

Chapter 9

Option 3—Office of the Children and Youth Advocate (OCYA): A New Multi-Disciplinary Body to Advance the Interests of Children and Young People

CONTENTS

368	Introduction
371	Structure of OCYA
372	OCYA organisational chart
372	OCYA's objectives
373	Functions to be performed by OCYA
382	Independence of OCYA

Option 3—Office of the Children and Youth Advocate (OCYA)

INTRODUCTION

- 9.1 This chapter describes Option 3, which involves altering the legal structure of Victoria’s child protection system by creating a new independent statutory commissioner. This commissioner would represent and promote the best interests of children and facilitate supported agreement-making processes, at all stages of the child protection process.
- 9.2 The current framework comprises two significant institutions: the Department of Human Services (the Department) that is usually a party to a case, most often the applicant,¹ and a court (the Children’s Court) which is the ultimate decision maker. A third institution—Victoria Legal Aid (VLA)—is involved as a service provider in most cases because it provides legal assistance to children and their families.
- 9.3 Different interests guide all three institutions. Those interests are best seen as responsibilities. The Department is responsible for ensuring that the state protects some of its most vulnerable members—children—from risks of serious harm, often as a result of acts or omissions of parents. These responsibilities arise before, during and after court proceedings. The Department investigates reports of child abuse, it initiates and conducts proceedings in the Children’s Court, and it administers orders made by the Court when a child is found to be in need of protection.
- 9.4 VLA is responsible for ensuring that parents who cannot afford private lawyers, as well as some children, receive legal assistance before any decisions are made about the need for protection. Because of potential for conflict between the interests of family members, many lawyers may be assigned to a particular case. Some of those lawyers are employees of VLA, while others are private practitioners who receive grants of aid, meaning they are separately paid for each court event. In nearly all cases when a child under the age of seven is the subject of a protection application, that child is not represented.
- 9.5 The Children’s Court has the responsibility of being an impartial decision maker. The Court must ensure that fair processes are followed before it decides on evidence presented to it whether there should be any changes to the rights and responsibilities of parents, children, the state and any other interested parties.
- 9.6 Given the diverse interests involved in Children’s Court proceedings and the history of the jurisdiction, especially its close connection with criminal law and procedure, the existing framework is a recipe for conflict, especially because the consequences of the Court’s decisions are so great. The Victorian Ombudsman concluded his 2009 report on child protection services by declaring that the evidence he gathered ‘raises fundamental questions regarding the design of the legal framework around the child protection system in Victoria’.²
- 9.7 The Commission believes that Victoria’s child protection system may benefit from a change in legal structure to create a new statutory body that would undertake a number of key roles within the system. That body could represent the interests of the child and play a leading role in facilitating supported agreement-making processes.
- 9.8 Many of the specific functions that could be given to a new body arise from the proposals contained in Options 1 and 2 of this report.³ The Commission suggests that consideration be given to establishing a new statutory commissioner to head a body known as the Office of the Children and Youth Advocate (OCYA).

- 9.9 The purposes of OCYA, broadly stated, should be to:
- promote child-focused processes and outcomes
 - ensure the representation of children at all stages in child protection decision-making processes
 - assist the parties to reach agreement in the best interests of the child whenever possible.
- 9.10 The Commission proposes that OCYA promote those purposes by undertaking the following functions:
- convening family group conferences (FGCs)
 - representing children in all decision-making processes
 - providing specialist expertise to the child protection system.

HISTORICAL INFLUENCES ON THE UNIQUE JURISDICTION OF CHILD PROTECTION

- 9.11 As discussed in Chapter 2, the child protection jurisdiction of the Family Division of the Children’s Court has grown out of criminal-style proceedings in which a child was charged with being ‘neglected’ and a state authority was responsible for proving the charge.⁴ Because of this history, child protection proceedings in the Family Division are still characterised in quasi-criminal terms: reference is made to ‘apprehending’ children in need of protection,⁵ the Department is often described as the ‘prosecutor’,⁶ and parallels are drawn between applications for interim accommodation orders and applications for bail.⁷ These concepts are not helpful when seeking to achieve an outcome that is in the child’s best interests.
- 9.12 As discussed in Chapter 3, child protection proceedings are neither criminal nor civil in nature. The Family Division of the Children’s Court exercises a unique jurisdiction dealing with three different interests that may sometimes overlap but may not be easily reconciled at other times.⁸ The child who is the subject of a protection application is not a party to those proceedings. In over 50 per cent of cases, the child is not represented by an advocate and has no voice in proceedings.⁹
- 9.13 There may be value in changing the legal structure of Victoria’s child protection system in order to ensure that the person who has the most at stake in child protection proceedings—the child—has a voice that is more likely to be heard because it has separate institutional support. This can be achieved by creating a new body whose main function is to advocate for the child in each case and to advance that child’s interests by non-adversarial means.

TENSION BETWEEN THE INSTITUTIONS OF CHILD PROTECTION

- 9.14 As discussed in Chapter 6, child protection proceedings in the Children’s Court involve the coming together of professionals with different perspectives and qualifications, as well as parents and children, in order to achieve an outcome that is in the child’s best interests. Reconciling these different perspectives is a challenging task, made more difficult by the sensitivity of issues relating to the protection of children.

1 It is only in the very rare irreconcilable difference application that the Department may not be a party, although the Department has a role in pre-litigation conciliation counselling and may seek leave to appear in these proceedings.

2 Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 64.

3 Most of the functions that the Commission believes could be given to a new body have been allocated to VLA in Options 1 and 2.

4 See Chapter 2 for a discussion of the legislative history.

5 See, for example, submission 46 (Children’s Court of Victoria) 53.

6 See, for example, submission 48 (Victorian Bar).

7 Springvale Legal Service, *Lawyers Practice Manual Victoria* (2009) [6.2.403].

8 These interests are discussed in Chapter 6.

9 See the discussion on this point in Chapter 3 under the heading ‘Children, parents and other parties with a direct interest in proceedings’.

Option 3—Office of the Children and Youth Advocate (OCYA)

9.15 These challenges are not new, but appear to have become more difficult over time. In 1993, Justice Fogarty commented on tensions between the Children’s Court magistrates and the Department’s child protection workers who give evidence in child protection proceedings.¹⁰ Justice Fogarty observed that a ‘major issue’ in child protection proceedings in the Children’s Court was that the magistrates and the child protection workers questioned each other’s professionalism (see Appendix D for more detail).¹¹ In 2004, Kirby, Ward and Freiberg noted that:

*The Children’s Court and the Child Protection service are embedded in an adversarial legal system which has historical and cultural determinants. The professional orientations of the Court and the Child Protection service differ and might not ultimately be reconcilable.*¹²

9.16 The friction that exists between the Department and the Children’s Court as a result of their different professional orientations was noted in consultations.¹³ In its submission, the Children’s Court acknowledged the long-held ‘perception of tension between the Department and the Court’.¹⁴

9.17 This friction is not surprising, and to some extent is inevitable, given the inherent tension between the competing principles involved in deciding whether to remove a child from his or her family.¹⁵ As Terry Carney recognised in 1982, in child protection law

*[t]ension exists between, on the one hand, the proponents of the view that the family relationship is sacrosanct and entitled to considerable autonomy, and on the other, the alternative view ... that the state has an overriding duty to step in and protect the interests of its weaker members ... Intersecting with these two fundamental sets of values is the more modern, but equally forceful, articulation of the case in favour of recognizing the independent interests of the child.*¹⁶

9.18 In each individual child protection case, these three different perspectives must be reconciled to achieve the correct balance that can be said to be ‘in the best interests of the child’. However, at present there is, in the majority of cases, no separate party to represent the third view: the independent interests of the child.

9.19 The Department is obliged to protect the child from harm. The lawyers representing the parents will often resist an application for the child to be separated from his or her family by asserting the need to protect and preserve the family unit. The child’s interests will not necessarily fall within either of those two positions and may involve a combination of both. This third view is further complicated by what the High Court has referred to as the

*natural reciprocity between the duty and authority of parents with respect to the nurturing, control and protection of their child and the child’s rights and its interests in being nurtured, controlled and protected.*¹⁷

9.20 In practice, it appears that the Children’s Court, in the absence of any other body, has been expected to identify this third perspective. This practice appears to have sometimes drawn the Court into unhelpful conflict with the Department, which sees itself as having a statutory charter to safeguard the child’s best interests, especially because the Court must decide where the balance between the three views should lie in each case.

- 9.21 In order to reduce this tension, and to properly promote the human rights of each child of whatever age, the Commission believes that there is merit in having an independent party represent the child's interests in every child protection matter. By representing the child's interests and presenting an assessment of how the competing values should be reconciled in the individual case, the independent party can assist the Court and ensure that the child's views are heard while also helping the Court to fulfil its role of being the impartial decision maker when agreement cannot be reached.
- 9.22 To be successful in this role, however, the third party must be able to draw from a specialised body of workers, from both social science and legal backgrounds. Only a body that is independent of both the Department and the Court, but can understand and draw from their different professional orientations, and has the integrity of a stand-alone institution, is likely to gain the trust of DHS child protection workers, legal practitioners and the Children's Court.
- 9.23 A multi-disciplinary body of this nature could play an important role in actively encouraging inter-professional collaboration in this jurisdiction, which is one of the key principles the Commission believes should govern child protection processes.¹⁸
- 9.24 In Option 1, the Commission proposes a fundamental restructuring of the current method used to resolve child protection concerns between parents and the Department; that is, to make FGCs the primary decision-making forum. This new structure would need the support of both the Court and the Department to succeed. The likelihood of success could be enhanced by assigning responsibility for convening FGCs to an independent body that has the force and integrity of an institution in its own right and can draw upon expertise from both legal and social science disciplines. Accordingly, the Commission proposes that this also be a function of OCYA.
- 9.25 The need to introduce a third institution into child protection proceedings that is independent of the Department and the Court was recognised by the Australian Law Reform Commission (ALRC) in 1981, in its report *Child Welfare*.¹⁹ In that report, the ALRC raised the need to address problems that are 'fundamentally institutional' with 'an institutional solution'.²⁰ The Commission believes that similar comments could be made about the need for institutional change in the current Victorian system. The Commission proposes that a statutory commissioner be established to head OCYA, with the functions described below.

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

STRUCTURE OF OCYA

- 9.26 In order for OCYA to operate effectively and fulfil its functions in relation to every protection application made to the Children's Court, a sufficient number and range of professionally qualified staff would be required. A combination of lawyers, social workers, psychologists and other appropriate professionals in the one office should facilitate the sharing of expertise, and ultimately benefit the children and young people OCYA supports and represents.

- 10 Justice Fogarty, *Protective Services for Children in Victoria: A Report* (1993) 73,143–7.
- 11 Ibid 144. For a discussion of the recommendations of Justice Fogarty's report, see Appendix D.
- 12 Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004) 40.
- 13 Consultations 4 (DHS Managers), 17 (Victoria Police).
- 14 Submission 46 (Children's Court of Victoria) 86.
- 15 See discussion in Chapter 3 under 'Charter of Human Rights and Responsibilities and international rights instruments', under the sub-heading 'Protection of families and children—a balancing exercise'.
- 16 Terry Carney, 'Recent Developments in Child Welfare in Victoria' (1982) *Recent Developments in Family Law* 36, 37.
- 17 *J v Lieschki* (1987) 162 CLR 447, 458 (Brennan J).
- 18 See the Commission's list of principles under the heading 'The principles that have guided the development of the options' in Chapter 6.
- 19 (Australian) Law Reform Commission, *Child Welfare*, Report No 18 (1981). For a full discussion of this report, see Appendix E.
- 20 Ibid 245.

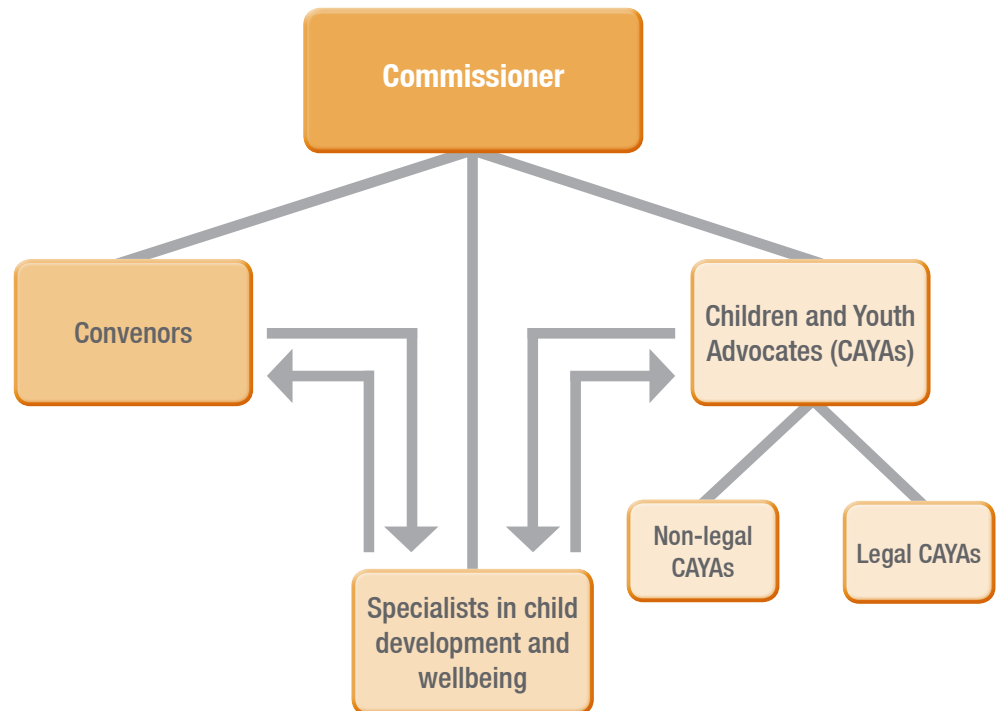
Option 3—Office of the Children and Youth Advocate (OCYA)

9.27 It is envisaged that OCYA would have the following three branches, represented in the diagram below:

- convenors of FGCs
- children and youth advocates, both legal and non-legal
- specialists in child development and wellbeing.

OCYA would need to be adequately resourced in order to play an important role in ensuring that the best interests of children and young people are paramount in child protection processes.

OCYA ORGANISATIONAL CHART



METROPOLITAN HEAD OFFICE AND REGIONAL OPERATIONS

9.28 To deal with child protection matters throughout Victoria, OCYA would need to establish a presence in regional areas. A number of sources alerted the Commission to differences in child protection processes and procedures in regional areas.²¹ To facilitate statewide coverage, but minimise costs, OCYA could be co-located with an existing service in regional areas. The Commission understands co-location already exists between other government services in some regional areas.

OCYA'S OBJECTIVES

9.29 The overarching aims of OCYA's involvement in child protection matters would be to ensure that:

- all decision-making processes are child-centred
- the best interests of children and young people are paramount in all decision-making processes, including supported negotiation

- children and young people have their views and experiences heard and made known in the decision-making process, and are given adequate opportunity to participate in decision-making processes as appropriate
- the best information available is provided in decision-making forums concerning children and young people.

FUNCTIONS TO BE PERFORMED BY OCYA

INTRODUCTION

9.30 The new independent statutory commissioner could undertake many of the new activities proposed in Option 1 and Option 2. In particular, OCYA could be responsible for the following:

- convening FGCs
- representing children and young people at all stages of the process
- providing specialist services.

9.31 In performing these functions, OCYA should act as an 'honest broker' to assist and encourage the parties to reach an agreement that is in the best interests of the child or young person whenever possible. In Tasmania, the separate representative of the child provides a good example of the 'honest broker' role. Because of his or her independence, the separate representative is often able to initiate conferences between the Department, the parents, the child and their legal representatives in order to clarify the issues in dispute.²²

DISTINGUISHING OCYA FROM OTHER AGENCIES

9.32 It is important to indicate clearly those functions that the Commission proposes could be fulfilled by OCYA, and those that are unsuitable. OCYA should not be responsible for bringing protection applications to the Court. This function should remain with DHS. The Commission's proposals concerning the carriage of child protection matters on behalf of the Department in the Children's Court are dealt with in Option 4.²³

9.33 The role of OCYA should not extend to guardianship and custody powers in relation to children and young people on protection orders. The Department should remain responsible for acting as the custodian or guardian of a child and young person found to be in need of protection, when there is no other more suitable person to undertake this role.²⁴

9.34 Additionally, it is not intended that OCYA would take on the Department's primary investigative role in relation to children about whom there are protective concerns, other than to make relevant inquiries to support the functions described below.

9.35 The functions that OCYA would adopt are separate from those of the Office of the Child Safety Commissioner (OCSC), which are discussed in Option 5. It is envisaged that OCYA and OCSC would provide complementary services designed to protect and promote the best interests of the children and young people in Victoria. In time, the two offices could merge.

21 Consultations 4 (DHS Managers), 16 (VLA), 27 (FVPLS Victoria); submissions 34 (Victoria Police), 39 (VACCA); Foster Care Association of Victoria Inc, *Results of Consultation with Carers Undertaken by the Foster Care Association of Victoria for Victorian Law Reform Commission* (2010) 16–18.

22 From telephone conversation with Andrew Mead, private legal practitioner, 21 April 2010.

23 See Chapter 10.

24 Note, however, that the Department has the power to delegate this role to the principal officer of an authorised Aboriginal agency: see the discussion in Chapter 3 under 'Institutions and participants involved in child protection proceedings', sub-heading 'Aboriginal agencies'.

Option 3—Office of the Children and Youth Advocate (OCYA)

CONVENING FAMILY GROUP CONFERENCES

- 9.36 In Option 1, the Commission suggests that FGCs should become the primary decision-making forum in Victoria’s child protection system.²⁵ In order for an FGC to be an effective mechanism for resolving protection concerns by agreement, it is essential that the FGC convenor be an independent person.²⁶ A convenor who is independent of the parties is better placed to be an ‘honest broker’ between the parents and the Department.
- 9.37 It is also essential for the FGC process to have the support of all participants in the child protection system, including the Court. FGC convenors should be independent of both the Court and the Department, but respected by both. These goals might be best achieved if an employee of OCYA convenes FGCs. In consultations there was support for an independent statutory commissioner who has a role in relation to ADR processes.²⁷
- 9.38 Placing the function of convening FGCs within OCYA would enable convenors to draw on the expertise of the specialists employed by OCYA, in relation to matters such as training and risk assessment. In Option 1, the Commission suggests that convenors should have appropriate qualifications and training,²⁸ and notes the importance of the Department and families having confidence that convenors have a thorough understanding of child development issues.²⁹
- 9.39 Children and youth advocates employed by OCYA should represent children in FGCs. These advocates and the convenors should be drawn from separate branches of OCYA. After careful deliberation, the Commission believes that these two roles would not be in conflict. VLA effectively manages these quite different functions in a family law context in its Roundtable Dispute Management conferences, in which both convenors and representatives for the parents or the child are employees of VLA.
- 9.40 It is important to note that particular considerations exist in relation to family decision-making processes for Aboriginal children, young people and families. As noted in Option 1, the Commission considers that the Children’s Court (Family Division) Koori Family Support Program (KFSP) is the appropriate vehicle for identifying the specific needs of Aboriginal communities in Victoria in relation to child protection matters.³⁰ Findings of the KFSP should inform the manner in which FGCs would be convened by OCYA for Aboriginal children, young people and families. Considerations for Aboriginal children, young people and families, when convening FGCs, are discussed in greater detail in Chapter 7.

REPRESENTING CHILDREN AND YOUNG PEOPLE

Introduction

- 9.41 The Commission has proposed elsewhere in this report that all children and young people who are the subject of protection matters should be represented.³¹ Option 2 contains a proposed model of representation for children and young people.³²
- 9.42 If OCYA is established, the Commission still envisages that all children and young people would be represented in child protection matters affecting them and that the models of representation described in Option 2 would apply. OCYA, however, would be the body primarily responsible for providing representatives for children.

Children and youth advocates

- 9.43 In order to fulfil its representation function, OCYA could employ a number of children and youth advocates (advocates).³³ As proposed in Options 1 and 2, the child or young person would be represented in both family decision-making processes and in court proceedings.³⁴ In this option, advocates would be both lawyers and non-lawyers. There may be various types of matters and various stages in proceedings where a non-lawyer advocate would be best placed to represent the child. For example, non-lawyer advocates could be appointed in cases in which the legal issues are relatively simple.³⁵
- 9.44 The concept of non-lawyer representatives in protection matters is not new. As noted in Chapter 3, the *Children, Youth and Families Act 2005 (Vic)* (CYF Act 2005) provides for a child to be represented by a layperson—that is, a person who is not a legal practitioner or a parent of the child.³⁶ The Commission is not aware of proceedings in which this has occurred.
- 9.45 The Children’s Court referred to the appointment of non-lawyer advocates in its submission, stating that ‘although the Court would generally be reluctant to allow a non-lawyer to represent a child, it is not difficult to think of instances where this might be appropriate.’³⁷ Although the reasons for the Court’s reluctance are not identified in its submission, the Commission suggests that all advocates, lawyers and non-lawyers alike, should be subject to extensive training. All advocates would need to be bound by guidelines relating to:
- the two models of representation for children and young people, and when each is to apply
 - interviewing children and young people and ascertaining their views
 - making an assessment of the child’s or young person’s best interests, in cases where acting on a best interests basis
 - assessing the capacity of children and young people to instruct, in cases where direct instruction may be appropriate
 - avoiding and resolving conflicts of interest
 - court process in protection proceedings.³⁸
- 9.46 In its submission, the Children’s Court approved of non-lawyer representatives being appointed only with the leave of the Court.³⁹ With sufficient training and support for adherence to guidelines, the Commission believes that non-lawyer advocates could effectively represent children and young people in some protection matters before the Court. In its submission, the West Heidelberg Community Legal Service referred to the need for an independent advocate of children, stating that ‘such an advocate need not be a lawyer’.⁴⁰ It should be noted that in some other jurisdictions, the child or young person may be represented by a lay advocate in an FGC.⁴¹ However, the Commission envisages the role of non-lawyer advocates within OCYA extending beyond that played by any layperson. The advocates, both lawyers and non-lawyers, should be appropriately qualified professionals trained in the representation of children.

- 25 See Chapter 7, Proposal 1.5.
- 26 See the discussion about the importance of the independence of FGC convenors in Chapter 7.
- 27 Consultations 20 (DHS Community Care Managers), 23 (DRC), 27 (FVPLS Victoria).
- 28 See Chapter 7, Proposal 1.2.
- 29 The qualifications, training and functions of FGCs convenors are discussed in Chapter 7.
- 30 The Koori Family Support Program is discussed in Chapter 7.
- 31 See discussion of representation in Chapter 8 under the heading ‘The need for all children and young people to be represented in protection proceedings’.
- 32 See Proposal 2.16 in Chapter 8. Although this model of representation was proposed in Option 2 specifically in the context of protection proceedings before the Family Division of the Children’s Court, it could equally apply to family decision-making processes with additional guidelines to regulate the role of the child’s representative. The term ‘family decision-making processes’ is used to refer to family group conferences, conciliation conferences and judicial resolution conferences. In Option 1, the Commission acknowledges the importance of legal advice around family decision-making processes and proposes that the child, at least, should have a representative in these processes. See Chapter 7 discussion of representation of children in family decision-making processes.
- 33 ‘Children and youth advocates’ will be referred to in this chapter as ‘advocates’ for simplicity. ‘Advocates’ is not being used to refer to representatives of other parties involved in protection matters, but rather children’s representatives employed by OCYA.
- 34 As noted, ‘family decision-making processes’ is used to refer to family group conferences, conciliation conferences and judicial resolution conferences.
- 35 This idea was raised in the Department of Health (UK) *Consultation Paper: Support Services in Family Proceedings—Future Organisation of Court Welfare Services* (1998) 42.
- 36 *Children, Youth and Families Act 2005 (Vic)* s 524(8). As noted in Chapter 5, the New Zealand CYPF Act 1989 also provides for lay advocates to represent children and young people in FGCs: *Children, Young Persons and Their Families Act 1989 (NZ)* s 22(1).
- 37 Submission 46 (Children’s Court of Victoria) 67.
- 38 As noted above, additional guidelines for representatives may be necessary in relation to family decision-making processes.
- 39 Submission 46 (Children’s Court of Victoria) 67. This is the situation as provided for under *Children, Youth and Families Act 2005 (Vic)* s 524(8).
- 40 Submission 24 (WHCLS).
- 41 See, for example, New Zealand: *Children, Young Persons and Their Families Act 1989 (NZ)* s 22(1); and South Australia: *Children’s Protection Act 1999 (SA)* s 29(2). See Chapter 5 for this point in relation to New Zealand, and Chapter 4 for South Australia.

Option 3—Office of the Children and Youth Advocate (OCYA)

9.47 A report prepared for the Commission by Foster Care Association Victoria (FCAV) for the purposes of this reference also recommended that children have skilled advocates.⁴² According to FCAV:

*These advocates would understand child development and the impact of traumatic events and child abuse. They would know not only what to ask children, but also how to best act upon what they have heard.*⁴³

This comment emphasises the benefit of child representatives having the relevant professional experience and expertise to efficiently and sensitively interact with and represent children.

9.48 The Commission favours a flexible approach to the appointment of lawyer and non-lawyer advocates within OCYA. In certain cases it may be more appropriate to appoint a non-lawyer advocate and in other cases a lawyer may better meet the child's or young person's needs. The Commission envisages a non-lawyer advocate with relevant social work experience being particularly useful, for example, early in proceedings where risk assessment is critical. Additionally, a non-lawyer advocate, perhaps with child psychology expertise, might be especially skilled in interviewing children and young people in order to elicit their views. Many children and young people involved in the consultation with CREATE expressed a desire to have proceedings explained to them in language they could understand.⁴⁴ Advocates would not necessarily have to have legal expertise and training to fulfil this function when a matter concerning a child or young person is initially referred to OCYA for FGC.

9.49 A 1998 Welsh Department of Health report made several suggestions about the appointment of non-lawyer representatives for children in the context of their guardian *ad litem* system. The report suggested that if a non-lawyer representative was initially appointed, the opportunity to later appoint a legal representative must be available if the necessity arose.⁴⁵ The report also suggested that legal representatives should be able to withdraw from cases if legal representation was no longer necessary, and that access to legal advice should always be available from the outset even if the child's appointed representative is a non-lawyer.⁴⁶ Considerations such as these may need to be adopted in relation to representation of children and young people by OCYA's non-lawyer advocates.

9.50 While the Commission has canvassed the many advantages of having children and youth advocates with experience and expertise in disciplines other than law, there would still be an ongoing need for lawyer advocates who would represent the child or young person in legally complicated cases.

Models of representation and avoiding conflicts

9.51 Advocates from OCYA should represent children and young people on the models set out in Option 2.⁴⁷ This means that children and young people would be represented by OCYA on a best interests basis, unless:

- a mature child or young person has a desire to fully participate in proceedings and has the understanding and capacity to direct their representation
- the child or young person, having had explained to them the duty of a representative to directly relay the child's or young person's views to the Court, nevertheless refuses to accept representation on a 'best interests' basis.⁴⁸

- 9.52 Where these conditions are satisfied, an advocate from OCYA should be appointed to represent the child or young person on his or her instructions. Where necessary, advocates may wish to draw on the expertise of OCYA specialists to determine whether a child or young person should be directly represented.
- 9.53 If OCYA was providing representation for just one child or young person, and it was deemed appropriate for that child or young person to be represented on his or her instructions, then an OCYA advocate would act as the child's or young person's direct representative. However, where OCYA had appointed an advocate to act in the best interests of a sibling group, and it was determined that an older sibling was to be represented on instructions, a direct representative from outside OCYA would need to be appointed to avoid any conflict of interest.
- 9.54 OCYA could not appoint both an advocate to act in the sibling group's best interests and another advocate to act on the instructions of an older sibling in the one matter. However, the Commission does not consider that a conflict would arise where an advocate acting on a best interests model for a sibling group was required to put divergent views to the Court from different children in that sibling group. The advocate would be presenting the individual views of each child in addition to an overall assessment of the children's best interests.

Role of advocates in obtaining expert reports and assisting decision making

- 9.55 The Commission envisages that where an OCYA advocate is acting on a best interests representation model, he or she would have a role in obtaining expert reports to inform the child's representation and assist decision making.⁴⁹ This is a typical role for a best interests representative to fulfil—gathering information to put before the decision maker and thereby enabling the decision maker to determine what is in the child's best interests.⁵⁰
- 9.56 This role would be important both in family decision-making processes⁵¹ and in proceedings before the Family Division of the Children's Court. In family decision-making processes, it may be necessary, for example, to obtain an expert report for informed negotiation and decision making to continue. This would be necessary in circumstances where an issue required determination before discussion and decision making could take place. An advocate acting for a child or young person on a best interests basis would be responsible for seeking expert reports or otherwise gathering information to enable participants in a family decision-making process to reach an agreement in the child's best interests.
- 9.57 Similarly, advocates acting on a best interests basis and appearing in hearings before the Court would gather relevant information, including expert reports. These expert reports could come from the specialists within OCYA or an external source. The Commission believes that a conflict would not arise where both the child's or young person's representative and an expert report came from within OCYA.
- 9.58 Where a child or young person is represented directly by an OCYA advocate, that advocate would not have this information-gathering role. It is the role of the direct representative to act on the child's or young person's instructions, and the direct representative is not required to provide information beyond those instructions.⁵² It is important for the representative-client relationship that the child's or young person's instructions are not undermined by information gathering that is inconsistent with those instructions. However, the direct representative could obtain expert reports if this was consistent with the child's or young person's instructions.

42 Foster Care Association of Victoria Inc, above n 21, 18.

43 Ibid.

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

45 Department of Health (UK), above n 35, 42.

46 Ibid.

47 See Chapter 8 under the heading 'Representation of children and young people in proceedings'. The Commission's proposed model of representation is set out under the subheading 'The Commission's views'.

48 See Chapter 8, Proposal 2.16.

49 This role may need to be performed at any stage, including FGCS, conciliation conferences, judicial resolution conferences and proceedings before the Family Division of the Children's Court.

50 See, for example, the role of the ICL in family law. This is discussed below and throughout Chapter 8.

51 Including FGCS, conciliation conferences and judicial resolution conferences.

52 The role of the direct representative is discussed in Chapter 8 under the heading 'The direct representative'.

Option 3—Office of the Children and Youth Advocate (OCYA)

- 9.59 It is possible in certain circumstances that the Court will desire more information on which to base its determination. At any stage of proceedings, and regardless of the model on which the child is represented, the Court must have the power to request expert reports or other information on its own motion, even where the child's representative is not responsible for facilitating the provision of those reports.⁵³ The Commission suggests that this power could include the Court requesting expert reports from within OCYA without conflict arising, even where a child or young person was directly represented by an advocate from OCYA. The representation and specialist branches of OCYA would need to be distinct and an OCYA direct representative for a child would be able to cross-examine a specialist from OCYA where necessary.⁵⁴
- 9.60 In circumstances where an advocate from OCYA directly represents the child or young person and the Court requires further information to make its determination, it should also retain the power to appoint a best interests representative for the child or young person if required. The Commission considers that this would only occur in rare cases, in circumstances where the Court considered it was unable to make its determination without appointing a best interests representative.

Continuity of the representative

- 9.61 It is highly desirable that, whenever possible, the same advocate represents a child or young person throughout the entire process. One advocate should have responsibility for a child's or young person's matter from the time a case is referred to OCYA for an FGC until any proceedings before the Family Division of the Children's Court are finalised. If a lawyer has been acting for a child in the Children's Court on a best interests basis, and the case is subsequently heard in a family court and an independent children's lawyer (ICL) is requested, ideally that lawyer should be the same lawyer who appeared for the child in the Children's Court.⁵⁵ In cases that are transferred from the family courts where an ICL has been acting for a child to the Children's Court, it is suggested that either the ICL continues to appear for the child, if best interests representation is the appropriate model, or otherwise liaises closely with the OCYA advocate.
- 9.62 Continuity of representation is also important when a non-lawyer advocate is appointed to represent a child in FGCs and Children's Court proceedings. If the non-lawyer advocate needs to engage a lawyer for court hearings, it is envisaged that the non-lawyer would continue to be the child's advocate and maintain a close working relationship with the child. In this way, the non-lawyer advocate would minimise the need for the child or young person to unnecessarily repeat information to a legal representative. If a case were subsequently heard in either the Family Court or Federal Magistrates Court, the non-lawyer advocate would not be qualified to appear as an ICL. The non-lawyer advocate could, however, work closely with any ICL to assist the child.

Representation of Aboriginal children

- 9.63 Several submissions raised the importance of representation for Aboriginal children in child protection processes.⁵⁶ In its submission, the Aboriginal Family Violence Prevention and Legal Service stated:

*FVPLS Victoria is of the view that ATSI children and families must have the option to access legal assistance through ATSI legal services where cultural issues and holistic service provision are at the forefront of advocacy.*⁵⁷

It was also noted in this submission that Aboriginal legal services would need to be resourced adequately to facilitate representation in the Children's Court, and that processes would need to be implemented to support such representation.⁵⁸

- 9.64 The Commission envisages that OCYA would have responsibility for all children and young people who are the subject of protection matters in Victoria, including Aboriginal children and young people. This means that OCYA advocates would be responsible for representing Aboriginal children and young people,⁵⁹ for which specific, culturally-appropriate practices would need to be developed.
- 9.65 To ensure adequate representation of Aboriginal children and young people in child protection matters, OCYA would need advocates with the necessary cultural competence, as well as training in the representation of children and young people. Guidelines governing the representation of children and young people, as discussed above,⁶⁰ would need to encompass representation issues specific to Aboriginal children and young people. These guidelines would need to be developed in partnership with Aboriginal agencies. If OCYA were to represent Aboriginal children and young people, there would need to be a specialised group of advocates to perform this function.
- 9.66 In its submission, the Victorian Aboriginal Child Care Agency Co-Op emphasised the need for all children to have an advocate, and proposed expanding the functions of the Aboriginal Child Specialist Advice and Support Service (ACSASS) to fulfil this role for Aboriginal children and young people.⁶¹ The Commission considers that ACSASS or a similarly expert advisory body would need to be involved in the representation of Aboriginal children and young people by OCYA. Aboriginal agencies would need to be involved in developing practice guidelines for the representation of Aboriginal children and young people through OCYA. The Commission reiterates its view that the Children’s Court (Family Division) Koori Family Support Program is the appropriate vehicle for identifying the specific needs of Aboriginal communities in Victoria in relation to child protection matters.

PROVIDING SPECIALIST SERVICES

- 9.67 OCYA should have an in-house body of experts in child development and wellbeing who would:
- provide expert input to advocates and convenors in the performance of their functions
 - assist with training and professional development of advocates and convenors
 - provide expert reports to family decision-making forums and the Court in some circumstances.
- 9.68 As well as professionals with expertise in child development and wellbeing, it would also be beneficial for the body of specialists within OCYA to include culturally competent professionals, who could inform OCYA’s operations when representing and convening FGCs for Aboriginal children, young people and families. Such specialists would need to liaise with Aboriginal agencies.
- 9.69 Having such specialists within OCYA would benefit not only Aboriginal children and young people, but also those from other culturally and linguistically diverse (CALD) communities. Specific considerations relating to CALD communities were raised in consultations and submissions.⁶² A devolved consultation undertaken by MyriaD Consultants for the purposes of this reference identified cultural barriers experienced by Afghani, Sudanese and Somali people when interacting with the child protection system in Victoria.⁶³ Employment of culturally competent specialists within OCYA, who could liaise with relevant community leaders and engage translators, might mitigate some of the difficulties experienced in Victoria’s child protection system by people from new and emerging communities. These specialists would assist OCYA’s convenors and advocates in their provision of services to children, young people and families from CALD communities.

- 53 It should be noted that the *Children, Youth and Families Act 2005* (Vic) already provides for the Family Division of the Children’s Court to ‘inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary’ (s 215(1)(d)) and gives the Family Division the power to summons any person to give evidence or produce documents or things before the Court, with or without any party having made an application for it to do so (s 532). This means that the Family Division already has the power to inform itself of certain matters by summoning persons, including experts, to give evidence in protection proceedings.
- 54 Lawyers from Legal Aid Queensland have the capacity to adduce further evidence from their in-house social workers with the leave of the court: telephone conversation with Kyle Terrance, Queensland Legal Aid, 15 June 2010.
- 55 All OCYA legal representatives would need to be accepted on the VLA panel of ICLs, and VLA (who allocate ICLs) would need to be notified that a particular OCYA lawyer had been representing a child.
- 56 See, for example, submissions 26 (FVPLS Victoria), 38 (VALS), 39 (VACCA).
- 57 Submission 26 (FVPLS Victoria).
- 58 Ibid.
- 59 Unless a child was represented by an Aboriginal legal organisation.
- 60 See above under the heading ‘Children and youth advocates’.
- 61 ACSASS currently provides advice to the Department on culturally appropriate intervention for Aboriginal children and young people alleged to be at risk of abuse and/or neglect: Submission 39 (VACCA).
- 62 See, for example, consultation 23 (DRC); submissions 15 (Connections), 43 (VCOSS & YACVic).
- 63 MyriaD Consultants, *Protection Applications in the Children’s Court: Report of Consultations with New and Emerging Communities* (2010) 17.

Option 3—Office of the Children and Youth Advocate (OCYA)

Providing expert input for advocates and convenors

- 9.70 The Commission envisages that a body of experts within OCYA would greatly assist both advocates and convenors in carrying out their respective functions.
- 9.71 Various systems in other jurisdictions demonstrate the benefits of lawyers working collaboratively with other experts, such as social workers, in child protection matters. As noted in the discussion of Option 2,⁶⁴ a number of stakeholders recommended that a guardian *ad litem* system be adopted.⁶⁵ In cases where the guardian is instructing the child’s solicitor on behalf of the child, the guardian is providing social work expertise and input about the child’s best interests. Both non-lawyer advocates and specialists in child development and wellbeing working within OCYA could provide this type of input. Employing non-lawyer advocates and a central body of experts within OCYA would eliminate the need for dual representation—both a guardian *ad litem* and a solicitor for the child—which occurs in some other jurisdictions, such as England.
- 9.72 In Option 2, the Commission also discussed the collaborative relationship that exists between ICLs and other experts in family law cases.⁶⁶ The experts may be either family consultants, engaged by the Family Court and Federal Magistrates Court, or private practitioners with relevant social science qualifications and experience.⁶⁷ ICLs are responsible for gathering information from various professionals that may not have been obtained by the parties to ensure that all relevant material regarding the child is put before the court.⁶⁸ Experts can assist the ICL in making their assessment of the child’s best interests and may provide guidance on issues of child development and wellbeing.
- 9.73 The ICL guidelines explicitly provide that the ICL should seek to work together with any family consultant or external expert in the case to promote the child’s best interests.⁶⁹ The ICL is also encouraged to seek peer and professional support where a case raises issues beyond his or her expertise.⁷⁰ When making submissions about the weight to be given to a child’s views, it may be necessary for the ICL to consult with the family consultant or other expert in relation to questions of:
- the content of the child’s views
 - the context in which those views arise and are expressed
 - the willingness of the child to express views
 - any relevant factors associated with the child’s capacity to communicate.⁷¹

It is these kinds of assessments that the in-house specialists at OCYA could assist the advocates to make. Experts may also assist the ICL in making an assessment of whether, where and how to meet with the child,⁷² and may be able to provide information relating to the dynamics of the family, for example.⁷³

- 9.74 Ontario's Office of the Children's Lawyer (OCL) is an organisation that utilises multidisciplinary collaboration. OCL is responsible for providing representatives for children in various types of proceedings, including child protection proceedings.⁷⁴ As well as a role in providing legal representation, OCL also employs 'clinical investigators',⁷⁵ who need to have social work qualifications.⁷⁶ Clinical investigators may assist lawyers where there are serious clinical concerns that need to be addressed for the lawyer to represent the interests of the child.⁷⁷ A lawyer within OCL may provide a clinical investigator with legal advice and guidance to assist with preparation of reports.⁷⁸ For example, assistance may be required on issues such as evidence, interpretation of documents and legal procedures.⁷⁹ While clinical investigators are responsible for preparing OCL reports in custody and access cases,⁸⁰ it is rare that both an expert report and legal representation would be provided by the OCL in the same case.⁸¹
- 9.75 Legal Aid Queensland employs social workers who prepare family reports for family law matters and social assessment reports for proceedings in the Children's Court of Queensland.⁸² These social workers only accept referrals from in-house ICLs in family law matters and children's separate representatives in protection matters.⁸³ In these particular cases, Legal Aid Queensland lawyers are not representing either parent, so conflicts of interest are avoided.⁸⁴
- 9.76 The kind of expert input for children's representatives detailed above is particularly useful, as in the case of the ICL, where the representative is required to make assessments and submissions to the Court regarding what is in the child's best interests. Specialists within OCYA would assist advocates acting on instructions in different ways. For example, expert input in relation to communicating with children and eliciting and interpreting their instructions would be invaluable to an advocate acting on a direct representation model.
- 9.77 Specialists within OCYA could also assist FGC convenors in the fulfilment of their functions by providing expert advice on matters such as family dynamics, power imbalances between negotiating parties, screening and risk assessment.⁸⁵

Assisting with training and professional development

- 9.78 As well as providing expert input for the other branches of OCYA, the in-house specialists at OCYA could assist with training of advocates and FGC convenors. Such training would need to address matters such as:
- risk assessment
 - interviewing children and eliciting their views and instructions
 - child-inclusive practices, such as explaining processes in language that the child or young person is able to understand
 - issues impacting on what is in the child's best interests.
- 9.79 The in-house specialists at OCYA would have an ongoing research role, to ensure that OCYA's convenors and advocates remained aware of current information in relation to child development and wellbeing.

Providing expert reports

- 9.80 Where advocates are acting on a best interests basis they could have a role in obtaining expert reports for family decision-making forums and, in some circumstances, the Court. The Court should have the power to request expert reports on its own motion. There is potential for the specialists within OCYA to provide these reports.

- 64 See Chapter 8 under the heading 'Relevant models of representation in overseas jurisdictions' for a detailed discussion of guardian *ad litem* systems in England and Wales, Northern Ireland, Florida, Michigan and the 'safeguarder' role in Scotland.
- 65 See, for example, consultations 18 (DHS CP Workers Gippsland), 20 (DHS Community Care Managers), 22 (DHS CP Workers Southern), 24 (Prof Cathy Humphreys); submissions 8 (Angela Smith), 29 (Anglicare Victoria), 37 (OCSC), 38 (VALS), 41 (Australian Childhood Foundation).
- 66 See Chapter 8 for this discussion.
- 67 See Chapter 8 for this discussion.
- 68 *P and P* (1995) 19 Fam LR 1, 33.
- 69 Family Court of Australia, *Guidelines for Independent Children's Lawyers*, endorsed by the Chief Justice of the Family Court of Australia and by the Federal Magistrates Court of Australia (2007) 2.
- 70 *Ibid.*
- 71 *Ibid.* 4.
- 72 *Ibid.* 6.
- 73 *Ibid.*
- 74 Ministry of the Attorney General, Ontario Office of the Children's Lawyer, *More About What We Do* (2007) <www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp> at 3 June 2010.
- 75 *Ibid.*
- 76 Ministry of the Attorney General, Ontario Office of the Children's Lawyer, *Join the Office of the Children's Lawyer* (2007) <www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp> at 3 June 2010.
- 77 Ministry of the Attorney General, Ontario Office of the Children's Lawyer, *More About What We Do*, above n 74.
- 78 *Ibid.*
- 79 *Ibid.*
- 80 *Ibid.* The Commission is aware that most collaboration between lawyers and experts in the OCL occurs in custody and access cases rather than protection cases.
- 81 Ministry of the Attorney General, Ontario Office of the Children's Lawyer, *More About What We Do*, above n 74.
- 82 Email from Kyle Terrance at Queensland Legal Aid, 9 June 2010.
- 83 *Ibid.*
- 84 *Ibid.*
- 85 The importance of such considerations when convening FGCs is discussed in Chapter 7.

Option 3—Office of the Children and Youth Advocate (OCYA)

Distinguishing non-lawyer advocates from OCYA specialists

- 9.81 Both lawyer and non-lawyer advocates should be supported by an in-house body of specialists in child development and wellbeing. While there is likely to be some overlap between the role of non-lawyer advocates and the role of specialists within OCYA, the two roles should be distinguished and the representation and specialist branches of OCYA should be separate.
- 9.82 As detailed above, the advocates' role is to represent children and young people in protection matters. OCYA specialists would play a role in assisting the advocates and convenors to perform their functions by providing expert input, and in training and professional development. While non-lawyer advocates would bring certain expertise to bear on their representation of children and young people, the purpose of having an in-house body of experts is to broaden the competence of all advocates and convenors.

Proposal 3.2: The Commissioner should have the following functions and powers:

- a) To convene family group conferences and assist the parties to reach an agreement that is in the best interests of the child or young person.
- b) To act as the representative of the child or young person in child protection matters and to appear on behalf of the child or young person in all proceedings before the Court.
- c) When acting as a best interests representative for a child:
 - i) to assist the Children's Court to act in an inquisitorial and problem-oriented manner by gathering evidence, including expert reports
 - ii) to assist decision making at family group conferences and family decision-making processes in the Children's Court by gathering evidence, including expert reports.

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

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

INDEPENDENCE OF OCYA

- 9.83 It is important that OCYA be an independent body so that it enjoys the confidence of the families, children and young people who are involved in protection matters, the Children's Court, the Department and the broader community. The need for widespread confidence in OCYA would be vital, because the issues at stake in protection matters have such far-reaching consequences for the people directly involved and because the jurisdiction is much in need of an 'honest broker' who can assist the parties to reach agreements in structured and supportive environments.

9.84 Perceptions of independence are likely to be just as important as actual independence in bringing about real change. A new statutory commissioner that is established to:

- facilitate FGCs
- be the advocate for each child involved in a protection matter
- assist the Children’s Court to act in an inquisitorial manner

would need to be sufficiently removed from the Department—the representative of the state in child protection matters—for those perceptions of independence to be widely held. It is important, therefore, that OCYA report to a minister other than the minister responsible for DHS. The Attorney-General would be the most appropriate minister to have responsibility for OCYA.

9.85 OCYA’s independence should be secured through appropriate appointment, tenure and reporting provisions in the legislation creating the new statutory commissioner. The Public Advocate is a useful model of a statutory commissioner who is involved in advocacy for vulnerable people in individual cases.⁸⁶ The Commission suggests that the provisions in Schedule 3 of the *Guardianship and Administration Act 1986* (Vic), concerning the Public Advocate’s appointment, tenure, and removal from office are appropriate for the statutory commissioner to head OCYA. Importantly, the Governor in Council should appoint the commissioner of OCYA, like the Public Advocate, for a period of seven years, and the commissioner should have the same security of tenure as the Public Advocate.⁸⁷

9.86 Parliamentary reporting powers are important because they provide statutory officers with the opportunity to speak directly to the elected representatives of the entire community. In view of the large number of reports into the child protection system over the past few decades, it is highly likely that most members of parliament would have a strong interest in receiving regular reports from OCYA about its activities. The Commission proposes that OCYA be required to report annually to parliament.

Proposal 3.5: The Commissioner should:

- a) be appointed by the Governor in Council
- b) hold office for a period of 7 years
- c) be otherwise appointed and hold office on terms similar to those that apply to the Public Advocate
- d) be required to report to Parliament on an annual basis about its activities and its financial operations.

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

86 The functions of the Public Advocate, which involve advocating for people with a disability, are set out in the *Guardianship and Administration Act 1986* (Vic) s 15.

87 See *Guardianship and Administration Act 1986* (Vic) sch 3.