Chapter 8

# Option 2—A New System: Enhancing Court Practices and Processes

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# Chapter 8 Option 2—A New System

## INTRODUCTION

8.1 This chapter examines new processes for the manner in which protection applications commence and proceed through the Children's Court, including new ways of conducting contested proceedings. It also explores the introduction of new emergency procedures, a new approach to the representation of children, new grounds for protection applications, and jurisdictional issues.

8.2 In Chapter 6, the Commission suggested that the procedures used in protection applications in the Children's Court should be specially designed for this unique jurisdiction. This chapter forms part of that process. It draws upon procedures used successfully in child protection matters in other jurisdictions. The proposals in this chapter should be read in conjunction with those in Chapter 7 concerning the introduction of a graduated range of supported, structured and child-centred agreement-making processes in child protection matters.

8.3 The chapter contains discussion and proposals about the following issues:

- new ways of commencing protection applications
- the introduction of more case management, inquisitorial and problem-oriented approaches in the Family Division of the Children's Court
- the status of children in protection applications and models of representation
- new grounds for protection applications and an 'agreement' provision
- the standard of proof for findings of fact
- mechanisms for the review of case plans
- increasing the age limit for the Family Division's protection jurisdiction
- addressing cross-jurisdictional issues
- improving the built environment and administration of the Children's Court
- improving the training of child protection workers, lawyers and Children's Court judiciary.

## COMMENCEMENT OF PROCEEDINGS

### INTRODUCTION

8.4 In this section, the Commission assesses the way in which protection proceedings commence in Victoria. In doing so, the Commission has been mindful of the issue referred to it by the Child Protection Proceedings Taskforce (the Taskforce):

> *Whether it is in the best interests of an apprehended child that section 242(3) of the* Children, Youth and Families Act 2005 *be amended to extend the period within which DHS must bring a safe custody application from 24 hours to 72 hours.*[1]

8.5 Section 242(3) of the *Children, Youth and Families Act 2005* (Vic) (CYF Act 2005) requires DHS to bring a child before the Children's Court or a bail justice within 24 hours of taking a child into safe custody. Children other than those 'of tender years'[2] are physically taken to court or to police stations where bail justice hearings are usually conducted.

8.6 After taking into account stakeholder views on this topic, the practices followed in other jurisdictions, and human rights considerations, the Commission proposes a new process for commencing proceedings in the Family Division of the Children's Court.

## BACKGROUND

8.7 The Commission asked two questions about this issue in its Information Paper. They were:

- Should the present time requirement that protection applications commenced by taking the child into safe custody be brought to court (or before a bail justice) within 24 hours be retained?
- If not, what period of time should apply before Children's Court authorisation of this state intervention is required?

8.8 These questions, and the question referred by the Taskforce, are based on the premise that judicial oversight of a child protection practitioner's decision to remove a child from the care of his or her parents should occur *after* removal of the child. Stakeholders tended to accept this premise and addressed the advantages and disadvantages of various time periods in which the case should be heard following the child's removal.

8.9 After considering the many problems associated with applications by safe custody, human rights issues and the practices followed in some other jurisdictions, the Commission concluded that it should formulate proposals that require child protection practitioners to obtain judicial authorisation *before* removing a child unless this step is not feasible. The way in which most cases currently enter the court system creates significant difficulties for children, parents, child protection workers and the Court.

## CURRENT COMMENCEMENT OF PROCEEDINGS

8.10 As discussed in Chapter 3, protection application proceedings currently commence either by way of notice (where a child is not involuntarily removed from parents) or by way of safe custody (where a child is involuntarily removed from parents). Over the past seven years, the proportion of protection applications commenced by safe custody has grown from 58 per cent to 78 per cent in Melbourne and from 16 per cent to 48 per cent in regional areas.[3]

8.11 Because more than three out of every four protection applications in Melbourne commence in circumstances where a child is removed from his or her parents' care, the atmosphere at the Children's Court in Melbourne is very stressful when the parties attend court within hours of the child's removal. It is also difficult for the Court to manage its lists because it has no forewarning of how many new protection applications will come before it each day. In an attempt to exercise some control over court listings and to avoid having to sit into the evening to hear protection applications without notice, the Court has issued a Practice Note, which requires all applications by safe custody to be filed at Melbourne Children's Court before 2 pm.[4]

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

2 *Children, Youth and Families Act 2005* (Vic) s 242(4). In practice, children under 6 are regarded as being children of tender years: Springvale Legal Service, *Lawyers Practice Manual Victoria* (2009) [6.2.205]. Note, however, that Judge Coate, the former President of the Children's Court of Victoria, 'has expressed the view that it meant a child of less than 5 years of age': Children's Court of Victoria, *Research Materials* (2009) [4.9.1].

3 Boston Consulting Group, *Child Protection Proceedings Taskforce: Children's Court Data* (2010) 2. While the present discussion primarily focuses on the commencement of the initial protection application, any proposal relating to the method by which a child is involuntarily removed from their parent or parents should apply to the commencement of all applications, whether primary or secondary. Secondary applications (such as applications for breach, variation or new interim accommodation order; or breach of a protection order) may also be brought to court following the removal of a child by safe custody

4 Children's Court of Victoria, *Practice Note No 1 of 2008: Applications by Apprehension,* 29 May 2008.

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8.12 Parents, children and the child protection practitioners involved in applications by safe custody arrive at the Melbourne and Moorabbin Children's Courts at various times from 9:30 am. Victoria Legal Aid (VLA) assigns a duty lawyer to parents and children requiring representation. Urgent discussion between the lawyers and their clients, interspersed with bouts of vigorous negotiation between the lawyers, usually follows. During this process, the parties may be called into a courtroom over the loudspeaker to explain the case's status and advise whether court time will be required for a submissions contest about an interim accommodation order (IAO). A protection worker usually brings the child concerned, who has only recently been separated from their parents, to the Court.

8.13 The CYF Act 2005 sets a very low threshold for the involuntary removal of a child without judicial approval. The Act provides that a child protection worker may commence proceedings by first removing a child if it is 'inappropriate' to commence by notice.[5] For certain secondary applications, the Act stipulates that a protective intervener may make an application by safe custody if there is 'good reason' not to proceed by notice.[6]

### Early and later stage safe custody removal

8.14 During consultations, the Commission heard that a protection application by safe custody may be considered necessary at the time of the first visit with a family. This would occur at the end of the intake phase of the child protection process (normally between two to 14 days).[7] The Boston Consulting Group (BCG) reported that in 2008–09, 47 per cent of applications by safe custody occurred 0 to 9 days from intake.[8]

8.15 Consultations with child protection workers indicated that applications by safe custody also occurred during the protective intervention phase of their work.[9] Current practice guidelines require child protection workers to assess whether to issue a protection application by the end of this phase (which is generally 90 days from the date of initial report)[10]. BCG reported that in 2008–09, 38 per cent of applications by safe custody occurred after 30 days from intake.[11] In 25 per cent of these cases, Child Protection had been working with the family for more than 70 days.[12]

8.16 Many child protection practitioners believe that an application by safe custody provides benefits that are not so readily available with an application by notice. Some child protection practitioners informed the Commission that they would initiate a protection application by safe custody, following a precipitating event, in order to protect a child by having conditions attached to an IAO. The following comments were made:

> *A PA [protection application] by safe custody is the only means of obtaining an Order immediately.*
>
> *A crisis is the only way to get an interim order otherwise the court will not make an IAO.*
>
> *If 'by notice applications' could be dealt with in a different way, the number of PAs [protection applications] by safe custody would be reduced.*[13]

8.17 If an application is brought by notice, a Court 'may' make an IAO,[14] but is very unlikely to do so on the first day if there is no agreement between the parties because the Court is very busy hearing cases brought by safe custody. Compared to a safe custody application, a protection application by notice is a relatively slow and less certain way for a child protection worker to secure a court order with protective conditions.

## VIEWS IN CONSULTATIONS AND SUBMISSIONS

8.18 The Commission received submissions for and against the retention of the 24-hour time limit in which to bring a matter to court following safe custody removal of a child. A number of people and organisations supported the retention of the existing 24-hour rule.[15] However, only a few of the child protection practitioners consulted supported the retention of the 24-hour timeframe,[16] with many more favouring a longer period—generally 72 hours.[17] One private legal practitioner supported a 72-hour timeframe for safe custody hearings 'if DHS provided detailed, accurate affidavits' during that time.[18] In its submission, the Office of the Child Safety Commissioner (OCSC) suggested 72 hours or two working days should be the maximum timeframe for applications by safe custody.[19]

8.19 In discussing the timeframe for the commencement of protection applications by safe custody, stakeholders acknowledged that children sometimes needed to be removed from their families for their protection, but that the decision to do this should be independently reviewed within a limited period. The Carney Committee recognised the tensions involved in removing children by 'safe custody' when recommending this power in 1984.[20]

### Lack of preparation time

8.20 Many child protection practitioners expressed concern about the lack of time to prepare for a hearing within 24 hours.[21] Child protection workers reported that they had many tasks following the removal of a child, including talking to children about was happening to them, organising clothes and toys and talking to the parents.[22] Child protection workers in regional Victoria discussed logistical difficulties in attending a hearing within 24 hours after arranging a placement for a child several hours distance from the place of hearing.[23] Some child protection practitioners expressed concern about the ability of families to absorb the legal process in less than 24 hours and access legal advice.[24] OCSC expressed concern about the lack of opportunity for court preparation, especially following after hours removals:

> *Protection Applications are often presented at the Children's Court by After Hours staff, who may have had little sleep due to the actions being undertaken during the course of the night.*[25]

5 *Children, Youth and Families Act 2005* (Vic) s 241(1).

6 *Children, Youth and Families Act 2005* (Vic) ss 314(1)(a), 269(4), 270(6).

7 On initial assessment protective workers may consider that urgent removal of the child is necessary and so an application by safe custody is filed and the child is brought before the Children's Court or bail justice (if the Court is not sitting) within 24 hours of removing the child from the care of his or her parents.

8 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 25.

9 This is the period following the intake and investigation in which a child practitioner has substantiated concerns of harm to the child's safety, stability and development. During this phase, the child protection practitioner has developed a best interests plan and is working intensively with the family while assessing the needs and future risk of the child. For more detail, see Chapter 3.

10 This period may be extended to 150 days with unit manager approval. See Chapter 3 for more detail.

11 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 25.

12 Ibid.

13 Consultation 25 (DHS CP Workers East & Nth West).

14 *Children, Youth and Families Act 2005* (Vic) s 262(1)(b).

15 Submissions 11 (VLA), 15 (Connections), 17 (CCC), 22 (Anchor), 26 (FVPLS Victoria), 28 (Anonymous), 31 (Gatehouse Centre), 38 (VALS), 45 (FCLC), 46 (Children's Court of Victoria) 52, 48 (Victorian Bar).

16 Consultations 18 (DHS CP Workers Gippsland), 25 (DHS CP Workers East & Nth West).

17 Consultations 4 (DHS Managers), 13 (DHS CP Workers Hume), 20 (DHS Community Care Managers), 22 (DHS CP Workers Southern), 25 (DHS CP Workers East & Nth West).

18 Consultation 6 (Private Practitioners 1).

19 Submission 37 (OCSC).

20 The 'safe custody power' was provided in s 69 of the *Children and Young Person's Act 1989* (Vic). See Chapter 2 for discussion of the introduction of the power to remove by safe custody to replace bail proceedings. As discussed in Chapter 2, the Carney Committee stated: 'Safe custody is a drastic option and should be reserved for the protection of the child who is at immediate risk. It should not be allowed to become a routine or de facto placement option, usurping the rights of the family': Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 2, 227 (citation omitted).

21 Consultations 4 (DHS Managers), 13 (DHS CP Workers Hume), 25 (DHS CP Workers East & Nth West).

22 Consultation 13 (DHS CP Workers Hume).

23 Ibid.

24 Consultations 4 (DHS Managers), 20 (DHS Community Care Managers).

25 Submission 37 (OCSC).

8.21 OCSC emphasised the need for authorisation of state intervention 'in as short a timeframe as possible', but said that this should not be 'at the cost of appropriate arrangements being made for the child's care and support … Consideration could be given to specifying 72 hours or a maximum of two working days'.[26] Other respondents suggested that short periods of time lead to poor decision making or an inability to undertake an appropriate investigation.[27]

### Children's attendance at court

8.22 The Commission received a number of submissions about the requirement for children to attend court.[28] Although some respondents stated that children might wish to attend court,[29] or that it provided them with an opportunity to see their family,[30] many felt that attending court could be a distressing experience for children.[31] The Gatehouse Centre submitted that for children, court is 'highly emotional and stressful at times'.[32] Many stakeholders expressed concern about court facilities for children, particularly the lack of childcare.

### Bail justice hearings

8.23 If Court is not sitting within 24 hours after removal of a child, a bail justice must hear an IAO application before the case proceeds to the Children's Court. Some stakeholders expressed concerns both about children needing to attend police stations for bail justice hearings and about bail justices' comprehension of children's issues.[33] Some child protection managers considered that bail justices lacked appropriate training.[34] Further, child protection practitioners in regional Victoria reported that children and workers sometimes waited many hours for a bail justice to attend a hearing.[35]

### Extension of time limit

8.24 The Commission heard different views about extending the 24-hour time limit within which to receive court or bail justice authorisation for a child's removal. Many people were concerned about the magnitude of the decision to remove a child from their family involuntarily and the resulting need to ensure timely independent oversight.[36]

8.25 The Children's Court opposed any extension of the 24-hour timeframe for three reasons:

1. Children are often returned home when applications by safe custody first come before the Court.
2. There is a lack of identifiable concern about current decision making by the Court.
3. there are concerns about the psychological impact of separation on a child.[37]

Other stakeholders concluded that an extension of the timeframe beyond 24 hours before a hearing would be contrary to a child's best interests.[38]

8.26 The Children's Court estimates that 50 per cent of children removed by safe custody are returned home on an IAO when the matter first comes before the Court.[39] The Court states that this occurs where the risk of harm 'could be ameliorated and rendered acceptable by court-imposed conditions', and that children should not be separated from their parents for more than 24 hours in these circumstances.[40] For children placed in out-of-home care, the Court states it usually will include in the order 'conditions in relation to access and counselling which will moderate the psychological effects of separation'.[41]

8.27 The Children's Court Clinic asserted that the current time requirement 'emphasises the importance and profound nature of such an intervention and is there to protect the child and the family from unnecessary, prolonged separation'.[42] Some lawyers for parents and children considered that increasing the time requirement to 72 hours would only increase the trauma experienced by children, and viewed it as a regressive step for the sake of better paperwork.[43] A child protection practitioner shared a similar view in consultations, suggesting that if the time period for bringing safe custody cases to court was increased to 48 hours, the child would be traumatised for two days instead of one day.[44]

## INVOLUNTARY REMOVAL OF A CHILD IN THE CONTEXT OF THE VICTORIAN CHARTER

8.28 As discussed in Chapter 3, any new Victorian laws must be consistent, as far as possible, with the rights in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).[45] The rights of direct relevance to the question of a child's removal from his or her family include:

- the right of the family to protection[46]
- the right of the child to protection[47] and to life[48]
- the right of a person 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'.[49]

8.29 It is clear that the involuntary removal of a child from his or her family without judicial oversight interferes with the family's right to protection as the fundamental group unit of society and limits the Charter's right concerning interference with the family and home. It is clear, however, that the family's right to protection may need to be limited at times in order to protect the child from harm.[50] As discussed in Chapter 3, the Charter only permits human rights to be subject to 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors'.[51]

26 Submission 37 (OCSC).

27 Submissions 18 (SECASA), 34 (Victoria Police). Similar concerns were also expressed in submission 1 (Anonymous) and consultation 22 (DHS CP Workers Southern).

28 This matter is discussed in Chapter 3.

29 Submissions 15 (Connections), 31 (Gatehouse Centre), 45 (FCLC); see section on participation of children for greater discussion on the general issue of children's attendance at court below.

30 Consultation 11 (FCLC).

31 Consultation 2 (CCC); submissions 22 (Anchor), 26 (FVPLS Victoria), 31 (Gatehouse Centre).

32 Submission 31 (Gatehouse Centre).

33 Consultation 17 (Victoria Police).

34 Consultation 4 (DHS Managers).

35 Consultations 18 (DHS CP Workers Gippsland), 13 (DHS CP Workers Hume).

36 Submissions 37 (OCSC), 24 (WHCLS), 17 (CCC), 46 (Children's Court of Victoria) 52.

37 Submission 46 (Children's Court of Victoria) 52–6.

38 Submission 22 (Anchor).

39 Submission 46 (Children's Court of Victoria) 53.

40 Ibid.

41 Ibid.

42 Submission 17 (CCC).

43 Consultation 16 (VLA).

44 Consultation 25 (DHS CP Workers East & Nth West).

45 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28. This section requires that a statement of compatibility with the Charter is tabled in Parliament with every new Bill. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(2) reinforces the importance of consistency with the Charter. For a detailed discussion of the Charter rights as they generally relate to child protection legislation, see Chapter 3 under 'Charter of Human Rights and Responsibilities and international rights instruments'.

46 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1).

47 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9.

49 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a). For brevity, the right in s 13(a) is referred to in the following discussion as the Charter right 'prohibiting interference'. For a discussion of these rights, see Chapter 3 under 'Charter of Human Rights and Responsibilities and international rights instruments'.

50 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Human Rights and Child Protection', Advice No 1568 (31 December 2007), from CD-ROM provided at 23 March 2010, 40. This is discussed in Chapter 3 in both 'Balancing the protection of the child in his or her best interests and protection of the family' and 'Separation of children from their families'.

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

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8.30 There are two important issues to consider in relation to the justification for the limitation of rights caused by the length of time for safe custody prior to a court order. The first is the relationship between the limitation and its purposes:[52] there must be a rational connection between the removal of the child and the protection of the child from harm. The second is the 'proportionality principle': a limitation must not extend further than is reasonably necessary to achieve its purpose, and may not be reasonable if there are other means of achieving the purpose which require less imposition on a right.[53]

8.31 The clear purpose of emergency removal without judicial authorisation is to ensure the immediate protection of the child. There will always be emergencies that require some limitation of the family's rights to protection[54] and to be free from interference[55] in order to protect a child from harm. Any legislative provisions designed to achieve this end must do so with as little interference with these family rights as possible. Provisions for emergency removal must not extend beyond what is needed to protect the child from harm, and there must not be any less restrictive means reasonably available.

## TIMEFRAMES FOR JUDICIAL AUTHORISATION OF INVOLUNTARY REMOVAL OF CHILDREN IN OTHER AUSTRALIAN JURISDICTIONS

8.32 All Australian states and territories have legislation giving child protection practitioners, or the police, powers to remove children from their parents in emergencies.[56] The jurisdictions vary in the timeframes they impose on child practitioners to seek judicial authorisation for a child's removal. Victoria does not have the shortest timeframe. In Queensland, child protection practitioners and police officers have eight hours to obtain a temporary assessment order or release the child.[57] In Tasmania, child protection practitioners cannot involuntarily remove a child without a warrant from a magistrate.[58] South Australia has a similar timeframe to Victoria, with a court hearing on 'the next working day', although there are no bail justice hearings so applications lodged on Friday after a child's removal are heard on the following Monday.[59] The ACT allows two working days, or if over the weekend, until the next sitting day. NSW has a 72-hour timeframe for filing applications following emergency removal.[60] The Northern Territory allows child protection practitioners 72 hours to obtain a temporary protection order from the Court.[61] Western Australia has the longest timeframe of the eight states and territories, with a court hearing usually five days after a child is removed.[62]

### Distinguishing between time of filing application and time of first hearing application

8.33 Western Australian legislation explicitly distinguishes between the time for filing an application (two days from removal) and the time period for having the case first heard (usually three days from filing).[63] In practice, parents and children in Western Australia are rarely able to contest the application and associated placement issues on the first court date.[64] It is usually necessary to seek hearing time on an adjourned date to contest the Child Protection Service's decision to remove a child.[65] Similarly, the Commission heard that in parts of regional Victoria, cases are often adjourned for contest by submission. At the Children's Courts in Melbourne and Moorabbin, parents and children have an opportunity to be legally represented and to challenge DHS's decision to remove a child within one working day of the child's removal.

## Judicial authorisation prior to involuntary removal of a child and temporary assessment

8.34 In the Australian jurisdictions that require judicial authorisation for the involuntary removal of a child either before removal (Tasmania) or within eight hours of removal (Queensland), a court order may be obtained by a child protection practitioner on an *ex parte* basis—that is, in the absence of the parents and child.[66] Both of those states then provide for the Court to make short-term orders to enable interim protection for the child while Child Protection Services carry out an investigation.[67]

8.35 In Queensland, an initial temporary assessment order may be made for up to four days,[68] and then if necessary a court assessment order may be ordered for four weeks, with one extension of four weeks.[69] The grounds upon which the Court makes these orders concern the child's immediate protection and are different to the grounds of any subsequent application for a protection order.[70] Similarly, in Tasmania, the initial order that may be obtained *ex parte* may last 120 hours,[71] after which a temporary assessment order may be made for four weeks, with one extension of either four weeks or eight weeks, depending on whether a family group conference (FGC) will be held.[72] Again, the requirements for obtaining a temporary assessment order are different to the grounds for making a care and protection order.[73]

8.36 In Victoria, temporary assessment orders were introduced with the CYF Act 2005 and came into effect on 1 October 2007. However, this order is seldom used within the Victorian child protection system. A temporary assessment order may be made in the absence of parents and children, but initially lasts only ten days. Temporary assessment orders may not extend beyond 21 days.[74] To obtain this order, child protection practitioners must have a 'reasonable suspicion that a child is in need of protection' and satisfy other grounds that relate to the need to undertake further investigation.[75]

52 Kylie Evans and Alistair Pound, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 74.

53 The 'nub' of the 'proportionality principle' originates from the relevant considerations in s 7(2)(c), (e) of the Charter, that is the nature and extent of the limitation and whether there is a less restrictive way to achieve the purpose of the limitation: ibid.

54 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1).

55 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

56 For a comparison, see Appendix N.

57 *Child Protection Act 1999* (Qld) s 18(7).

58 *Children, Young Persons and Their Families Act 1997* (Tas) s 20; see also Chapter 2.

59 *Children's Protection Act 1993* (SA) s 16.

60 *Children and Young People Act 2008* (ACT) s 410; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45.

61 *Care and Protection of Children Act 2007* (NT) s 105(5). The Act provides that as soon as practicable after the order is made, the CEO must give a copy of the order to each parent of the child, inform the child about the order, and explain the effect of the order to the child: s 106.

62 In WA, an application must be made not more than two working days after a child is removed and the Court must try to list the application in three days: *Children and Community Services Act 2004* (WA) s 38.

63 *Children and Community Services Act 2004* (WA) s 38.

64 Email from Julie Jackson, Solicitor in Charge, Family Court Services and Children's Court (Protection) Services, Legal Aid Western Australia, 18 June 2010.

65 Ibid.

66 *Children, Young Persons and Their Families Act 1997* (Tas) s 20; *Child Protection Act 1999* (Qld) s 26.

67 *Children, Young Persons and Their Families Act 1997* (Tas) s 21, 22; *Child Protection Act 1999* (Qld) ss 28, 29.

68 The initial order is for three days only with the possibility of extension for an additional day: *Child Protection Act 1999* (Qld) ss 28–9, 34; see also Chapter 4 for detailed discussion of these points.

69 *Child Protection Act 1999* (Qld) s 47, 49.

70 See a summary of the Queensland child protection system in Chapter 4.

71 *Children, Young Persons and Their Families Act 1997* (Tas) s 21.

72 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(5).

73 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(1)–(2) compared with s 42(3)(a)–(b).

74 *Children, Youth and Families Act 2005* (Vic) s 236.

75 *Children, Youth and Families Act 2005* (Vic) s 228(1).

8.37 Child protection practitioners have rarely applied for this order and in 2008–09 the Children's Court did not make any temporary assessment orders.[76] The Commission notes that the threshold for applying for a protection order (being 'satisfied on reasonable grounds that a child is in need of protection') is not much higher than the threshold for applying for a temporary assessment order (having 'reasonable suspicion that a child is in need of protection'). If a protective intervener makes a protection application by safe custody (removal of the child), the Court may make a 21-day IAO within one working day and in most circumstances, this order may be continually extended.[77]

### EMERGENCY INVOLUNTARY REMOVAL AND COMMENCEMENT IN NEW ZEALAND

8.38 In New Zealand, child protection practitioners require judicial authority ('a place of safety warrant') prior to involuntarily removing a child from his or her parents. In the absence of judicial authority, only police have removal power.[78] This process is described in Chapter 5. When a child is removed on a place of safety warrant or by police, the first court appearance should occur within five days of the child being removed and does not necessitate the commencement of proceedings for a declaration that a child is in need of care and protection.[79] The Court has power, in the absence of the Child Protection Service filing an application for a declaration, to make orders concerning a child's placement and orders relating to access.[80] Alternatively, the child protection agency may have entered into a temporary care agreement with the parents and child, or returned the child. Following a child's emergency removal, an FGC must first be attempted before the Court can declare that the child is in need of protection, unless the child has been abandoned.[81]

### DISTINGUISHING BETWEEN THE DECISION TO REMOVE A CHILD AND THE DECISION TO FILE A PROTECTION APPLICATION

8.39 In its review of child welfare laws in 1981, the Australian Law Reform Commission (ALRC) recognised the need for a power to take a child into safe custody immediately, but stated:

> *A decision to take action of this kind should, however, be quite separate from a decision to initiate care proceedings. Placing a child in custody should not inevitably lead to the initiation of care proceedings.*[82]

8.40 In Victoria, the decision by a child protection practitioner to remove a child from the care of his or her parents or guardian requires the initiation of protection proceedings. A protection application must be filed at court 'as soon as possible' after taking a child into safe custody, with copies of the application provided to parents and children over 12 years.[83]

8.41 The Commission believes that the decision to obtain an urgent order to protect a child from immediate risk should be separated from the decision to initiate a protection application. Immediate concerns for a child's wellbeing ought to be addressed by an urgent interim court order. There should then be an opportunity, in most cases, for parents, children, child protection and other relevant people or agencies to seek to address future concerns for a child through a supported and structured agreement-making process as described in Chapter 7 (Option 1). If this process is inappropriate or fails to produce agreement and child protection practitioners have ongoing concerns for a child's wellbeing, it should then be possible to commence protection proceedings.

## ADDRESSING FAMILY VIOLENCE PREVENTION OPTIONS BEFORE REMOVING A CHILD

8.42 In NSW, a child protection practitioner or police officer may remove a child without warrant if the child is at immediate risk of significant harm and making an apprehended violence order would be insufficient to protect the child from risk.[84] The legislation requires authorities to consider whether it is appropriate to obtain an order to exclude the alleged perpetrator of violence from the home before taking steps to remove a child. Similarly, in England and Wales, an exclusion order may be attached to an emergency removal order or an interim care order so that the child can remain at home and the alleged abuser is excluded from the home.[85]

8.43 The Commission considers that provisions such as these seek to minimise further trauma to parents and children affected by family violence, and actively promote outcomes that involve the least amount of compulsory intervention in the family's life as is required.

## ADDRESSING THE SERIOUSNESS OF REMOVING A CHILD SUDDENLY

8.44 In NSW, if a child protection practitioner removes a child considered at 'immediate risk of serious harm' from the care of parents without a warrant, on the first hearing date the practitioner must explain to the Court why removal without a warrant was necessary in the circumstances.[86]

8.45 In Victoria, a child protection practitioner is not required to explain to the Court why they considered an application by notice 'inappropriate'[87] when deciding to take a child into safe custody. Once the child is taken into safe custody, the Court must consider whether there would be 'an unacceptable risk of harm to the child' if not removed from the care of his or her parents at the time of the court hearing.[88] The original decision to take a child into safe custody is not formally examined.

## THE COMMISSION'S VIEWS IN RELATION TO COMMENCEMENT

8.46 The Commission proposes a new process for commencing proceedings in the Family Division of the Children's Court that has the following main features:

- All protection applications should commence by notice.
- An FGC should be conducted prior to filing a protection application by notice, unless exceptional circumstances exist.
- If emergency removal of a child is required, a child protection practitioner should first obtain an emergency removal order (which may be obtained in the absence of parents and child), unless there is immediate risk, and insufficient time to apply for this order, and a safety notice or intervention order would not be sufficient to protect the child. On making an emergency removal order, a judicial officer should also order that the matter return to court at a time and date (at the judicial officer's discretion) up to 72 hours from the likely time of the child's involuntary removal.
- If a child is involuntarily removed without an emergency removal order, the protective intervener should apply to the Court for a hearing of an interim care order application within one working day of the child's removal.

76 Children's Court of Victoria, *Annual Report 2007–2008* (2008) 19.

77 *Children, Youth and Families Act 2005* (Vic) s 267(2); see also discussion in Chapter 3 regarding periods of extensions and limitation of extension for an IAO to secure welfare.

78 *Children, Young Persons and Their Families Act 1989* (NZ) ss 39(1), 42.

79 However, an application can be made without first attending FGC where the child or young person has been removed: *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2)(a).

80 *Children, Young Persons and Their Families Act 1989* (NZ) s 46.

81 *Children, Young Persons and Their Families Act 1989* (NZ) ss 14(1)(g), 70(2)(c), 72(2).

82 (Australian) Law Reform Commission, *Child Welfare*, Report No 18 (1981) 232.

83 *Children, Youth and Families Act 2005* (Vic) s 240(3).

84 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 43(1).

85 *Children Act 1989* (UK) s 44(a). An exclusion order may also be attached to an interim care order made under s 38(1)(a).

86 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 43, 45(2).

87 *Children, Youth and Families Act 2005* (Vic) s 241(1).

88 *Children, Youth and Families Act 2005* (Vic) s 10(3)(g); see also discussion in Chapter 3.

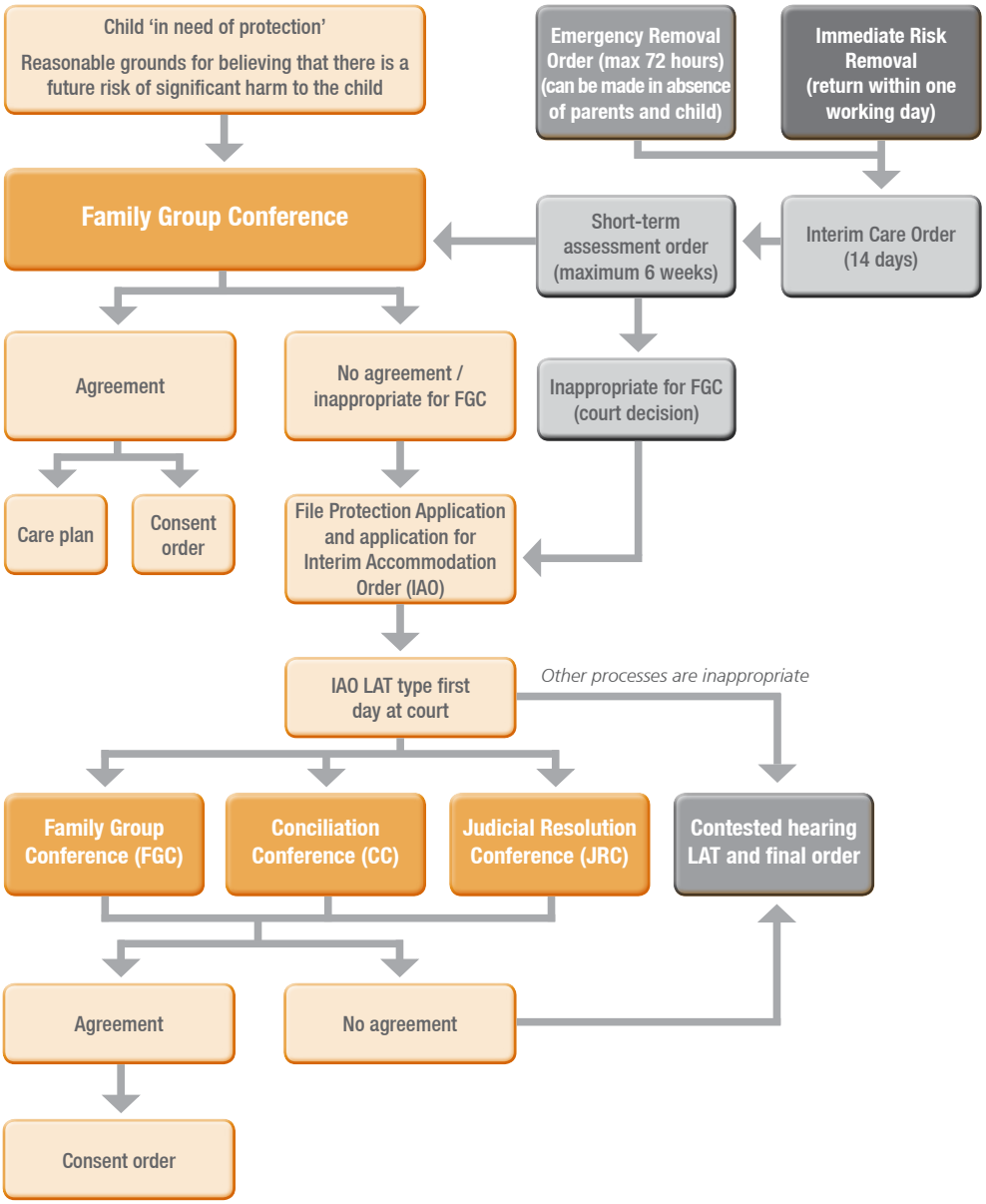
- Following a child's removal, the Court should be permitted to make a 14-day interim care order if satisfied that a child is at unacceptable risk of harm. Prior to the conclusion of an interim care order, the Court should be permitted to make a short-term assessment order for a maximum period of six weeks to enable the parties to attend an FGC, or if exceptional circumstances exist, to enable a protection application to be filed.
- A protective intervener should file an application for an IAO with any protection application if an FGC has failed to produce an agreement (or an FGC was unsuitable) and an interim order is required to protect a child from risk of significant harm.
- Once a protection application is filed, the Court should direct that a conciliation conference (CC), a judicial resolution conference (JRC) or another FGC (whichever is most appropriate) takes place, unless exceptional circumstances exist.

8.47 The Commission acknowledges that some emergencies are inevitable and that there must be a framework for dealing with them that is compatible with the rights in the Charter. In some instances, the child's right to protection must take priority over other relevant rights. In the rare instances where an emergency removal order, safety notice or intervention order is not appropriate, it should be possible to remove a child from his or her family without judicial oversight. Even when a child is removed in this way, the proposed new commencement process seeks to ensure the child's protection by limiting this step to the minimum duration necessary. To achieve this end, the proposed model requires the matter to be brought before the Court within one working day.

8.48 Under the proposed model, a child protection worker would generally need to obtain an emergency removal order *before* removing a child from his or her family. The protection worker would only be permitted to remove a child without an order if there is an immediate risk to the child or insufficient time to apply for an emergency removal order, and a safety notice or intervention order would not ensure the child's protection. In this instance, the protective intervener would be required to apply to the Court for a hearing of an interim care order application within one working day of the child's removal.

8.49 Requiring a child protection worker to obtain an emergency removal order would provide judicial oversight of decisions now made solely by the Department. Judicial authorisation of a decision to remove a child is desirable when considering the extent of this intervention into family life. Further, safety notices and intervention orders would have to be considered as possible means by which the child could remain at home and have his or her safety ensured. Although a safety notice or intervention order still involves family intervention, it enables the child to remain at home with a parent, grandparents or other family members while the party creating the risk of harm is removed from the home.

## PROCESS MAP FOR A NEW SYSTEM




### All protection applications to commence by notice

8.50 The Commission proposes that if a child is considered by a child protection practitioner to be 'in need of protection' (as defined in the CYF Act 2005), and the child is assessed as being at risk of future harm, then a child protection practitioner should refer the case to an FGC. Emergencies requiring the prompt removal of a child from his or her parents should be dealt with quite separately from protection applications. The procedures proposed for use in emergencies are discussed in detail below.

# Chapter 8 Option 2—A New System

8.51 The reasons for requiring a case to be referred to an FGC before a protection application can be commenced are discussed at length in Chapter 7 (Option 1). The current child protection policy is to initiate court action only if there is a 'risk of future harm' to the child, rather than simply relying on past harm alone.[89] This is a helpful policy that should apply to the decision to initiate a referral to an FGC under the proposed new commencement process.

8.52 Under the proposed new process, a child protection practitioner would commence formal action by requesting an FGC rather than filing a protection application in the Court. As suggested in Option 1, the relevant agency to arrange an FGC could be VLA. If Option 3 were adopted, child protection practitioners would notify the Office of the Children and Youth Advocate (OCYA) to request an FGC. The procedure relating to assessment of suitability for an FGC—including whether exceptional circumstances exist to exclude an FGC—is outlined in Option 1 (Chapter 7).

8.53 If an FGC proceeds and an agreement is reached, parties could either produce a 'care plan' or file an application for consent orders with the Court. In this circumstance, a protection application would not be filed. If, however, an FGC fails to result in an agreement or if an FGC convener decides that an FGC should not take place because of exceptional circumstances, then a child protection practitioner could file an application by notice in the Children's Court.

**Proposal 2.1:** All protection applications should commence by notice.

**Proposal 2.2:** A family group conference should be conducted prior to filing a protection application unless there are exceptional circumstances that warrant a departure from this general rule.

## PROCESS AND DISCLOSURE FOLLOWING FILING OF PROTECTION APPLICATION

8.54 When protection applications are filed at court, they should be given an early return date, with most matters generally being set down for an initial hearing within seven days. If a protection application is accompanied by an application for an IAO, or the Court grants leave for the filing of a protection application when making a short-term assessment order (see the section below), then it should be possible for a case to be listed within a shorter period of time at the discretion of the Court. In certain situations, this could be within 24 hours.

8.55 The protection application should contain the orders sought by the protective intervener and should be filed with a summary that sets out the specific concerns and available relevant material that support the application.[90] The Department of Human Services (the Department/DHS) should not be confined to relying on this summary alone in future hearings.

8.56 This proposal for a summary is aligned with the Taskforce's recommendation for 'earlier and succinct disclosure from DHS regarding their main concerns and their recommendations for the future'.[91] The Commission is aware that VLA and DHS are currently developing an appropriate early disclosure document to improve the current practice relating to protection applications by safe custody.[92]

8.57 If, pending the determination of the protection application, an IAO is necessary to ensure a child is protected from harm, then a protective intervener should file a separate IAO application. In this circumstance, the summary that accompanies the protection application should contain material in support of any IAO conditions sought. Details of the proposed placement should be included in the summary.

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

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

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

c) the orders sought.

## FIRST RETURN DATE AFTER FILING PROTECTION APPLICATION

8.58 In the following section, the Commission describes how cases could proceed through the Court if its proposals for a new mode of commencing protection applications and new emergency procedures are adopted.

8.59 Prior to the first return date, a protection application should be allocated to a particular judicial officer who would deal with the case, wherever possible, until it is finalised.[93]

8.60 The judicial officer should deal with the matter on the first return date by adopting an inquisitorial approach.[94] As discussed below, the Children's Court could use a court-appointed expert as part of this more inquisitorial approach. In addition, a best interests representative for the child could assist the Court in ensuring relevant evidence is available.[95] The judicial officer should be encouraged to hear directly from, and speak directly to, the parties who attend, even though the parties would continue to be represented.[96]

### Application for an interim accommodation order heard on first return date

8.61 The judicial officer would determine any application for an IAO on the first return date and the duration of this order would depend on the minimum time required to enable the next court-ordered process to occur. The Commission supports the Taskforce's recommendation to remove the 21-day time limit for IAOs, except that the strict time requirements for orders in relation to secure welfare placement should remain.[97] The Taskforce suggests that the 21-day limitation for IAOs 'would seem to have been intended to give the Court a monitoring role'.[98] While the Commission considers that it is important to monitor interim orders, appropriate monitoring can be achieved through more active judicial case management, which is discussed below.

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

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

8.62 As well as dealing with IAOs on the first return date of a protection application, the judicial officer should also consider the most appropriate forum for trying to resolve outstanding issues. The Court should consider the appropriateness of another FGC, or a CC or JRC (as described in Option 1).

89 A child may be found to be 'in need of protection' on the basis of not being protected from past significant harm alone: *Children, Youth and Families Act 2005* (Vic) s 162(1)(c)–(f).

90 The Commission notes that protection reports and disposition reports are often filed with, or shortly after the filing of, protection applications by notice, but this is not required under the *Children, Youth and Families Act 2005* (Vic). See Chapter 3 for further discussion on protection reports and disposition reports.

91 Child Protection Proceedings Taskforce, above n 1, 6.

92 The Commission is aware of a proposal to introduce to the Melbourne Children's Court the 'statement of grounds' form that is in use at Moorabbin Children's Court for protection applications by safe custody. This form is discussed in Chapter 3.

93 The advantages of a docket system, and the Commission's views as to the desirability of the Children's Court adopting such a system, are discussed below in the section entitled 'Introduction of new case management, inquisitorial and problem-oriented processes'.

94 See discussion below under the heading 'The introduction of more inquisitorial approaches'.

95 See discussion below under the heading 'Models of representation for children'.

96 See the discussion of children's representation and participation at court under 'Models of representation for children' below.

97 Child Protection Proceedings Taskforce, above n 1, 30–1, recommendation 12; *Children, Youth and Families Act 2005* (Vic) ss 264(2), (4), 267(2)(c).

98 Child Protection Proceedings Taskforce, above n 1, 12, 30.

# Chapter 8 Option 2—A New System

8.63 If a matter is appropriate for some type of family decision-making process, the IAO should be made for a period that enables the appropriate conference to take place. The case could also be given a final hearing date which could be vacated if an agreement is reached following the family decision-making process. Following the family decision-making process, the judicial officer responsible for the case may wish to hold a directions hearing to determine whether a case still requires a contested hearing and whether an IAO should be extended. A telephone mention[99] could be held at this point. If any party seeks to vary an IAO, the application should be supported by a short summary document and it should be listed before the judicial officer docketed to the case.

8.64 The combination of a single magistrate or judge managing individual applications with greater use of family decision-making processes should result in fewer court events for each case. While most cases in the Children's Court are finalised within a comparatively short timeframe,[100] there is a relatively high average number of court events. In the 2008–09 year, 41 per cent of primary protection applications[101] that resolved prior to hearing required an average of 5.6 mentions.[102] The current average number of court events should reduce with active judicial management of cases.

## LISTING THE CASE FOR A CONTESTED HEARING AND OBLIGATIONS OF PARTIES TO NARROW ISSUES IN DISPUTE

8.65 The considerations that should apply when assessing whether exceptional circumstances should prevent a case from being directed to one or more of the family decision-making processes have been discussed in Chapter 7.[103] If the Court determines that exceptional circumstances exist and the matter cannot proceed to further FGC, a CC or a JRC, then the case should be listed for contested hearing, with any IAO extended to that contested hearing date.

> **Proposal 2.5:** The Court should direct that a conciliation conference, a judicial resolution conference, or another family group conference (whichever is most appropriate) take place at the earliest possible opportunity after an application is filed unless there are exceptional circumstances that warrant a departure from this general rule.

8.66 In order to facilitate resolution and reduce costs and delays, the parties should be obliged to disclose and narrow the issues in a case.[104] Consequently, any party who opposes the protection application or the orders sought by the protective intervener should be required to file a document prior to a contested hearing in which they identify their opposition and set out a short statement in support of that position. Disclosure obligations now apply throughout the legal system, even in criminal trials.[105]

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

## EMERGENCIES REQUIRING PROMPT REMOVAL OF A CHILD FROM CARE OF PARENTS

### General

8.67 The Commission proposes that judicial authorisation should be obtained prior to removing a child from the care of his or her parents unless this step is not feasible in the circumstances. There will be cases in which the risk of harm to a child is so immediate that a child protection worker should have the power to remove a child before seeking a court order. When this power is used, the child protection worker should later be required to inform the Court why it was not feasible to apply for judicial authorisation prior to taking the child into safe custody.

### Emergency removal order

8.68 In most circumstances that require prompt removal of a child from his or her family, a protective intervener should apply for an emergency removal order *prior* to removing the child. In order for this proposed system to operate effectively, the Children's Court would require assistance from the Magistrates' Court of Victoria's After Hours Service. Attendance at court would be unnecessary, as it should be possible to transmit the documents in support of an application for an emergency removal by email or facsimile. Additional evidence, if required, could be taken over the telephone.

8.69 An emergency removal order should be sought if a child protection practitioner believes, on reasonable grounds, that:

- a child is at risk of significant harm
- the risk is of such magnitude that an interim order should be made
- a safety notice or intervention order (or variation of an existing order) would not be sufficient to protect the child from the risk.

8.70 A child protection practitioner, or delegate with appropriate expertise, should make an application for an emergency removal order by providing a precise summary of the reasons for the application. The summary would need to:

- identify the nature of the risk to the child and explain how an order could protect the child from the risk
- contain details of the accommodation proposed for the child in the immediate future
- include reasons why, in the circumstances of the particular case, the child's protection could not adequately be secured through either a safety notice or family violence intervention order (FVIO) (if the protective concerns do not relate to concerns about family violence then a statement to this effect should suffice).

This information should be provided on affidavit, but could be supplemented with evidence given over the telephone, and recorded, if necessary.

8.71 Whenever family violence may be a relevant issue, the child protection worker should ascertain before making the application, whenever practicable, if there is an existing safety notice or FVIO in relation to the family in question. If so, the worker should advise the Court why the existing notice or order is not sufficient to protect the child from risk of significant harm.

99 Telephone mentions, not requiring the physical presence of parties, are utilised in the Family Court and Federal Magistrates Court for case management purposes: see *Family Law Act 1975* (Cth) s 69ZQ(e), (h).

100 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 12. This data on the Children's Court indicates that 59 per cent of primary protection applications for which final orders were made in 2008-09 were finalised in less than 2.5 months, with the other 41 per cent finalised on average within 4.8 months. In comparison, in 2008-09 in the Federal Magistrates Court, 83.96 per cent of applications were completed within six months and 95.07 per cent were completed within 12 months: Federal Magistrates Court of Australia, *Annual Report 2008–2009* (2009) 15.

101 Excluding applications for siblings who are the subject of the same hearing: Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 12.

102 Ibid.

103 See 'Exceptional Circumstances' in Chapter 7.

104 This is consistent with recommendations made in relation to civil proceedings in Victorian Law Reform Commission, *Civil Justice Review: Report*, Report No 14 (2008) ch 3. Also, the Commission notes that the Civil Procedure Bill 2010 (Vic), introduced into the Victorian Legislative Assembly on 22 June 2010, sets out overarching obligations on the parties to 'narrow the issues in dispute' and disclose the existence of documents, and includes more specific 'pre-litigation requirements': cls 23, 26, 34.

105 *Criminal Procedure Act 2009* (Vic) s 183.

8.72 In cases of this nature, the protective worker should also ascertain, whenever practicable, whether the affected family member (adult or child) is willing and able to make an FVIO application to protect themselves. If the affected family member is a child, the parent (or other such person as designated within section 45 of the *Family Violence Protection Act 2008* (Vic)) may make an application on behalf of the child.[106] If this step is not possible, the child protection worker should give reasons for their belief that an application by an affected family member for an FVIO would not be sufficient to protect the child from risk of significant harm.

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

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

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

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

8.73 A judicial officer would need to be available at any time of the day to hear applications for an emergency removal order. It would be desirable to have a judicial officer on duty in Melbourne, available to deal with all applications for emergency removal orders in chambers, for the whole of Victoria.

8.74 The judicial officer should be permitted to make an emergency removal order in the absence of the parents and the child, and set a return date for the matter, which should be no later than 72 hours after the time at which the Court believes that its order will be executed. A discretionary power to list the case for return to Court up to the 72-hour limit would permit the judicial officer to make orders tailored to the case's circumstances.

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

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

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

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

8.75 Once an emergency removal order is made, parents and children (above the age of 12 years) should be served with relevant documents, including the order itself, which would contain details of the venue, time and date for the case's return to court. During the time between the child's removal and the return date, the child protection worker should provide their legal representative with all relevant documents. In addition, the child protection practitioner should be required to provide VLA[107] with the following information:

- a copy of the emergency removal order and application
- a precise summary of the information upon which the application is made

- the orders sought
- names and birth dates of the parties and children.

8.76 Early advice would permit VLA to undertake conflict checks and lawyer allocation before the case returns to court. Lawyers with access to the Department's protective concerns would be in a better position to obtain instructions from clients prior to the first court listing. This process should allow time for a lawyer to meet the child prior to the first court hearing in order to find out the child's wishes, if any, and to determine the basis upon which the child should be represented.[108] This step should eliminate the need for children who are removed from their families by emergency order to attend court, except for those children who actually wish to participate in or observe the proceedings.

### Interim care order (following emergency removal order)

8.77 On the return of an emergency removal order, if satisfied that there is an unacceptable risk of harm to the child, the Court should be permitted to make an interim care order for a period not exceeding 14 days. The interim care order might include an order about where and with whom the child must live, an order requiring a parent, guardian or carer to accept supervision by the Secretary and any other order the Court thinks fit in order to protect the child from the risk of harm. The purpose of the interim care order should be to protect the child from significant risk of harm while all parties are given time to assess the child's circumstances.

8.78 The Court should be permitted to order an FGC when making an interim care order if it is appropriate to do so in the circumstances.[109] The matter should be required to return to court upon the expiry of the 14-day interim care order, at which time a short-term assessment order could be made.[110]

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

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

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

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

### Emergency intervention without judicial authorisation: immediate risk

8.79 It is highly likely that there will always be circumstances in which the risk of significant harm to a child is so immediate that a child protection worker will have no opportunity to seek judicial authorisation to remove the child. While the law should continue to permit child protection workers and police officers to take a child at immediate risk of significant harm into safe custody, there should be additional safeguards to ensure that the power is used only when necessary. The Commission proposes that this power should be available for use only when there is insufficient time to apply for an emergency removal order, and a safety notice or intervention order would not be sufficient to protect a child from the immediate and significant risk of harm.

106 *Family Violence Protection Act 2008* (Vic) s 45(d).

107 If Option 3 is adopted, this information should also be given to the Office of the Child and Youth Advocate.

108 For discussion of this, see below in this chapter under 'Models of representation for children'.

109 This links to proposals in Option 1: see Chapter 7.

110 Short-term assessment orders are discussed below.

# Chapter 8 Option 2—A New System

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

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

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

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

### Interim care order (following immediate risk removal)

8.80 If a protective intervener removes a child from the care of his or her parents without judicial authorisation and by use of these emergency powers, he or she should be required to apply to the Court for an interim care order within one working day, unless the child has been returned to the care of a parent or guardian. The Commission proposes that only the Children's Court, and not bail justices, should be permitted to hear applications for interim care orders. It is no longer appropriate for orders of this magnitude to be made by any body other than a court.

8.81 If satisfied that there is an unacceptable risk of harm to the child, the Court should be permitted to make an interim care order for a period not exceeding 14 days.[111] Unless exceptional circumstances exist, the Court should seek to determine the application on the day it is made.

8.82 If a child is returned to the care of a parent or guardian within one working day of removal, the protective intervener should be required to file a document with the Court that explains why the child was involuntarily removed from the care of his or her parents. Following a child's removal, if the protective intervener proceeds with an application for an interim care order, he or she must explain to the Court why it was necessary to remove the child without first seeking an emergency removal order.[112] This information could be included in the summary that is provided in support of the application.

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

### Short-term assessment orders

8.83 Prior to the expiry of an interim care order made following an emergency removal order by a judicial officer or the involuntary removal of a child by a protective intervener, the Children's Court should be permitted to make a short-term assessment order for up to six weeks.

8.84 The Court should be permitted to make a short-term assessment order to protect a child while the parties attempt to reach agreement through an FGC. If the Court believes there are exceptional circumstances that exclude the case from being referred to an FGC, it should be permitted to grant the Secretary leave to file a protection application.

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

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

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

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

## INTRODUCTION OF NEW CASE MANAGEMENT, INQUISITORIAL AND PROBLEM-ORIENTED PROCESSES

### INTRODUCTION

8.85 The Commission proposes that the Children's Court should:

- be encouraged to make greater use of various case management practices used successfully in other courts
- be given a range of powers that permit it to take a more inquisitorial approach when dealing with child protection matters
- adopt some problem-oriented processes.

### CASE MANAGEMENT AND DOCKET SYSTEMS

8.86 The term 'case management' is used with different meanings. In a legal context, 'case management' refers to the role of a court in actively managing the progress of a case from the time it commences until finalisation[113] in order to ensure that is conducted efficiently.[114] In a clinical context, 'case management' usually means management of the details of a particular case. The term is sometimes used in this clinical sense when referring to some of the child protection management decisions made by the Secretary of the Department about assisting children and families, investigating whether a child is in need of protection, and acting as the custodian or guardian of children found to be in need of protection.[115] The Commission does not use the term 'case management' in that sense.

8.87 Case management involves the 'deliberate transfer of some of the initiative in case preparation from the parties to the court'.[116] In 2008, the Commission observed that many Australian courts are moving towards a 'second generation' of case management, having embraced the view that 'court-developed case management systems have to date produced cost effective and timely resolution of cases through judicial supervision of cases'.[117] Case-flow management can be implemented either through a docket system (or individual list) in which a judicial officer is assigned a case at the time of filing and is responsible for supervising the progress of that case until finalisation, or through a master list system, where cases are controlled by the court registry and then assigned to judicial officers.[118]

8.88 For almost two decades, there have been many suggestions that Australian courts should move towards greater use of case-management techniques in controlling the unmanaged adversarial litigation process. In 2008, the Commission emphasised the desirability of more active judicial case management within Victorian courts and recommended the introduction of an explicit active case management statutory provision.[119] This recommendation has been adopted in the Civil Procedure Bill 2010 (Vic), which includes specific provisions for case management in the Supreme, County and Magistrates' Courts.[120]

111 Further detail about interim care orders is set out in Proposal 2.9.

112 A similar provision is found in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45(2).

113 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [6.3].

114 For detailed discussion of of case management, see Victorian Law Reform Commission, *Civil Justice Review*, above n 104, ch 5.

115 See for example Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care* (2010) 98.

116 Australian Law Reform Commission, *Managing Justice*, above n 113, [9.12].

117 Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 291.

118 Australian Law Reform Commission, *Managing Justice*, above n 113, [9.14].

119 Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 303.

120 Civil Procedure Bill 2010 (Vic) pt 4.2.

# Chapter 8 Option 2—A New System

8.89 There have been a number of previous calls for more case management in Victorian child protection matters.[121] In 1997, the Human Rights and Equal Opportunity and the Australian Law Reform Commissions suggested, when proposing national standards for child protection proceedings, that case management processes ought to be adopted by state and territory child protection courts in order to reduce delays:

> *The national care and protection standards should specify that children's court magistrates and judges should be active and managerial in their approach to care and protection cases and that the same magistrate or judge should manage a case from first listing, on an individual case management or single docket model.*[122]

## Individual docket systems

8.90 Individual docket systems aim to 'promote more active and effective judicial case management in order to streamline processing, encourage early settlement and, overall, dispose of cases more efficiently'.[123] Docket systems involve the allocated judicial officer, who remains with the case from commencement until disposition, formulating orders about how the case should be managed and prepared for trial. Referrals to appropriate dispute resolution (ADR) or other settlement processes can be made. The judicial officer supervises compliance with directions, ensures that hearing dates are maintained and deals with any interlocutory issues.[124] All of the federal trial courts use docket systems: the Federal Court of Australia since 1997, the Federal Magistrates Court (FMC) since it opened in 2000, and the Family Court of Australia (FCA) since 2009.[125] In Victoria, there are a number of judge-managed specialist lists in the Supreme Court (such as the Commercial List) and the County Court.[126]

8.91 In 2008, the Commission recommended the introduction of an expanded docket system for civil matters in the Supreme and County Courts and for more complex, higher value claims in the Magistrates' Court of Victoria.[127] The Commission suggested that expanded or new docket systems for Victorian courts 'would have many benefits, including savings in time and costs resulting from greater judicial familiarity with cases before trial'.[128]

8.92 In 2008, the Wood Commission recommended a trial of a docket system for care and protection matters in NSW's Parramatta Children's Court.[129] The NSW Children's Court has supported this proposal, arguing that the benefits of a docket system

> *include greater time efficiencies resulting from the judicial officer responsible for a particular case having a close knowledge of the case and the relevant issues in the case. It is also recognised that a docket system, whereby the same judicial officer manages the case from the first time the proceedings come before the court, may result in greater understanding of and satisfaction in the ultimate result by the parties.*[130]

8.93 The 12-month pilot of the docket system at the Parramatta Children's Court commenced in February 2010. As far as possible, the Court is allocating its Monday and Friday case lists to the same judicial officer, who will

> *manage all the matters in their list and, should the matter require to be listed for a hearing, that judicial officer will list the matter for hearing before himself or herself at a time convenient to the court and, as far as is reasonably possible, to the parties.*[131]

## Response in submissions

8.94 Some submissions, such as that made by Connections (part of UnitingCare), addressed the issue of whether the Children's Court should adopt a more active role in managing cases 'to ensure consistency and thorough knowledge of the case [by the magistrate] as it proceeds'.[132] The Federation of Community Legal Centres supported an individual docket system,[133] as did several others.[134] The Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria) argued that case management would provide Aboriginal children with better rights protection and judicial oversight of DHS's decisions.[135]

8.95 Some submissions focused on how case management could alleviate some of the delays in the Court,[136] such as moving 'cases more quickly towards a final disposition', which was supported by the Children's Court Clinic.[137] One submission recommended that, in order to reduce tactical delays, the same magistrate who presides over the final hearing should be docketed to hear the directions hearing 'so that the parties cannot change direction or come up with other issues out of the blue without consequences'.[138]

8.96 The submission from the Australian Childhood Foundation was pessimistic about procedural reform, stating:

> *the adversarial nature of the Children's Court will not be reduced by introducing procedural reform. The experience of participants in Court processes will be less adversarial if the focus of the Court is clarified on protecting children from abuse.*[139]

8.97 The Children's Court of Victoria noted the desirability of docket systems, but stated that it did not currently have the capacity to implement an individual docket system:

> *Some courts are well resourced to 'docket' cases. They are not high volume State courts. The Court is unaware of any summary, high volume, State courts that are able to docket cases. The Children's Court does not have the capacity to do so.*[140]

121 Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993) 156; Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004) 40.

122 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC Report No 84 (1997) 447.

123 Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (2002) 1.

124 See Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 293.

125 See Chapter 4.

126 Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 293.

127 Ibid 296.

128 Ibid.

129 James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, 539, 543 (recommendation 13.11).

130 Children's Court of New South Wales, *Pilot of a "Docket System" in Care and Protection Matters Commencing on 8 February 2010 at the Parramatta Children's Court* (2010) <www.lawlink.nsw.gov.au/lawlink/childrens_court/ll_cc.nsf/pages/CC_publicationsnews> at 18 May 2010.

131 Ibid.

132 Submission 15 (Connections).

133 Submission 45 (FCLC).

134 See submissions 25 (LIV), 48 (Victorian Bar) 37 (OCSC), 8 (Angela Smith).

135 Submission 26 (FVPLS Victoria).

136 See, for example, submissions 8 (Angela Smith) and 48 (Victorian Bar). The Victorian Bar argued that case management could assist 'where it is often important to test evidence and formulate appropriate orders during the early stages of a protection application to avoid the establishment of a status quo that is not in the best interests of a child'.

137 Submission 17 (CCC). The Children's Court Clinic supported a greater role for the Court in managing cases through court processes, noting that '[u]ltimately, judicial officers remain the final authority and this should allow them to have a monitoring or overseeing role in the case and be more active in directing how a case proceeds and what is required by both the family and the DOHS in the best interests of the child'.

138 Submission 28 (Anonymous).

139 Submission 41 (Australian Childhood Foundation).

140 Submission 46(Children's Court of Victoria) 69 (citations omitted). The Court argued that it 'needs to have sufficient flexibility to enable it to provide two magistrates to sit at Moorabbin, a magistrate available regularly to travel to the country to hear lengthy contests and magistrates available to sit in the criminal mention court; the Family Division mention court; the special mention court and contest courts. Children's Court magistrates also participate in statewide after hours service which means they are unable to sit during the day, during the week of their service. In addition, the Criminal Division requires an additional judicial officer to conduct a Koori Court every second Thursday and a Sex Offences list every fourth Friday.'

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8.98 The Children's Court explained that its judicial officers currently manage the progress of cases through the Court to avoid delay: 'Members of the Court actively ensure that cases are dealt with as expeditiously as possible. Magistrates sitting in the mention court scrutinise adjournment applications.'[141]

8.99 The Court believes that a docket system would require a significant increase in resources.[142] The Court suggested that with the provision of further resources, it wished to develop intensively case-managed lists run by a single judicial officer for some matters.[143]

### The Commission's views

8.100 The Commission believes that the Children's Court should seriously consider adopting an individual docket system as soon as the Court believes it is capable of doing so. A case management system that has a single judicial officer responsible for each case that comes before the Court is an important step in establishing processes for dealing with child protection matters that will 'minimise disputation and maintain a focus on the best interests of the child'.

8.101 The Children's Court believes that it needs additional resources in order to introduce an individual docket system.[144] While no high volume summary state court in Victoria currently operates under a docket system, it is noteworthy that the NSW Children's Court has agreed to pilot a docket program at its main venue at Parramatta.

8.102 The FMC is a high volume summary federal court that has operated on an individual docket basis since it started in 2000. In 2008, each federal magistrate had an average of 74 new family law matters added to her or his docket every month and case-managed approximately 400 matters at any given time.[145] FMC also operates its docket system in conjunction with an extensive judicial circuit to 38 regional areas, and accepts that this occasionally means that another federal magistrate will be involved at the intermediate stage of a matter.[146]

8.103 The Children's Court observed, based on 2007 BCG data, that any delays in cases before it are frequently caused by the parties.[147] An individual docket system would provide the Court with additional tools, most notably case familiarity, with which to comprehensively manage party tactics that may contribute to delay. The NSW Children's Court has already embraced this view.[148] A docket system should also encourage rigorous case preparation by parties because of their awareness that the same judicial officer will be responsible for the case each time it comes before the Court.[149]

8.104 A docket system cannot be introduced at the Children's Court without the support of its judicial officers and court staff. Some pilot programs may be necessary. Docketing may be difficult to achieve for those cases requiring emergency intervention through the new emergency removal orders, interim care orders and short-term assessment orders proposed in this chapter. In the first instance, it might be possible to achieve docketing of cases to the same judicial officer in Victoria's metropolitan and regional Children's Courts. The Commission suggests that consultants should be engaged to assist the Children's Court to determine how a docket system could be implemented and the amount of additional resources that may be required.[150]

### Cases involving allegations of child sexual abuse and the Magellan case management model

8.105 The Commission believes that in cases involving serious allegations about physical or sexual abuse of children, it would be beneficial for the Children's Court to consider adopting the Magellan case management model used by FCA since 1998. This model, along with the similar Columbus model used in the Family Court of Western Australia, is described in detail in Chapter 4.

8.106 Cases involving allegations of child sexual abuse are among the most difficult matters dealt with by the Family Division of the Children's Court. Dr Cathy Humphreys expressed a preference for a specialist list in the Family Division for child sexual abuse matters.[151] These cases carry great significance for the children and their families, as well as the potential for criminal proceedings and stigmatisation for the alleged perpetrator.

8.107 Some aspects of the Magellan process may be suitable for inclusion in any case management model employed by the Family Division of the Children's Court of Victoria. The Children's Court itself supports the creation of a specialist list and the adoption of a problem-oriented approach for child sexual abuse cases.[152] In particular, use of the Magellan model's collaborative, child-focused approach to providing information to achieve a timely resolution may be beneficial. Other aspects of the model, such as cooperation between key agencies through the development of memoranda of understandings, early specialist assessment and evidence gathering, could be used in a specialist child sexual abuse list in the Family Division of the Children's Court.

## THE INTRODUCTION OF PROBLEM-ORIENTED APPROACHES

8.108 Problem-oriented approaches to justice encourage a holistic and collaborative view of matters coming before a court, including the nature and causes of the problems faced by court users. Although problem-oriented approaches originated in the criminal courts, they are relevant to other areas of law.[153] Problem-oriented approaches draw upon therapeutic, collaborative and less-adversarial conceptions of a court system.

### The principles of therapeutic jurisprudence and influence on problem-oriented approaches

8.109 The principles of therapeutic jurisprudence have been especially important in the development of problem-oriented approaches. Therapeutic jurisprudence focuses on the emotional and psychological welfare of those who come into contact with the justice system.[154]

8.110 Courts that adopt a problem-oriented approach tend to focus upon a particular type of 'problem' area of law, locality, or specific population, such as Drug Courts, Neighbourhood Justice Centres or Family Violence Courts. Problem-oriented courts are not simply specialised courts that deal with a particular area of law, but courts that adopt a philosophy of seeking to deal with the special problems faced by court users.[155]

141 Ibid. The Court's submission cited 2007 Boston Consulting Group data to back its claim that the causes of delay do not emanate from court processes. That data shows that departmental delay accounts for 35 per cent of adjournment applications and parent delay for 34 per cent of adjournment applications. The data referred to is Boston Consulting Group, *Children's Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007).

142 Submission 46 (Children's Court of Victoria) 69.

143 Ibid 73–5.

144 Ibid 69.

145 Federal Magistrates Court of Australia, *Annual Report 2007–2008* (2008) 24.

146 Federal Magistrates Service, *Annual Report 2000–01* (2001) 17.

147 Submission 46 (Children's Court of Victoria) 69.

148 Children's Court of New South Wales, above n 130.

149 Australian Law Reform Commission, *Managing Justice*, above n 113, [9.23].

150 This was also recommended in Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 296.

151 Submission 7 (Prof Cathy Humphreys). Prof Humphreys suggested this specialist list should be presided over by magistrates with special training to overcome the problems associated with evidence and protection of children in such cases.

152 Submission 46 (Children's Court of Victoria) 75. See also the discussion under 'The introduction of problem-oriented approaches', below. A number of magistrates in Dr Rosemary Sheehan's 2001 study of judicial decision making in the Children's Court of Victoria argued that sexual abuse cases exemplify the complexity of child protection cases and the difficulties they have with finding proof, especially where allegations of sexual abuse rely on a child's disclosures, and they are cases that are almost always contested: Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (2001) 98.

153 Michael King and C L Tatasciore, 'Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Approach to Care and Protection Applications' (2006) *eLaw: Murdoch University Electronic Journal of Law* (Special Series) 78, 89–91.

154 David Wexler, 'An Orientation to Therapeutic Jurisprudence' (1994) 20 *New England Journal on Criminal and Civil Confinement* 259, 259.

155 Michael King et al, *Non-Adversarial Justice* (2009) 142.

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8.111 Courts that adopt problem-oriented approaches do not need to become full problem-oriented courts, but can adapt individual elements of problem-oriented courts.[156] This model of generalising elements of the problem-oriented approach has been developed by the USA's Center for Court Innovation.[157] The Victorian Government's Next Generation Courts Project (discussed below) has been established to embed already successful problem-oriented approaches within the day-to-day business of generalist courts.

8.112 In 2009, the Australasian Institute of Judicial Administration and the Legal Services Board of Victoria produced a bench-book that aims to provide Australian judges with a practical and theoretical understanding of the techniques of 'solution-focused judging'.[158] The bench-book is designed to offer 'specific strategies judicial officers can use when adopting a problem-solving methodology'.[159]

8.113 Problem-oriented approaches are compatible with proposals for the introduction of case management, more inquisitorial and less adversarial approaches, as both problem-oriented and more inquisitorial approaches require an ongoing familiarity with individual cases by the judicial officer.

### Problem-oriented approaches in Victoria

8.114 The Victorian Government has demonstrated a strong commitment to problem-oriented approaches in creating the Neighbourhood Justice Centre, the Dandenong Drug Court, the Koori Court, the Koori County Court, the Children's Koori Court and the Family Violence Division of the Magistrates' Court. As noted in Chapter 1, the Commission has undertaken visits to these courts.

8.115 The Victorian Government's Next Generation Courts Project seeks to 'make problem-oriented approaches to justice part of the mainstream, day-to-day functions of Victoria's courts'.[160] The project aims to improve efficiency and access to programs, better identify and respond to gaps in each specialist list or program, and to pool information and resources more effectively.[161]

### The use of problem-oriented approaches in the Family Division of the Children's Court

8.116 Although problem-oriented approaches to justice have originated in the criminal context, they may be well suited to the child protection jurisdiction of the Family Division of the Children's Court. The particular nature of the child welfare jurisdiction—responding to concerns about child abuse and neglect often in circumstances of acute family disadvantage or marginalisation—appears to favour the Court adopting a problem-oriented approach to cases that come before it. Some commentators suggest that any setting where a best interests approach is demanded, such as in juvenile or family law, explicitly fosters a problem-oriented approach.[162] This view was affirmed in submissions to the Commission.[163]

8.117 For some time, the Criminal Division of the Court has been successfully employing problem-oriented approaches through the Children's Koori Court.[164] In its submission, the Children's Court demonstrated a strong commitment towards increasing its capacity to bring problem-oriented approaches into its Family Division.[165]

8.118 Dr Michael King suggested that the

> *establishment of a specialist court applying therapeutic jurisprudence is an option that could be considered in promoting a more therapeutic and less adversarial approach to resolving child welfare problems where the intervention of a court is required.*[166]

West Heidelberg Community Legal Centre also supported the shift of court-based decision-making towards a problem-oriented model, but cautioned that this approach would only work if a model of collaborative service provision was adopted along with court review of departmental provision of support services.[167]

8.119 The Children's Court argued strongly in its submission that the expansion of problem-oriented approaches is a key part of its strategy to conduct Family Division matters in a less adversarial way.[168] The Court pointed out that it has always shown a commitment to innovative problem-oriented approaches, especially in its Criminal Division.[169] The Court identified four types of Family Division cases where intensive problem-oriented case management would be appropriate:

- cases involving Koori families
- infant cases (from newborn children until they are three years old)
- drug and family treatment models
- sexual abuse cases.[170]

For each of these types of matters, the Court expressed a desire to develop lists managed by a single judicial officer. The Court emphasised that its development of any of these special lists would depend upon the injection of significant resources into the Court.[171]

## The Commission's response and suggested proposals for reform

8.120 The Commission believes that the Court should be given a range of powers that encourage it to control the conduct of child protection proceedings by taking a problem-oriented approach. Many of the problem solving approaches that could be adopted overlap with a more inquisitorial role for the Court. While the Commission supports the Court in adopting more problem-oriented approaches in the Family Division, it should be careful not to assume the case management functions currently performed by the Secretary of DHS under the *CYF Act 2005*.

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

156 For example, in 2009 the Law Reform Commission of Western Australia recommended the introduction of a pilot general court intervention program, which consisted of various problem-oriented approaches, in the criminal division of the Western Australian Children's Court, which would remain separate from other specialist problem-oriented courts such as the Perth Drug Court: Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report*, Project No 96 (2009) 117.

157 King et al, *Non-Adversarial Justice*, above n 155, 165–7. For further information, see the Center for Court Innovation <www.courtinnovation.org> at 20 May 2010.

158 Michael King, *Solution-Focused Judging Bench Book* (2009).

159 Ibid.

160 Department of Justice (Victoria), *Next Generation Courts: The Next Chapter of Reform* (2010) Courts & Tribunals Victoria <www.courts.vic.gov.au/CA256EBD007FC352/page/New+Initiatives-Next+Generation+Courts?OpenDocument&1=05-New+Initiatives~&2=0-Next+Generation+Courts~&3=~> at 20 May 2010.

161 Ibid.

162 Donald Farole et al, 'Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts' (2005) 26 *The Justice System Journal* 57, 64.

163 Submission 7 (Prof Cathy Humphreys), which argued that: 'In other children's court jurisdictions a process of enquiry into the most effective way of realising children's best interests has been part of a culture of innovation between state and courts. Even in Victoria itself, we see some exciting court developments with the Koori Court, exploration of new developments in drug courts, and juvenile justice.'

164 The specialist nature of the work of the Family Division suggests that problem-oriented approaches may fit well with existing practices designed to achieve the best outcomes for children, including the Court's existing and planned ADR services, the presence of special mention courts and new programs such as the Diversion to Mediation Program with the Dispute Settlement Centre of Victoria used for stalking intervention order applications.

165 Submission 46 (Children's Court of Victoria) 72–5.

166 Submission 2 (Dr Michael King) (citations omitted). Dr King argued that a special program could be incorporated into Family Division practices that involves a multi-disciplinary court team formulating a plan with parents to address underlying issues which affect their parenting, linkage to appropriate support services and regular review by the Court of parents' progress under this plan. Dr King argued that more collaborative and less adversarial approaches are the practices most likely to achieve the best outcomes for children in this field, noting: 'Rather than taking a paternalistic or coercive approach, the court program would aim at promoting therapeutic values such as voice, validation and respect and participant self-determination and self-efficacy – principles that are seen to be important in promoting positive behavioural change.'

167 Submission 24 (WHCLS).

168 Submission 46 (Children's Court of Victoria) 30.

169 Ibid 72.

170 Ibid 73.

171 Ibid 72–5.

# Chapter 8 Option 2—A New System

## THE INTRODUCTION OF MORE INQUISITORIAL APPROACHES

### Introduction

8.121 Many examples of more inquisitorial approaches to conducting legal proceedings already exist within the Australian civil and criminal legal systems. In this section, the Commission considers the desirability of introducing a range of more inquisitorial processes into the Family Division of the Children's Court of Victoria, modelled on the provisions in Division 12A of Part VII of the *Family Law Act 1975* (Cth) (FLA 1975).

8.122 Margaret Harrison summarises the features of an inquisitorial approach to conducting legal proceedings as:

- *The judge has an investigative role and can pursue avenues of inquiry he/she considers relevant, including the appointment of experts.*
- *The proceedings are not regulated by detailed procedural or evidentiary rules.*
- *The proceedings take the form of an ongoing inquiry rather than a single trial event.*
- *Non litigated outcomes are assumed to be the preferred outcome (although European approaches had not, until very recently, incorporated mediation into their court dispute resolution armoury).*
- *The judge's responsibility to ascertain the truth exceeds the responsibility to determine the dispute between the parties.*
- *The focus on carefully defined issues encourages the proceedings to be short in duration.*[172]

### The introduction of Division 12A processes into the Children's Court of Victoria

8.123 The Taskforce recommended that the Commission consider whether the CYF Act 2005 should be amended to enable the Children's Court to conduct less adversarial trials with powers similar to those found in Division 12A of Part VII of the FLA 1975 (Division 12A).[173] Division 12A, which is discussed in Chapter 4 and reproduced in Appendix O, gives courts exercising family law jurisdiction a range of powers that allow cases involving children to be conducted in a far more inquisitorial manner than has traditionally occurred in Australia.

8.124 The Division 12A powers have been used somewhat differently in practice by the two courts that currently carry primary responsibility for determining matters under the FLA 1975. FCA has implemented the less adversarial trial (LAT) process—a child-focused individual docket case-management system[174]—while FMC employs its docket case management model.

8.125 Under Division 12A, the role of the court-appointed child development expert is particularly important in family court processes.[175] In the family courts, the information provided by the family consultant is central and designed to assist parents, lawyers and judges to reach the safest and most developmentally appropriate outcomes for children.[176] The family consultant is the court-appointed expert on child welfare and development.[177]

8.126 Almost all submissions[178] received by the Commission that addressed this issue expressed general support for the introduction of Division 12A type processes in the Family Division.[179]

8.127 The Victorian Bar argued that the application of some of the Division 12A provisions to the work of the Children's Court would enable more direct judicial control of proceedings and would help reduce some of the more adversarial litigation practices.[180] The Law Institute of Victoria argued that Division 12A processes would better enable a focus on the child and his or her future and allow the parties to speak directly to the judge.[181] The Child Safety Commissioner also commented on LAT's positive features, including the focus on children and their future, greater flexibility and less costs than traditional trials.[182]

8.128 Many children and young people involved in the consultation with CREATE expressed a desire for greater involvement in proceedings.[183] While individual judicial officers sometimes adopt a different approach, one young person consulted by CREATE commented that the judicial officers they encountered 'never speak with young people or look at them when talking, like they don't exist'.[184]

8.129 The Children's Court stated that it was 'impressed' with the LAT procedure developed by FCA.[185] The Court argued that most but not all of the Division 12A provisions should be incorporated into the CYF Act 2005 in place of the current section 215(1).[186] Essentially, the Court submitted that it could adopt similar actively judge-managed processes to those used by family courts under Division 12A, with the following changes:

- the Family Division of the Children's Court not be required to deal with as many aspects of the matter as it can on a single occasion[187]
- sections 69ZU and 69ZW of the FLA 1975 be omitted from the CYF Act 2005 (these sections relate to the giving of un-sworn testimony by court appointed child development experts and notifications by state and territory child welfare agencies)[188]
- the addition of a provision explicitly permitting video and audio taped evidence for children if this is consistent with the *Evidence Act 2008* (Vic)[189]

172 Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (2007) 7.

173 Child Protection Proceedings Taskforce, above n 1, 13.

174 For a detailed description of the LAT process and evaluations of its effectiveness, see Chapter 4.

175 In the FCA, a court-employed family consultant is assigned to each case and is in attendance on the first day of the LAT. The consultant has usually spoken to the family before the first trial date and may prepare a report. Communications with family consultants are not confidential: *Family Law Act 1975* (Cth) s 11C. Further, the FCA has made use of single expert witnesses since 2004 to eliminate controversy created by the conflict of party-appointed expert witnesses. In the FMC, family reports prepared by court-based or external family consultants can be ordered by federal magistrates to assist with determination of parenting disputes: *Family Law Act 1975* (Cth) s 62G. Family consultants may provide oral reports to the Court for certain interim applications in the FMC.

176 Deborah Fry, 'The Role of the Family Consultant in the Less Adversarial Trial' (2007) 21 *Australian Journal of Family Law* 113, 117.

177 Fry further outlines this role in the LAT trial process, explaining that 'The judge may ask the family consultant to elaborate or clarify certain points or may ask specific questions of them and may invite the parties and lawyers to do likewise': ibid.

178 Only one submission received by the Commission did not support the introduction of Division 12A processes on the basis that trials in the FCA and FMC are not much less adversarial than the current procedure used in the Children's Court of Victoria: submission 28 (Anonymous).

179 Submissions 1 (Anonymous), 25 (LIV), 31 (Gatehouse Centre), 37 (OCSC) 38 (VALS), 46 (Children's Court of Victoria) 75–83, 48 (Victorian Bar); Consultations 9 (Barristers), 13 (DHS CP Workers Hume), 16 (VLA).

180 Submission 48 (Victorian Bar).

181 Submission 25 (LIV).

182 Submission 37 (OCSC).

183 CREATE Foundation, *Children and Young People in Care Consultation for the Victorian Law Reform Commission* (2010) 7.

184 Ibid 6.

185 Submission 46 (Children's Court of Victoria) 79.

186 Ibid 79, 81. The Court suggested that ss 69ZN–69ZR of the *Family Law Act 1975* (Cth) should be introduced into the Victorian Act and that ss 69ZT, 69ZV and 69ZX of the *Family Law Act 1975* (Cth) could be implemented with some modifications. The Court set out its proposed scheme for the div 12A reforms in Appendices 7 and 8 of its submission.

187 That is the provision in *Family Law Act 1975* (Cth) s 69ZQ(1)(g). See submission 46 (Children's Court of Victoria) 79–80, where the Court explained its reasons for rejecting this provision.

188 The latter provision is only relevant in a federal context where the state and territory authorities are not usually parties to family law proceedings.

189 Submission 46 (Children's Court of Victoria) 124.

- the addition of principles that the Court must determine:
  - disputed issues of past fact on the balance of probabilities[190]
  - the likelihood of future harm on the basis of 'whether there is a real possibility, which cannot sensibly be ignored having regard to the nature and gravity of the feared harm, of the requisite harm being suffered by the child in the future'.[191]

### The Commission's response and suggested proposals for reform

8.130 The Commission believes that the Family Division of the Children's Court should have powers similar to those given to FCA and FMC by Division 12A. While the Commission accepts that the public law nature of matters heard in the Family Division of the Children's Court distinguishes that jurisdiction in significant ways from private family law matters, the centrality of children in decision-making to both jurisdictions justifies the use of LAT in both areas of law.

8.131 The provisions of Division 12A provide an excellent legislative model for the adoption of more inquisitorial approaches to protection application hearings in the Children's Court. In particular, the Commission proposes that the Family Division adopts a first day 'LAT-style' hearing for a range of new applications before the Court. These new powers for the Family Division would be best supported by the introduction of an individual docket system within the Court, in line with the way that both FCA and FMC have implemented the Division 12A provisions.

8.132 A central aspect of any new Division 12A-type process in the Court is the role of a child development specialist as a single expert witness. The Commission believes that when developing new trial processes in the Family Division of the Children's Court, careful attention should be paid to the availability of reliable and testable evidence on child welfare that is presented in a cost-effective and timely manner.[192]

8.133 The Commission believes that in proceedings, the Court should speak directly to the parties and actively encourage their participation. A Division 12A-type process has the benefit of allowing the parties to converse directly with the judicial officer, to feel listened to and to engage in the process. If a case concerns a child who chooses to attend the Court with their representative, it may benefit her or him to have the magistrate explain the process to them in open court so that it becomes less intimidating and confronting.[193] Both parents and children are likely to engage better with the process if a single judicial officer who speaks to them directly conducts their case from beginning to end.

8.134 In a recent evaluation by the Australian Institute of Family Studies, a majority of family law professionals endorsed the introduction of Division 12A.[194] Legal practitioners expressed some concern, however, about the different approaches taken by judicial officers in applying the new provisions. Lawyers considered that some judicial officers were interventionist in their approach, and some more traditional, and this made case preparation and advising clients more difficult.[195] The Commission therefore suggests that careful consideration should be given to the implementation of any new, more inquisitorial processes so that some consistency in approach is achieved.

8.135 The Commission believes that its proposed reforms to the operation of the Family Division of the Children's Court, including the incorporation of Division 12A procedures and problem-oriented processes, are constitutionally valid because they would not undermine the 'institutional integrity' of the Children's Court of Victoria. The constitutional issues are discussed briefly in Appendix R.

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

## MODELS OF REPRESENTATION FOR CHILDREN

### CHILDREN AND YOUNG PEOPLE AS PARTIES TO PROCEEDING

8.136 As noted in Chapter 3,[196] children and young people are named on all protection applications and from the age of 12 years they are given copies of the application.[197] Children do not, however, automatically have the status of a party in the case.

8.137 The failure to afford party status to children in protection proceedings appears to be an historical anomaly that might not be consistent with contemporary human rights protections. Under the Charter, a child who is the subject of a protection application has the right to be recognised 'as a person before the law'[198] and to be treated equally before the law.[199]

8.138 Various other jurisdictions provide for the child to be a party in protection proceedings. Legislation in South Australia, Western Australia, Queensland, the Northern Territory, Tasmania and the ACT provides that the child is a party to a protection application.[200] In most other Australian jurisdictions, the party status of the child is directly linked to an entitlement to legal representation.[201] Some states that connect party status directly to the entitlement to legal representation leave the appointment of a child's legal representative to the court's discretion.[202]

8.139 The Commission believes that a child who is the subject of a protection application should be a party to those proceedings regardless of her or his age.

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

190 Ibid 120. This is an adaptation of the current s 215(1)(c) of the *Children, Youth and Families Act 2005* (Vic).

191 Submission 46 (Children's Court of Victoria) 120. For further discussion about the appropriateness of adopting these two new principles, see the section below entitled 'Findings of fact on the balance of probabilities'.

192 Submission 27 (CPS) highlighted the importance of changed methods of obtaining expert evidence on child well-being. The submission stated: 'A more inquisitorial model would permit the body deciding child protection matters to question CPS staff (and other experts) about all aspects of their assessments. CPS suggests that a more inquisitorial model would have greater success in discovering the full facts about a particular case and, thereby, be in a better position to advance the best interests of children.'

193 The Commission similarly notes that in the recent evaluation of the Division 12A provisions conducted by the Australian Institute of Family Studies, some lawyers thought that their parent clients appreciated the chance to speak directly to the judge while other lawyers felt that inarticulate, nervous or uneducated clients were not able to effectively use the opportunity to speak to the judge and would have been better off with a court advocate: Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (2009) 330.

194 Ibid 333.

195 Ibid 334.

196 See 'Children, parents and other parties with a direct interest in proceedings' in Chapter 3.

197 *Children, Youth and Families Act 2005* (Vic) ss 242(1)(a), 243(2)(c).

198 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(1).

199 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(2).

200 *Children's Protection Act 1993* (SA) s 46(1); *Children and Community Services Act 2004* (WA) s 147; *Child Protection Act 1999* (Qld) sch 3 definition of 'party'; *Care and Protection of Children Act 2007* (NT) ss 94, 125; *Children, Young Persons and Their Families Act 1997* (Tas) s 64; *Children and Young People Act 2008* (ACT) s 700.

201 For example the Northern Territory lists the child as a party and then provides that all parties may be legally represented: *Care and Protection of Children Act 2007* (NT) s 101. The ACT legislation names the child as a party and provides that any party to proceedings may be legally represented: *Children and Young People Act 2008* (ACT) s 74E.

202 Although in the ACT the child is a party to proceedings and, as such, entitled to legal representation, the Court can proceed to hearing an application with a child unrepresented if it is satisfied that the child or young person has had reasonable opportunity to get legal representation and the best interests of the child or young person will be adequately represented in the proceedings: *Children and Young People Act 2008* (ACT) s 74G.

# Chapter 8 Option 2—A New System

## REPRESENTATION OF CHILDREN AND YOUNG PEOPLE IN PROCEEDINGS

### Current law

8.140 As discussed in Chapter 3, in Victoria children considered mature enough to give instructions to a lawyer (generally seven year olds or older)[203] are legally represented in child protection proceedings.[204] A legal practitioner representing a child or young person in any proceeding

> *must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.*[205]

8.141 For the more than 50 per cent of children subject to protection applications who are under the age of seven,[206] (and therefore generally considered to lack capacity to give instructions),[207] separate legal representation is provided only in exceptional circumstances when the Court exercises its power to make an appointment.[208] The Children's Court advised that this power has been exercised in only 33 cases. If appointed, a child's representative must 'act in accordance with what he or she believes to be in the best interests of the child'[209] and is to be guided by the Act's best interests principles when determining what is in the child's best interests.[210]

### Models of representation for children and young people

8.142 There are two basic models for representation of children and young people: the best interests model and the direct representation model.

### The best interests representative

8.143 The best interests model of representation for children does not involve the lawyer acting on the child's instructions, but acting instead on his or her own assessment of the child's best interests.[211] On this model, the child and representative are not in a solicitor–client relationship.[212] Rather, the representative acts as an officer assisting the Court by representing the child's best interests.[213]

8.144 The New South Wales Law Society has published principles (the NSW principles) to guide children's lawyers in that jurisdiction.[214] These principles, which have been revised three times,[215] contain information about the role of a best interests representative for children. The NSW principles state that it is the 'overriding duty' of a best interests representative to ensure that the child's long-term best interests are served by informing the Court of all the evidence that is relevant to its determination.[216] The representative has a role in requesting that experts provide reports or opinions,[217] cross-examining witnesses and questioning the accuracy of evidence called by other parties.[218]

8.145 The best interests representative's role also involves seeking the child's views and presenting them to the Court,[219] which is a different exercise from obtaining and acting upon instructions. It is particularly important that the best interests representative's assessment of what is in the child's best interests is made objectively,[220] based on the evidence available and not on personal value judgments.[221] The representative should meet the child in order to ascertain his or her views, as well as seek other information that may be relevant to the child and his or her wellbeing.[222] Although not acting on instructions, the representative has a responsibility to explain the available options to the child and to advise about possible consequences.[223]

8.146 The independent children's lawyer (ICL) in Australian family law is one example of a best interests representative for children.[224] In family law, where the child's best interests or welfare is the paramount or a relevant consideration in proceedings, the court may order that the child be independently represented by an ICL.[225] The ICL's functions include forming an independent view of what is in the child's best interests based on the evidence available.[226] An ICL is independent of the parties and acts in accordance with their own view of the child's best interests.[227] ICLs gather relevant information from various professionals that may not have been obtained by the parties to ensure that all relevant material regarding the child is available.[228] Part of the effectiveness of best interests representation by ICLs is the collaborative relationship they share with experts.[229] Depending on the case's circumstances, ICLs often request general family assessments but may also request specific assessments or reports (such as a psychiatric assessment of a parent). Experts may also provide guidance to the ICL on general child development and welfare issues.

8.147 In its 1997 report, *Seen and Heard*,[230] the ALRC raised concerns that discussions between a child and a best interests representative may not be covered by legal professional privilege, as the child is not the representative's client.[231] Under such an arrangement, representatives could be cross-examined on discussions with the child.[232] This was historically cited as a reason for representatives in family law matters not meeting with the children they represented.[233] This problem has been resolved for ICLs in family law; the FLA 1975 provides that the ICL is under no obligation to and cannot be required to disclose to the Court any information that the child communicates to the ICL.[234]

203 Victoria Legal Aid, *Grants Handbook* (12th ed, 2001) 30.

204 *Children, Youth and Families Act 2005* (Vic) ss 524(2), 525(1).

205 *Children, Youth and Families Act 2005* (Vic) s 524(9)–(10). Note that there is also provision for the direct representative of the child to be a layperson, but the Commission is not aware of any circumstances in which this has occurred.

206 Email from Russell Hastings, Children's Court of Victoria, 7 June 2010. Statistics provided in this email for primary applications registered statewide suggest 52 per cent of children who are the subject of these applications are under seven years of age. Primary applications include 3034 protection applications and 13 of the other types of primary applications. The statistics provided by the Department for protection applications are similar: Email from Department of Human Services (Victoria), 22 March 2010. The DHS statistics suggest that in 2008–09, 55 per cent of children who were the subject of 3145 protection applications were under seven years of age, with only 45 per cent being over the age of seven.

207 '[I]n administering this guideline, VLA will act on the basis that, in general, a child aged seven or older is of sufficient maturity to give instructions': Victoria Legal Aid, *Grants Handbook*, above n 203, 30.

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

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

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

211 Geoff Monahan, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) 8(2) *QUT Law and Justice Journal* 392, 392–3. It is also possible, on the best interests model, for the lawyer to be instructed by a competent adult acting on behalf of the child.

212 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 253.

213 Law Society of New South Wales, *Representation Principles for Children's Lawyers* (3rd ed, 2007) 7.

214 Ibid. Note also the *Guidelines for Lawyers Representing Children and Young People in Care and Protection Matters in the ACT Children's Court* (2004) and the South Australian *Guidelines for Lawyers Acting for Children* (2007). The NSW principles are used because the Victorian Guidelines were published before the 'exceptional circumstances' best interests representation provision was incorporated in the CYF Act 2005. The provision for a best interests representative in 'exceptional circumstances' came into force when s 524(4) of the *Children, Youth and Families Act 2005* (Vic) was proclaimed on 23 April 2007, whereas the Victorian guidelines were published in August 1999: Louise Akenson, Victoria Law Foundation, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (1999).

215 With the first edition adopted by the Council of the NSW Law Society on 19 October 2000, and the second edition adopted on 21 March 2002.

216 Law Society of New South Wales, *Representation Principles*, above n 213, 23.

217 Ibid 7.

218 Ibid 24.

219 Ibid 7.

220 Ibid 10.

221 Dan L Goldberg, 'Representing Children in Custody and Access Proceedings' (Paper presented at the Voice of the Child Conference, Toronto, 5 March 2009) 12.

222 Law Society of New South Wales, *Representation Principles*, above n 213, 15.

223 Ibid.

224 This is discussed in Chapter 4.

225 *Family Law Act 1975* (Cth) s 68L(1)–(2).

226 *Family Law Act 1975* (Cth) s 68LA(2)(a).

227 *Family Law Act 1975* (Cth) s 68LA(2)(b).

228 *P and P* (1995) 19 Fam LR 1, 33.

229 The experts are either family consultants (employed or engaged by the FCA or FMC) or private practitioners with relevant social science qualifications and experience.

230 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122.

231 Ibid 276.

232 Ibid.

233 Ibid.

234 *Family Law Act 1975* (Cth) s 68LA(6). Note, however, that the ICL may disclose information to the court if he or she considers disclosure to be in the child's best interests, even if such disclosure is against the wishes of the child: s 68LA(7)–(8).

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8.148 Although the Victorian *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (the Victorian guidelines) in relation to the CYF Act 2005 recommend that a direct representative must not disclose information without the child's consent, even where the child is at risk,[235] they say nothing about the role of the best interests representative. This is because provision for best interests representation of children in 'exceptional circumstances' was incorporated into the Act long after the Victorian guidelines were published.[236] In order to ensure that best interests representatives in the Family Division of the Children's Court are protected from having to disclose to the Court matters divulged by the child in confidence, a similar system to that for ICLs in family law would have to be introduced.

## The direct representative

8.149 Direct representation,[237] the present model almost universally employed in the Family Division of the Children's Court, involves a very different role from best interests representation. Under the direct representation model, the child or young person is the representative's client.[238] The direct representative obtains instructions from a child or young person who is considered capable of instructing and acts upon them. The solicitor–client relationship is theoretically identical to that which exists between lawyers and their competent adult clients.[239] In relation to direct representation, in *Seen and Heard* it was recommended that 'the child's willingness to participate and ability to communicate should guide the representative rather that any assessment of the "good judgment" or level of maturity of the child'.[240]

8.150 The Victorian guidelines provide that the lawyer should ensure that the Court hears the child's or young person's 'views'[241] and that it is for the Court to decide what weight should be given to those views and where the young person's best interests lie.[242] The guidelines state that 'the aim of the lawyer must be to achieve the result requested by the young client'.[243] The direct representative's role is contrasted with that of the best interests representative, as the former is 'bound' by the child or young person's instructions. The direct representative's own assessment of what is in the child's or young person's best interests is relevant only insofar as advising the client of the likely approach the Court will take[244] or advising the client about the prospects of obtaining VLA funding.[245]

8.151 Where the child or young person is incapable of giving instructions, it is clear that the lawyer cannot act on a direct representative basis.[246] The practitioner ordinarily determines the child's capacity to instruct.[247] In NSW, if the child or young person is incapable of giving instructions, the lawyer should bring this to the Court's attention and seek the appointment of a best interests representative.[248] This is not the case in Victoria, where a best interests representative is only appointed in exceptional circumstances.[249] As noted previously, this limitation results in over 50 per cent of children being unrepresented before the Family Division of the Children's Court.[250] It is significant that while Victorian children are typically considered capable of instructing a lawyer from the age of seven,[251] in NSW the legislation establishes a rebuttable presumption that children under 12 are incapable of giving proper instructions.[252]

8.152 The direct representative must interview children and young people effectively and in a manner that is developmentally appropriate.[253] Both the NSW principles and *Seen and Heard* recommend that direct representatives seek the input of behavioural scientists in order to ascertain the wishes and directions of younger children.[254] This approach is consistent with article 12(1) of the *United Nations Convention on the Rights of the Child* (CROC), which provides that where a child is capable of forming his or her own views, state parties will allow the child to express those views freely in all matters affecting him or her.[255] Article 12(2) provides that the child may do this either directly or through a representative or appropriate body.[256] This principle is also relevant to best interests representatives when ensuring that children's views are expressed to the Court.

8.153 The Victorian guidelines suggest that lawyers acting for children who have been deemed mature enough to instruct should:

- ensure the Court hears the child's views[257]
- continually assess the child's capacity to give instructions, based on his or her ability to understand the nature of court proceedings and possible consequences[258]
- not undermine the child's preference/s even when limited instructions are given[259]
- do all that is possible to ensure the child makes his or her own decision without pressure from others, including the lawyers themselves[260]
- present confused or inconsistent views 'as is' to the Court[261]
- represent the child in a competent and professional manner[262]
- always seek their client's permission before any disclosure takes place[263]

235 Akenson, *Guidelines for Lawyers*, above n 214, 18. Note, however, that the representative should discuss with the child the benefits of bringing the matter to the attention of the Department and must not mislead the court by intimating that the child is not at risk: at 18. Lawyers are not subject to mandatory reporting under the Act, but if a lawyer believes that a child is in need of care and protection and makes a report to a protective intervener, he or she will not be in breach of professional ethics or subject to any liability in respect of the report: *Children, Youth and Families Act 2005* (Vic) s 189(a)–(b).

236 As noted above, the provision for a best interests representative came into force when s 524(4) of the *Children, Youth and Families Act* 2005 (Vic) was proclaimed on 23 April 2007, whereas the Victorian guidelines were published in August 1999.

237 Note that 'direct representation' and 'representation on instructions' can be used interchangeably.

238 Law Society of New South Wales, *Representation Principles*, above n 213, 7.

239 Nicola Ross, 'Legal Representation of Children' in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 544, 552.

240 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 274.

241 It should be noted that although the word 'views' is used here, a best interests representative will also have a role in putting the child's views before the Court, but acting on instructions requires more than just eliciting the child or young person's views.

242 Akenson, *Guidelines for Lawyers*, above n 214, 8.

243 Ibid.

244 Ibid 9.

245 Victoria Legal Aid will not fund a lawyer to act for a party, including a child, if the case is without merit: Victoria Legal Aid, *Grants Handbook,* above n 203; *Legal Aid Act 1978* (Vic) s 24(4)(b).

246 Law Society of New South Wales, *Representation Principles*, above n 213, 9.

247 Ibid 10; Akenson, *Guidelines for Lawyers*, above n 214, 12.

248 Law Society of New South Wales, *Representation Principles*, above n 213, 10.

249 *Children, Youth and Families Act 2005* (Vic) s 524(4). See the discussion in Chapter 3 under ' Lawyers for children and types of legal representation'.

250 See Chapter 3 under 'Children, parents and other parties with a direct interest in proceedings'.

251 See Victoria Legal Aid, *Grants Handbook,* above n 203, 30.

252 The age presumption was raised from 10 to 12 years by the *Children and Young People (Care and Protection) Miscellaneous Amendments Act 2006* (NSW) s 99B. This was because 'there is clear evidence based on child development that most 10 and 11 year olds are incapable of understanding the legal ramifications of their instructions, the intricacies of legal procedure in care matters and the various legal, procedural and jurisdictional issues that may arise': New South Wales, *Parliamentary Debates,* Legislative Council, 15 November 2006, 3930 (Henry Tsang, Parliamentary Secretary).

253 Law Society of New South Wales, *Representation Principles*, above n 213, 12.

254 Ibid; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 272–3.

255 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990). This is discussed in Chapter 3.

256 Ibid art 12(2).

257 Akenson, *Guidelines for Lawyers*, above n 214, 8.

258 Ibid 12.

259 Ibid 14–15.

260 Ibid 16.

261 Ibid.

262 Ibid 16–17.

263 Ibid 18.

264 Ibid.

- maintain the child's confidence, even if the child refuses to disclose information indicating a serious risk.[264]

### Distinguishing between an 'ability to express a view' and a 'capacity to give instructions'

8.154 A child's or young person's ability to express views and capacity to instruct a lawyer are not the same. A child with the ability to express an opinion may have their opinion or views directly relayed to the Court whether represented on a 'direct representation' or 'best interests' model. The ability of a child to express his or her views, where willing, is not necessarily synonymous with that child's capacity to instruct. Notably, some members of the Children's Court of Victoria argued that 'in many cases children's lawyers have real concerns about the viability of their instructions and the risk to their clients if those instructions were adopted'.[265]

8.155 The complexity of giving instructions, or the higher level of comprehension needed, is provided by the following examples. The Victorian guidelines highlight that to be capable of giving instructions a young client needs to understand and articulate concepts like 'who', 'when' and 'where',[266] as well as their lawyer's role, and the nature and potential consequences of the proceedings.[267] The guidelines define capacity to instruct as based on a child's or young person's 'ability to understand the nature of the proceedings and to have an appreciation of the possible consequences of the proceedings, both in the short-term and long-term'.[268]

8.156 The Commission believes that there is a distinction between a child's or young person's ability to express views and a capacity to instruct, and that a capacity to instruct involves more complex or higher levels of comprehension of the nature of proceedings, court processes and consequences. It would be helpful for the distinction between expressing wishes and providing instructions to be set out in new guidelines for the representation of children in child protection matters. The existing Victorian guidelines, published prior to the current CYF Act 2005, require updating.

## STANDARDS APPLICABLE TO ALL REPRESENTATION OF CHILDREN AND YOUNG PEOPLE

8.157 Some considerations apply to the representation of all children and young people, regardless of the model adopted. In all instances and on any model, the child's or young person's representative must be 'very involved, active, and professional'.[269] For the purposes of this reference, the CREATE Foundation conducted a consultation with 25 children and young people, in which they described their interactions with lawyers.[270] When asked how they would treat young people if they were a lawyer, the children and young people stated they would

> *get to know the young person by asking them how they are going and what they did yesterday; listen to the young people's stories and requests; respect the young people; and simply explain what is going to happen and the possible outcomes.*[271]

8.158 Many participants in this consultation wanted the lawyer to employ the exact words used by the child or young person when putting their views to the Court.[272] The children and young people wanted the lawyer always to use language that they could understand and to fully explain the process.[273]

8.159 Broadly speaking, the child's representative should:

- elicit the child's views in a developmentally appropriate manner[274]
- advise the child[275]
- provide guidance[276]

- express the child's wishes and preferences to the Court where relevant[277]
- explain to the child, in an appropriate way, information that will allow the child to have maximum input[278]
- inform the child about significant developments in his or her matter,[279] relevant facts and applicable laws and processes, as appropriate to the child's ability to understand[280]
- ensure that the child has the opportunity to express any further view or instruction or any refinement or change to previously expressed views.[281]

8.160 *Seen and Heard* identified additional standards for all legal representatives of children.[282] The report emphasised that the child's representative should always meet with the child, preferably face to face.[283] This meeting should occur where and when it is comfortable for the child, and not merely at a time and place convenient for the representative.[284] It was also recommended that representatives should at least see a non-verbal child who they are representing, preferably in the child's home environment.[285] When communicating with a child, representatives should use appropriate language for the child's level of understanding and should listen to the child.[286] The Victorian guidelines provide guidance for representatives on how to communicate with children when interviewing them.[287]

8.161 With regard to eliciting views, another important requirement is that verbal children are not forced to express a view against their will. This is encapsulated by CROC's article 12 right for children to express their views 'freely' in matters affecting them[288]—interpreted by CROC to mean that the child can express or withhold his or her views without pressure.[289]

8.162 The representative has an important role in assisting those children and young people who wish to participate directly in proceedings. The representative must clearly inform the Court of the child's or young person's desire to participate.

265 Submission 46 (Children's Court of Victoria) 66.

266 Akenson, *Guidelines for Lawyers*, above n 214, 13.

267 Ibid 14.

268 Ibid 12.

269 Donald Duquette, 'Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required' (2000) 34(3) *Family Law Quarterly* 441, 457.

270 CREATE Foundation, above n 183.

271 Ibid 6.

272 Ibid 24.

273 Ibid.

274 See, *The President's Initiative on Adoption and Foster Care Guidelines for Public Policy and State Legislation Governing Permanence Care for Children* (1999), in Duquette, above n 269, 456–7.

275 Ibid.

276 Ibid.

277 Ibid.

278 Ibid.

279 Family Court of Australia, *Guidelines for Independent Children's Lawyers*, endorsed by the Chief Justice of the Family Court of Australia and by the Federal Magistrates Court of Australia (2007) 4.

280 See, *The President's Initiative on Adoption and Foster Care Guidelines for Public Policy and State Legislation Governing Permanence Care for Children* (1999), in Duquette, above n 269, 456–7.

281 Family Court of Australia, *Guidelines for Independent Children's Lawyers*, above n 279, 4. One of the disadvantages of the current direct representation model is that lawyers representing children during ADR or negotiation processes may struggle to obtain up to date instructions where negotiations are particularly dynamic. That may limit the effectiveness and participation of the child representative in the negotiation process.

282 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 272.

283 Ibid.

284 Ibid.

285 Ibid.

286 Ibid.

287 Akenson, above n 214, *Guidelines for Lawyers* 11.

288 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990). This is discussed in Chapter 3 under 'Charter of Human Rights and Responsibilities and international rights instruments'.

289 Committee on the Rights of the Child, *General Comment 12: The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [22]. This is discussed in Chapter 3 under ' Charter of Human Rights and Responsibilities and international rights instruments'.

8.163 The *Seen and Heard* inquiry received a number of submissions emphasising the need for specialist training of children's representatives.[290] The report emphasised the importance of skills in interviewing children and taking instructions, and recommended the development of multi-disciplinary training for lawyers and social scientists.[291] Specialist accreditation is one way to ensure that representatives are adequately trained to represent on either a best interests or direct representation model.[292] The NSW principles emphasise the need for training of children's representatives in child development and language, and how to communicate with children.[293] The Commission supports specialist accreditation in the area of children's law for Victorian lawyers practising in the Children's Court, and understands that the Law Institute of Victoria is currently exploring this possibility.[294]

### THE NEED FOR ALL CHILDREN AND YOUNG PEOPLE TO BE REPRESENTED IN PROTECTION PROCEEDINGS

8.164 No Australian jurisdiction other than Victoria provides that children who are unable to give instructions should only be represented in protection applications in 'exceptional circumstances'. In South Australia, *all* children must be represented in care and protection proceedings, unless the child has made an express decision not to be represented.[295] Similarly, the NSW principles provide that a child who is unwilling or unable to give instructions should still be represented.[296] This Victorian approach to children's representation remains despite a General Comment from the Committee on the Rights of the Child in 2005, which provided that:

> *States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences.*[297]

8.165 Some submissions suggested that best interests legal representation of infants and young children was generally not required given the Department's duty to represent a child's best interests.[298] One submission suggested that while best interests lawyers were desirable in private family law proceedings where parents may be promoting their own interests and not representing a child's best interests, in protection proceedings the child protection practitioner had the responsibility to ensure a child's best interests were met.[299]

8.166 Some of the people who supported the status quo in relation to children's representation suggested that a best interests appointment is only necessary in cases where the Court had doubts that the Department's disposition recommendation was in the child's best interests.[300]

8.167 The Commission considers that the roles of a best interests representative and child protection practitioner are distinct, yet complementary. A best interests representative stands apart from both the child protection practitioner and the child's parents to present an independent view of what is in the child's best interests. The Commission considers that a best interests representative, while having the same objective as a child protection practitioner—to ensure that processes and the outcome are in the child's best interests—has the capacity to bring a unique perspective that may greatly assist the decision maker.

8.168 Many of the arguments against introducing a best interests representative for children in protection proceedings assume that there is only one perspective on what is in a child's best interests. As applicants in proceedings, protective interveners necessarily seek a particular disposition from the Court in the child's best interests. Evidence will be presented in support of the disposition sought. In some cases, the unique perspective of a best interests representative who meets the child directly and makes appropriate enquiries may result in options being advanced that have previously not been considered.

8.169 Some people expressed concerns that lawyers lacked the expertise to make assessments about a child's best interests.[301] Well-developed models of best interests representation for children, however, recognise that lawyers need to work alongside experts in child welfare and development. A best interests lawyer should have ongoing training in child development and risk issues in order to base opinions on available evidence about what is in a child's best interests.

8.170 There are many demands on a child protection practitioner. Commentators in other jurisdictions have acknowledged that child welfare agencies 'often have responsibility to the entire family and must often allocate scarce and inadequate resources to many children or families'.[302] This view was echoed in one submission from a social worker that was supportive of the appointment of a child's representative early in the process to 'better present the interests of the child',[303] as protection workers are often overworked and are required to focus on the adults' behaviour rather than just the child's interests.[304]

## THE NEED FOR TWO MODELS OF REPRESENTATION

8.171 Both the best interests and direct representation models are needed if all children are to be represented, as 'trying to define a single lawyer role for children of all ages and capacities is not possible'.[305] Neither model is well suited to all children and young people.

290 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 287. Although this point was made with specific regard to children's representatives in the Family Court, the same concept is applicable to children's representatives in the Family Division of the Children's Court.

291 Ibid recommendation 84.

292 The New South Wales Law Society offers specialist accreditation in Children's Law: Law Society of New South Wales, *Specialist Accreditation: Areas of Practice* (2009) <www.lawsociety.com.au/ForSolictors/Education /specialists/areasofpractice/index.htm> at 30 May 2010.

293 Law Society of New South Wales, *Representation Principles*, above n 213, 18.

294 Specialist accreditation and training generally is discussed in greater detail later in this chapter.

295 *Children's Protection Act 1993* (SA) s 48. This will be on a direct representation model if the child is capable of giving instructions, and on a best interests model otherwise.

296 Law Society of New South Wales, *Representation Principles*, above n 213, 10. Note, however, that whether a child or young person needs to be represented remains at the discretion of the Court in NSW: *Children and Young People (Care and Protection) Act 1998* (NSW) s 99.

297 Committee on the Rights of the Child, *General Comment No 7: Implementing Rights in Early Childhood*, 40th sess, CRC/C/7/rev 1 (20September 2006) [13]. This is also discussed in relation to children's rights in Chapter 3.

298 Submission 19 (Joe Gorman); consultation 4 (DHS Managers).

299 Submission 19 (Joe Gorman).

300 See, for example, submission 19 (Joe Gorman). Note also that the 'status quo proponents' of the Children's Court were satisfied that the vast majority of the Department's disposition recommendations were in the best interests of the child, and considered this to be sufficient representation of the child's best interests in all but exceptional circumstances: submission 46 (Children's Court of Victoria) 63. Three submissions expressed concern, in discussing the Department's role in representing the best interests of children, that the Department no longer has the expertise of many experts in early childhood development, since the Office of Children, formerly within the Department of Human Services, was transferred to the Department of Education and Early Childhood in 2007: submissions 33 (Youthlaw), 43 (VCOSS & YACVic), 45 (FCLC).

301 See, for example, submission 37 (OCSC).

302 See Duquette, above n 269, 446, in relation to child welfare agencies in the US and the need for a separate representative of the child's best interests.

303 Submission 8 (Angela Smith).

304 Ibid.

305 Duquette, above n 269, 456–7.

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8.172 A direct representation model allows older, more mature children to apply their own judgment in directing a lawyer about the outcome the child believes will best meet their own needs.[306] A best interests model of representation for some mature children, in certain circumstances, may be inconsistent with the participatory principle enshrined in article 12 of CROC[307] and may be unacceptably paternalistic.[308] Circumstances in which direct representation would be appropriate include where mature children, who wish to directly participate in proceedings, do not want a lawyer putting submissions to the Court that are inconsistent with their own considered views.[309]

8.173 A best interests model has advantages for both young children and older children who may wish to express their point of view but do not wish to actively participate in and make decisions about their representation, and do not reject a best interests model of representation. *Seen and Heard* identified that best interests representation for children may 'allow children to express a view without feeling responsible for the ultimate decision'.[310] A best interests lawyer should put a child's views (if the child wishes to express views) before the Court directly and not editorialise or discount a child's view 'simply because the representative disagrees with those views'.[311] A best interests model of representation is particularly appropriate for less mature children with understandable wishes that are not realisable.

8.174 A direct representation model for all children means that representation flows from the child's ability to give instructions. Given the limitation on best interests representation under the CYF Act 2005,[312] this is essentially the present situation in the Family Division of the Children's Court. The pure direct representation model creates a clear problem for children who are incapable of instructing. One response to this problem has been to not separately represent these children at all.[313] A number of submissions expressed concern that a large proportion of children who are incapable of instructing a representative are unrepresented.[314] Another response to having only one direct representation model for children[315] is to assume that young children who are capable of expressing views are also capable of instructing. This response is understandable, as an eight- or nine-year-old child would generally be denied separate legal representation in proceedings if a less liberal approach were adopted. However, it is a model that may not be furthering the interests of the very young client.

8.175 Direct representation and best interests models each have advantages for the representation of children and young people in different circumstances. The advantage of direct representation is that it allows children and young people to direct how their voice is heard in proceedings if they are capable of doing so. The best interests model of representation provides that children's views, where expressed, are made known and that a child's interests are independently represented. There may be situations where both models are required: for instance, in a case involving siblings of varying ages, an older child may be unwilling to be represented by a 'best interests' lawyer and may have their own direct representative.

### Guidance for determining when each model would apply

8.176 It is imperative that guidance is developed to assist in deciding when a best interests model should be followed and when the child or young person should be directly represented.

8.177 If a well-developed best interests model of representation for children is developed in the Children's Court, it is likely to be the more commonly applied model based on the current very young age of most children involved in protection proceedings. More than 50 per cent of children subject to protection applications in the Children's Court of Victoria are under seven years of age and more than 70 per cent of children involved in protection applications are under 12 years of age.[316] While age alone is no measure of maturity, it does serve as a general guide.

8.178 The conventional wisdom in Victoria about when a child is capable of giving instructions is very different to that in NSW.[317] Although developmental psychology has many benefits for enhancing understanding of children's development, its use as a 'yardstick' in law can be problematic.[318] The danger arises when 'evidence' of child development is cited simplistically, without specific indication of the evidence relied on.[319]

## RELEVANT MODELS OF REPRESENTATION IN OVERSEAS JURISDICTIONS

8.179 The Commission looked to other relevant jurisdictions for guidance about children's representation. A number of submissions and consultations suggested considering guardian *ad litem* systems in other jurisdictions as models of representation.[320] In 1996, the Auditor-General also recommended this model, suggesting that:

> *consideration be given to the appointment of Guardian Ad Litems to independently assess and advise Magistrates on what are considered to be the best interests of the child in terms of future placements.*[321]

306 This was raised in *Seen and Heard*, where it was stated that the major criticism of a best interests model 'is that it effectively denies competent children the right to instruct their advocates even where they are directly involved in a case': Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 259.

307 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12 (entered into force 2 September 1990).

308 Duquette, above n 269, 447.

309 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 259.

310 Ibid 258.

311 Ibid 260.

312 The Court is to adjourn proceedings in exceptional circumstances where the Court determines that it is in the best interests of a child to allow legal representation to be obtained despite the opinion that the child is not mature enough to give instructions: *Children, Youth and Families Act 2005* (Vic) s 524(4).

313 Duquette, above n 269, 448.

314 See, for example, submissions 33 (Youthlaw), 37 (OCSC), 43 (VCOSS & YACVic). Submission 45 (FCLC) supported the notion of separate representation for children who are incapable of instructing a representative. The 'best interests proponents' within the Children's Court expressed concerns about the operation of a solely direct instruction model: submission 46 (Children's Court of Victoria) 65.

315 Unless there are 'exceptional circumstances' under *Children, Youth and Families Act 2005* (Vic) s 524(4).

316 See, Hastings, above n 206; Department of Human Services (Victoria), above n 206.

317 In Victoria, children aged seven and over are typically assessed as capable of giving instructions: Victoria Legal Aid, *Grants Handbook*, above n 203, 30. In NSW, there is a presumption that children aged 12 and over are capable of giving instructions: *Children and Young People (Care and Protection) Miscellaneous Amendments Act 2006* (NSW) s 99B.

318 Ross, above n 239, 567.

319 Ibid. An example of this is in the second reading speech to the Children and Young People (Care and Protection) Miscellaneous Amendments Bill (NSW), which stated 'there is clear evidence based on child development that most 10 and 11 year olds are incapable of understanding the legal ramifications of their instructions, the intricacies of legal procedure in care matters and the various legal, procedural and jurisdictional issues that may arise': New South Wales, *Parliamentary Debates*, Legislative Council, 15 November 2006, 3930 (Henry Tsang, Parliamentary Secretary).

320 See, for example, consultations 22 (DHS CP Workers Southern), 18 (DHS CP Workers Gippsland), 20 (DHS Community Care Managers), 24 (Prof Cathy Humphreys); submissions 8 (Angela Smith), 29 (Anglicare Victoria), 37 (OCSC), 38 (VALS), 41 (Australian Childhood Foundation).

321 Victorian Auditor-General's Office, *Special Report No 43 Protecting Victoria's Children: The Role of the Department of Human Services* (1996) 241.

# Chapter 8 Option 2—A New System

## England and Wales

8.180 England and Wales have a guardian *ad litem* system of representation for children in 'specified proceedings',[322] including protection proceedings. The guardian *ad litem* in England and Wales is an independent professional appointed in accordance with court rules to safeguard the child's interests.[323] The Court must appoint a guardian unless satisfied that it is not necessary to do so to protect the child's best interests.[324] When a guardian is deemed necessary, the Children and Family Court Advisory and Support Service (CAFCASS) provides the Court with the name of an available guardian (usually a CAFCASS officer who is a social worker)[325] and the Court makes an order appointing that guardian, by name, for the individual child.

8.181 The guardian investigates the child's circumstances[326] and provides the Court with a report on the child's wishes and his or her welfare, 'but the case advocated on behalf of the guardian is based on the child's welfare'.[327] The guardian will have direct contact with the child to establish his or her wishes, read social services files, interview members of the child's family and make an assessment of the child's interests, sometimes with the assistance of expert reports.[328]

8.182 The guardian appoints a solicitor for the child, unless the Court has already done so.[329] The guardian instructs the solicitor about matters relevant to the child's interests, unless the child is judged to be of sufficient maturity to do this him- or herself.[330] In certain circumstances, the child has a right to have his or her views represented directly by the solicitor, rather than through the guardian's instructions.[331] This right is subject to three conditions:

- that the child is competent to give instructions
- that the child wishes to give instructions
- that the child wishes to give instructions that differ from those of the guardian.[332]

Commentators have noted that this step occurs rarely, and in all other cases the solicitor acts on the guardian's instructions and does not raise issues other than those identified with the guardian.[333]

## Northern Ireland

8.183 Northern Ireland also has a guardian *ad litem* system, under which a guardian is 'an independent officer of the Court who is experienced in working with children and families … employed by the Northern Ireland Guardian Ad Litem Agency' (NIGALA).[334] The function of NIGALA is to provide independent social work investigation and advice in specified proceedings under the *Children (Northern Ireland) Order 1995*.[335] The Court must appoint a guardian unless it is satisfied that it is not necessary to so in order to safeguard the child's interests.[336]

8.184 The guardian performs a very similar function in Northern Ireland to the guardian in England and Wales. The guardian, who is a social worker, is required to investigate the child's circumstances and provide an independent report to the Court, as well as appoint a solicitor for the child if the Court has not done this.[337] The guardian instructs the solicitor unless the child is competent to do so, or unless the child wishes to give the solicitor different instructions to those of the guardian *ad litem* and the solicitor considers the child competent to do so.[338]

## Scotland

8.185 The Scottish 'safeguarder' plays a similar role to a guardian *ad litem*. A safeguarder is appointed if the children's hearing determines that this is necessary to safeguard the interests of the child in the proceedings.[339] The role of the safeguarder is to make recommendations about the child's best interests, producing a report for the children's hearing.[340] The safeguarder is appointed from a panel maintained by the local authority, which can include safeguarders who are legally qualified.[341]

8.186 Since 2002 in Scotland, free legal representation has also been available for children in protection hearings[342] when it is required to ensure effective participation, or when the hearing is considering placing a child in secure accommodation.[343] There is a clear distinction between the role of legal representatives and safeguarders:

> *A safeguarder safeguards the interests of the child, takes account of his/her views and interests and makes a recommendation on what is in the child's best interest. A legal representative will protect the child's rights, and if the child is able to instruct the solicitor, will act on the child's wishes. The legal representative need not consider the child's interests.*[344]

## United states—general

8.187 Federal legislation in the US requires a guardian *ad litem* to be appointed to represent the child in every case involving allegations of abuse or neglect.[345] The guardian can be a lawyer, social worker or layperson, including a court appointed volunteer.[346] Different states have implemented this requirement in different ways.

## United states (Michigan)

8.188 In Michigan, a lawyer guardian *ad litem* is appointed in all child protection cases.[347] The lawyer guardian *ad litem* serves as the independent representative of the child's best interests, is entitled to full and active participation in proceedings and has access to all relevant information regarding the child.[348] The lawyer guardian *ad litem* meets the child to ascertain his or her wishes, reviews the agency case file and consults with other relevant parties.[349]

322 'Specified proceedings' for the purposes of appointing a guardian *ad litem* include any proceedings: on an application for a care or supervision order; in which the court is considering whether to make an interim care order; on an application for the discharge or variation of a care order; for an emergency protection order or child assessment order; for appeal against various decisions: *Children Act 1989* (UK) s 41(6). The England and Wales guardian *ad litem* system is also discussed in Chapter 5.

323 *Children Act 1989* (UK) s 5 (41).

324 *Children Act 1989* (UK) s 41(1).

325 Jane Fortin, *Children's Rights and the Developing Law* (3rd ed, 2009) 247.

326 House of Commons, Committee on the Lord Chancellor's Department, *Children and Family Court Advisory and Support Service: Third Report of Session 2002–03,* vol 1 (23 July 2003) 9; Fortin, above n 325, 9.

327 *Family Proceedings Rules 1991* (UK) rr 4.11(1), 4.11(2)(b); Judith Masson, 'Representation of Children in England: Protecting Children in Protection Proceedings' (2000) 34(3) *Family Law Quarterly* 467, 485.

328 House of Commons, above n 326, 9; Fortin, above n 325, 9–10.

329 Children and Family Court Advisory and Support Service (CAFCASS), *Practice Guidance for Guardians Appointing a Solicitor for the Child* (2006) 3.

330 Ibid.

331 Masson, above n 327, 485.

332 *Family Proceedings Rules 1991* (UK) r 4.121)(a).

333 Masson, above n 327, 485.

334 Northern Ireland Guardian Ad Litem Agency, *Information for Professionals* (2005) <www.nigala.hscni.net/faq/info_professionals.htm > at 28 June 2010.

335 Ibid.

336 *Children (Northern Ireland) Order* 1995 (NI) art 60.

337 Northern Ireland Guardian Ad Litem Agency, above n 334.

338 Ibid.

339 *Children (Scotland) Act 1995* (Scot) s 41. The Scottish children's hearing is discussed in Chapter 5.

340 *Children's Hearings (Scotland) Rules 1996* (Scot) r 14.

341 *The Panels of People to Safeguard the Interests of Children (Scotland) Regulations 2001* (Scot).

342 The impetus for introduction, and the history and debate around legal representation in hearings, is covered in more detail in Chapter 5.

343 *Children's Hearings (Legal Representation) (Scotland) Rules 2002* (Scot) r 3. See also, Rachel Ormston and Louise Marryat, *Review of the Children's Legal Representation Grant Scheme: Research Report* (2009) 4.

344 Scottish Executive, *Advice to Panel Members: The Children's Hearings (Legal Representation) (Scotland) Rules 2001* (2002) as cited in Ormston and Marryat, above n 343. It has been suggested that the distinction between safeguarder and legal representative can be confusing: Ormston and Marryat, above n 343, 33.

345 *Child Abuse Prevention and Treatment Act* (US) 42 USC § 5106a (b)(2)(A)(xiii) (1998).

346 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 256.

347 Duquette, above n 269, 444.

348 *Probate Code of 1939* MICH COMP LAWS §712A.17d(1)(b).

349 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(1)(d).

8.189 The lawyer guardian *ad litem* makes a determination regarding the child's best interests, taking into account the child's wishes in accordance with his or her competence and maturity.[350] The lawyer guardian *ad litem* may make a best interests determination that diverges from what the child wants.[351] The lawyer guardian *ad litem* must nevertheless inform the Court about the child's wishes and preferences, consistent with the law governing attorney–client privilege.[352]

8.190 If the lawyer guardian *ad litem* determines that his or her assessment of the child's best interests differs from the child's own assessment, the lawyer guardian *ad litem* must communicate the child's position to the Court.[353] The Court may appoint an attorney for the child if it considers the appointment appropriate in light of the child's maturity and the nature of the inconsistency between the child's and lawyer guardian *ad litem's* identification of the child's interests.[354] An attorney appointed for the child serves in addition to the child's lawyer guardian *ad litem*.[355]

### Features drawn from other models

8.191 The guardian *ad litem* models have various features that are informative when proposing a model of representation for children. A characteristic of all the models discussed is that they emphasise the need to have an independent representative focused on the child's best interests from the early stages of proceedings. The guardian *ad litem* systems, particularly those in which the guardian is not a lawyer, also provide for a lawyer for the child. Either the guardian or the child or young person, depending on his or her age or maturity, will instruct the lawyer for the child. An advantage of various guardian *ad litem* systems is that they allow professionals with social work expertise—guardians—to be closely involved in assessment of what is in the child's best interests.

8.192 The guardian *ad litem* model in England has been of particular interest to the Commission. As noted above, it appears that ordinarily a case regarding the child's best interests[356] will be presented to the Court by or on behalf of the guardian *ad litem*.[357] The guardian ordinarily appoints and instructs the lawyer for the child; the child would only instruct the solicitor directly where an inconsistency arises between the child's and the guardian's assessments of best interests and the child wishes to instruct.[358] The *Practice Guidance for Guardians* provides that 'if the child is competent and wishes to instruct the solicitor directly it is likely that the guardian will separate from the child's solicitor'.[359]

8.193 Lawyers and guardians reportedly have strategies for avoiding conflicts when a child or young person gives instructions that are not considered to be in his or her best interests.[360] However, commentator Judith Masson has noted that these 'strategies' may include:

- withholding information from the child or young person regarding the contents of the guardian's report
- the lawyer only meeting with the child or young person in the presence of the guardian, not privately
- both the guardian and the lawyer for the child being reluctant to recognise a child as competent when the child or young person's instructions do not appear to be in his or her best interests.[361]

The Commission does not view these as acceptable mechanisms for dealing with conflicts. As Masson notes, '[w]ithout a clear understanding of what the guardian was proposing and time to discuss privately with the solicitor, children had no opportunity to identify their disagreement and give contrary instructions'.[362]

8.194 While the Commission is in favour of certain aspects of the guardian *ad litem* system in England, such as the social work expertise a guardian brings to the assessment of the child's best interests, it is keen to ensure that the child is always fully informed about the role of his or her representative(s). The Commission strongly supports appointment of a separate lawyer to represent the child or young person on instructions when necessary, but expresses concern about the possibility for a lawyer to initially act on instructions from the guardian and then switch to act on direct instructions from the child. The potential problems and conflicts that may arise emphasise the need for clear guidelines about the roles of representatives. The Commission also believes that the tandem model of appointing a guardian and a lawyer in all cases[363] may be unnecessary.

## THE COMMISSION'S VIEWS

8.195 The Commission proposes the following model for representation of children and young people in protection matters.[364] Every child or young person who is a party to a protection application should be separately represented on either a best interests model or instructions model, but two or more siblings may be represented by the same lawyer on a best interests basis.

8.196 Children and young people should be represented on a best interests model by a lawyer unless the lawyer considers that:

- a mature child or young person has a desire to participate in proceedings and has the understanding and capacity to direct his or her representation[365]
- the child or young person, who has had explained to him or her the duty of a lawyer to directly relay the child or young person's views to the Court, nevertheless is unwilling to accept representation on a best interests basis
- where both of these conditions are satisfied, a separate practitioner should be appointed to represent the child or young person on the child or young person's instructions.

8.197 Guidelines drawing on social science research should be drafted to assist lawyers in assessing a child's or young person's capacity to instruct. Guidelines for the respective models should also be developed so that the practitioner's role, function and duties under a best interests model and a direct representation model are clear.

8.198 A best interests model should, at the least, require that the representative of the child or young person must:

- ensure that any views (even where contradictory) that a child or young person may choose to express are put before the Court. However, a child or young person would not be required to express a view and the representative would not be required to put before the Court any views expressed to him or her in confidence
- assist the Court in ensuring that all relevant evidence is available to the Court
- have access to social science input on matters such as risk assessment and the child's best interests
- make an assessment of the child's best interests based on the information available, both expert and in relation to the particular child, rather than on a personal view.

350 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(1)(h).

351 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(1)(h).

352 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(1)(h).

353 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(2).

354 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(2).

355 *Probate Code of 1939* MICH COMP LAWS § 712A.17d(2). It has been suggested that in order to avoid dual representation, although reportedly rare, an attorney could be appointed instead of a lawyer guardian ad litem for children and young people over a certain age or level of maturity: Duquette, above n 269, 462–3.

356 Also referred to as the child's 'welfare' in England.

357 *Family Proceedings Rules 1991* (UK) rr 4.11(1), 4.11(2)(b); Masson, above n 327, 485. An email from Bruce Clark, Director of Policy at CAFCASS, 1 June 2010, informed the Commission that ordinarily the guardian will attend all court hearings and present the report, responding to questions about the report.

358 *Family Proceedings Rules 1991* (UK) r 4.12(1)(a).

359 CAFCASS, above n 329, 5.

360 Masson, above n 327, 485.

361 Ibid 486.

362 Ibid.

363 Where the guardian puts a best interests assessment to the court and also instructs a lawyer for the child.

364 'Matters' is used here rather than 'proceedings' in order to allow for representation of the child in family decision-making processes. In Chapter 7, the Commission proposes that family group conferences become the primary decision-making forum in Victoria's child protection system.

365 The Commission notes that the Federation of Community Legal Centres, in its submission, supported best interests representation for children who lack capacity to instruct a lawyer, but opposed this model for children with capacity to instruct: submission 45 (FCLC).

8.199 An instructions model should, at the least, require that the representative of the child or young person must:

- interview the child or young person and elicit his or her instructions
- act upon the instructions of the child or young person when presenting his or her case to the Court
- inform the child or young person about significant developments in his or her matter, relevant facts and applicable laws and processes and ensure that the child has the opportunity to express instructions at each stage of proceedings.

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

a) have capacity to instruct a legal practitioner, and

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

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

## DIRECT PARTICIPATION OF CHILDREN AND YOUNG PEOPLE IN PROCEEDINGS

8.200 The direct participation of children in matters affecting them is an important children's rights issue. While representation of children and young people is important, the child or young person should also be given the opportunity to participate in proceedings him- or herself. The CYF Act 2005 requires the Court, as far as practicable, to allow the child 'to participate fully in the proceeding'.[366] This is consistent with article 12 of CROC, which provides that where a child is capable of forming his or her own views, states parties shall allow the child to express those views freely in all matters affecting him or her.[367] Article 12 requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative.[368]

8.201 The Commission proposes that the participatory right in the CYF Act 2005 should be strengthened. The legislation in both South Australia and Tasmania provides that in protection proceedings, the child or young person may put his or her views personally before the Court unless the Court is satisfied that he or she is not capable of doing so.[369] South Australia also limits the child's or young person's entitlement to express his or her views personally to the Court if doing so would 'give rise to an unacceptable risk to the child's wellbeing'.[370] The Commission favours this aspect of the South Australian approach, and proposes that a lawyer acting on a best interests basis would make submissions to the Court about whether the child is capable of putting their views directly to the Court and whether this would be in the child's best interests. The Court would then make this determination. A lawyer acting on a direct representation model would indicate the child's desire to participate directly in proceedings and the Court would provide an opportunity for the child to do so.

8.202 An important aspect of the right to direct participation is that the child is able to express his or her views 'freely'.[371] This has been interpreted by CROC to mean that the child can express or withhold his or her views without pressure.[372] Consistently with this, the Tasmanian legislation clarifies that this provision for the child to put his or her views personally to the Court does not permit the Court or any person to *require* the child to express his or her wishes in relation to any matter.[373] This consideration should be expressly incorporated into the relevant section of the CYF Act 2005.[374] The words 'participate fully' do not necessarily denote the child putting his or her views to the Court personally and the section's wording should reflect this distinction by replacing 'fully' with 'personally' or 'directly'.

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

## NEW GROUNDS FOR INTERVENTION AND AGREEMENT PROVISION

### INTRODUCTION

8.203 The grounds upon which the Children's Court can find a child to be 'in need of protection' under the CYF Act 2005 have evolved substantially over time.[375]

8.204 As discussed in Chapter 2,[376] Victoria's first child welfare legislation was the *Neglected and Criminal Children's Act 1864* (Vic) (the 1864 Act). In the 1864 Act, the grounds for state intervention were directed to children who were exhibiting undesirable behaviour, and 'appeared likely to develop into unsatisfactory adults'.[377] Under the 1864 Act, a child could be found to be a 'neglected child' if the child was found begging, wandering the streets, frequenting a tavern, residing in a brothel, or associating with known criminals, or was homeless or had committed an offence.[378]

### CURRENT GROUNDS IN VICTORIA

8.205 The current grounds for finding that a child is in need of protection[379] may be traced back to the 1984 report by the Carney Committee.[380] In formulating these grounds, the Carney Committee stressed the importance of having grounds that reflected a '"harms" rather than a "needs" approach to abuse and neglect'.[381]

8.206 All except the first two grounds in section 162 of the CYF Act 2005[382] concern situations where the parent or caregiver has failed to either protect the child, or is unlikely to protect the child from certain harms. The Court has noted almost all protection applications are brought on one of the latter four grounds.[383]

8.207 It is likely that the current grounds increase disputation between the parties, because they do not allow for a finding that a child is in need of protection through no fault of his or her parents, or for an agreement between the parents and the Department that the child is in need of protection without identifying one of the statutory grounds that involve some form of parenting failure.

366 *Children, Youth and Families Act 2005* (Vic) s 522(1)(c).

367 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990). Children's participation in a rights context is discussed in Chapter 3 under 'Charter of Human Rights and Responsibilities and international rights instruments'.

368 Ibid art 12(2).

369 See *Children's Protection Act 1999* (SA) s 48(3); *Children, Young Persons and Their Families Act 1997* (Tas) s 56.

370 *Children's Protection Act 1999* (SA) s 48(3).

371 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990).

372 Committee on the Rights of the Child, *General Comment 12*, above n 289, [22]. This is discussed in Chapter 3.

373 *Children, Young Persons and Their Families Act 1997* (Tas) s 58.

374 *Children, Youth and Families Act 2005* (Vic) s 522(1)(c).

375 For a discussion of the current grounds see Chapter 3.

376 See *Neglected and Criminal Children's Act 1864* (Vic) in Chapter 2.

377 Committee of Enquiry into Child Care Services in Victoria, *Report* (1976) 15.

378 *Neglected and Criminal Children's Act 1864* (Vic) s 13. As the discussion in Chapter 2 illustrates, it took Victoria 114 years (and several Acts) to move completely away from viewing a child's undesirable (but non-criminal) behaviour in itself as sufficient grounds for state intervention. It was not until the passage of the *Community Welfare Services Act 1978* (Vic) that all grounds relating to the child's behaviour were removed, and replaced entirely with grounds relating to the maltreatment (or abandonment) of a child by his or her guardian. The first ground to refer to the 'unfitness' of a guardian was introduced in 1933: *Children's Welfare Act 1933* (Vic) s 2. See further discussion in Chapter 2.

379 The grounds are set out in s 162 of the *Children Youth and Families Act 2005* (Vic) and are dicussed briefly in Chapter 3.

380 Child Welfare Practice and Legislation Review, above n 20. This report is discussed in both Chapter 2 and Appendix D.

381 Ibid vol 2, 218.

382 The first two grounds in s 162(1) concern situations where there is no suitable carer for the child following the abandonment of a child or death or incapacity of parents or carers: *Children, Youth and Families Act 2005* (Vic) s 161(1)–(2). 'Parent' is broadly defined in s 3 of the Act.

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

# Chapter 8 Option 2—A New System

## PREVIOUS PROPOSALS FOR NEW GROUNDS

### ALRC Report No 18: Child Welfare

8.208 In its 1981 *Child Welfare* report, the ALRC analysed the appropriateness of the grounds available in the ACT for statutory intervention in a child's life, and concluded that 'it is actual or potential harm to the child which should, in general, provide the basis for coercive state intervention'.[384] The ALRC focused on the advantages and disadvantages of retaining a ground in the *Child Welfare Ordinance 1957* (ACT), which justified intervention in relation to 'uncontrollable' children.[385] The ALRC concluded that '[g]enerally the community should not assume an intrusive role with regard to so-called "uncontrollable" children',[386] but that the harm the child may be causing him- or herself needed to be addressed.[387] The ALRC emphasised that

> *society's concern in care proceedings should be to protect the child, not to curb non-criminal behaviour which excites disapproval. The aim should be prevention of harm.*[388]

8.209 The ALRC warned against formulating any ground for intervention that 'focuses on the behaviour and child-rearing practices of the *parents* and not on the behaviour of the child',[389] because:

> *The parents may be extremely conscientious and do their best to control a child, but whether his behaviour does or does not stem from a failure or absence of control should not, under the principles proposed by the Commission, be the sole determinant of whether intervention should occur … it is the actual or potentially harmful nature of the child's non-criminal behaviour which should provide the ground for intervention.*[390]

8.210 The ALRC also warned that a definition that focused solely on a child's behaviour could also be harmful and confer too much power on the Department.[391] Striking a compromise between the need for the ground to refer to the child's parents' lack of capacity to curb the child's harmful behaviour, but not to attribute blame, the ALRC proposed wording that 'would indicate that it is the harmful behaviour which justifies intervention, but that it must be viewed in the context of the child's home situation'.[392] The ALRC therefore recommended that the new ground for bringing care proceedings should be defined as if the child

> *is engaging in behaviour that is, or is likely to be, harmful to him and his parents or his guardian are unable or unwilling to prevent him from engaging in that behaviour.*[393]

### DHS technical options paper

8.211 As part of its comprehensive review of the child protection system in Victoria, which led to the introduction of the CYF Act 2005, in 2004 the Department published a discussion paper that set out technical options for improving the system (the technical options paper).[394] In this paper, the Department canvassed the idea of introducing a new ground of intervention for children who are causing harm to themselves. The Department suggested that a new ground for intervention be introduced 'for children who are in need of protection because they are placing themselves at risk of significant harm'.[395] This idea, while not incorporated in the CYF Act 2005, remains relevant.[396]

## VIEWS IN CONSULTATIONS AND SUBMISSIONS

### Alteration of current grounds

8.212 Many submissions supported the retention of the existing grounds in the CYF Act 2005.[397] Comments raised in consultations, however, highlighted that the existing grounds 'are worded in a punitive way',[398] and that 'all the grounds talk about fault'.[399] As noted by the Victorian Bar:

> *The existing grounds require a finding that a parent or guardian is or is highly likely to fail in their parental obligations towards the child, or has actually harmed or is likely to actually harm the child. This, combined with the current range of orders available, does not assist families in situations where they are not at fault, but still need assistance.*[400]

8.213 In its submission, Victoria Police expressed concerns that the grounds in section 162 of the CYF Act 2005 'emphasise parental blame', 'do not provide for cases where parents are unaware or unable to prevent the risk', and 'do not include grounds that recognise a need for protection where children place themselves at risk'.[401] The Children's Court also acknowledged that '[m]ost—if not all—of the grounds in s162(1) … are predicated in some way or another on fault by a parent'.[402]

### Addition of no-fault ground

8.214 Many people supported the inclusion of a no-fault ground in section 162 of the CYF Act 2005.[403] Some submissions pointed out that a no-fault provision would 'avoid the stigmatisation of an innocent parent',[404] and 'may work to diffuse the adversarial nature of proceedings' in the Children's Court.[405] It was also noted that 'from a child's perspective it is a negative thing to see the parent at fault'.[406]

8.215 One submission made the important point that the 'fault' or 'family dysfunction' involved in child protection cases is 'often economic, social and demographic in origin rather than individual in the classic sense of fault'.[407]

8.216 The situations identified in the submissions and consultations for which a no-fault ground might be desirable included:

- an older child or teenager who is 'out of control' or 'goes off the rails' and the parents cannot protect the young person from his or her own harmful behaviour[408]
- an autistic child[409]
- '[w]here a child has been sexually abused by a sibling or some other person in circumstances where the parents did not know and could not reasonably have known of the abuse'[410]
- where the parent or carer of a child has an intellectual or physical disability which severely impairs their capacity to parent[411]
- where a parent has been hospitalised due to illness.[412]

8.217 OCSC gave an example of a case in which a no-fault ground would have been appropriate.[413] The case concerned an adolescent male with an acquired brain injury. His mother was 'highly motivated and caring' but was unable to manage his behaviour 'given his physical destruction of their home'. His behaviour had reached the point that 'it became physically dangerous for him to remain there'. The OCSC stated that this situation led to a protection application being filed in relation to the adolescent on the grounds of physical harm (the ground in subsection 162(1)(c)).[414]

384 (Australian) Law Reform Commission, *Child Welfare*, above n 82, 221.
385 Ibid 224–6.
386 Ibid 227.
387 Ibid.
388 Ibid.
389 Ibid (emphasis in original).
390 Ibid.
391 Ibid.
392 Ibid.
393 Ibid.
394 Community Care Division, Department of Human Services (Victoria), *Protecting Children: Ten Priorities for Children's Well-Being and Safety in Victoria—Technical Options Paper* (2004).
395 Ibid 114.
396 In considering a new ground on this basis, the Department stated: 'The child protection system is primarily concerned with protecting children from harm resulting from the actions of others. Some young people inflict harm on themselves or place themselves in danger. These young people create great challenges for parents, the service system and the workers within it. In most instances, the young person has at least one parent seeking help in addressing the young person's behaviour. Some parents report the system is perversely unresponsive because they are trying to protect their child, and that it is only through giving up and abandoning the child that Child Protection and other services will become involved. It has been suggested the current grounds for intervention are inadequate in such situations and a new ground should be introduced for children who are in need of protection because they are placing themselves at risk of significant harm. This, it is argued, would avoid a perception that parents are being blamed by having to prove maltreatment': ibid 113.
397 Submissions 1 (Anonymous), 15 (Connections), 17 (CCC), 25 (LIV), 26 (FVPLS Victoria), 31 (Gatehouse Centre), 38 (VALS), 46 (Children's Court of Victoria) 48–9.
398 Consultation 17 (Victoria Police).
399 Consultation 3 (CAU).
400 Submission 48 (Victoria Bar).
401 Submission 34 (Victoria Police).
402 Submission 46 (Children's Court of Victoria) 48.
403 Consultation 3 (CAU); submissions 10 (Anonymous), 11 (VLA), 17 (CCC), 22 (Anchor), 27 (CPS), 28 (Anonymous), 34 (Victoria Police), 46 (Children's Court of Victoria) 48–9, 48 (Victorian Bar).
404 Submission 46 (Children's Court of Victoria) 49.
405 Submission 29 (Anglicare Victoria).
406 Consultation 3 (CAU).
407 Submission 28 (Anonymous).
408 Submissions 11 (VLA), 17 (CCC), 25 (LIV), 27 (CPS), 34 (Victoria Police), 37 (OCSC), 46 (Children's Court of Victoria) 48, 48 (Victorian Bar); consultations 2 (CCC), 6 (Private Practitioners 1).
409 Submission 46 (Children's Court of Victoria) 48.
410 Ibid.
411 Submissions 37 (OCSC), 48 (Victorian Bar); consultation 6 (Private Practitioners 1).
412 Submission 11 (VLA).
413 Submission 37 (OCSC).
414 Ibid.

8.218 The Children's Court stated that the way it currently deals with applications concerning one of the first three 'no-fault' situations identified above is to make a finding that a child is in need of protection under the 'emotional abuse' ground in subsection 162(1)(e).[415] The Court expressed concern about this method of dealing with 'no-fault' situations, stating that the making of the finding 'involves the fiction that the child's or the perpetrator's aberrant behaviours are in some way the fault of the parent'.[416] The Court explained that

> *Currently the 'no-fault' situation is usually dealt with by a notation on the Court file that all parties acknowledge that the parents have not caused harm to the child. However, the Court does not consider such a notation to be adequate. It is for cases like [the first three situations mentioned above] that it believes the current grounds are deficient and the Court recommends the addition of a 'no-fault' provision, such as:*
>
> *'For the purposes of this Act, a child is in need or protection if harm to the child contemplated by sections 162(1)(c),(d),(e) or (f) exists or is likely to exist through no fault of the parents of the child.'*[417]

## NO-FAULT GROUNDS IN OTHER JURISDICTIONS

### Australian jurisdictions

8.219 In other Australian jurisdictions, there are different models of 'no fault' grounds in the child protection legislation, including:

- In NSW, the Children's Court can make a care order if 'the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection'.[418]
- In the Northern Territory, a child is defined to be in need of care and protection if 'the child is not under the control of any person and is engaged in conduct that causes or is likely to cause harm to the child or other persons'.[419]
- In South Australia, a care and protection order can be made if a child is 'at risk', which is defined to include where 'there is a significant risk that the child will suffer serious harm to his or her physical, psychological or emotional wellbeing against which he or she should have, but does not have, proper protection'.[420]
- In Tasmania, a care and protection order can be made if a child is 'at risk'.[421] A child is defined as being 'at risk' if 'the child has been, is being, or is likely to be, abused or neglected'.[422]

8.220 Aside from these specific 'no-fault grounds', it is important to note that in most Australian jurisdictions other than Victoria, the language used to refer to parents' responsibility for harm the child may be suffering is being 'unable or unwilling' (or not 'willing and able') to protect the child.[423] The language used in sub-paragraphs 162(1)(c)(d) and (e) of the CYF Act 2005, namely that the child's parents 'have not protected, or are unlikely to protect, the child from harm', is not used in any other Australian jurisdiction.[424]

### Overseas jurisdictions

8.221 Under the New Zealand child protection legislation—the *Children, Young Persons, and Their Families Act 1989* (NZ) (CYPF Act 1989) —there are four no-fault grounds. The first two refer only to the existence of past harm or risk of future harm to the child, and require no connection to the home context.[425] The third no-fault ground under the CYFP Act 1989 defines a child to be in need of care and protection if:

> *The child or young person has behaved, or is behaving, in a manner that:*
>
> *(i) is, or is likely to be, harmful to the physical or mental or emotional well-being of the child or young person or to others*
>
> *(ii) the child's or young person's parents or guardians, or the persons having the care of the child or young person, are unable or unwilling to control.*[426]

8.222 The fourth no-fault ground under the CYFP Act 1989 refers only to the parents' inability or unwillingness to care for the child, but makes no reference to the child suffering, or being likely to suffer, any harm.[427]

8.223 In England and Wales, a care and supervision order can be made if:

- the child is currently suffering or likely to suffer significant harm
- the harm is attributable to the fact that the child is beyond parental control.[428]

## NEW NO-FAULT GROUNDS

8.224 The Commission proposes that a no-fault ground should be added to the grounds for intervention in section 162 of the CYF Act 2005. It is highly desirable that the CYF Act 2005 permits a finding that a child is in need of protection that does not imply the parents or guardians of a child are at fault.

8.225 The Commission supports the alteration of section 162 in two ways to enable protection orders to be made in no-fault situations, without the need to resort to the 'fiction of finding fault against an innocent parent'.[429]

8.226 The first alteration is the inclusion of the words 'unable or' before the words 'are unlikely' in sub-paragraphs of section 162(1)(c),(d),(e) and (f). This would enable those existing grounds to be relied upon in a situation when the parents lack the capacity (but not the motivation) to protect the child, including by reason of mental impairment or intellectual disability. It would also cover the situation involving an autistic child whose parents are simply unable to address the special needs of the child.

8.227 The second proposed alteration of section 162 is the addition of a new ground specifically designed to justify intervention in circumstances where a child is engaging in behaviour that is harmful, or potentially harmful, to him- or herself. Most submissions that addressed this point, including that from the Children's Court, supported this no-fault ground.

8.228 Care must be taken when wording this ground, as the ALRC 1981 report warns. The report explains that this ground must be drafted in such a way that:

- it makes clear that it is the harm or risk of harm to the child (caused by his or her own behaviour) that justifies intervention, not the fact of the behaviour itself

415 Submission 46 (Children's Court of Victoria) 48.

416 Ibid 49.

417 Ibid 48.

418 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71.

419 *Care and Protection of Children Act 2007* (NT) s 20.

420 *Children's Protection Act 1993* (SA) ss 6(2), 37.

421 *Children, Young Persons and Their Families Act 1997* (Tas) s 42.

422 *Children, Young Persons and Their Families Act 1997* (Tas) s 4.

423 *Children and Young People Act 2008* (ACT) s 345; *Care and Protection of Children Act 2007* (NT) s 20; *Child Protection Act 1999* (Qld) s 10; *Children's Protection Act 1993* (SA) s 6(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 4.

424 Under s 28(2) of the *Children and Community Services Act 2004* (WA), the words 'unlikely or unable' are used.

425 *Children, Youth and Their Families Act 1989* (NZ) s 14(1)(a)–(b).

426 *Children, Young Persons and Their Families Act 1989* (NZ) s 14(d).

427 *Children, Young Persons and Their Families Act 1989* (NZ) s 14(f).

428 *Children Act 1989* (UK) s 31(2). The grounds for intervention utilised in Scotland's child protection system blur the distinction between protecting children and addressing criminal and non-criminal behaviour by children, as Scotland has a combined system for dealing with child protection and juvenile crime matters. These grounds therefore do not provide an appropriate basis for protective intervention in Victoria. For further discussion of the Scottish child protection system, see Chapter 5.

429 Submission 46 (Children's Court of Victoria) 49.

- it is not so broad so as to enable (or even require) the Department to intervene when the harm to the child has no connection with the child's home context
- it does not attribute blame to the parents for their inability to prevent the harmful behaviour of the child.[430]

8.229 It is important that any new ground in section 162 that refers to a child's behaviour does not suggest that it is this behaviour that justifies intervention, rather than the harm caused to the child *by* that behaviour. For the legislation to provide otherwise would be to revert to the pre-1978 Victorian child protection system, before non-criminal behaviour on the child's part was unequivocally rejected as an appropriate basis for protective intervention.[431]

8.230 The second point requires a move away from the models of no-fault grounds used, for example, in the Tasmanian Act,[432] or as the first two no-fault grounds available under the New Zealand CYPF Act 1989.[433] These models require no connection between the harm or risk to the child and the child's home context.

8.231 The third point noted by the ALRC requires avoiding referring to a parent's 'unwillingness' to curb a child's harmful behaviour. If a parent is able, but not willing, to protect a child from his or her own harmful behaviour, then the existing grounds in section 162(1) would apply, as it could be said that that parent had not protected, or is unlikely to protect the child. To the Commission, a no-fault ground that refers to the unwillingness of a parent to protect a child seems to be self-defeating.

8.232 The Commission believes that the wording of any no-fault ground must clearly indicate that the basis for intervention is the existence of risk of harm to the child. For this reason, it is not desirable to refer to a lack or failure of control over that child's behaviour. This concept is used in the United Kingdom and New Zealand.[434] However, in its 1981 report, the ALRC outlined how use of such a concept improperly shifts the focus either to the child's 'uncontrollable' (ie undesirable) behaviour, or to the parents' inability to control their child.[435] For this reason, the ground proposed by the ALRC avoids using this concept.[436]

8.233 The reason why the Commission does not favour the Children's Court's proposed model of a no-fault ground is the very problem identified by the Court in its submission. The no-fault ground suggested by the Children's Court essentially provides that the grounds in sub-paragraphs of section 162(1)(c), (d), (e) and (f) can be found to be made out 'through no fault of the parents of the child'.[437] In its submission, the Court states that it acknowledges

> *a potential problem with a 'no fault' provision. It may create more contests with parents arguing that they are not at fault in situations where they clearly are. Parents would certainly have nothing to lose by attempting to avoid a finding that they were at fault.*[438]

8.234 In order to remove the problem of creating this choice of arguing that parents are not at fault, the Commission proposes no-fault grounds that are limited in application and a separate provision that will allow the parents and the Department to agree to an outcome when there is no agreement as to grounds.

8.235 The Commission proposes the inclusion of a no-fault ground in relation to children engaging in behaviour harmful to themselves that combines aspects of both the ALRC's proposed ground, and relevant aspects of the New Zealand legislation.

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

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

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

## 'AGREEMENT AS TO OUTCOME' PROVISION

8.236 In the context of discussing the adequacy of the current grounds and desirability of creating a no-fault ground, some submissions raised the possibility of the parents and the Department being able to agree to a protection order being made without the need to agree on the specific ground upon which the child is in need of protection.[439]

8.237 In it's submission, the Children's Court stated that in situations where the parents are not at fault,

> *there is usually agreement between the Department, the parents and the child that it is appropriate for a protection order to be made so that the child may be provided with services designed to assist him or her.*[440]

8.238 The Court went on to say, however, that even where the parties agree on a particular protection order being made but not on the specific grounds, in order for the Court to make the order, it has to find that the child is in need of protection under one of the grounds in section 162(1).[441] The Court expressed its disapproval of this 'fiction', and for this reason requested a no-fault ground be included in the CYF Act 2005.[442]

8.239 For the reasons set out above, the Commission does not support the Court's broad 'no fault' ground, but believes that the Court's wish to make an order on the basis of an agreed outcome can be satisfied with the inclusion of an 'agreement provision' in the CYF Act 2005.

8.240 The proposed 'agreement provision' would permit the Children's Court to make a protection order if the Department and parents agree that such an order should be made. It might avoid disputation between the parents and the Department where the question of which ground is relied upon is immaterial because there is agreement about the need for both an order to protect the child and the content of that order. The Court should be permitted to make the order if agreed to by one parent, when the other parent cannot be located or expresses no interest in an application's outcome.

8.241 The Court should not be able to make the order unless satisfied it is in the child's best interests. The Court should be required to take the child's views and wishes into account before making any order. A child represented on instructions (who, on the Commission's proposed direct representation model, would have sufficient maturity and capacity to understand the nature and effect of any proposed protection order) would need to 'not oppose' the making of the order by agreement. A child of sufficient maturity and capacity should have a right to object to the making of a particular protection order.

430 (Australian) Law Reform Commission, *Child Welfare*, above n 82, 227.

431 See the discussion of the *Community Welfare Services Act 1978* (Vic) in Chapter 2 under 'Legislative history'.

432 *Children, Young Persons and Their Families Act 1997* (Tas) ss 4, 42.

433 *Children, Youth and Their Families Act 1989* (NZ) s 14(1)(a)–(b).

434 *Children Act 1989* (UK) s 31(2); *Children, Young Persons and Their Families Act 1989* (NZ) s 14(d).

435 (Australian) Law Reform Commission, *Child Welfare*, above n 82, 227.

436 Ibid.

437 Submission 46 (Children's Court of Victoria) 48.

438 Ibid 49.

439 Ibid 48; submission 28 (Anonymous).

440 Submission 46 (Children's Court of Victoria) 48.

441 Ibid.

442 Ibid.

# Chapter 8 Option 2—A New System

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

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

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

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

## FINDINGS OF FACT ON THE BALANCE OF PROBABILITIES

8.242 In cases where the parties do not agree whether a child is 'in need of protection', the Court often has to make findings of fact. Nearly all protection applications that come before the Court are brought on one of four grounds.[443] These grounds require a finding either that the child has suffered significant harm (that a parent has failed to protect them from) or the child is likely to suffer significant harm (that a parent is unlikely to protect them from).

8.243 The standard of proof that the Court must apply in making findings of fact is the civil standard of 'the balance of probabilities'.[444] In cases involving serious allegations, such as sexual abuse of a child, the Court sometimes refers to the '*Briginshaw* qualification'.[445] This qualification stems from a 1938 adultery case, *Briginshaw v Briginshaw*,[446] in which Justice Dixon said:

> *The seriousness of an allegation made, the inherent unlikeliness of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.*[447]

8.244 The *Briginshaw* qualification is often misunderstood to mean that in cases involving serious allegations, such as sexual abuse by a parent, a higher standard of proof—somewhere between the civil standard and the criminal standard—is required. This is a misunderstanding that also arises in other areas of law.[448]

8.245 In a recent Children's Court case, Magistrate Power referred to the following comments of Justice McHugh with approval:

> *There are only two standards of proof: balance of probabilities and proof beyond reasonable doubt. I know* Briginshaw *is cited like it was some sort of ritual incantation. It has never impressed me too much. I mean, it really means no more than, Oh, we had better look at this a bit more closely than we might otherwise', but it is still balance of probabilities in the end.*[449]

8.246 Some people expressed concern that the *Briginshaw* qualification meant that it was difficult for the Department to obtain a court finding that a child had been significantly harmed or was likely to be significantly harmed as a result of sexual abuse.[450]

8.247 Since 1 January 2010, section 140 of the *Evidence Act 2008* (Vic) governs the standard of proof in protection applications.[451] The section reads:

> *(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.*
>
> *(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—*
>
> *(a) the nature of the cause of action or defence; and*
>
> *(b) the nature of the subject-matter of the proceeding; and*
>
> *(c) the gravity of the matters alleged.*

8.248 This section clearly applies to findings of fact about past events. In considering whether any fact is established, the Court must make a determination having regard to the nature and subject matter of the application, as well as the gravity of the matters alleged. As allegations of sexual abuse and serious physical abuse are grave, the Court must take this into account before deciding on the balance of probabilities, and not to any higher standard, whether conduct of this nature has occurred.

8.249 It is unclear whether the Court will accept that section 140 of the *Evidence Act 2008* (Vic) governs its findings about whether a child is, in the future, 'likely' to suffer any of the particular harms described in section 162(1) of the CYF Act 2005.

8.250 When making a determination about whether it is 'likely' that a child will suffer significant harm in the future, the Children's Court has considered whether there is 'a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and the gravity of the feared harm in the particular case'.[452] In adopting this approach, the Court has drawn on the leading English child protection case on the topic—*Re H (Minors) (Sexual Abuse: Standard of Proof).*[453]

8.251 When dealing with 'likely' future harm, this second standard of proof probably adds unnecessary complexity to child protection cases. In NSW, this matter is dealt with by stipulating that findings of this nature, as with findings of past fact, must be made on the balance of probabilities.[454] The Commission proposes that the Victorian legislation should contain a similar provision in order to remove any doubt about the applicability of section 140 of the *Evidence Act 2008* (Vic) to the Court's findings about whether a child is, in the future, 'likely' to suffer any of the particular harms described in section 162(1) of the CYF Act 2005.

8.252 In Australian family law, when serious allegations such as sexual abuse against a child are raised, the Court is required to consider whether a parenting order would expose the child to an 'unacceptable risk' of abuse.[455] Family law courts make findings on the balance of probabilities about the existence or otherwise of any relevant fact, but may refrain from making a finding as to whether sexual abuse occurred. The ultimate finding is future-focused and encompasses consideration of the nature and degree of future risk.

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

443 These grounds are *Children, Youth and Families Act 2005* (Vic) s 162(1)(c), (d), (e), (f): ibid 18.

444 *Children, Youth and Families Act 2005* (Vic) s 215(1)(c).

445 See, for example, *DOHS v Mr K and Ms D* (Unreported, Children's Court of Victoria, Magistrate Power, 15 June 2009) 17–18; *DOHS v Mr and Mrs K* (Unreported, Children's Court of Victoria, Magistrate Power, 27 November 2009) 19–20; *DOHS v C* (Unreported, Children's Court of Victoria, Magistrate Power, 8 November 2006) 27.

446 (1938) 60 CLR 336.

447 (1938) 60 CLR 336, 362.

448 For a discussion of this misunderstanding in anti-discrimination law, see L De Plevitz, 'The Briginshaw "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27 *Melbourne University Law Review* 308, 332–3.

449 Magistrate Power attributes the comments by McHugh J to his exchange with the NSW Solicitor-General during argument in *Witham v Holloway* (1995) 183 CLR 525: *DOHS v Mr and Mrs K* (Unreported, Children's Court of Victoria, Magistrate Power, 27 November 2009) 20.

450 Consultation 4 (DHS Managers); submission 7 (Prof Cathy Humphreys).

451 Section 4(1) of the *Evidence Act 2008* (Vic) provides that the 'Act applies to all proceedings in a Victorian court'. 'Civil proceeding' is defined in the sch to mean 'a proceeding other than a criminal proceeding'.

452 See for example *DOHS v Mr K and Ms D* (Unreported, Children's Court of Victoria, Magistrate Power, 15 June 2009) 17–18.

453 [1996] AC 563.

454 Section 93(5) of the *Child and Young Persons (Care and Protection) Act 1998* (NSW) provides that when the Children's Court is required to be 'satisfied' of any particular matter, it must 'be satisfied on the balance of probabilities'. Section 71 provides that the Children's Court may make a care order when 'satisfied' that a child or young person is in need of care or protection for any of the reasons (or grounds) set out in that section.

455 The leading High Court case is *M v M* (1988) 166 CLR 69.

# Chapter 8 Option 2—A New System

## REVIEW OF CASE PLAN DECISIONS

8.253 Case plans are considered in Chapter 3. In brief, a case plan (often referred to as a 'statutory case plan' or 'statutory best interests plan') is a document prepared by Child Protection within six weeks of the Court making certain protection orders.[456] It contains all of the Secretary's significant decisions concerning the child that relate to the child's present and future wellbeing, including the placement of, and access to the child.[457] It could include a stability plan, or for an Aboriginal child, a cultural plan.[458] While the CYF Act 2005 directs that a case plan must be reviewed by the Secretary 'from time to time',[459] the Child Protection Practice Manual sets a specific standard that a case plan 'meeting must be held for the purpose of review … at least 6 weeks prior to the expiry of an order'.[460]

8.254 Copies of the plan must be provided to the child and parents within 14 days of preparation, together with a notice advising of procedures for an internal review.[461] Parents and children may seek an internal review of a case plan decision and, if unsatisfied with the result, they have a right of review by the Victorian Civil and Administrative Tribunal (VCAT).[462]

### Relationship between case plans and further protection applications

8.255 Although case plans are made at the conclusion of court proceedings, in practice there may be many secondary applications concerning a child. This means that a case is not always 'finalised' by an initial protection order that may last for periods of up to 12 or 24 months.[463] If ongoing Child Protection involvement is necessary, the Department must bring a further (secondary) application to court. In 2008–09 the Court heard over 7000 secondary applications.[464] During that year, 70 per cent of the Court's applications concerned cases that had previously been in the system.

8.256 It is helpful to consider a hypothetical case that illustrates the relationship between case plans and protection applications. A child may be initially placed on a custody to Secretary order for 12 months,[465] pursuant to which the child is placed in foster care or community care (residential units). A case plan is prepared within six weeks of the Court order. The case plan could contain goals for reunification of the child with his or her family and include access conditions and family assistance to attempt to achieve that goal. Alternatively, the case plan could set out goals for the child being placed in long-term out-of-home care.

8.257 If the latter goal is adopted, it will guide decisions relating to parental access (often reduced) and the type of assistance provided to parents. If parents or children who disagree with an out-of-home care goal are unsuccessful in seeking internal review of the case plan, they must lodge an application for review at VCAT. If they require legal assistance, they will need to argue for special consideration under legal aid guidelines, as VLA does not routinely fund VCAT reviews. In the meantime, a secondary application (for instance an application to extend the custody to Secretary order) could be brought back to the Children's Court within 12 months of making of the initial order.[466] The issues about whether a child should be returned home or remain in out-of-home care would be the same for both the review of the case plan and for the application for an extension of the custody to Secretary order.

### Overlap of case plan review issues and secondary application issues

8.258 The Commission heard concerns about how case plans (and, where a protection order had not yet been made, a best interests plan) may seek a particular goal or outcome that was at the heart of the matter in dispute between family members and Child Protection.[467]

8.259 The Victorian Bar submitted that a party's failure to review a case plan decision had a detrimental impact on their ability to challenge future applications brought by the Department. The Victorian Bar stated:

> *When an Application to Extend a Custody to the Secretary Order is lodged with the Children's Court and opposed by one or more parties, this opposition often stems from disagreements over Case planning decisions during the life of the previous order. When the effect of these decisions and motives for them is challenged in a contested hearing, DHS has asserted that the aggrieved party should have sought review of the decision via VCAT.*[468]

8.260 In consultations, child protection practitioners also acknowledged concerns about the current interaction of case plan decisions with subsequent protection applications in the Children's Court. One child protection practitioner spoke of her obligation to set goals for a child and prepare a case plan so that the child was not 'left in limbo'. Yet it was often only when an application was filed for an extension of a custody to Secretary order (or revocation of an order and application for a guardianship order) that parents would seek to challenge the case plan in the Children's Court.[469]

### Case plans for Aboriginal children

8.261 The Aboriginal Family Violence Prevention and Legal Service (FVPLS Victoria), the Victorian Aboriginal Child Care Agency Co-op (VACCA) and the Victorian Aboriginal Legal Service Cooperative (VALS) all expressed concerns about case plans and case plan reviews. In the Commission's consultation with FVPLS Victoria, a participant stated that if Aboriginal Family Decision Making (AFDM) was not included in a case plan 'we must then go to VCAT if we want to make an AFDM happen'. VACCA submitted that the role of ACSASS and interested Aboriginal agencies should be enhanced in case plan decisions 'to ensure that both the best interests of Aboriginal children and the principle of self-determination is being adhered to'.[470] VACCA proposed that the jurisdiction of the Children's Court should be expanded to enable it to conduct a full case plan review. In its submission, VALS stated 'that the current practice of case planning appeals being heard by and decided [by] VCAT is unsatisfactory'.[471]

### Access to justice

8.262 Many stakeholders discussed concerns that the review processes were not easily accessible to affected parents, children and carers. The Fitzroy Legal Service submitted:

> *Complaining to VCAT about case planning matters usually involves exhausting the Department's review processes. Lack of legal support or advice about how to do this and delays involved are a significant disincentive to parents who want reconsideration of a matter.*[472]

8.263 Some stakeholders expressed concern that VLA did not generally provide funding for review of case plan decisions. While funding may be granted for 'substantive disputes',[473] the Victorian Bar suggested that funding was not usually available. The Victorian Bar noted that '[n]ot being able to obtain legal representation is a severe impediment for many family members in accessing VCAT'.[474]

8.264 Some stakeholders also stated that it was difficult for people to navigate the processes and rules of two separate decision-making bodies. The Victorian Bar noted:

> *It is confusing to many people that these review functions are separated between distinct bodies … One specialist jurisdiction should be resourced to deal with both Protection Applications and merits review of administrative decisions made by DHS.*[475]

456 *Children, Youth and Families Act 2005* (Vic) s 167. The orders are: supervision order, supervised custody order, custody to the Secretary order, guardianship order, long-term guardianship order or therapeutic treatment (placement) order.

457 *Children, Youth and Families Act 2005* (Vic) s 166.

458 For circumstances in which stability plans and cultural plans apply, refer to Chapter 3.

459 *Children, Youth and Families Act 2005* (Vic) s 168.

460 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Concluding the Protection Order Phase', Advice No 1496 (23 April 2007), from CD-ROM provided at 23 March 2010.

461 *Children, Youth and Families Act 2005* (Vic) ss 167(2), 331.

462 *Children, Youth and Families Act 2005* (Vic) s 333.

463 For length of each order and extensions of orders see Chapter 3. Note that a long-term guardianship to Secretary order may be made for a child of or above the age of 12 years, to last until he or she is 18 years old.

464 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 3.

465 Children's Court of Victoria, *Annual Report 2008–2009* (2009) 19: in 2008–09, the Court made 1288 custody to Secretary orders.

466 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 3, 7: in 2008–09 the Children's Court heard 1669 applications for extension of custody to Secretary orders. As case plans are generally reviewed by a child protection practitioner six weeks prior to the expiry of an order, a party seeking to challenge a case plan decision made at this time has little time to do so before a secondary application is listed in the Children's Court.

467 Submission 28 (Anonymous).

468 Submission 48 (Victorian Bar).

469 Consultation 25 (DHS CP Workers East & Nth West).

470 Consultation 27 (FVPLS Victoria) submission 39 (VACCA).

471 Submission 38 (VALS).

472 Submission 36 (FLS).

473 Ros Porter, 'Current Lessons in Child Protection: The Experience in Victoria' (Paper presented at the NSW Legal Aid Commission Care and Protection Conference, NSW, April 2008) 23.

474 Submission 48 (Victorian Bar).

475 Ibid.

# Chapter 8 Option 2—A New System

8.265 The Federation of Community Legal Centres, Fitzroy Legal Service, VACCA, VALS, the Victorian Bar and Youthlaw all provided written submissions supporting the expansion of the Children's Court's jurisdiction to review case plan decisions. The 2004 report by Kirby, Ward and Freiberg included a recommendation to review VCAT's role in reviewing case planning decisions.[476]

### The Commission's views

8.266 In 2009, there were only 12 case plan reviews by VCAT. The Commission understands that the President of VCAT supports the Children's Court and VCAT having concurrent jurisdiction in relation to case plan reviews.[477]

8.267 The Commission considers that it would be highly desirable for the Children's Court to have concurrent jurisdiction in relation to hearing case plan reviews, for reasons of both efficiency and accessibility for participants. As explained above, there is often substantial overlap between the issues raised in a protection application and those that inform a case plan following a protection order. In such circumstances, it is inefficient and undesirable to force participants to apply to a separate decision-making body for case plan review from the body (the Children's Court) that made the initial protection order.

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

## INCREASING THE JURISDICTIONAL AGE LIMIT OF THE FAMILY DIVISION OF THE CHILDREN'S COURT

### CURRENT LAW

8.268 There is an anomaly in the Children's Court jurisdiction to make protection orders concerning older children that should be remedied. As discussed in Chapter 3, the Family Division of the Children's Court generally only has child protection jurisdiction of children under the age of 17, with the exception that it can make orders for a child on an existing protection order that may last until the child turns 18.[478] A person who has had his or her 17th birthday cannot be the subject of a new protection application.

8.269 The Court's Criminal Division has jurisdiction in relation to all persons who are between the ages of 10 and 18 at the time of committing the alleged offence, and are under 19 at the time the criminal proceedings commence.[479]

8.270 When the Family Division is exercising its powers to make, vary, revoke or extend intervention orders under the *Family Violence Prevention Act 2008* (Vic) (FVP Act) and *Stalking Intervention Orders Act 2008* (Vic) (SIO Act), the 'child' is defined as a person who is under the age of 18 at the time the application for the intervention order is made.[480]

### HISTORICAL BACKGROUND

8.271 It appears that this discrepancy exists because of historical accident rather than well-considered policy making. As discussed in Chapter 2, when children's courts were first created in Victoria in 1906, the Court was given exclusive jurisdiction in relation to both criminal and child protection matters concerning children under the age of 17 years.[481]

8.272 In 1984, the Carney Committee recommended increasing the maximum age for a child falling under the jurisdiction of the Court's Criminal Division to 18 years in order to rationalise the various age requirements in Victorian legislation and to reflect society's thinking about the definition of adulthood.[482] The Carney Committee also believed that the age jurisdiction of the Family Division should extend to children up to 18 years old.[483]

8.273 It was not until 2004 that the age limit for the jurisdiction of the Court's Criminal Division was raised to 18 years.[484] No reason was given for why the Family Division's child protection jurisdictional age limit was not also increased at this time.[485]

## PREVIOUS RECOMMENDATIONS AND OTHER AUSTRALIAN JURISDICTIONS

8.274 Two previous major reviews of Australian laws relating to children have recommended that children's courts should have child protection jurisdiction for children up to 18 years old.

8.275 In its 1981 *Child Welfare* report, the ALRC concluded that the upper limit of the ACT Children's Court jurisdiction should remain at 18 years of age, commenting that

> *the age of eighteen has a particular significance. In our society it seems to be the age which is most closely associated with 'adulthood'. Many of the school pupils to whom members of the Commission spoke regarded the attainment of the age of 18 as marking a significant change of status.*[486]

8.276 The ALRC also noted that 18 is the age of majority for many legal purposes, the voting age, and the age at which a person can no longer be the subject of a guardianship, custody or access order under the FLA 1975.[487]

8.277 In their 1997 report, the ALRC and the Human Rights and Equal Opportunity Commission[488] noted that the definition of 'child' in legislation in certain jurisdictions precluded courts making care and protection orders in relation to young people aged 16 or 17, 'even where there may be evidence of abuse or neglect'.[489] The Commissions stated that '[f]amily services departments should be able to respond to the needs of all children and young people who require care and protection'.[490] The Commissions recommended that care and protection legislation in all Australian jurisdictions should define a child as a person under the age of 18.[491]

8.278 Victoria is now the only Australian jurisdiction to exclude 17-year-olds (not already on a child protection order) from its child protection system. In every other state and territory, the child protection jurisdiction of the relevant court extends to people under 18 years old.[492]

## THE NEED TO COVER THE GAP BETWEEN CHILD PROTECTION AND GUARDIANSHIP

8.279 An important reason for increasing the upper age limit of the Family Division's child protection jurisdiction is the gap between the CYF Act 2005 and the *Guardianship and Administration Act 1986* (Vic). Under the *Guardianship and Administration Act 1986* (Vic), a guardian can only be appointed for a person with a disability who has reached 18 years of age.[493]

8.280 Under current Victorian law, a 17-year-old who has a disability and whose parents are unable to adequately care for him or her does not come within either the child protection jurisdiction or the guardianship jurisdiction. The state offers 17-year-olds no formal protection other than through the Supreme Court's *parens patriae* jurisdiction.

476 Freiberg, Kirby and Ward, above n 121, 36.

477 Email from Justice Ross, President of VCAT, 31 May 2010.

478 See sub–s (b) of the definition of 'child' in s 3 of the *Children, Youth and Families Act 2005* (Vic).

479 See sub–s (a) of the definition of 'child' in s 3 of the *Children, Youth and Families Act 2005* (Vic).

480 See sub–ss (aa), (ab) of the definition of 'child' in s 3 of the *Children, Youth and Families Act 2005* (Vic); *Family Violence Protection Act 2008* (Vic) ss 4,146,147; *Stalking Intervention Orders Act 2008* (Vic) s 6.

481 *Children's Court Act 1906* (Vic) s 12.

482 Child Welfare Practice and Legislation Review, above n 20, vol 2, 409–13. See Chapter 2 and Appendix D for further discussion of the Carney Committee's report.

483 See the definition of 'child' in s 3 of the draft Bill proposed by the Carney Committee: Child Welfare Practice and Legislation Review, above n 20, vol 1.

484 *Children and Young Persons (Age Jurisdiction) Act 2004* (Vic).

485 This remained the same as originally introduced in 1906.

486 (Australian) Law Reform Commission, *Child Welfare*, above n 82, 35.

487 Ibid.

488 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122.

489 Ibid 461.

490 Ibid.

491 The Commissions stated 'a court should be able to make orders for a young person aged 16 to 18 if it finds, after taking into consideration the wishes of the young person, that the young person is in need of care and protection': ibid 463.

492 *Children and Young People Act 2008* (ACT) s 12; *Legislation Act 2001* (ACT) dictionary pt 1; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3; *Care and Protection of Children Act 2007* (NT) s 13; *Child Protection Act 1999* (Qld) s 8; *Children's Protection Act 1993* (SA) s 6; *Children, Young Persons and Their Families Act 1997* (Tas) s 3; *Children and Community Services Act 2004* (WA) s 3.

493 *Guardianship and Administration Act 1986* (Vic) s 19(1).

# Chapter 8 Option 2—A New System

## INTERNATIONAL OBLIGATIONS

8.281 It is important to consider whether the age limit on the Family Division's child protection jurisdiction is compatible with Australia's obligations under CROC.[494] Article 19 of CROC requires states parties to implement statutory systems to protect children from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (including sexual abuse) while in the care of parents or legal guardians.[495]

8.282 Article 1 of CROC states that the term 'child' in the Convention means a person under the age of 18, with one limited exception that is not applicable to Australia.[496] The absence of child protection jurisdiction in the Children's Court in relation to 17-year-olds therefore may not be consistent with the state's obligation in article 19 to take all appropriate legislative measures to protect persons under the age of 18.

8.283 The Commission considers that the age jurisdiction of the Family Division of the Children's Court should be increased to include children under 18 years old to ensure that 17-year-olds who are in need of protection (and cannot be allocated a guardian) can be brought within the Court's protective jurisdiction. This reform would bring Victoria's child protection system in line with all other Australian jurisdictions, and be consistent with international obligations under CROC.

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

## CROSS-JURISDICTIONAL ISSUES

### JURISDICTIONAL OVERLAP BETWEEN FAMILY LAW AND CHILD PROTECTION

8.284 Many jurisdictional difficulties arise because state law, and state courts, deal with child protection matters, while federal courts deal with private disputes concerning children that fall under the FLA 1975. These difficulties spring from the distribution of law-making powers between the parties to the Australian federation.

8.285 Difficulties about overlapping jurisdiction may arise when child abuse allegations are made in the course of family law proceedings in the Family Court, and when a child protection application is brought in the Children's Court in relation to the same child.[497] Jurisdictional overlap can also occur in cases where there is no issue of child abuse. Arguments about whether a child should live and have contact with a particular person may arise in the context of a dispute between the state and the child's parents in a child protection proceeding in the Children's Court, or as part of a dispute between the parents in family law proceedings in the Family Court.[498]

8.286 In the Commission's consultation with the Children's Court, one member of the Court commented that very often child protection proceedings occurred in the context of family law disputes, and that the Children's Court and the Family Court were dealing with the same families, and yet the Children's Court has no power to make family law orders.[499]

8.287 In its submission, Family Relationship Services Australia also expressed concerns about the 'disconnection' between the legal systems for child protection and family law. It suggested that one way of ensuring that fewer children were 'caught between two systems' would be to grant the Family Court the jurisdiction to make child protection orders, and to give the Children's Court the jurisdiction to make parenting orders.[500]

8.288 The fragmentation of jurisdiction in relation to children between state and federal courts has been 'a source of difficulty at least since the Family Law Act came into effect in 1976'.[501] For example, it became apparent soon after the FLA 1975 commenced operations that there was a gap in the Family Court's jurisdiction because it could not make orders in relation to children of unmarried parents, referred to as 'ex-nuptial' children. In the 1980s, the states (except Western Australia) transferred power to the Commonwealth so that it could legislate to enable the Family Court to make custody, guardianship and access orders in relation to ex-nuptial children.[502]

8.289 In 1997, the ALRC and the Human Rights and Equal Opportunity Commission noted the 'jurisdictional confusion' that exists due to both the Commonwealth and the states and territories having jurisdiction in relation to children, in different (but often related) contexts.[503] The Commissions noted:

> *The lack of co-ordination between the family law and care and protection jurisdictions and between the care and protection systems of each State and Territory was raised as a source of serious concern during the Inquiry. There was wide agreement that the current jurisdictional arrangements fail to serve the interests of many children in the family law and care and protection systems and may add to their disadvantage and distress.*[504]

8.290 The Commissions identified a number of issues that arose out of the jurisdictional division between the Family Court and the state and territory children's courts, including:

- the consequences of making an inappropriate choice of forum
- tandem or serial proceedings in relation to the same matter
- low priority given by child protection departments to Family Court notifications of suspected abuse or risk of abuse.[505]

### Options for addressing the family law/child protection overlap—the 'one court principle'

8.291 As part of their current inquiry into family violence laws (discussed in Chapter 1), the ALRC and the NSW Law Reform Commission (NSWLRC) are examining the intersection between family violence laws, family law, and child protection laws in Australia.[506]

8.292 In their consultation paper, the ALRC and NSWLRC state that their preliminary view is that: 'wherever possible, matters involving children should be dealt with in one court—or as seamlessly as the legal and support frameworks can achieve in any given case'.[507] The Commissions adopt the 'one court principle' recommended by the Family Law Council in its 2002 report, *Family Law and Child Protection*.[508] However, the Commissions acknowledge[509] the challenge presented by the fact that it is not constitutionally possible for a state law to vest jurisdiction in a federal court.[510]

8.293 The ALRC and NSWLRC outline options for enabling child protection and family law matters to be dealt with in the same court. The options can be summarised as:

- vesting family law jurisdiction in state courts
- transferring ('referring') state powers in relation to child protection to the Commonwealth
- creating state family courts with both federal family law and state child protection jurisdiction
- amending state child protection legislation to enable children's courts to make an order granting residence to one parent and prohibiting contact between the child and the other parent.

494 The incompatibility with CROC of having an under 17 jurisdictional limit for the Criminal Division was one of the reasons given for increasing the upper age limit of the Criminal Division's jurisdiction in 2004: see Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 2004, 566 (Robert Hulls, Attorney-General).

495 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 19 (entered into force 2 September 1990).

496 Ibid art 1. The limited exception applies if the law of the state party provides that the age of majority is younger that 18, but, as the ALRC noted in the *Child Welfare* report discussed above, in Australia the age of majority is 18: (Australian) Law Reform Commission, *Child Welfare*, above n 82.

497 Family Law Council, *Family Law and Child Protection: Final Report* (2002) 86.

498 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks,* ALRC Consultation Paper No 1 (2010) 577.

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

500 Submission 35 (FRSA).

501 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 357.

502 Ibid 358.

503 Ibid 355.

504 Ibid 356.

505 Ibid 359–63.

506 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498.

507 Ibid 654.

508 Ibid 86–91.

509 Ibid 652.

510 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. See further Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498, 105.

# Chapter 8 Option 2—A New System

### Vesting family law jurisdiction in state and territory children's courts

8.294 Because the High Court has determined that the Constitution does not permit state jurisdiction to be vested in federal courts,[511] the child protection jurisdiction of the states cannot be exercised by the Family Court of Australia or the Federal Magistrates Court.

8.295 It is constitutionally possible for the Commonwealth to vest family law jurisdiction in state courts and this happens to some extent. The courts in each state and territory that are 'courts of summary jurisdiction' are able to exercise federal family law jurisdiction under Part VII of the FLA 1975.[512] These courts, however, cannot hear contested proceedings for a parenting order under the FLA 1975 unless all the parties consent.[513]

#### Problems with this option

8.296 It appears that state and territory general magistrates exercise this FLA jurisdiction, but children's court magistrates do not.[514] This limitation appears to be a consequence of there being doubt about whether those children's courts that are independent of magistrates' courts, especially those comprised of both magistrates and a higher court judge (as in Victoria, NSW and South Australia), are 'courts of summary jurisdiction'.[515]

8.297 There are two ways for the Commonwealth Government to ensure that children's courts can exercise family law jurisdiction under Part VII of the FLA 1975:

- it could amend section 69J of the FLA 1975 to expressly make reference to children's courts[516]
- it could declare the relevant children's courts in each state or territory to be courts of summary jurisdiction under the *Judiciary Act 1903* (Cth).[517]

8.298 Even if either of these actions were taken to remove doubt that the Children's Court in Victoria could exercise federal family law jurisdiction under section 69J of the FLA 1975, this jurisdiction would remain conditional on the parties to a child protection proceeding agreeing to the Court exercising its power to make parenting orders. Accordingly, to effectively enable children's courts to exercise federal family law jurisdiction under Part VII of the FLA 1975 in child protection proceedings, an additional amendment would be required to the FLA 1975 to remove the requirement for consent from all the parties.[518]

### Referral of powers in relation to child protection to the Commonwealth

8.299 Another way in which one court could exercise federal family law and state child protection jurisdiction would be for the states to refer their powers to make laws in relation to child protection to the Commonwealth.[519] This approach would require political support in all jurisdictions, and it would be practically difficult to refer only enough legislative power to enable the Commonwealth to give federal courts concurrent jurisdiction in relation to child protection, without creating inconsistent state and federal laws.[520]

### Creation of state family courts with both federal family law and state child protection jurisdiction

8.300 Jurisdiction under Part VII of the FLA 1975 can also be vested in state family courts.[521] The only state to have utilised this provision is Western Australia, which has created the Family Court of Western Australia, a state court that exercises both federal family law jurisdiction and state jurisdiction.

8.301 The Family Court of Western Australia is able to exercise child protection jurisdiction in limited circumstances. Under the *Family Court Act 1997* (WA), the Family Court of Western Australia can only exercise the powers of the Children's Court if a child who is the subject of family law proceedings appears also to be a child in need of protection within the meaning of the *Children and Community Services Act 2004* (WA).[522] The practice in Western Australia therefore remains that child protection proceedings are generally commenced in the Children's Court.

### Amendment of state child protection laws to enable children's courts to make orders granting residence to one parent and exclude contact with the other

8.302 In its 2002 report about the interaction between state and federal systems when child protection issues arise in cases under the FLA 1975, the Family Law Council of Australia made a number of recommendations to reduce problems associated with this overlap.[523] One recommendation was that in child protection proceedings, state and territory children's courts should be given the power to make long-term orders granting residence to one parent and prohibiting contact between the child and the other (often abusive) parent.[524] The Council suggested that this would remove the need to make a separate application for such an order in the Family Court when a protection application was on foot.[525]

8.303 The Council noted that granting this power to state and territory children's courts would be consistent with the principle underpinning most child protection legislation that the courts should take the least intrusive form of intervention necessary to ensure the child's safety. A children's court should have this power in situations where this objective can be achieved by an order denying contact with one parent and a residence order in favour of the other when the parents have separated.[526]

8.304 The Council stated:

> *The removal of parental responsibility from both should only be justified where neither parent is adequate to care for the child and to protect him or her from harm. The inability under some State and Territory laws to make such orders results in over-intrusive interventions.*[527]

8.305 The Council noted that one jurisdiction in which the children's court did have such a power was NSW. Section 79 of the *Child and Young Persons (Care and Protection Act) 1998* (NSW) (the NSW Act) provides that

> *If the Children's Court finds that a child or young person is in need of care and protection, it may:*
>
> *(a) make an order allocating the parental responsibility for the child or young person, or specific aspects of parental responsibility:*
>
> *(i) to one parent to the exclusion of the other parent.*

8.306 Subsection 79(2) makes clear that an aspect of parental responsibility that can be allocated pursuant to subsection (1) is the residence of the child. An order under section 79(1) could be combined with an order denying contact to the abusing parent under section 86(1)(c) of the NSW Act.

8.307 The Council noted two possible objections to granting state and territory children's courts the power to make residence and contact orders to a parent:

- it could clog up those courts with applications for variation and enforcement of those orders
- it could 'tie up State court resources on what are essentially private law matters'.[528]

511 Ibid.

512 *Family Law Act 1975* (Cth) s 69J. Part VII of the FLA deals with matters involving children.

513 *Family Law Act 1975* (Cth) s 69N.

514 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498, 652.

515 See Family Law Council, above n 497, 82.The Commission questions whether these doubts are properly held because it is strongly arguable that children's courts, whether led by a judicial officer from a higher court or not, are state courts of summary jurisdiction. The argument that the Children's Court of Victoria is not a state 'court of summary jurisdiction' for the purposes of section 69J of the *Family Law Act 1975* (Cth) appears to rely upon an unnecessarily narrow interpretation of that section read in conjunction with s 26 of the *Acts Interpretation Act 1901* (Cth).

516 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 372.

517 Ibid 375.

518 This was recommended by Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 372 and Family Law Council, above n 497, 81–2.

519 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard*, above n 122, 372.

520 Ibid 373–4.

521 *Family Law Act 1975* (Cth) s 69H(2).

522 *Family Court Act 1997* (WA) s 36(6). The Commission understands that the Attorney-General of Western Australia has recently requested that a Reference Committee be set up by 1 July 2010 to examine the advantages and disadvantages of child protection matters being heard exclusively in the Family Court of Western Australia.

523 Family Law Council, above n 497.

524 Ibid 86.

525 Ibid 82–4.

526 Ibid 84.

527 Ibid 84–5.

528 Ibid.

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8.308 In response to the first objection, the Council proposed that applications for variations and enforcement of orders made under a child protection Act could be dealt with by the Family Court 'if there is a need to resolve what is essentially a private dispute between the parents without raising the same child protection concerns which led to the initial proceedings'.[529] This could be achieved by the state or territory child protection authority consenting[530] to proceedings being brought in the Family Court under the FLA 1975 'if issues arose between the parties which did not involve significant child protection concerns'.[531]

8.309 The Council rejected the suggestion that enabling children's courts to make orders granting residence to one parent to the exclusion of the other would tie up state courts' resources with private family law matters. It emphasised that the courts would only be given the power to make such orders in child protection proceedings initiated by child protection authorities.[532] The Council stated that

> *There is no danger then, of State courts being caught up in private residence and contact disputes because the initiation of such proceedings would be entirely a matter for the child protection authority, and their continuance is usually also a matter for that authority. The making of an order concerned with residence and contact could only occur, under Council's proposals, as a disposition available to the Court if grounds for a care order have been proven.*[533]

8.310 The Council concluded:

> *The enactment of provisions allowing for the making of residence and contact orders as an outcome of a child protection proceeding has the great advantage of allowing maximum flexibility within the present state-federal arrangements to deal with all substantive matters through proceedings in one court. In this way, the most appropriate orders could be made depending on the circumstances of the case without the need to initiate proceedings in another court to ensure the child's best interests are addressed. Such movements between courts are contrary to the child's best interests, administratively cumbersome, and costly.*[534]

## The Commission's views

8.311 The Commission, like the ALRC and NSWLRC, supports the Family Law Council's recommendation of the 'one court principle'. The Commission encourages the ALRC and NSWLRC to consider recommendations that would enable child protection and family law matters to be dealt with by the one court. It is beyond the scope of the Commission's reference to comment on which of the options for realising this objective should be pursued.

8.312 The Commission believes that granting the Children's Court the power to make long-term orders granting custody and guardianship to one parent to the exclusion of the other, as is the case in NSW, is one step that the government should take towards the 'one court principle'.

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

## JURISDICTION TO MAKE FAMILY VIOLENCE ORDERS UNDER THE *FAMILY VIOLENCE PROTECTION ACT 2008* (VIC)

### Current jurisdiction of the Children's Court

8.313 As discussed in Chapter 1, there is a strong connection between family violence and child protection.[535] This point was made during consultations and in the submissions received by the Commission.[536]

8.314 The Family Division of the Children's Court of Victoria has jurisdiction to make, vary, revoke or extend intervention orders under the *Family Violence Prevention Act 2008* (Vic) (FVP Act) and *Stalking Intervention Orders Act 2008* (Vic) (SIO Act), if either the affected family member (or for the SIO, 'affected person'), protected person, or respondent is under the age of 18 (a 'child') at the time the order was made.[537]

8.315 Under the FVP Act, the Children's Court can also hear and determine an application for a family violence order, which does not involve a child as the affected family member, protected person or respondent, providing that the application is made on the grounds of the same or similar circumstances as an application made to the Court involving a child.[538] The application for a child's protection can be included on the application for protection of his or her parent, rather than in two separate applications.[539]

8.316 In practice, this means that the Children's Court has the jurisdiction to hear an application for a family violence order that either includes a child on the application, or is related to an application that includes a child. This is consistent with the Commission's recommendation in its *Review of Family Violence Laws Report*.[540] It is also important to note that an application for a family violence order to protect a child can be made on the basis that the respondent has caused the child to hear or witness, or otherwise be exposed to, the effects of family violence, as this in itself constitutes family violence as defined in the FVP Act.[541]

8.317 If the Children's Court makes a family violence order under the FVP Act, there may be an issue if there is a previous family law order made under the FLA 1975 that is inconsistent with the family violence order. This would be the case, for example, if the previous family law order provided that the child was to have contact with the person against whom a family violence order in favour of the child is subsequently made. The usual position would be that the family law order, made pursuant to a law of the Commonwealth, would prevail over the order made pursuant to a state child protection law to the extent of any inconsistency.[542]

8.318 The FLA 1975 seeks to avoid this outcome by providing that state and territory courts making family violence orders have the power to 'revive, vary, discharge or suspend' a parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child.[543] In this way, the state court can remove any inconsistency between the family violence and family law orders. In fact, the FVP Act requires a court making a family violence order to use the power in this section to remove any inconsistency in a prior family law order.[544]

8.319 This can only be used, however, by those state and territory courts that have jurisdiction under Part VII of the FLA 1975.[545] If, for the purposes of the FLA 1975, the Children's Court is not 'a court of summary jurisdiction', family law orders will prevail over family violence laws made by the Children's Court.

529 Ibid.

530 In accordance with s 69ZK(1) of the *Family Law Act 1975* (Cth).

531 Family Law Council, above n 497, 85.

532 Ibid.

533 Ibid 85–6.

534 Ibid 86.

535 Freiberg, Kirby and Ward, above n 121, 35.

536 Consultations 15 (Koori Justice Unit), 27 (FVPLS Victoria); submissions 26 (FVPLS Victoria), 46 (Children's Court of Victoria) 95.

537 *Children, Youth and Families Act 2005* (Vic) s 515(2); *Family Violence Protection Act 2008* (Vic) pt 6; *Stalking Intervention Orders Act 2008* (Vic) s 6.

538 *Family Violence Protection Act 2008* (Vic) s 147.

539 This is permissible under s 47 of the *Family Violence Protection Act 2008* (Vic).

540 Victorian Law Reform Commission, *Review of Family Violence Laws Report*, Report No 10 (2006) 258–60.

541 *Family Violence Protection Act 2008* (Vic) s 5(1)(b).

542 *Australian Constitution* s 109.

543 *Family Law Act 1975* (Cth) s 68R.

544 *Family Violence Protection Act 2008* (Vic) s 90.

545 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498, 385.

# Chapter 8 Option 2—A New System

### Option for an integrated approach to child protection and family violence

8.320 The ALRC and NSWLRC discuss the protection afforded to children by family violence legislation, in the context of the orders that state and territory children's courts are able to make in child protection proceedings. They note that under the *Domestic Violence and Protection Orders Act 2008* (ACT) in the ACT, the Children's Court can make both final and interim intervention orders if an application for a care and protection order has been made but not yet finally determined.[546] If satisfied that the grounds for making the order under family violence legislation are made out, the Court can make such orders either on the application of a party or on its own motion.[547]

8.321 The ALRC and NSWLRC express the view that

> *Allowing a children's court to make a protection order in favour of that child, when the child or young person is already subject to care proceedings before the court, and final care orders are pending, gives the court another tool to protect children from harm. It is also consistent with the broad goal of this Inquiry of providing a more seamless system for victims of family violence, including children.*[548]

8.322 As noted above, the Children's Court currently has jurisdiction to make a family violence order if the child is the person in need of protection from a family member. However, it does not have jurisdiction to hear and determine an application for a family violence order if the child is not listed on the application.

8.323 The Commission believes that the child protection and family violence jurisdictions should be streamlined as much as possible.[549] If during child protection proceedings the Children's Court considers that a family violence order, rather than a protection order, is the more appropriate response to concerns for the child's welfare, then the Court should have the power to make a family violence order.

8.324 The Commission believes that the Children's Court should have the power to hear and determine an application for a family violence order, even if a child is not included on the application,[550] if making the order would protect a child who is the subject of protection proceedings under the CYF Act 2005. This would require an extension of the jurisdiction currently afforded to the Court under section 146 of the FVP Act.

8.325 If the Children's Court's jurisdiction under the FVP Act is extended to enable it to hear applications for family violence orders that do not include a child, the power in section 77 of the FVP Act should also be available to the Children's Court. Currently under that section, the Magistrates' Court, when considering an application for a family violence order that does not include a child, must consider whether there are any children of the affected family member or respondent who have been subjected to family violence by the respondent.[551] If the Court is satisfied on the balance of probabilities that the child of the affected family member or respondent satisfies the test for the making of a family violence order, the Court may, on its own initiative, include the child on the order protecting the affected family member, or make a separate final order for the child as the protected person.[552]

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

## BUILT ENVIRONMENT OF THE CHILDREN'S COURT

### INTRODUCTION

8.326 In Chapter 6, the Commission proposed that new procedures specially designed for use in child protection matters should only foster supported child-centred agreement-making processes and rely upon adjudication by inquisitorial means when proceeding by way of supported agreement is unachievable or inappropriate in the circumstances. If this proposal is adopted, it should be supported by changes to the built environment of the Children's Court, which currently emphasises the Court's adjudicatory role.

8.327 The issue of the current court space and environment was repeatedly raised in consultations with and submissions to the Commission. The recent Taskforce report also examined the Court's physical environment. The Taskforce noted the issue of overcrowding, particularly of the Melbourne Court. One strategy suggested by the Taskforce, and supported by the Commission, is to minimise the need for children to attend court unless they wish to do so.[553]

8.328 Concerns about the physical environment and facilities of the Children's Court are not new. Twenty-six years ago, the Carney Committee wrote:

> *There is no doubt that any building serving as a Children's Court should have, as a minimum, suitable waiting facilities, private interview rooms for young people and families to talk to their advisors, and a court layout and furniture which is compatible with the participation of all parties. Court layout should allow children to sit with parents/guardians or other support persons if they choose.*[554]

8.329 The academic literature in the field of court architecture, environment and behaviour relations, organisational behaviour and development indicates both the complexity and the importance of the built environment.[555] Over the years, there have been many attempts to improve the situation for the Children's Court, with the most significant being the commissioning of a purpose-built court building in Little Lonsdale Street, Melbourne, which was completed in 2000.

### METROPOLITAN CHILDREN'S COURT BUILDINGS

8.330 There are two metropolitan locations for hearing Children's Court matters. The main court in Little Lonsdale Street, Melbourne, houses nine courtrooms: five in the Family Division, three in the Criminal Division and one that may be locked off from either Division depending on whether the case being heard is a Family Division or criminal matter.[556] In addition, the Little Lonsdale Street building has spaces downstairs to accommodate dispute resolution conferences. The Court Clinic is also located at this venue, with a separate entrance to the side of the court.

8.331 The second court is located within the Moorabbin Justice Centre (MJC) complex, which houses the Melbourne Magistrates' Court, both Criminal and Family Divisions of the Children's Court, and VCAT hearings. The complex was not purpose-built for the Children's Court. In response to pressures on the Little Lonsdale Street courthouse, on 1 June 2009, a Children's Court (Family Division) was opened in Moorabbin. This move to the MJC complex involved some changes and refitting to allow for security screening equipment and increasing the height of the bench in one court room.[557] Other small modifications to the waiting areas were required to make it more suitable for young children.[558]

8.332 MJC now houses two courtrooms for Children's Court matters and a separate space for convening DRCs. The Criminal Division is accommodated in the section of the complex alongside the adult courts.[559]

546 *Children and Young People Act 2008* (ACT) ss 459–60.

547 *Children and Young People Act 2008* (ACT) ss 459–60.

548 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence*, above n 498, 634.

549 This is reflected, for example, in the proposed requirement that a protective worker consider whether a safety notice or family violence order would be an adequate and appropriate alternative to removing the child from the home: see the discussion in the first section of this chapter.

550 Including if there is no related application—within the meaning of s 147 of the *Family Violence Protection Act 2008* (Vic)—concerning a child.

551 *Family Violence Protection Act 2008* (Vic) s 77(1).

552 *Family Violence Protection Act 2008* (Vic) s 77(2).

553 Child Protection Proceedings Taskforce, above n 1, 27.

554 Child Welfare Practice and Legislation Review, above n 20, vol 2, 240; see also 405–6.

555 The Commission would like to thank Emeritus Professor Graham Brawn, of the University of Melbourne and Professor David Tait of the University of Western Sydney, who assisted the Commission in highlighting areas for consideration when considering principles of court architecture and design.

556 The Court advises that if there are at least eight magistrates available then Family Division cases can be listed on the criminal division side. This occurs on average one day per week: Email from Janet Matthew, Court Liaison Officer, Children's Court of Victoria, 28 May 2010. Court 7, in the Criminal Division, has been used on one day per fortnight for sittings of the Children's Koori Court. Court 7 is also used for judicial resolution conferences in Family Division cases.

557 This was because one of the original courtrooms now utilised for family matters was originally intended as a VCAT hearing room which traditionally has a lower bench.

558 This included the removal of a metal sculptural detail from the far corner of the (now) Family Division to ensure that young children do not fall or hurt themselves. There is no play area at Moorabbin court.

559 It is the Commission's understanding, however, that this court only operates when the adults courts are not sitting.

8.333 Cases from the Department's Southern Metropolitan region are now listed at Moorabbin, which is closer to the DHS regional offices of Cheltenham, Dandenong and Frankston. There is, however, a need to continue to list some Southern Region cases at Little Lonsdale Street due to security arrangements, such as where a party is in custody or in secure welfare, and also cases for final contest.[560]

### Little Lonsdale Street—Courthouse

8.334 The Little Lonsdale Street court was a purpose-built Children's Court finalised in 2000. The new court building and facilities were widely acknowledged as being a vast improvement on the previous facilities in the non-purpose built building in Queensbridge Street, South Melbourne.

8.335 The architects Bates Smart won a number of awards[561] for the building, which uses natural light within the design as well as housing all the functions of the Court within one building and allowing for secure outdoor spaces. Bates Smart commented that '[t]he building design derives from humane modernist principles and utilises glass, steel, concrete and timber as the primary building materials'.[562]

8.336 The project included the following design elements:

- a concentration on the use of natural light aimed at de-institutionalising the feel of the Court
- a desire to make courtrooms less formal and more innovative, including having external-facing windows with the use of screening and planting
- separate, but equal, accommodation for criminal and family divisions and a desire to maximise back office functions between these divisions
- a focus on security considerations, with the design enabling judicial officers to be separated from public spaces—resulting in a series of internal walkways and the retention of a bench within courtrooms
- the commissioning of artworks for public areas, such as the wall panels by artist Bruno Leti and timber sculptures by Bruce Armstrong.[563]

8.337 Although aesthetically pleasing, the Little Lonsdale Street building does not currently serve its occupants well. Changing practice and procedure in child protection has meant that the way in which the building is utilised has changed. The increase in emergency applications by safe custody and the growth in the number of secondary applications have meant that children and their families, carers, workers and lawyers spend increasingly long times in a space that is inadequate for their needs. The intermediary spaces are too small, particularly as many of the exchanges between child protection workers and lawyers occur in the corridors. As the Children's Court put it, 'there are now too many people in too small a space and this creates tension, antagonism and frustration'.[564]

8.338 Increases in judicial and administrative personnel have also placed strains on the Court's Little Lonsdale Street facilities. The Commission understands that the registry space has been refitted a number of times to accommodate growing staff numbers and workload. While the Commission is aware of some innovative ways in which the building has been made more child-friendly and welcoming, such as rolling exhibitions of artwork by children[565] and greater use of the Koori Court for JRCs where appropriate, it is widely acknowledged that the court 'is not a good place for a child'.[566]

8.339 Criticisms include a lack of private, secure spaces to talk with families, lack of appropriate childcare facilities, inadequate places to purchase food or drink,[567] lack of personal security throughout and fear of incidents occurring due to narrow spaces and overcrowding. In its submission, the Children's Court noted:

> *There is an urgent need for childcare facilities at the Melbourne court and [the Court] has long argued this position. On any given day there are many children and families in the waiting areas of the Family Division. These areas are not child or family friendly.*[568]

8.340 The issue of physical space was revisited in the preparatory work for the 2010 Taskforce, with the report recommending 'the feasibility of structural works at the Melbourne Children's Court to make better use of space'.[569] The Taskforce noted:

> *Child protection is emotionally demanding and the overcrowding contributes to the distress, anxiety and agitation of those who are not at court. Put simply, there are too many people in too small a space. It is not a good place for a child.*[570]

### Views from consultations and submissions

8.341 Children and young people had revealing views on the way the Court looked, such as that it 'was a really big building that had metal detectors at the front and it was really intimidating',[571] and that 'it had 'high ceilings, grey carpet on the floor and was scary'. A number of young people noted the metal detectors and the feeling of being at the airport or on a TV show. Carers who have attended Court also commented on the lack of facilities for young people.[572]

8.342 A number of people raised the issue of security. Carers noted that in areas like bathrooms and waiting areas around the reconfigured court space (particularly outside court six) security could be a concern.[573] Others raised the recent incidents involving use of capsicum spray as reasons why children either should not attend court or should have properly arranged care.[574] Some young people commented on the layout of the courtrooms, especially about the magistrate being up high, using words such as 'looking down at me', 'intimidating', 'scary' and that they were in 'big trouble'.[575]

8.343 The Commission heard that the current space was inadequate for the Court's needs.[576] Many respondents commented on the inadequacy of the children's play area[577] and lack of childcare facilities.[578] Carers and workers noted the state of bathrooms, with references to graffiti and rubbish.[579] Concern was expressed about the lack of refreshment facilities (only vending machines), which meant that leaving the court to find a café could mean missing your name being called over the public announcement system.

8.344 Foster and kinship carers commented both on the lack of signage, and on signs that direct you to people who 'won't speak to you'.[580] The carers provided photographic examples of signage they considered unclear or inadequate for helping them negotiate the court environment.[581] This included signs, some with handwritten additions, stating 'Don't Knock', and 'We Are Not Legal Aid, No Entry'.[582]

8.345 Some people referred to the intrusive sound of the public announcement system. Foster and kinship carers noted that they found being called over a loudspeaker 'intimidating'.[583] Others commented on the level of noise and 'chaos' at the Court.[584]

560 Child Protection Proceedings Taskforce, above n 1, 28.

561 Property Council of Australia (Vic) Category Winner, Public Buildings 2001 and RAIA (Vic) Chapter Award for New Institutional Buildings, Award of Merit.

562 Bates Smart, *Children's Court Project Sheet* <www.batessmart.com.au/projects/community-culture/childrens-court-of-victoria-melbourne> at 7 May 2010.

563 Telephone discussion with Andrew Raftopoulos, Associate Director, Bates Smart, 20 May 2010. Mr Raftopoulos was project architect at time of designing and building the Children's Court, 1998–2000.

564 Submission 46 (Children's Court of Victoria) 30.

565 'Boorai—The Children's Art Gallery' was established by the University of Melbourne's Early Learning Centre to present exhibitions that stimulate and challenge audiences to recognise and value the personal, social and cultural comments expressed by young children through the arts and language. Boorai develops and presents exhibitions for local and international audiences and has partnerships with a number of public and private organisations. It provides a variety of services including Boorai: University of Melbourne, *Boorai—The Children's Art Gallery: About the Gallery* (2009) <www.edfac.unimelb.edu.au/eldi/elc/boorai/index.html> at 1 June 2010.

566 Child Protection Proceedings Taskforce, above n 1, 27.

567 The Commission has observed the work undertaken by the Salvation Army in supplying tea, coffee and pastries to families as well as workers.

568 Submission 46 (Children's Court of Victoria) 12.

569 Child Protection Proceedings Taskforce, above n 1, 12.

570 Ibid 27.

571 CREATE Foundation, above n 183, 13.

572 Foster Care Association of Victoria Inc, *Results of Consultation with Carers Undertaken by the Foster Care Association of Victoria for Victorian Law Reform Commission* (2010) 16.

573 Ibid 15.

574 Consultations 1 (Children's Court of Victoria), 6 (Private Practitioners 1); submission 16 (Anonymous).

575 CREATE Foundation, above n 183, 15.

576 Consultation 1 (Children's Court of Victoria); submission 13 (Anonymous).

577 Submissions 13 (Anonymous), 28 (Anonymous).

578 Consultations 1 (Children's Court of Victoria), 11 (FCLC).

579 Foster Care Association of Victoria, above n 572, 16; submission 13 (Anonymous).

580 Foster Care Association of Victoria, above n 572, 16.

581 Ibid 15.

582 Ibid 27, Appendix C.

583 Ibid.

584 Submission 13 (Anonymous).

8.346 When asked how they would design a Children's Court and where they would like that court to be, young people commented variously on having more toys, games and seats, as well as a less formal environment, using words like 'friendlier' and 'cosy'.[585] The importance of quiet spaces was also raised, with one young person calling for '[m]ore rooms for private conversations and to be able to have time alone, when you're at court your business is everyone else's, nothing is private'.[586]

8.347 When asked how the courtroom could be set up, one suggestion presented to CREATE was to have a round table in the courtroom where everyone can sit. Young people said that this would allow them to have more opportunities to be involved.[587]

### Childcare facilities at Little Lonsdale Street

8.348 Although the Commission has considered ways of overcoming the need for children to attend court, some older children may wish to do so. Families will still be required to attend court and at times may bring children not involved in a care matter with them.

8.349 There are no childcare facilities at the Little Lonsdale Street Court. In its submission, the Children's Court said there is 'an urgent need for childcare facilities at the Court'.[588]

8.350 The Court's facilities for children taken into safe custody consist of a small waiting room to the side of the Department workers' office. The space, which also doubles as a staff locker room, is cramped and does not have access to natural light or ventilation. In addition, this room can become overcrowded if workers are required to mind multiple children brought in on an application by safe custody. The room does not have access to a toilet or washroom, requiring Department workers to take children out into the public waiting areas to use the bathroom. There are no facilities for children who may require a bath or shower and fresh clothing.

8.351 In consultation, foster and kinship carers in particular noted the lack of appropriate children's spaces at the current courthouse, particularly for children in their care. Carers made some detailed recommendations about how facilities may be better suited to children.[589] In comments to the Commission, Department workers at the Court echoed these views.[590]

8.352 The children's play area at the Court is some distance from the main waiting space for the courtrooms. The area is unsupervised, although the Commission understands that the Salvation Army provides cadets three days a week to undertake activities in the space and parents/carers are required at other times (although again this is unsupervised).[591] The play area is directly behind the outside smoking area and has access to a downstairs bathroom and television.

8.353 The Commission attended the Commonwealth Law Courts to discuss and view the childcare facilities for children who are subject of proceedings in the family courts. The primary role of this facility is to accommodate children required to attend court pursuant to judicial officer's order, or those required to attend for an appointment with a family consultant.[592]

8.354 The Commission also looked at the model of childcare provided by the Neighbourhood Justice Centre (NJC). The NJC has an arrangement with a local childcare centre to provide, with prior notice, some occasional care places for NJC clients (for example, for clients with appointments at the NJC or to fulfil conditions of court-enforceable orders).[593] The NJC also has a fully equipped, unsupervised children's playroom on the ground floor that can be utilised by families and their children and a smaller play area attached to the victim and witness facilities at the court level.

8.355 The Commission believes that further work should be undertaken to examine possible improvements to both the children's room and DHS worker facilities. This work could examine whether it is feasible to make the current play area a supervised facility (for children attending with families). There is also merit in further examining the feasibility of other on-site models for children involved in proceedings, (similar to the family courts model) or an off-site model along the lines of that used at the NJC.[594]

### Moorabbin Justice Centre (MJC)

8.356 The Moorabbin Children's Court (Family Division) is part of a larger multi-jurisdictional court complex for the Melbourne Magistrates' Court, Children's Court Criminal Division and VCAT hearings. The building itself is notable for the use of night sky cooling and thermal louvres in its design. The principles of using calming colours and natural light also contribute to the relaxed internal environment.

8.357 Court users commented that the environment at MJC was more favourable than Little Lonsdale Street. This seemed due to both the reduced volume of cases through the Court, allowing for less time at court by all parties, and the fact that some felt the space was better utilised, perhaps because it is less crowded.[595] The Moorabbin Children's Court is also able to make use of a mobile refreshment facility serving the wider court complex.

8.358 Nevertheless, the Taskforce raised some concerns about the MJC, including issues such as air-conditioning and security, as well the cost implications of running a decentralised model for the Court and professional staff.[596]

## REDUCING VOLUME: DECENTRALISATION OF METROPOLITAN CHILD PROTECTION MATTERS

8.359 The Taskforce recommended that the Children's Court be decentralised.[597] This included, in the first instance, the recommendation that some of the old County Court building in William Street be utilised for child protection cases from the DHS Eastern Region. The Taskforce also recommended relocating all DRCs off-site.[598]

8.360 The Taskforce, based on the model set by the Moorabbin relocation, explored the possibility of further decentralisation to other metropolitan courts. The Commission notes that while the Taskforce stopped short of recommending in detail how this would work, it understands that this would focus nominally on 'growth corridor' areas and include considerations such as refurbishment of other metropolitan courts.[599]

8.361 In its submission, the Children's Court supported this approach, noting:

> *The Court seeks Government support to continue moving cases away from the Melbourne Court. It supports the Taskforce recommendations that two court rooms of the old County Court building be allocated to the Children's Court for Eastern Region cases. If this recommendation is adopted by Government, the pressure at Melbourne would be reduced with that Court effectively becoming the court for the North West Region.*[600]

## REGIONAL CHILDREN'S COURTS

8.362 The Children's Court is split between a specialist metropolitan court model and a generalist regional model. This difference in operation has a significant impact on the built environment of regional Children's Courts because they are essentially Magistrates' Courts with no designated or separate waiting areas for children and/or their families.

585 CREATE Foundation, above n 183, 20.

586 Ibid.

587 Ibid 8.

588 Submission 46 (Children's Court of Victoria) 57.

589 Foster Care Association of Victoria suggest that the Court or DHS lease an empty office space in an adjoining building and set this up as a safe space for children: Foster Care Association of Victoria Foster Care Association of Victoria, above n 572, 20–1.

590 Visit to Family Division to observe facilities, 1 June 2010.

591 Ibid.

592 Family Court of Australia, *Children's Facility Protocols in the Melbourne Registry* (2008); Email from Ilana Katz, Regional Coordinator Child Dispute Services, Family Court of Australia, 31 May 2010.

593 Neighbourhood Justice Centre, *Childcare Practice Guidelines at the NJC* (2009).

594 A recent in-house study by the Magistrate's Court of Victoria undertook a review of the relevant legislation in this area including definitions of a children's service and the licensing requirements of the operation of a defined children's service: 'Proposal to Establish a Child Care Service at the Melbourne Children's Court', received by the Commission on 19 February 2010.

595 Child Protection Proceedings Taskforce, above n 1, 28.

596 Ibid.

597 Ibid 12. Under the recommendation 'Improving the physical environment of the Court' the Taskforce noted 'The principle that the Children's Court should operate on a decentralised model'.

598 Ibid, see Recommendation 11. Note that the Taskforce recommends remodelling DRCs as 'Child Protection Resolution Conferences'.

599 Ibid 28.

600 Submission 46 (Children's Court of Victoria) 12.

8.363 A number of people commented on the run-down nature of facilities in several regional areas and the fact these generalist courts have no private spaces for children and their carers.[601] The Foster Care Association of Victoria's consultation observed, however, that people were more positive about regional court facilities, noting that carers in general felt less overwhelmed or rushed in regional courts compared to Melbourne.[602]

### INVOLVING COURT USERS IN DESIGN

8.364 The Commission understands that while judicial officers, court staff and other professionals, such as legal practitioners, were consulted in the initial planning stages of the Little Lonsdale Street Court, children and families were not. The Commission suggests that 'when new courts are being designed and constructed, the therapeutic needs of the court and its users should be carefully considered and accommodated'.[603] The views of children have been sought in the concept, design and planning stages of other new institutions for children, such as the Royal Children's Hospital building project.[604]

### A NEW-LOOK CHILDREN'S COURT

8.365 Although children involved in protection applications should not have to attend court unless they wish to do so, the Commission acknowledges that there will be occasions when it is necessary to depart from this general rule. Children who attend court should enter 'an environment that promotes respectful and empathetic communication, participation, collaboration and healing'.[605]

8.366 There are changes that could be made to the Children's Court in Little Lonsdale Street, some of which have been previously recommended,[606] that could have a positive impact for all court users, particularly children and families. These include:

- a welcoming and well-lit waiting area with information readily available and someone to answer questions or assist people arriving at court[607]
- walls decorated by locally produced artwork that could include artwork from children who have been present at court
- an area where visitors can obtain light refreshments and snacks
- appropriate, supervised facilities for children required at court, with games and other activities to occupy them while waiting
- quiet areas/zones where visitors can go to be with their family or support person
- roving, rather than static, security presence where possible.[608]

## COURT ADMINISTRATION

### INTRODUCTION

8.367 Court administration is an important component of problem-oriented approaches to justice. As noted by King et al:

> *The development of non-adversarial justice and in particular therapeutic jurisprudence along with procedural justice research has led judicial officers to explore how they and their courts can 'treat all of our customers with courtesy, respect and dignity, by providing services that meet their needs'.*[609]

8.368 In previous reports, the Commission has explored the interrelated issues of court governance and administration and their role in assisting cultural change.[610] The purpose of this section is to look briefly at the role administration and governance can play in facilitating cultural change, particularly in setting an example to those working within the court environment. In this section, the Commission briefly sets out the current Court operating model before examining other models of court administration and governance.

## CURRENT COURT OPERATING MODEL

8.369 The Children's Court is headed by a President (a County Court Judge), with 11 specialist magistrates in the Melbourne metropolitan region sitting in two court locations (Melbourne and Moorabbin). A principal registrar, operations manager, court coordinator and court liaison officer, and approximately 33 other staff working from the Melbourne and/or Moorabbin complexes, support the judicial officers. Local court registrars in the regional courts support regional coordinating magistrates.[611] Staff of the Children's Court are Victorian Public Sector employees and report through their direct line managers to the CEO of the Magistrates' Court of Victoria.

8.370 The Children's Court at Melbourne hosts a number of agencies. These include the Court Clinic, which is separate from the registry and directly reports to the CEO of the Magistrates' Court, as well as agencies such as the VLA duty desk, the CAU, the Court Network (a voluntary support agency) and the Salvation Army. The Court has two rooms for use by private practitioners and one room and anteroom used by Department child protection workers.

8.371 The Commission understands that the Children's Court has a 'Court User Forum' that meets three times a year, chaired by the President of the Court, and involves all court professionals and service delivery staff, but not security personnel.

601 See, for example, comments on Geelong, Shepparton and Bendigo Magistrates' Courts in Foster Care Association of Victoria, above n 572, 16–17.

602 Ibid 17.

603 King et al, *Non-Adversarial Justice*, above n 155, 217.

604 In the process of consultation, the Royal Children's Hospital heard the views and perspectives of over 600 children, adolescents and adult family members on what is important to them in the design of the new hospital: Royal Children's Hospital, Melbourne, *Working with Families: Report of the Consultation with Children and Families – Informing Hospital Design* (2006).

605 King et al, *Non-Adversarial Justice*, above n 155, 216.

606 Boston Consulting Group, *Children's Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007) recommended the following considerations to improve the Little Lonsdale Street courthouse: additional waiting areas for families; larger offices for VLA, CAU, private practitioners and support services; a crèche for children attending court with their families; and desk space for additional registry staff as well as additional chambers for magistrates: at 62. Further, the Taskforce recommended the feasibility of minor structural changes following on from the relocation of the DRC function to outside of the courthouse to make better use of available space: Child Protection Proceedings Taskforce, above n 1, 29. This would enable the expansion of office space for support services and lawyers such as the VLA, CAU and private practice solicitors.

607 A recent review of the NJC highlighted the following points as contributing to the success of the NJC: design, including the waiting area being marked by its space, light and openness; the courtroom being well fitted out with good seating for observers and participants; a spacious foyer and access to interview rooms as well as a small outside deck and a kiosk: Department of Justice (Victoria), *Evaluating the Neighbourhood Justice Centre in Yarra 2007–2009* (2010) 17.

608 In highlighting these areas, the Commission is aware that security considerations must be taken into account, but notes the NJC as an example of balancing the therapeutic aims of minimising overt security presence with the highly skilled and trained security staff who are part of the centre's management processes. For example, the security staff at the NJC attend the staff and centre management meetings on a fortnightly basis. Similar cooperative practices could be adopted at the Children's Court.

609 King et al, *Non-Adversarial Justice*, above n 155, 218.

610 See Victorian Law Reform Commission, *Review of Family Violence Laws*, above n 540, 419–21; Victorian Law Reform Commission, *Civil Justice Review*, above n 104, 791.

611 There are currently 27 members of staff at the Melbourne registry and four full-time members of staff at Moorabbin, plus one staff member who spends two days per week at Moorabbin and the Melbourne registry conducting dispute resolution conferences. These figures do not include staff of the Children's Court Clinic (the basis of a separate review by Department of Justice as discussed in Chapter 1) or the four sessional dispute resolution convenors engaged by the Court. Magistrates in suburban and regional courts sit as Children's Court magistrates at gazetted times. Suburban courts (excluding Moorabbin) hear Children's Court criminal matters only, whereas country courts hear cases in both divisions: Email from Janet Matthew, Court Liaison Officer, Children's Court of Victoria, 25 June 2010.

### Meeting the needs of Aboriginal clients in the Family Division

8.372 The Children's Court (Family Division) Koori Family Support Program (KFSP) identified the need for some type of Koori-specific support to families at court, such as an Indigenous Court Officer. The Commission believes this may be further explored through the KFSP consultation process. Other submissions raised the idea of making the Court more culturally responsive and generally a friendlier place.[612]

### Court Network and the Salvation Army

8.373 The Court Network and the Salvation Army provide valuable assistance to vulnerable family members. These agencies provide support and refreshments to families and staff alike, as well as activities and games for children in the waiting area. Court Network staff provide some basic information and referral information to family members requiring non-legal assistance.

### Desirability of further assistance for vulnerable family members at court

8.374 The Commission notes that the limitations in space prevent more extensive availability of services at court. However, basic measures such as brochures and information or staff members to assist with explaining court processes to people could help. In consultations, young people and foster and kinship carers noted the lack of information about what to expect at court.

8.375 The Court arranges for interpreters who attend court to assist clients of non-English speaking backgrounds. Employees from disability services, Aboriginal agencies, the Office of the Public Advocate and other agencies may attend court to assist vulnerable family members, but unlike the Neighbourhood Justice Centre (discussed below), there is not a broad range of service providers with a continual presence at court.

8.376 Information such as a simple map or floor plan showing families where things are, or answers to questions such as 'who sits where in the courtroom and what is court etiquette' could be very useful.[613] The CREATE foundation suggested that a modification of the current VLA publication involving 'Lex the Cat' could be appropriate.[614]

## OTHER MODELS OF ADMINISTRATION

### The Neighbourhood Justice Centre model

8.377 As discussed earlier in this chapter, the NJC is an example of a highly regarded and successful problem-oriented court.[615] The NJC model of governance and administration provides an example of how judicial and administrative arms can complement and support one another while retaining clear lines of independence.

8.378 The NJC employs the services of a Director who, along with other NJC staff, manages behaviour in the corridors and other non-courtroom spaces at the Court. The Director leads and manages a multi-disciplinary team. The broad role of the Director includes court operations, community engagement, crime prevention, mediation and access to justice. It is also to 'develop, enhance and support various governance structures surrounding the NJC'.[616] These governance structures include a Centre Leadership Group (including monthly reflective practice meetings), which involves heads of agencies working within the centre such as prosecutions, VLA, drug and alcohol agencies, and housing agencies. They also include a staff forum that includes all centre staff including security, and a Community Advisory Group who oversee a small grants program for the centre.

### The Magistrates' Court of Victoria—specialist courts

8.379 The Magistrates' Court of Victoria has adopted some new therapeutic jurisprudence approaches in recent years. The family violence registry at Melbourne Magistrates' Court[617] conducts itself in ways that aim to minimise the stress and impact on court users. The Dandenong Drug Court also has an interesting structure of judicial, administrative and clinical staff. The Court is structured with one magistrate who is supported administratively by a program manager.[618] The program manager runs the Drug Court program, but not the line management of the clinicians working at the Drug Court centre.

## NEXT STEPS

8.380 The Commission sees great merit in a director-type role for the Children's Court based on the NJC model. This role would complement existing court staff and act as a conduit between the judicial and non-judicial roles. It is envisaged that the person in the role would have an active hands-on approach to everyday problem solving in the court environment. This could include examining issues such as children's spaces, security, community forums and education, and court user groups, including professionals working within the court environment.

# TRAINING

### Views from consultations and submissions

8.381 The issue of training for practitioners and judicial officers was repeatedly raised during consultations.[619] There were many general comments on cross-disciplinary training for all child protection practitioners, as well as specific comments on training about disability[620] and cultural and linguistic diversity (CALD) awareness.[621]

8.382 A number of submissions highlighted a general need for Aboriginal cultural awareness training.[622] In their submission, VACCA stated that there is 'need for the implementation of Aboriginal cultural competence standards … to ensure a culturally responsive service'.[623] The Commission believes that training or professional development regarding the Aboriginal Child Placement Principles and related cultural awareness would be valuable for legal representatives, Children's Court magistrates and family decision-making convenors.

8.383 Many submissions emphasised the importance of shared, cross-disciplinary training of all stakeholders.[624] The Australian Institute of Family Studies highlighted this point.[625] The Law Institute of Victoria argued that, rather than widespread legislative or process change, the child protection system required in part 'increased training and support for Children's Court staff and other professionals in the system'.[626] A number of submissions supported a 'systemic guarantee' of the priority of reunification, supported in part through 'adequate … training for professionals'.[627]

612 Submission 39 (VACCA).

613 Foster Care Association of Victoria, above n 572, 20.

614 CREATE Foundation, above n 183, 7; Victoria Legal Aid, *Just in Case … You Visit the Children's Court* (2nd ed, 2008).

615 Department of Justice (Victoria), *Evaluating the Neighbourhood Justice Centre*, above n 607.

616 Department of Justice (Victoria), *Position Description: Neighbourhood Justice Centre Director* (August 2006).

617 Other family violence lists are located at Heidelberg, Sunshine and Broadmeadows. There is not a specialist registry at these locations to attend to family violence matters.

618 This program manager reports to a specialist courts manager within the office of the CEO, Magistrates' Court of Victoria, who reports to the CEO.

619 See, for example, consultations 4 (DHS Managers), 9 (Barristers), 13 (DHS CP Workers Hume), 17 (Victoria Police), 22 (DHS CP Workers Southern), 24 (Prof Cathy Humphreys), 28 (VACCA); submissions 2 (Dr Michael King), 7 (Prof Cathy Humphreys), 8 (Angela Smith), 11 (VLA), 24 (WHCLS), 25 (LIV), 28 (Anonymous), 30 (CECFW), 34 (Victoria Police), 36 (FLS), 37 (OCSC), 38 (VALS), 39 (VACCA), 40 (AIFS), 44 (CHP), 45 (FCLC), 46 (Children's Court of Victoria) 29, 38, 41, 47 (DDLS). See also, CREATE Foundation, above n 183; Foster Care Association of Victoria, above n 572; MyriaD Consultants, *Protection Applications in the Children's Court: Report of Consultations with New and Emerging Communities* (2010).

620 See, for example, submission 47 (DDLS), which noted the need for all stakeholders to undertake training 'regarding the needs and rights of parents with disabilities'.

621 A number of submissions and consultations highlighted the importance of adequate training regarding culturally and linguistically diverse (CALD) families, including awareness of the unique issues facing, and experiences of, the communities; cultural differences between different communities; and language issues. See, for example, submission 30 (CECFW); consultation 7 (Private Practitioners 1). MyriaD Consultants noted that there is 'very little literature related to CALD experiences of Child Protection matters in the Children's Court. There is however an increasing focus on CALD communities and their experiences with Child Protection Systems'. It also highlighted that there is a need for significant community education for CALD communities about the Court's role in the child protection system: MyriaD Consultants, above n 619, 5, 17.

622 Consultation 28 (VACCA); submissions 25 (LIV), 39 (VACCA).

623 Submission 39 (VACCA).

624 Consultation 24 (Prof Cathy Humphreys); submissions 25 (LIV), 38 (VACCA), 40 (AIFS), 44 (CHP), 45 (FCLC).

625 Submission 40 (AIFS).

626 Submission 25 (LIV).

627 Submissions 38 (VALS), 44 (CHP), 45 (FCLC).

# Chapter 8 Option 2—A New System

### Training for protection workers

8.384 New child protection practitioners are required to undertake a compulsory seven-week intensive induction, called the 'Beginning Practice in Child Protection Program'.[628] The Commission understands that the program is broken into workplace-based learning, including mentoring, and 12 days of practice clinics (comprising three clinics, each four days in length). During the workplace-based time, new workers gain experience in all aspects of their work—for example, sitting in on interviews and visiting families—without taking primary responsibility for any case.[629]

8.385 The legal context of the child protection role is raised throughout their training, but the third practice clinic focuses completely on legal and court processes. It includes a one- to two-hour address at the Melbourne Children's Court by a current magistrate, and presentations by the Court Advocacy Unit and Victoria Police's Sexual Offences and Child Abuse Unit. As part of the practice clinic, workers also spend a full day practising giving evidence and being cross-examined on the court report they have produced during training by a barrister currently practising in the Children's Court.[630]

8.386 During the program, the practitioner is introduced to and works with resources such as the Child Protection Practice Manual[631] and a *Guide to Court Practice for Child Protection Practitioners 2007*.[632] In addition, protection workers receive a child protection court kit.[633] New protection workers may also have undertaken a practical session of court skills training provided by a former magistrate.[634]

8.387 Experienced child protection practitioners can undertake a Graduate Certificate in Child and Family Practice to advance their practice knowledge and skills.[635] The DHS Child Protection and Youth Justice Professional Development Unit also conducts a range of compulsory and non-compulsory training programs for protection workers after they have completed the Beginning Practice in Child Protection Program. One such program relates to sexual abuse and includes a component by the Court Advocacy Unit about how to deal with such cases at court, and how to prepare evidence.[636]

8.388 The Ombudsman's report raised concerns about the adequacy of the training provided to protection workers.[637] The report noted a key theme for child protection workers was feeling inadequately prepared to present matters at the Children's Court.[638] The Taskforce recommended that additional training, including in court preparation, be added to the DHS training calendar.[639]

8.389 Many submissions and consultations raised training as an area of concern or importance.[640] A number of submissions highlighted concern specifically with the inadequacy of training for protection workers in Children's Court proceedings and related activities.[641]

8.390 As discussed in Chapter 1, the State Services Authority is undertaking a review of the current protection workforce. The Commission also understands that DHS is undertaking 'a training needs analysis in respect of all aspects of training' for protection workers, and that the resulting package will be aimed at workers with 18 months to two years experience and will include training in Court preparation.[642]

8.391 The Commission is mindful that any training would need to be sensitive to the different requirements of regional- and Melbourne-based protection workers. For example, the Commission is aware that many regional workers often self-represent in court, which is rare for Melbourne-based workers.

## Training of lawyers, including specialist accreditation

8.392 A number of submissions and consultations raised concerns with lawyers' training[643] and whether they have a 'comprehensive understanding of the complexities of child welfare and psychology'.[644]

8.393 The Commission has previously noted that the practice of law has become increasingly specialised.[645] Additionally, '[r]epresenting children is recognised as a specialist occupation these days'.[646] The Law Institute of Victoria states that specialisation benefits both the public and the legal profession through enhancing client confidence in their legal representative, increasing professional competence and encouraging best practice.[647]

8.394 Following discussions with the Commission, the Law Institute of Victoria's Specialisation Board is exploring the possibility of a children's law specialisation.[648] The Law Society of New South Wales offers specialist accreditation in Children's Law.[649] Specific accreditation programs are generally offered every two to three years, based on interest from practitioners, renewal rates, and any legislative changes.[650] In 2009, 13 practitioners undertook Children's Law accreditation in NSW, and there has been a consistent pool of interest.[651]

8.395 England provides another example of an accreditation scheme. As noted in Chapter 5, practitioners who represent children are selected from the Law Society's Children Panel. The Law Society runs the accreditation scheme by which solicitors can become members of this Panel. In relevant children's matters, children are entitled to non means- or merits-tested, publicly-funded legal representation.[652] Through selection of children's representatives from the Panel, a solicitor's accreditation is linked to access to legal aid funding.

8.396 In Victoria, it is likely that the majority of solicitors who may be interested in attaining Children's Law accreditation would be the practitioners currently appearing in the Family Division of the Children's Court.[653] Additionally, there may be interest from practitioners who appear in the Court's Criminal Division, and lawyers who act for children in family law cases.[654] The Commission is mindful of the fact that a move to specialisation, with its eligibility requirements,[655] should not discourage new lawyers from moving into this jurisdiction by ensuring that such lawyers have access to appropriate professional development.

628 Child Protection Proceedings Taskforce, above n 1, 33. This report provides an overview of the current training undertaken by new child protection workers. See also, Lynne McPherson and Mark Barnett, 'Beginning Practice in Child Protection: A Blended Learning Approach' (2006) *Social Work Education* 25 (2) 192–8, which provides a detailed overview of the program as it was initially set up.

629 Telephone discussion with Natasha Courtney, Assistant Manager, Department of Human Services, Child Protection and Youth Justice Professional Development Unit, 31 May 2010.

630 Ibid.

631 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual,* from CD-ROM provided at 23 March 2010.

632 Department of Human Services (Victoria), *Guide to Court Practice for Child Protection Practitioners 2007* (2007).

633 Department of Human Services (Victoria), *Child Protection Court Kit* (2007). It is a guide to assist practitioners with the 'processes, procedures and legal and practice requirements associated with applications to the Children's Court and related jurisdictions': at 1.

634 Child Protection Proceedings Taskforce, above n 1, 33. The Commission understands that this practical training session was offered to all Department staff, not just new protection workers, and was run over the last year throughout the various regions around the state. As all the regions have now taken part, the program is currently finished.

635 Department of Human Services (Victoria), *Children, Youth and Families: Announcing the 2010–2011 Graduate Certificate in Child and Family Practice*, <www.cyf.vic.gov.au/home/announcing-the-2010-2011-graduate-certificate-in-child-and-family-practice> at 31 May 2010.

636 Courtney, above n 629.

637 Office of the Victoria Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 14. The following areas were noted: inadequate training of staff in how to use the relevant DHS information technology system leading to instances where criminal records checks of carers were not conducted, which has led to some children being placed with convicted sex offenders; and inadequate training to ensure an appropriate level of privacy compliance.

638 Ibid 56.

639 Child Protection Proceedings Taskforce, above n 1, 13, recommendation 15.

640 See, for example, consultations 9 (Barristers),17 (Victoria Police); submissions 11 (VLA), 24 (WHCLC), 25 (LIV), 28 (Anonymous), 36 (FLS), 37 (OCSC), 38 (VALS), 44 (CHP), 45 (FCLC), 46 ( Children's Court of Victoria) 29, 47 (DDLS).

641 See, for example, submissions 28 (Anonymous), 34 (Victoria Police), 46 (Children's Court of Victoria) 29, 85, 87.

642 Child Protection Proceedings Taskforce, above n 1, 33 which states that '[t]he training package that will be developed as a result of the analysis will including training in Court preparation'. The Commission understands that the dual impetus for this training analysis was a ministerial announcement regarding the need for additional training for this section of protection workers, with specific funding attached, and the findings in the Victoria Ombudsman *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009): Telephone discussion with Department of Human Services (Victoria), 27 May 2010.

643 See for example, consultation 13 (DHS CP Workers Hume), 28 (VACCA); submissions 16 (Anonymous), 37 (OCSC), 39 (VACCA).

644 Submission 16 (Anonymous). See also submission 39 (VACCA).

645 Victorian Law Reform Commission, *Jury Directions: Final Report*, Report No 17 (2009) 137.

646 Ross, above n 239, 570. It is also noted that 'this does not hold true in many country and rural areas, where children's representation is arguably very different from that delivered by their urban and regional counterparts'.

647 Law Institute of Victoria, *Accredited Specialisation* <www.liv.asn.au/Education---Events/Accredited-Specialisation.aspx> at 18 May 2010.

648 Email from Julie McCormack, General Manager Education and Secretary to Specialisation Board, 22 February 2010; meeting with the Law Institute of Victoria Specialisation Board on 23 March 2010.

649 Email from Anita Khosla, Business Manager Specialist Accreditation, Law Society of New South Wales, 22 March 2010. See also Ross, above n 239, 571, which states that at the time of publication there had been two intakes.

650 Ibid. See also, Law Society of New South Wales, *Be the Right Lawyer for the Job!* (2010)—a pamphlet outlining the Accredited Specialist program.

651 Khosla, above n 649.

652 Law Society (UK), *Good Practice in Child Care Cases: A Guide for Solicitors Acting in Public Law Children Act Proceedings Including Involving Adoption* (2004) [2.7.1].

653 The Commission estimates that there are over 120 such practitioners.

654 The Commission estimates that there are 70 ICLs on the Panel, and four Legal Aid ICLs. The Commission also notes that national ICL training for new ICLs is regularly offered by the Family Law Section of the Law Council of Australia, in conjunction with National Legal Aid. State and territory legal aid bodies take turns at co-hosting this training. Training is not a one-off event; state and territory legal aid bodies provide ongoing training. For example, VLA provides a full day of specialist training for existing ICLs approximately once per year.

655 There is a requirement to have five years practice, with three years substantial experience prior to application: Law Institute of Victoria, *Accredited Specialisation: Why Become an Accredited Specialist* <www.liv.asn.au/education---events/accredited-specialisation/why-become-an-accredited-specialist> at 27 May 2010.

8.397 Another way of promoting training and professional development among legal practitioners working in the Children's Court is to make eligibility for the VLA panel conditional on completion of nominated training and professional development. In Western Australia, a grant of legal aid is conditional upon a practitioner having experience in mediation.[656]

### Cross-jurisdictional training—lawyers and protection workers

8.398 Rosemary Sheehan has suggested that 'effective child protection is a shared enterprise amongst the professionals'.[657] The Taskforce's report noted the desirability of moving towards a more collaborative approach between professionals as a means of improving the Court's culture.[658] Concerns about the current culture were raised during many consultations.[659] While not a complete solution,[660] appropriate training could encourage more collaboration.[661]

8.399 One example of cross-disciplinary training is the Western Australian 'Signs of Safety' program. This was brought to the Commission's attention during the current reference[662] and was considered by the Taskforce. 'Signs of Safety' was developed in collaboration between legal aid, the Department of Child Protection, a hospital and the Perth Children's Court. It aims to use mediation and the involvement of all interested parties to resolve child welfare disputes as early as possible and to reduce the number of matters reaching the court system.[663]

8.400 As part of this program, child protection workers and lawyers undertake joint training in the Department's risk assessment model.[664] The Taskforce noted that this joint training was, in part, responsible for the 'striking feature about the culture' that the Department and lawyers 'recognised and respected each other's legitimate role in protecting children'.[665]

8.401 The Taskforce recommended that introducing a joint training package, following the Western Australian idea, across both VLA and DHS would benefit both professional groups by 'encouraging lawyers to become more familiar with child protection practice and familiarising child protection workers in their preparation for and involvement in Children's Court processes'.[666]

8.402 The Commission is aware that DHS and VLA are moving ahead with such a program, and that an initial joint training session is scheduled for the end of July 2010. The initial training session will be in the new dispute resolution model recommended by the Taskforce and a subsequent session on DHS's best interests case practice model is mooted.[667] In addition, the Commission is aware of many other collaborative initiatives between DHS and VLA.[668]

8.403 The Commission supports the Taskforce's recommendations and the work initiated collaboratively by DHS and VLA, including joint training.

### Judicial training

8.404 A number of submissions and consultations raised the importance of judicial training.[669] The Commission recognises, as it has in previous reports, the complex and challenging nature of the work undertaken by judicial officers and the need for ongoing education and professional development to support this work.[670]

8.405 The Children's Court is a specialist court. It has been suggested that what makes 'work in the Children's Court so challenging [is] that it calls on expertise other than legal training'.[671] The importance of multi-disciplinary knowledge of decision makers in the child protection area was noted in a number of submissions and consultations.[672]

8.406 The Medical Director of the Victorian Paediatric Forensic Medical Services noted that decision makers should have a good knowledge across areas including child development and behaviour, the effect of trauma on children, parental mental illness and prenatal exposure to drugs, family violence and the dynamics of sexual assault.[673] It was also suggested that outcomes for children and young people would be enhanced through court personnel having 'further training in the areas of child development and the effects of abuse and trauma on children'.[674]

8.407 Any changes to court processes should be accompanied by appropriate judicial training. This would include changes aimed at encouraging more inquisitorial and problem-oriented approaches, the introduction of new decision-making processes (discussed in Chapter 7), and the extension of the Children's Court jurisdiction to other areas such as family violence and family law (also discussed in Chapter 7).

8.408 The Judicial College of Victoria is the primary body for assisting judges with their professional development.[675] The College has indicated awareness of the current reference to the Commission, and has demonstrated interest in exploring potential training to support any reforms.[676]

656 Legal Aid Western Australia, *Specialised Family Law Panels* (2009) <http://www.legalaid.wa.gov.au/infolawyers/aspx/default.aspx?Page=Grants/FamilyLawSpecialised.xml> at 15 June 2010. The website notes that where a matter cannot be dealt with in-house, a grant of legal aid is made to a private practitioner on a specialist panel; for children's representatives this is the Child Representatives Panel. Requirements for being on the panel include: experience in advocacy and mediation, and extensive knowledge of family law practice and procedures, child welfare issues and relevant case law.

657 Sheehan, above n 152, 223.

658 Child Protection Proceedings Taskforce, above n 1, 26, 33. Office of the Victoria Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program*, above n 637, 13, also noted the desirability of moving to a more collaborative approach.

659 See, for example, consultations 3 (CAU), 7 (Private Practitioners 2), 9 (Barristers), 22 (DHS CP Workers Southern), 25 (DHS CP Workers East & Nth West).

660 For example, submission 46 (Children's Court of Victoria) 30 notes that the 'adversarialism' complaints are 'frequently complaints about the process at the Melbourne Court and particularly the conditions for court users in that building', and refers to the Taskforce finding that the work is emotionally demanding and the court's overcrowding adds to the distress, anxiety and agitation of court users. See also, Child Protection Proceedings Taskforce, above n 1, 7, where the Taskforce discusses collaboration more broadly, such as developing a Code of Conduct and Memorandum of Understanding.

661 See for example, Child Protection Proceedings Taskforce, above n 1, 33, which states that: 'The Western Australians told us that training was the key to the success of a more collaborative approach in that State'.

662 A member of the Commission's research team joined the Taskforce during their visit to Western Australia.

663 Information taken from the *Taskforce Visit Information Pack*, introduction page, provided to a Commission research and policy officer during a visit to WA.

664 Child Protection Proceedings Taskforce, above n 1, 33.

665 Ibid 26.

666 Ibid 8, see recommendations 15–16.

667 Department of Human Services (Victoria), Telephone discussion, above n 642. It is also noted in Child Protection Proceedings Taskforce, above n 1, 33.

668 For instance, a team associated with the Signs of Safety program in Western Australia conducted a seminar on that program for DHS and VLA employees. In addition, VLA and DHS are developing a joint Memorandum of Understanding and a Code of Conduct. Further, the Commission is aware that in June 2010, a VLA lawyer was seconded to DHS to undertake compulsory protection worker induction—Beginning Practice in Child Protection Program; to assist with the development of the Code of Conduct and the MOU; and, to assist with the new ADR model for the Children's Court, facilitating children's participation in legal proceedings without the need to attend court, and earlier disclosure and preparation of matters: Department of Human Services (Victoria), Telephone discussion, above n 642.

669 See, for example, consultation 28 (VACCA); submissions 8 (Angela Smith), 39 (VACCA), 46 (Children's Court of Victoria) 41.

670 Victorian Law Reform Commission, *Jury Directions*, above n 645, 143.

671 Sheehan, above n 152, 87.

672 Consultation 10 (VFPMS); submission 39 (VACCA).

673 Consultation 10 (VFPMS).

674 Foster Care Association of Victoria, above n 572, 18.

675 Victorian Law Reform Commission, *Jury Directions*, above n 645, 143.

676 Letter from Lyn Slade, Chief Executive Officer, Judicial College of Victoria, 23 March 2010.