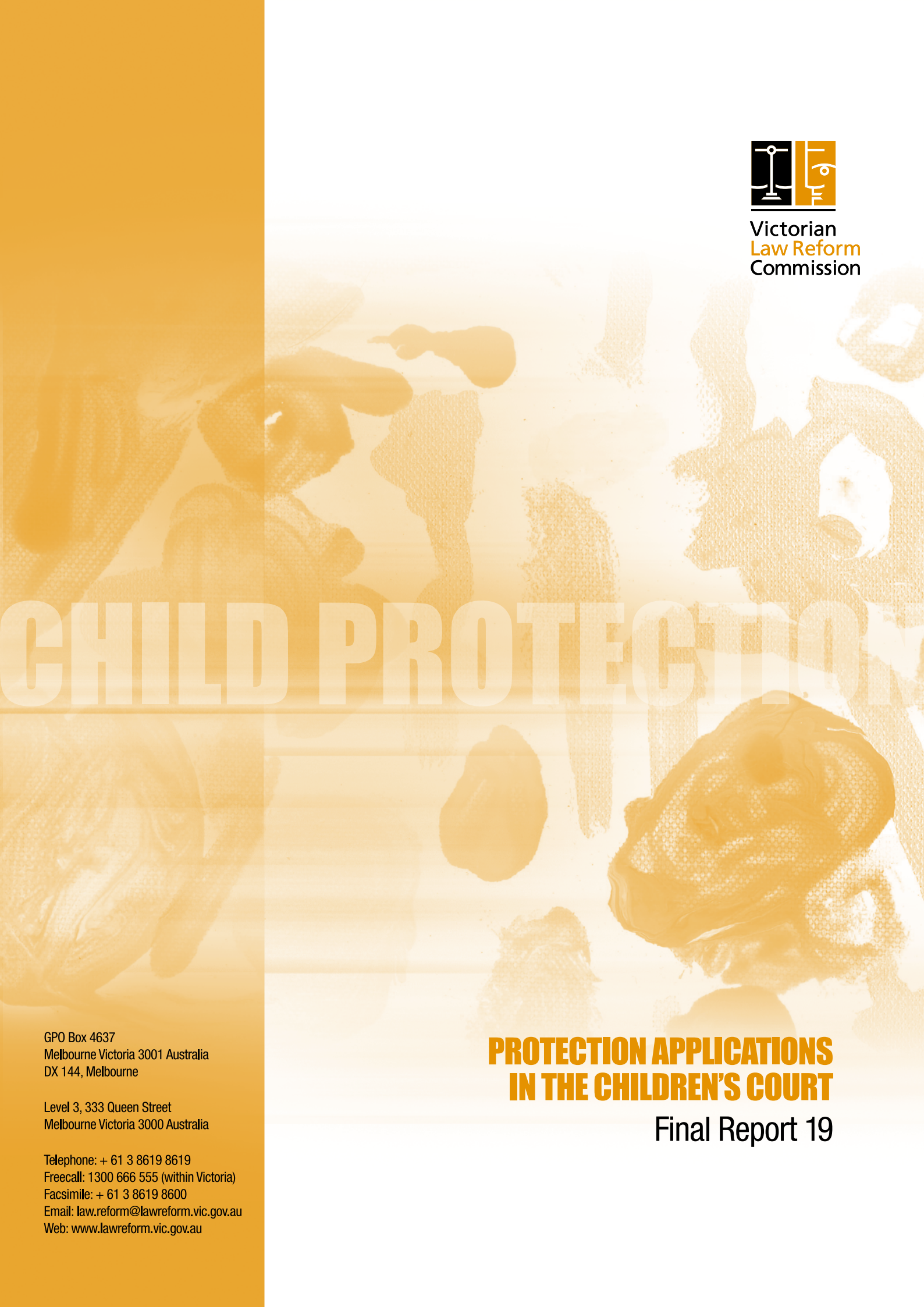

Victorian
Law Reform
Commission

PROTECTION APPLICATIONS IN THE CHILDREN'S COURT

Final Report 19

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Preface

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

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

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

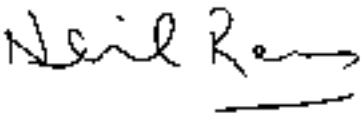
This report is the tenth major review of Victoria's child protection system in the past 33 years. The number of reviews demonstrates the complexity of the field and the difficulty in balancing the interests involved in child protection matters.

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

The members of the Division of the Commission who worked with me on this reference—Judge Felicity Hampel, Magistrate Mandy Chambers and Hugh De Kretser—gave generously of their time and expertise. Justice Iain Ross AO was a member of this Division before resigning from the Commission in March 2010 upon his appointment as President of the Victorian Civil and Administrative Tribunal.

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

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



Professor Neil Rees

Chairperson

30 June 2010

Terms of Reference

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

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

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

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

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

The Commission is to report by 30 June 2010.

Glossary of Terms and Abbreviations

ABBREVIATIONS

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

Glossary of Terms and Abbreviations

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

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

TERMINOLOGY

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

Executive Summary

INTRODUCTION

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

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

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

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

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

BACKGROUND

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

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

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

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

CONSULTATIVE PROCESS

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

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

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

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

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

CURRENT LAW AND PRACTICE

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

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

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

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

Executive Summary

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

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

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

STRUCTURE OF THE REPORT

There are two parts to this report.

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

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

PRINCIPLES

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

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

THE OPTIONS

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

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

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

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

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

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

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

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

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

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

Executive Summary

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

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

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

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

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

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

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

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

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

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

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

Finally, the Commission also proposes that the Court should be given a range of powers which encourage and permit it to control the conduct of proceedings by taking an inquisitorial and problem-oriented approach. The Court should have powers similar to those given to the Family Court and the Federal Magistrates Court in Division 12A of Part VII of the *Family Law Act 1975* (Cth).

OPTION 3—THE OFFICE OF THE CHILDREN AND YOUTH ADVOCATE (OCYA): A NEW MULTI-DISCIPLINARY BODY TO ADVANCE THE INTERESTS OF CHILDREN AND YOUNG PEOPLE

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

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

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

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

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

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

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

OPTION 5—BROADENING THE ROLE OF THE CHILD SAFETY COMMISSIONER

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

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

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

Options and Proposals

CHAPTER 7

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

1.1 A graduated range of supported, structured and child-centred agreement-making processes should be the principal means of determining the outcome of child protection matters.

1.2 The convenors of family decision-making processes should have appropriate qualifications and training.

1.3 The parties involved in family decision-making processes should have access to appropriate legal assistance.

1.4 The professionals who participate in family decision-making processes should have appropriate qualifications and training that fosters inter-professional collaboration.

1.5 Family group conferences should become the primary decision-making forum in Victoria's child protection system.

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

1.7 When an interim care order is made following emergency intervention, the Court should order a family group conference at the earliest possible opportunity unless there are exceptional circumstances that warrant a departure from this general rule.

1.8 A family group conference should be conducted before certain secondary applications are filed in the Court unless there are exceptional circumstances that warrant a departure from this general rule.

1.9 A family group conference should be:

a) convened by an independent person

b) conducted in an appropriate location

c) conducted in accordance with practice standards

d) conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding

e) confidential except as provided in (f) or where any person engages in unlawful conduct during a conference

f) capable of producing an agreement that may become:

(i) a consent order in the Court, or

(ii) an agreement or 'care plan' that can be taken into account in any subsequent court proceedings, family group conference or other decision-making process.

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

1.11 A conciliation conference should be:

a) convened by an independent person

b) conducted in an appropriate location

c) conducted in accordance with practice standards

d) conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding

e) confidential except as provided in (f) or where any person engages in unlawful conduct during a conference

f) capable of producing an agreement that may become a consent order.

1.12 A judicial resolution conference should be:

a) convened by a judicial officer who will not determine the application if the matter is not resolved at the conference

b) conducted in an appropriate location

c) conducted in accordance with practice standards

d) conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding

e) confidential except as provided in (f) or where any person engages in unlawful conduct during a conference

f) capable of producing an agreement that may become a consent order.

1.13 All new family decision-making processes should be independently evaluated and regularly reviewed.

CHAPTER 8

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

2.1 All protection applications should commence by notice.

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

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

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

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

c) the orders sought.

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

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

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

Options and Proposals

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

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

a) 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.

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.

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.

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.

2.11 After involuntary removal of a child from his or her parents, a protective intervener must apply to the Court within one working day for an interim care order unless the child has been returned to the care of a parent or guardian and the Court must seek to determine the application on the day it is made unless there are exceptional circumstances.[1]

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

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

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

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

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

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

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

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

a) have capacity to instruct a legal practitioner, and

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

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

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

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

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

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

1 If a child is returned to the care of a parent or guardian within one working day, the protective intervener should be required to file a document with the Court in which he or she explains why the child was involuntarily removed from the care of his or her parents. If the protective intervener applies for interim orders, he or she must explain to the Court why it was necessary to exercise this removal power.

Options and Proposals

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

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

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

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

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

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

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

2.23 If the Court finds that a child is in need of protection it should be permitted to make an order granting guardianship and/or custody of the child to one parent of the child to the exclusion of another parent when satisfied that this order is necessary to meet the needs of the child.

2.24 Section 146 of the *Family Violence Protection Act 2008* (Vic) should be amended to permit the Court to exercise jurisdiction under that Act when a child who is the subject of a child protection application is a child of 'the affected family member' or 'the protected person'.

CHAPTER 9

OPTION 3—THE OFFICE OF THE CHILDREN AND YOUTH ADVOCATE (OCYA): A NEW MULTI-DISCIPLINARY BODY TO ADVANCE THE INTERESTS OF CHILDREN AND YOUNG PEOPLE

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

3.2 The Commissioner should have the following functions and powers:

a) To convene family group conferences and assist the parties to reach an agreement that is in the best interests of the child or young person.

b) To act as the representative of the child or young person in child protection matters and to appear on behalf of the child or young person in all proceedings before the Court.

c) When acting as a best interests representative for a child:

(i) to assist the Children's Court to act in an inquisitorial and problem-oriented manner by gathering evidence, including expert reports

(ii) to assist decision making at family group conferences and family decision-making processes in the Children's Court by gathering evidence, including expert reports.

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

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

3.5 The Commissioner should:

a) be appointed by the Governor in Council

b) hold office for a period of seven years

c) be otherwise appointed and hold office on terms similar to those that apply to the Public Advocate

d) be required to report to Parliament on an annual basis about its activities and its financial operations.

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

CHAPTER 10

OPTION 4—REPRESENTING THE DEPARTMENT OF HUMAN SERVICES: A ROLE FOR THE VGSO IN PROTECTION MATTERS

4.1 The Victorian Government Solicitor should be primarily responsible for conducting proceedings on behalf of protective interveners in Victoria.

4.2 The Victorian Government Solicitor should prepare, in conjunction with the protective interveners, and after consulting the Managing Director of Victoria Legal Aid and the President of the Children's Court, model litigant guidelines that are specifically designed for protection applications in the Children's Court.

4.3 In preparing these guidelines, regard should be had to the following:

a) the model litigant guidelines prepared by the State of Victoria

b) relevant guidelines prepared by the Office of Public Prosecutions and the Director of Public Prosecutions

c) relevant rules of the Victorian Bar Association and the Law Institute of Victoria.

4.4 The model litigant guidelines should be evaluated and reviewed after they have been in operation for three years.

CHAPTER 11

OPTION 5—BROADENING THE ROLE OF THE CHILD SAFETY COMMISSIONER

5.1 The Child Safety Commissioner should have the following additional functions:

a) to oversee and review the child protection system

b) to investigate and report to the Minister about the operation of the *Children, Youth and Families Act 2005* (Vic)

c) to advocate for children across government and throughout the community

d) to liaise with the Aboriginal community in order to ensure that the Commissioner is able to effectively advocate for Aboriginal children

e) to promote awareness of children's and young people's rights

f) to report to Parliament on an annual basis and when reporting to the Minister about the operation of the *Children, Youth and Families Act 2005* (Vic)

g) to consult children about the performance of the Commissioner's functions.

5.2 The Child Safety Commissioner should:

a) be appointed by the Governor in Council

b) hold office for a period not exceeding five years

c) be otherwise appointed and hold office on terms similar to those that apply to the Public Advocate

d) be required to report to Parliament on an annual basis about the Commissioner's activities and financial operations.

5.3 The Attorney-General should be the Minister responsible for the Child Safety Commissioner.