act

This Act is repealed on the first anniversary of the day after the day on which it receives the Royal Assent.

5 Duration & conditions for contact on Care by Secretary Orders

(1) Insert after section 289(1)(d) of the Amending Act:

“(e) must include a condition concerning contact with a parent or other person significant to the child which the Court considers to be in the best interests of the child.”

(2) For section 289 (1)(b) of the Amending Act, substitute entirely with the following:
“subject to this Division, remains in force for a period determined by the Court to a maximum of two years”.

6 Amend Family Reunification Orders

(1) Section 41 of the Amending Act is repealed.

(2) For section 68 of the Amending Act, substitute:

“In section 216 of the Principal Act, for “custody to Secretary order or a guardianship to Secretary order” substitute “care by Secretary order or a long-term care order”.

(3) In section 86 of the Amending Act, after (1)(i) (ii) application in respect of a failure to comply), insert:

(iii) a family reunification order

(4) In section 86 of the Amending Act, after (1)(k)(ii), insert

(iii) a family reunification order.

(5) In section 26 of the Amending Act, substitute entirely by the following:

26 New section 287 substituted

For section 287 of the Principal Act substitute—

"287 Family reunification order

(1) Subject to the provisions of this section a family reunification order—

(a) confers on the day the order is made parental responsibility for the child on the Secretary; and

(b) confers on the day the order is made responsibility for the sole care of the child to the person specified by the Court to have sole care of the child; and

(c) subject to this Division, remains in force for the operative period (not exceeding 12 months) specified in the order and

(d) must include any conditions that the Court considers—

(i) to be in the best interests of the child; and

(ii) are reasonably capable of being carried out by each person who will be subject to the condition; and

(iii) promote the reunification of the child with a parent of the child; and
(iv) provide for contact between the child and a parent of the child and other persons of significance to the child consistent with a plan of reunification.

(e) must provide that if, while the order is in force, the Secretary is satisfied that it is in the child’s best interests, the Secretary may in writing direct that a parent of the child is to resume parental responsibility for the child to the exclusion of the Secretary.

(2) (deleted).

(6) Section 27 of the Amending Act, be substituted entirely by the following:

27 New section 287A inserted

After section 287 of the Principal Act insert—

"287A Determining the period of a family reunification order

(1) This section applies to the determination of the period of a family reunification order for a child who is or has been in out of home care as a result of any of the following orders—

(a) (deleted – interim accommodation orders);
(b) a family reunification order;
(c) a care by Secretary order;
(d) a long-term care order;
(e) a therapeutic treatment (placement) order.

(2) If the child has been in out of home care for less than 12 months under one or more orders specified in subsection (1), the period specified in a family reunification order must not have the effect that the child will be placed in out of home care for a continuous period that exceeds 12 months commencing on the date that the child is placed in out of home care unless the court determines that period of 12 months should be otherwise extended.

(3) If the child has been in out of home care for 12 months or more but less than 24 months under one or more orders specified in subsection (1), the period specified in a family reunification order must not have the effect that the child will be placed in out of home care for a continuous period that exceeds 24 months commencing on the date that the child is placed in out of home care under the first of those orders.

(4) For the purposes of determining the commencement of the continuous period under this section—
(a) any period during which a protective worker has not been allocated to the child by the Secretary is to be disregarded;

(b) any period where the Secretary has not taken all reasonable steps to provide the services necessary in the best interests of the child is to be disregarded;

(c) any period that the child is in out of home care under a child care agreement under Part 3 or under a private arrangement made by a parent is to be disregarded; and

(d) any period that the child is being cared for by a parent under an interim accommodation order, an undertaking or a family preservation order under this Part must be disregarded; and

(e) any period that the child was in out of home care under an order must be disregarded if the child was subsequently returned to the care of a parent.

(7) Section 29 of the Amending Act be substituted entirely by the following:

29 New section 288A inserted.

After section 288 of the Principal Act insert—

"288A Change to nature of order

(1) If under a family reunification order the Secretary directs that a parent or parents of a child are to resume parental responsibility for the child to the exclusion of the Secretary, then on and from the date of the direction—

(a) the Secretary ceases to have parental responsibility for the child; and

(b) the parent resumes parental responsibility for the child as specified in the direction; and

(c) the family reunification order is taken to be a family preservation order for so long as the family reunification order was due to operate giving the Secretary responsibility for the supervision of the child and placing the child in the day to day care of the parent or parents who have parental responsibility for the child; and

(d) the conditions of the family reunification order continue to apply as conditions of the family preservation order; and

(e) Division 3 applies to the order; and

(f) the order ceases to be a family reunification order for the purposes of this Act."
(2) The Secretary must give a copy of a direction under this section to—
   (a) the Court; and
   (b) the child; and
   (c) the parent of the child.

(3) The Secretary may apply to the Court to determine that the order is to include conditions and the Secretary must serve notice of such application on the parties.

(4) The Court may determine that the order is to include conditions of a kind referred to in section 281.

(5) If the Court makes a determination under subsection (4), the order is taken to include those conditions as if they were included in the order under section 281.

(8) Section 34 of the Amending Act, be substituted entirely by the following:

After section 294 of the Principal Act insert—

"294A Restrictions on the extension of protection orders

(1) The Court must not extend a family reunification order unless it is satisfied that—
   (a) there is compelling evidence that it is likely that a parent of the child will permanently resume care of the child during the period of the extension; and
   (b) the extension will not have the effect that a child will be placed in out of home care for a continuous period that exceeds 24 months, calculated in accordance with section 287A unless the Court determines that a further extension is in the best interests of the child.

7 Remedy the removal of s.297

After section 294 of the Principal Act insert—

"294A Restrictions on the extension of protection orders ...

(2) The Court must not extend a care by Secretary order unless the Court is satisfied that—
   (a) firstly, a permanent care order is not appropriate in the circumstances; and
(b) secondly, a long-term care order is not appropriate in the circumstances;

c) thirdly, an application by a person other than a child’s parent for parenting orders for that child in the Family Court or Federal Circuit Court is not appropriate in the circumstances;

(3) Despite subsection (2), the Court may extend a care by Secretary order if the Court is satisfied that there are exceptional circumstances which justify the making of a further care by Secretary order”.

(4) If the Court is satisfied that an application by a person other than a child’s parent should be made for parenting orders in the Family Court or Federal Circuit Court, the Court may direct the Secretary to take steps to ensure that at the end of a period no more than 6 months, a person other than the child’s parent applies to the Federal Circuit Court or Family court for an order relating to parental responsibility and day to day care of the child.

8 Reinstatement of Court’s right to make an Interim Accommodation Orders & conduct proceedings.

(1) Section 13(1) of the Amending Act be repealed.

9 Permanent Care Orders

(1) For s.60(1)(d) of the Amending Act substitute:

“(d) must include conditions that the Court considers in the best interests of the child concerning contact with the child’s parent.”

(2) Repeal s.60(1)(c) of the Amending Act.

(3) Repeal s.64 of the Amending Act.
10 Adoption

(1) For section 10(3)(b) of the Amending Act, substitute:

“place him or her for adoption under the Adoption Act 1984 if he or she is under the Long Term Care Order and available for adoption”;

(2) For section 97(1) of the Amending Act, substitute:

(a) “Family Reunification;
(b) Family Preservation;
(c) Long-term Out of Home Care;
(d) Permanent Care;
(e) Adoption.”

(3) Repeal section 97(3) and section 97(4) of the Amending Act.