

## Chapter 2

# Background: Historical Overview

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### INTRODUCTION

- 2.1 The Victorian child protection jurisdiction has been reviewed many times. In this chapter, we examine many of these earlier reviews and the Victorian Ombudsman's November 2009 report to parliament.<sup>1</sup> This chapter also contains an historical overview of child protection legislation.
- 2.2 There have been nine major reviews of Victoria's child protection system in the past 33 years.<sup>2</sup> When implementation audits and discrete reviews of particular aspects of the system are included, the number of reviews rises to 16.<sup>3</sup> Appendix C contains a chronology of these reviews and key legislation.
- 2.3 Reviewing the child protection system is not a modern phenomenon. In the 50 years prior to 1976 there were eight major reviews of the Victorian child welfare system.<sup>4</sup> Although one former child protection system reviewer, Justice John Fogarty, suggested in 1993 that '[w]e cannot continue to have reviews in Victoria every few years',<sup>5</sup> the practice continues.<sup>6</sup> The prevalence of reviews demonstrates both the complexity of child protection issues and the difficulty in gaining widespread support for reform.
- 2.4 Reviewing the child protection system is not just a Victorian phenomenon. In this chapter, we also examine a number of relevant reviews in other Australian jurisdictions.

### OMBUDSMAN'S REPORT

- 2.5 On 17 April 2009, after receiving complaints about deficiencies in the Department of Human Services' response to children at risk of harm, the Victorian Ombudsman commenced an investigation into the DHS Child Protection Program.
- 2.6 The Ombudsman presented his report, *Own Motion Investigation into the Department of Human Services Child Protection Program*, to parliament on 25 November 2009.<sup>7</sup> The Ombudsman concluded that the best interests of children were not met in a number of cases his investigators reviewed.<sup>8</sup>
- 2.7 The Ombudsman particularly focused on the legal processes through which protection applications are determined in the Children's Court. The Ombudsman noted that the current process, which involves presenting two competing arguments to the Court, 'runs the risk of exacerbating a difficult situation or turning decision-making in relation to a child's "best interests" into a competition to present the best argument'.<sup>9</sup> The Ombudsman further noted that 'the current legal system perversely encourages disputation rather than cooperation in the protection of children'.<sup>10</sup>
- 2.8 The Ombudsman reported that a 'substantial proportion of the department's resources' were being 'absorbed' by legal processes in the Children's Court,<sup>11</sup> as

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

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

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

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

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

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

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

2.12 The Attorney-General accepted this recommendation, stating:

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

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

## REPORT OF THE CHILD PROTECTION PROCEEDINGS TASKFORCE

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

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

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

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

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

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

6 Ibid.

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

8 Ibid 8.

9 Ibid 12.

10 Ibid 57.

11 Ibid 47.

12 Ibid 12.

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

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

15 Ibid 55–6.

16 Ibid 56–7.

17 Ibid 13.

18 Ibid 62.

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

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

21 Ibid 66.

22 Ibid 66–7.

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

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

These matters are considered in this report.

## LEGISLATIVE HISTORY

### PARENS PATRIAE

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

### NEGLECTED AND CRIMINAL CHILDREN'S ACT 1864 (VIC)

- 2.25 Early Victorian laws concerning child welfare
- tended to be the product of two main considerations. Firstly, there was a genuine public desire to 'save' children from 'neglect' as defined in terms of homelessness, exposure to moral 'contamination' and maltreatment. Secondly, there was a strong element of social control, based on widely prevalent fears that disorderly lower social classes would proliferate unless children were removed from criminal environments.*<sup>41</sup>
- 2.26 The first Act directed to child welfare was the *Neglected and Criminal Children's Act 1864 (Vic)* (the 1864 Act). The 1864 Act, '[f]ollowing overseas patterns ... legislated in respect of three classes of children who appeared likely to develop into unsatisfactory adults ... "criminal" children, "neglected" children and those children who misbehave'.<sup>42</sup>
- 2.27 Under the 1864 Act, the police were to apprehend children<sup>43</sup> who fell into these categories and bring them before the courts.<sup>44</sup> Dr Terry Carney has stated that the 1864 Act 'was believed to have a deterrent effect on the child rearing practices of the poor—threatening them with state intervention if they were too lax in their parental responsibilities'.<sup>45</sup>
- 2.28 A child would be deemed to be 'neglected' under the 1864 Act if found in a variety of circumstances, including being found begging, wandering the streets, residing in a brothel or having committed an offence.<sup>46</sup> Once apprehended, the child would be charged with being a 'neglected child', the Court would 'hear the matter of the said charge',<sup>47</sup> and, if satisfied that the grounds had been made out, commit the child to a state institution—usually an industrial school—for a fixed period.<sup>48</sup>
- 2.29 In 1897, the Society for the Prevention of Cruelty to Children<sup>49</sup> was established. The Society was a charitable organisation that investigated suspected cases of child abuse in Victoria. In conjunction with the police, the Society was responsible for investigating and taking action in relation to notifications of child abuse. This practice continued until 1985.<sup>50</sup>

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

**CHILDREN'S COURT ACT 1906 (VIC)**

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

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

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

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

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

**CHILDREN'S COURT ACT 1958 (VIC)**

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

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

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

**LEGISLATIVE DEVELOPMENTS IN CHILD PROTECTION IN THE 1970S**

2.37 The *Children's Court Act 1973 (Vic)* gave the Children's Court the power to make supervision orders for children found to be in need of care and protection.<sup>62</sup> The child could be supervised by a probation officer for a maximum of three years, or until the child turned 18.<sup>63</sup>

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

## LEGISLATIVE DEVELOPMENTS IN CHILD PROTECTION IN THE 1980S

### The Carney Committee Report and state responsibility for child protection

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

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

- 2.45 In 1984, the powers to receive, investigate and take action in relation to child abuse notifications were exercised by the Children’s Protection Society and the Victorian Police.<sup>77</sup> The government’s involvement had generally been confined to providing services in cases where the Children’s Court had made court orders.<sup>78</sup>
- 2.46 The Carney Committee strongly recommended that all responsibility for coercive intervention should lie exclusively with the state, given the consequences of such intervention for the child’s future.<sup>79</sup> It accordingly recommended that the Children’s Protection Society should no longer be authorised to undertake investigations into child protection matters, and that responsibility for investigation and intervention be vested in the Community Welfare Services Department and the police under a ‘dual track’ system.<sup>80</sup>
- 2.47 Following the Carney Committee’s recommendation, the Children’s Protection Society ceased its statutory activities in 1985<sup>81</sup> and the Victorian Government—specifically the Community Services Victoria Department (CSV)—became directly involved in child protection services in Victoria for the first time.<sup>82</sup> CSV was appointed to assume the responsibility for child protection services in conjunction with Victoria Police, which gave rise to the dual track system for child protection proposed by the Carney Committee.<sup>83</sup>
- 2.48 While a number of the Carney Committee recommendations were adopted, some also pertinent to this reference were not. Appendix D contains a detailed discussion of the report.

### ***Children’s Court Amendment Act 1986 (Vic)***

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

### **End of the dual track child protection system**

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



2.52 The Victorian Government adopted the recommendation to phase out the dual track system and transfer primary responsibility for child protection services to a welfare-based system within a government department, and by March 1992 the dual track system had ended and the transfer of responsibility was complete.<sup>88</sup> The government also implemented Justice Fogarty's recommendation that, if the dual track approach was abolished, a 24-hour child protection service would need to be established by CSV<sup>89</sup> to replace the 24-hour coverage that the police provided when they were authorised as protective interveners.

### **Children and Young Persons Act 1989 (Vic)**

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

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

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

- included principles to guide decision making in the Court<sup>91</sup>
- revised the grounds for protection applications, to focus on past harm or the risk of future harm to the child<sup>92</sup>
- included the Aboriginal Child Placement Principle<sup>93</sup>
- generally provided for children in Family Division proceedings who were mature enough to provide instructions to be directly represented<sup>94</sup>
- created a new and flexible range of dispositional powers, ranging from minimum intervention (voluntary undertakings) to maximum intervention in the child's life (permanent care orders, where guardianship and custody are vested in the state).<sup>95</sup>

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

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

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

78 Ibid.

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

80 Ibid 223.

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

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

83 Ibid.

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

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

86 Ibid 60–1.

87 Ibid 64.

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

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

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

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

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

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

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

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

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

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

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

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

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

- 2.57 In 1990, Victoria was the only state other than Western Australia not to have provisions for mandatory reporting of suspected child abuse.<sup>100</sup> The impetus for the introduction of mandatory reporting in Victoria arose from Daniel Valerio's murder in September 1990.<sup>101</sup> Daniel was two years and four months old when his stepfather beat him to death.<sup>102</sup> In the lead up to his death, several professionals had come into contact with Daniel but had failed to intervene.<sup>103</sup> Daniel's death sparked public outcry and calls for mandatory reporting.
- 2.58 In November 1993, by passage of the *Children and Young Persons (Further Amendment) Act 1993 (Vic)*, the Victorian Government introduced mandatory reporting of suspected serious physical or sexual abuse of children for medical practitioners, nurses, and police, and later, in July 1994, for teachers and school principals. In the year following the introduction of mandatory reporting, notifications increased 38 per cent.<sup>104</sup>
- 2.59 Following a second report by Justice Fogarty in 1993,<sup>105</sup> the *Children and Young Persons (Miscellaneous Amendments) Act 1994 (Vic)* was passed. The Act amended section 87 of the CYP Act 1989 to emphasise the paramountcy in protection proceedings of the 'need to protect children from harm, to protect their rights and to promote their welfare'.<sup>106</sup>
- 2.60 Also in 1994, in response to Justice Fogarty's recommendation, pre-hearing conferences became a permanent feature of the Family Division of the Children's Court.<sup>107</sup> The CYP Act 1989 had been amended in 1992 to provide for the pre-hearing conferences,<sup>108</sup> but until 1994 they had only been trialled in the Court as a pilot program.<sup>109</sup>

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

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

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

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

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

### **CHILD WELLBEING AND SAFETY ACT 2005 (VIC)**

- 2.65 In November 2005, the Victorian Parliament passed the *Child Wellbeing and Safety Act 2005* (Vic) (the CWS Act 2005). The purpose of the CWS Act 2005 is to provide 'a legislative framework' of 'overarching principles to guide the delivery of child, youth and family services within Victoria, which will apply to universal, secondary and tertiary child, youth and family services'.<sup>116</sup>
- 2.66 The Minister for Children emphasised that the principles set out in the CWS Act 2005 are designed to be 'complementary' to those set out in the CYF Act 2005.<sup>117</sup>
- 2.67 The CWS Act 2005 also established the Victorian Children's Council to provide the Premier and Minister for Children with independent expert advice about policies and services,<sup>118</sup> and the Children Services Coordination Board to support coordination of child-related government action taken at local and regional levels.<sup>119</sup>
- 2.68 The CWS Act 2005 also provides that the functions of the Child Safety Commissioner are to:
- advise the Minister for Children about child safety issues
  - promote child-friendly and child-safe practices in the Victorian community
  - review the Working with Children Check
  - advocate on behalf of children in out-of-home care
  - undertake inquiries and report on child deaths known to Child Protection.

### **THE CHILDREN, YOUTH AND FAMILIES ACT 2005 (VIC)**

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

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

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

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

- a principle requiring that the ‘best interests of the child must always be paramount’ for all persons working under the Act and that consideration must always be given to the need to protect children from harm, to protect their rights and to promote their development<sup>126</sup>
- a new focus on addressing cumulative harm<sup>127</sup>
- greater acknowledgement of the need for cultural considerations to be taken into account when making decisions about the placement of Aboriginal children, in the form of provision for Aboriginal Family Decision Making (AFDM)<sup>128</sup>
- a requirement to apply the Aboriginal Child Placement Principle, with greater elaboration on its application,<sup>129</sup> and a requirement that the Secretary provide cultural plans for Aboriginal children under his or her guardianship<sup>130</sup>
- a power of the Children’s Court Family Division to refer any protection proceeding to one of two types of dispute resolution conference, either ‘facilitative’ or ‘advisory’<sup>131</sup>
- own motion powers of the Family Division of the Children’s Court to summons a witness to give evidence or produce documents,<sup>132</sup> to ensure that the Court has all the information ‘necessary to make the best decisions about the care and protection of a child’<sup>133</sup>
- ‘long-term guardianship to Secretary’ orders for young persons of or over 12 years of age,<sup>134</sup> which can continue in force until the young person turns 18, but only if the young person consents.<sup>135</sup>

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

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

- temporary assessment orders,<sup>138</sup> which are designed to strengthen the Secretary’s investigatory powers where the Secretary has a reasonable suspicion that a child or young person may be in need of protection, but where families are refusing to cooperate with an investigation<sup>139</sup>
- therapeutic treatment orders, ‘a new basis for intervening earlier with young people [aged 10 to 14] who exhibit sexually abusive behaviour to help prevent ongoing and more serious sexual offences’.<sup>140</sup>

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

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

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

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

125 The *Community Welfare Services Act 1970 (Vic)* was renamed the *Community Services Act 1970 (Vic)* in 1987: see *Community Services Act 1987 (Vic)* s 4.

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

127 *Children, Youth and Families Act 2005 (Vic)* ss 10(e), 162(2).

128 *Children, Youth and Families Act 2005 (Vic)* s 12(b).

129 *Children, Youth and Families Act 2005 (Vic)* ss 12(c), 13–14.

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

131 *Children, Youth and Families Act 2005 (Vic)* s 217. These conferences (called DRCs) replaced the pre-hearing conferences under the *Children and Young Persons Act 1989 (Vic)*.

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

133 Explanatory Memorandum, *Children, Youth and Families Bill 2005 (Vic)* 106.

134 *Children, Youth and Families Act 2005 (Vic)* s 275(1)(g).

135 *Children, Youth and Families Act 2005 (Vic)* s 290.

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

137 *Children, Youth and Families Act 2005 (Vic)* s 524(11).

138 *Children, Youth and Families Act 2005 (Vic)* pt 4.8, div 1.

139 Office for Children, Department of Human Services (Victoria), *Protecting Children ... The Next Steps*, above n 123, 45. These orders are similar to 'holding/investigation' orders that the Carney Committee in 1984 recommended should be available: *Child Welfare Practice and Legislation Review*, above n 4, 228–9, 266.

140 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1373 (Sherryl Garbutt, Minister for Children).

141 Boston Consulting Group, *Children's Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007). For a summary of this report, see paras 2.90 and 2.91. For a fuller discussion of BCG's recommendations, see Appendix D.

142 Office of the Victorian Ombudsman, above n 7, 54.

143 *Ibid* 54.

144 Boston Consulting Group, above n 141, 2.

145 Office of the Victorian Ombudsman, above n 7, 55. 'Safe custody' is explained below.

146 Department of Justice (Victoria), *Attorney-General's Justice Statement 2: The Next Chapter* (2008) 9.

147 *Ibid* 39.

148 *Ibid* 40.

149 *Ibid*.

150 *Ibid*.

151 *Ibid* 43.

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

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

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

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

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

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

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

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

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

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

## RECENT VICTORIAN REPORTS

### NORGARD COMMITTEE REPORT (1976)

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

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

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

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

- 2.91 Importantly, the Carney Committee stated:

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

152 Ibid 10.

153 Ibid 48.

154 Ibid 51.

155 Ibid 52.

156 Ibid.

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

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

159 Ibid.

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

161 Ibid 26.

162 Ibid 28, 85.

163 Ibid 79.

164 Ibid 79–80.

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

166 Ibid 227.

167 Ibid 227 (citation omitted).

- 2.92 Other central features of the current child protection system that have their origins in the Carney Committee's report include:
- the Aboriginal Child Placement Principle<sup>168</sup>
  - the six grounds upon which a child can be found to be 'in need of protection', with a focus on the harm suffered, or likely to be suffered, by the child<sup>169</sup>
  - the splitting of the Children's Court into two separate divisions—the Criminal Division and the Family Division—so that the Family Division, which hears protection applications, has 'a distinct identity and a philosophy separate from the criminal jurisdiction'<sup>170</sup>
  - the Children's Court being headed by a County Court judge, to whom the Carney Committee gave the title 'chief judge'<sup>171</sup>
  - mediation conferences conducted at court, at any stage in child protection proceedings<sup>172</sup>
  - the less formal process of determining protection applications, with the Family Division being unbound by 'legal forms and ceremonies' and being able to 'determine the manner of its own proceedings' and 'inform and direct itself, on any matter, in such manner as it thinks just'<sup>173</sup>
  - the wide range of 'graded' options for disposition available to the Family Division,<sup>174</sup> ranging from minimum intervention (undertakings),<sup>175</sup> to intermediate intervention (supervision orders),<sup>176</sup> to maximum intervention (custody to a third party, custody to the state, or guardianship and custody to the state orders) in the life of a family.<sup>177</sup>
- 2.93 For a fuller discussion of the Carney Committee recommendations that gave rise to the above features of Victoria's system, see Appendix D.
- 2.94 The Carney Committee also recommended that the Children's Court's Family Division should be constituted by a multi-disciplinary panel, consisting of a magistrate or County Court judge, an expert in child and family welfare, and someone with experience in community welfare.<sup>178</sup> The Carney Committee believed that the new Family Division's decision making could 'be vastly improved by including non-legal expertise on the bench', and that this could be done in such a way that the rights of the parties would not be prejudiced.<sup>179</sup> This recommendation was not adopted.

### **PROTECTIVE SERVICES FOR CHILDREN IN VICTORIA: INTERIM REPORT**

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

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



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

### **PROTECTIVE SERVICES FOR CHILDREN IN VICTORIA: FINAL REPORT**

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

2.99 Justice Fogarty noted that

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

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

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

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

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

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

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

168 Ibid 82.

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

170 Ibid 237.

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

172 Ibid 241–2.

173 Ibid 244.

174 Ibid 264.

175 Ibid 269.

176 Ibid 271.

177 Ibid 274.

178 Ibid 238–9.

179 Ibid 238.

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

181 Ibid.

182 Ibid.

183 Ibid 6.

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

185 Ibid 141.

186 Ibid 142–3.

187 Ibid 145.

188 Ibid.

189 Ibid.

190 Ibid 144.

191 Ibid 146.

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

2.103 Justice Fogarty also recommended that:

- pre-hearing conciliation conferences, at that time a pilot scheme, should be extended to become a permanent feature of the Court<sup>193</sup>
- the senior magistrate should issue practice directions in relation to procedure in the Court<sup>194</sup>
- the Children's Court should be separated from the Magistrates' Court and headed by a County Court judge, as the Carney Committee had suggested.<sup>195</sup>

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

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

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

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

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

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

#### **REPORT OF THE COMMUNITY CARE REVIEW (THE CARTER REPORT)**

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

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

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

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

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

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

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

2.112 The PAEC concluded that the CYP Act 1989, 'despite its numerous amendments, does not reflect legislative developments interstate and overseas or contemporary thinking regarding child protection'.<sup>211</sup> The PAEC accordingly recommended that DHS examine developments in other Australian jurisdictions and overseas with a view to amending the CYP Act 1989.<sup>212</sup>

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

2.114 The PAEC also commented on the over-representation of Aboriginal children in the child protection system, particularly those children in out-of-home care. It expressed concern that 'a high proportion of Indigenous children in the care system have no case plans, child care agreements or plans to return home',<sup>215</sup> and that from submissions it appeared there was a lack of compliance with the Aboriginal Child Placement Principles in the CYP Act 1989.<sup>216</sup> The PAEC recommended that DHS work with Aboriginal Affairs Victoria and the appropriate Aboriginal peak agency to improve access to support services for Aboriginal children and young people and their families, and 'develop and implement a case management framework for Aboriginal agencies placing Aboriginal children in out-of-home care'.<sup>217</sup>

192 Ibid 73.

193 Ibid 157–9.

194 Ibid 161.

195 Ibid 153.

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

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

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

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

200 Ibid 194.

201 Ibid 235–8.

202 Ibid 227.

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

204 Ibid 133.

205 Ibid 144–5.

206 Ibid 163.

207 Ibid 163.

208 Ibid 167.

209 Ibid 165.

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

211 Ibid 65.

212 Ibid 66.

213 Ibid.

214 Ibid 62.

215 Ibid 170.

216 Ibid 166.

217 Ibid 170.

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

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

**Allen Consulting Group report**

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

2.117 ACG noted that the CYP Act 1989 was based on the assumption that statutory child protection is an emergency service.<sup>220</sup> ACG questioned whether it was appropriate or effective to continue with this concept, given the steady increase in the numbers of notifications, substantiations—40 per cent of which were re-substantiations, children on care and protection orders, and children placed in care since the enactment of the CYP Act 1989.<sup>221</sup> It ultimately concluded that the CYP Act 1989 was out of date, and new legislation was required.<sup>222</sup>

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

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

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

**Kirby, Ward and Freiberg report**

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

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

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

### Reform proposals

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

### EVALUATION OF PRE-HEARING CONFERENCES

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

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

2.126 Maughan and Dagleis identified various ‘barriers to conciliation’ in the pre-hearing conference process under the CYP Act 1989.<sup>239</sup> They also noted concerns about:

- the low level of remuneration for legal representatives to participate in pre-hearing conferences, which was said to discourage ‘good practice’ and was a disincentive to carry out detailed preparation and preliminary work for such conferences<sup>240</sup>
- legal practitioners in Melbourne coming to pre-hearing conferences for only a limited amount of time before leaving to attend to another matter<sup>241</sup>
- protective workers who attended pre-hearing conferences often not having the authority necessary to make decisions that would lead to settlement, and needing to leave the conference to consult or seek advice from their supervisors or senior staff, who had not been privy to the deliberations in pre-hearing conferences<sup>242</sup>
- the problem in pre-hearing conferences in Melbourne that the ‘“culture” of each group [the convenors, the protective workers and the legal practitioners] had an exacerbating effect on the other two groups resulting in increasing levels of intolerance and absence of cooperation’.<sup>243</sup>

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

219 Allen Consulting Group, above n 90.

220 *Ibid.* vi.

221 *Ibid.*

222 *Ibid.* 93.

223 *Ibid.* 56.

224 *Ibid.* 57.

225 *Ibid.* 85–6.

226 *Ibid.* 87–8.

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

228 *Ibid.* 16.

229 *Ibid.* 38.

230 *Ibid.* 39.

231 *Ibid.* 40.

232 *Ibid.*

233 *Ibid.*

234 *Ibid.* 46.

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

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

237 *Ibid.* 11.

238 *Ibid.* 13–14.

239 *Ibid.* 19.

240 *Ibid.* 28.

241 *Ibid.* 29.

242 *Ibid.* 33.

243 *Ibid.* 63.

- 2.127 To alleviate some of the problems identified with the pre-hearing conferences, Maughan and Daglis recommended that:
- ‘the appropriate bodies consider an increase in fees payable to legal representatives/counsel for pre-hearing conferences’ to address these issues<sup>244</sup>
  - convenors be given appropriate training in ADR processes, as well as regular ongoing professional development<sup>245</sup>
  - DHS consider providing legal representation for its workers in pre-hearing conferences<sup>246</sup>
  - the parties identify the issues in dispute at the mention hearing<sup>247</sup>
  - a pre-hearing conference coordinator position be created<sup>248</sup>
  - the Children’s Court issue guidelines for the pre-hearing conferences<sup>249</sup>
  - the President of the Children’s Court issue a Practice Direction, giving the convenor authority to terminate a pre-hearing conference as a result of the conduct of one of the attendees, and report the reasons for termination to the Court.<sup>250</sup>

### **BOSTON CONSULTING GROUP REPORT ON THE CHILDREN’S COURT 2007**

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

## SELECTED REVIEWS IN OTHER JURISDICTIONS

### AUSTRALIAN LAW REFORM COMMISSION REPORT NO 18: CHILD WELFARE

#### Background to the report

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

#### Recommendations in the report

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

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

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

#### Youth Advocate

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

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

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

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

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

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

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

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

### Outcome of the report

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

- receiving notifications of children suspected of being in need of care<sup>272</sup>
- initiating care proceedings after consultation with the Standing Committee of the Children's Services Council<sup>273</sup>
- chairing court-ordered child care conferences<sup>274</sup>
- bringing applications to revoke, vary or replace existing care orders.<sup>275</sup>

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

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

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

2.142 The Commissions' report, *Seen and Heard: Priority for Children in the Legal Process*, was released on 30 September 1997.<sup>278</sup> In the report, the Commissions discussed options for the appropriate model of legal representation for children involved in care and protection applications in children's courts.<sup>279</sup> The Commissions recommended that all children who are the subject of a care and protection application should be provided with a lawyer 'as early as possible'.<sup>280</sup>

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



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

#### **FAMILY LAW AND CHILD PROTECTION FINAL REPORT**

- 2.146 In September 2002, the Child and Family Services Committee of the Family Law Council of Australia (the Council) published a report entitled *Family Law and Child Protection Final Report*.<sup>286</sup> The report considered the interaction between state and federal systems when child protection issues arise in cases under the *Family Law Act 1975* (Cth) (the FLA 1975).
- 2.147 The Council made a number of recommendations to reduce problems caused by the ‘jurisdictional overlap’ that occurs due to child protection being a matter for state law and disputes concerning children falling under the Commonwealth FLA 1975.<sup>287</sup> One such recommendation was that in child protection proceedings, state and territory children’s courts be given the power to make long-term orders granting residence to one parent and prohibiting contact between the child and the other (abusive) parent.<sup>288</sup> The Council suggested that this would remove the need to make a separate application for such an order to the Family Court when a protection application was on foot.<sup>289</sup>

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

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

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

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

- the timeframe in which DoCS was required to file an application after the emergency removal of a child be extended from 24 to 72 hours<sup>291</sup>
- adequate funding be provided to enable ADR to be used prior to and during care proceedings<sup>292</sup>
- DoCS commence care applications by filing an application supported by a written summary of the information available to DoCS, rather than filing affidavits in support and all material on which it relies<sup>293</sup>
- the Children's Court be given the power to order, on its own motion, that expert evidence be provided<sup>294</sup>
- a code of conduct be developed, applicable to all legal representatives in care proceedings, and specialist accreditation be available<sup>295</sup>
- a trial of a 'docket system' be undertaken in the Parramatta Children's Court for matters in the care and protection jurisdiction<sup>296</sup>
- a District Court judge be appointed as the senior judicial officer in the Children's Court<sup>297</sup>
- Children's Court registrars be legally qualified and trained in ADR, and should perform ADR and procedural and consent functions.<sup>298</sup>

291 James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, 508–9, 542 (Recommendation 13.4).

292 *Ibid* 489–91 (Recommendation 12.1).

293 *Ibid* 541 (Recommendations 13.2, 13.3).

294 *Ibid* 462 (Recommendation 11.1(xv)).

295 *Ibid* 532.

296 *Ibid* 539, 543 (Recommendation 13.11).

297 *Ibid* 542 (Recommendation 13.9).

298 *Ibid* 543 (Recommendation 13.12).

#### Outcome of the report

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