# CHILDREN'S COURT OF VICTORIA

## RESPONSE TO THE

## VICTORIAN LAW REFORM COMMISSION

## REVIEW OF VICTORIA'S CHILD PROTECTION

## LEGISLATIVE ARRANGEMENTS

**APRIL 2010**

***Section 17 of the Charter of Human Rights and Responsibilities Act 2006 provides:***

1. ***Families are the fundamental group unit of society and are entitled to be protected by society and the state.***
2. ***Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.***

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# ABBREVIATIONS

| | |
|---|---|
| ADR | Alternative Dispute Resolution (aka Appropriate Dispute Resolution) |
| ALRC | Australian Law Reform Commission |
| BCG | Boston Consulting Group |
| CAU | Court Advocacy Unit |
| CPD | Child Protection Division Department of Human Services (DHS) |
| Cth | Commonwealth |
| CTSO | Custody to Secretary Order |
| CYFA | Children Youth and Families Act 2005 (Vic) |
| CYPA | Children and Young Persons Act 1989 (Vic) |
| DAO | Dispute Assessment Officer |
| DHS | Department of Human Services (also referred to as 'The Department') |
| DOCS | Department of Community Services (NSW) |
| DRC | Dispute Resolution Conference |
| DSCV | Dispute Settlement Centre of Victoria |
| FLA | Family Law Act 1975 (Cth) |
| IAO | Interim Accommodation Order |
| ICL | Independent Children's Lawyer in the federal jurisdiction |
| IPO | Interim Protection Order |
| IRD | Irreconcilable Difference Application |
| JRC | Judicial Resolution Conference |
| KEMH | King Edward Memorial Hospital |
| NADRAC | National Alternative Dispute Resolution Advisory Council |
| PCO | Permanent Care Order |
| PHC | Pre Hearing Conference |
| SIOA | Stalking Intervention Orders Act 2008 (Vic) |
| TT(P)O | Therapeutic Treatment (Placement) Order |
| TTO | Therapeutic Treatment Order |
| UNCROC | United Nations Convention on the Rights of the Child |
| VCAT | Victorian Civil and Administrative Tribunal |
| VLA | Victoria Legal Aid |
| VLRC | Victorian Law Reform Commission |

# INTRODUCTION

The views expressed in this submission are informed by the daily experience of the judicial officers of the Children's Court of Victoria. This submission is made on behalf of the President and magistrates of the Court.

## THE VICTORIAN CHILDREN'S COURT

The Children's Court provides a service for the children of Victoria including those in need of protection and child offenders, categories that often overlap. It provides a responsive service in both the Melbourne metropolitan area and throughout rural and regional Victoria. The Court is able to offer a preliminary hearing to any child alleged by the State to be in need of protection and to all other parties within 24 hours of the child's apprehension by the State child protection authorities.[1] In conjunction with the Magistrates' Court, it also provides the child protection authority with the ability to seek safe custody warrants for children believed to be in need of protection throughout the whole State 24 hours a day 365 days a year.

The Court also delivers services to the broader Victorian community. This service includes a program of community education, delivered by judicial officers, and coordinated by its Children's Court Liaison Officer[2]. It also provides a comprehensive website.

The Court acknowledges the work of the Children's Court Clinic, which provides expert reports to the Court when requested, and is independent of all of the parties involved in a case.[3]

In a speech delivered at the Children's Court of Victoria Centenary Celebration on 21 April 2006, the Attorney-General, the Hon. R. Hulls noted the quality of the Court's performance:

> *"This Court is entrusted with a weighty responsibility, and today we can celebrate the fact that it is meeting this obligation better than ever before.*
>
> *Because of the importance with which the Government views this jurisdiction, when we first came into office we established the Court, until that time a division of the Magistrates' Court, as an independent court. In doing so, we also provided that it be headed by a County Court judge, to be known as the President of the Children's Court of Victoria.*

[1] This is the next Court sitting day rather than the next Court day at weekends and public holidays: see sections 242(2) & 242(3) of the CYFA. The latter section provides that unless an apprehended child is brought before the Court within 24 hours after the child was taken into safe custody, he or she must be brought before a bail justice as soon as possible within that period of 24 hours for the hearing of an application for an interim accommodation order.

[2] The functions of the Children's Court Liaison Office are described in section 545(3) of the CYFA.

[3] The functions of the Children's Court Clinic are described in section 546 of the CYFA. The Court believes that the functions of the Clinic will shortly be formally expanded to include the conduct of assessments and the provision of reports in intervention order proceedings, a service which for some time now it has informally provided at the request of the Court.

*The Court's recent history has been marked by diligence, integrity and imagination, and all who have been involved in its operation over the last few decades should be very proud indeed."*

The Court has a crucial role in the child protection system. It makes decisions regarding the removal and placement of children, as well as the provision of services for families, according to legal standards and based on the evidence before it. The Court guarantees to all parties the right to be heard. The Court is not subject to influence by any party no matter how powerful. It "*must maintain its position of independence and integrity and if anything that position should be reinforced rather than diminished."*[4] Anything less will derogate from the rights of the children of Victoria in an unacceptable way.

[4] Justice Fogarty, at p.143 of his 1993 report entitled "Protective Services for Children in Victoria".

# EXECUTIVE SUMMARY

Child protection is linked to social disadvantage. Many of the families who come into the Court have one or more of the following common characteristics - poverty, lack of education, inadequate housing, social isolation, intellectual disability or mental illness, family violence or drug and alcohol abuse. Child protection is not just a problem for a government department or the Court: it is an issue for the whole community to address and it requires a whole of government response.

As one writer has expressed it:

> *"This endeavour requires integrity of government, planning and appropriately generous investment, to ensure required levels of personnel can meet needs not just for case assessment, investigation and service delivery, but, just as importantly, to enhance primary and secondary prevention. The endeavour should be a principled exercise informed by good evidence, consistently adopted by all governments. It should not be reduced to a political task, motivated inappropriately by short sighted personal, economic or electoral interests."*[5]

The Court has summarised its response in relation to each option proposed by the Victorian Law Reform Commission (VLRC) below.

**Option 1 (New processes that may assist the resolution of child protection matters by agreement rather than by adjudication)**

Recent research by the Boston Consulting Group (BCG) shows that less than 3% of cases before the Children's Court of Victoria proceed to a final contested hearing. The great majority of cases are resolved by negotiation between the parties, assisted by their lawyers and facilitated by the Court. The Court reviews every order to ensure that they are in the best interests of the child.

It appears to the Court that concerns about the current court based model are not focussed on the quality of its decision-making or its ability to resolve disputes. Rather it is focussed on some aspects of the Court process including its operating environment which is considered "too adversarial" by some. The focus of much of this criticism appears to relate to proceedings at the Melbourne Court.

The Court outlines in Option 1, its long-standing commitment to and appreciation of Alternative Dispute Resolution (ADR) processes and its determination to ensure a best practice model is achieved to further reduce adversarial practices at the Court. The Court's commitment to the work of the Premier's Child Protection Taskforce[6] (the Taskforce), established in response to the *Own Motion Investigation Into the*

[5] See Ben Matthews – "Protecting Children from Abuse and Neglect" in "Children and the Law in Australia" 2008 LexisNexis Butterworths.

[6] The Taskforce Report was provided to the Premier on 26 February 2010. Its full title is "Report of the Child Protection Proceedings Taskforce."

*Department of Human Services Child Protection Program* (Ombudsman's Report), and its determination to implement recommendations of the Taskforce in relation to-

- stronger ADR;
- less cases at Melbourne;
- structural changes to the Melbourne building;
- supporting the development of a "code of conduct" for practitioners;
- improved training for convenors; and
- developing less adversarial trial processes and improved listings

should allow these process concerns to be addressed. [7]

The Court notes that the Taskforce work followed the successful establishment of the Family Division of the Children's Court at the Moorabbin Justice Centre. The trial of a new model of ADR at that Court has proved successful.

The Court confirms its commitment to an integrated ADR response that includes the effective use of Judicial Resolution Conferences (JRCs).

The Court strongly supports the development and strengthening of pre-court (or "front-end") interventions, and urges the Commission to examine existing models, such as the WA *Signs of Safety Pilot.* It is the Court's view that legal representation of parties is critical to the conduct of good practice ADR at all stages of the intervention process.

Prior to the reference to the VLRC, the Court was already exploring alternate "problem solving" approaches in its child protection division. For example, the Court is developing Family Division processes that would be appropriate for Koori children, Koori families and Koori communities. The Court would also like to build upon the learnings from the Sex Offenders List in its Criminal Division by creating a specialist list for protection applications where sexual abuse is alleged.

The Court urges the Commission to examine other Court models such as Family and Drug treatment models[8] and a 0-3 Years Family Division List[9]. The Court supports these innovative approaches but requires resources to develop and implement them.

**Option 2 (New grounds for state intervention and specific court processes)**

In Option 2 the Court submits that, given the extremely high proof rate of protection applications and the lack of applications for temporary assessment orders, children are adequately protected by the existing grounds in section 162 of the *Children, Youth and Families Act 2005* (CYFA). In the Court's view, save for the addition of a "no fault" ground, no expansion of the grounds is either necessary or desirable.

The Court supports the extension of the power in section 272 of the CYFA to pre-court proceedings in circumstances where the undertaking is subsequently presented to the Court for "approval". However, support for this proposal is provided on the basis that the person giving the undertaking does so voluntarily and is able to access legal representation, if he or she wishes, prior to entering the undertaking.

[7] Assuming the Government agrees to adopt and fund the Taskforce recommendations.
[8] Based on successful US model discussed at p74.
[9] Discussed at p74.

The Court further recommends that, in terms of sanctions for breaches of undertakings, it should have the power to confirm the undertaking or contract, vary the undertaking or contract, or revoke the undertaking or contract and replace it with a protection order, provided that the Court is satisfied that the child is still in need of protection.

The Court would not oppose provisions which allow it to "approve" a "parental responsibility undertaking" or a "child welfare contract" at any stage of proceedings if it is satisfied that such undertaking or contract is in the best interests of the child.

The Court does not support any change to the present requirement that a child taken into safe custody must be brought before the Court within 24 hours. In the Court's view, a change to 72 hours is not in the best interests of the child.

The Court recognises the justifiable concerns about children attending court; particularly the over crowded Melbourne Court. However, children who are mature enough to give instructions will need to attend court on a safe custody application to provide instructions to their lawyer.

The Court notes that there is an urgent need for childcare facilities at the Melbourne Court and has long argued this position. On any given day there are many children and families in the waiting areas of the Family Division. These areas are not child or family friendly.

The Court outlines six models of child representation but does not have a unanimous view on the best model to adopt; it does however, unanimously support better funding for those charged with representing children.

The Children's Court does not have the capacity to docket cases and is unaware of any summary, high volume, State Courts that are able to do so. However, the Court is active in managing its cases and constantly reviews listing practices to improve case management and flow through the system. The Court has agreed to changes to listing practices recommended by the Taskforce.

The Court notes the positive responses to moving Southern Region cases to the Moorabbin Justice Centre. The Court seeks Government support to continue moving cases away from the Melbourne Court. It supports the Taskforce recommendation that two courtrooms in the old County Court building be allocated to the Children's Court for Eastern Region cases. If this recommendation is adopted by Government, the pressure at Melbourne would be reduced with that Court effectively becoming the Court for the North West Region.

The Court supports the adoption, with appropriate variations, of the "Less Adversarial Trial" provisions of Division 12A of Part VII of the *Family Law Act 1975* (Cth), in the Children's Court. The Court has provided a detailed proposal for legislative amendment and notes that it has been agitating for such a change for some time.

**Option 3 (An independent statutory commissioner)**

The Court strongly supports the creation of an independent statutory commissioner largely analogous to the Office of Public Prosecutions with responsibility for the carriage of proceedings before the Children's Court. However, the Court does not support the Commissioner's involvement in pre-court deliberations, or in having a 'first instance' capacity to authorise State intervention in 'safe custody' cases, or a capability of being appointed as a guardian or custodian. The Court submits that these additional responsibilities compromise independence and, for that reason, are regarded as inappropriate functions for the Commissioner.

**Option 4 (The nature of the body which decides whether there should be State intervention in the care of a child)**

The Court does not support the proposed option to utilise lay panels or boards as decision-makers in child protection cases. The Court opposes the adoption of a model that is based on the Scottish Children's Hearing System.[10]

Nor does the Court support the proposed option to replace the court based model with a tribunal, whether it is comprised of non-judicial members or both judicial members and non-judicial members.

The Court notes that the reference to the Commission derives from the Ombudsman's Report. The Court submits that conclusions about the need for a departure from a court-based model are not based on thorough research or a balanced assessment of evidence.

It is important to note in relation to the Court's decision-making that the relevant legislation provides for a comprehensive system of appeals and reviews of Children's Court decisions. This comprehensive appeal process is available to any party aggrieved by a decision of the Court.[11]

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[10] The Court's examination of the Scottish Children's Hearings System is at p106. There is no suggestion that the criminal jurisdiction of the Children's Court be transferred away from the Court notwithstanding that it was central to the reasoning of the Kilbrandon report (which provided the foundation for the current Scottish system) that child offenders and children in need of protection be dealt with in the same way by exactly the same system.

[11] There are four different avenues of appeal/review:

(1) A right of appeal to the Supreme Court from a final order of the Family Division in cases where the appellant alleges that the judge/magistrate has made an error of law. This is granted and regulated by sections 329 & 330 of the CYFA.

(2) A right of appeal to the Supreme Court on the Court's decision to make or refuse to make an interim accommodation order. See section 271 of the CYFA.

(3) A right of judicial review by the Supreme Court in cases where the appellant alleges that the judge/magistrate has made an error of law. See Order 56.01 of the Supreme Court Rules.

(4) A right of appeal to the County Court from an order of a Children's Court magistrate and to the Supreme Court from an order of the President. The appellant does not have to show any error by the Court. The appeal is a re-hearing, not a determination of whether the orders made by the Children's Court should or should not have been made. This is granted and regulated by sections 328 & 330 of the CYFA.

In the financial year 2007-2008, the Family Division of the Court made 13,499 orders[12]. The Court understands that no more than 12 cases were subject to appeal or review. Two cases involved the complete over-turning of the Court's orders and a third case involved a partial over-turning. This represents three cases out of 13,499 where the Court's decision-making was over turned by a superior court.

Any decision by the State, through its child protection agency, to interfere in the life of a family, and especially to seek removal of a child, is such a significant decision that it must be subject to the independent scrutiny that comes from a Court conducting a public hearing with all of the safeguards that provides. This is consistent with the approach of all Australian States and Territories. It is also consistent with the Victorian Charter of Human Rights and the United Nations Convention on the Rights of the Child.

**The Victorian Law Reform Commission Process and Reference**

In the absence of any sound rationale for the departure from a court-based model, the Court has largely developed this submission in a policy vacuum. The extremely tight period for the preparation of a response, together with the lack of a discussion paper makes the process highly unsatisfactory.

The Court has endeavoured to anticipate matters that may be of interest to the VLRC as well as issues that the VLRC may regard as important to its decision-making. In particular, the Court has included a brief commentary on two topics. Those two topics are *cumulative harm*[13] and *frequency of access between a child and a non-custodial parent.*[14]

Given the absence of any discussion paper from the VLRC, the Court reserves the right to make supplementary submissions responding to particular issues raised in other submissions.

[12] This figure excludes orders extending interim accommodation orders and orders under family violence or stalking legislation.
[13] Discussed at p98.
[14] Discussed at p97.

# THE OPERATIONS OF THE CHILDREN'S COURT OF VICTORIA

## JURISDICTION OF THE CHILDREN'S COURT

The Children's Court of Victoria is comprised of two divisions: the Family Division and the Criminal Division.[15]

The jurisdiction of the Family Division is set out in section 515 of the CYFA and consists of two components:

- jurisdiction to hear and determine various child protection applications ("the child protection jurisdiction")[16]; and
- jurisdiction, shared with the Magistrates' Court, to hear and determine intervention order applications in cases involving children ("the intervention order jurisdiction")[17].

Under the child protection jurisdiction – the Family Division of the Court has the power to hear a range of applications and to make a variety of orders upon finding that a child is in need of protection or that there is a substantial and irreconcilable difference between a child and the person who has custody of the child. For these purposes, a "child" is defined as a person who is under the age of 17 or if a protection order, a transferred interstate child protection order or an interim order is continuing, a person who is under the age of 18.

Under the intervention order jurisdiction – the Family Division of the Court has the power to hear applications relating to intervention orders. Until 7 December 2008, the Court's power in relation to these applications derived from the *Crimes (Family Violence) Act 1987* and the stalking provisions of the *Crimes Act 1958*. On 8 December 2008 new legislation - the *Family Violence Protection Act 2008* and the *Stalking Intervention Orders Act 2008* - became operational. An application for an intervention order can be heard in the Children's Court where the "affected family member" (family violence cases) or "affected person" (stalking cases) or the respondent or an associate is a child. For the intervention order jurisdiction, "child" is defined as a person who is under the age of 18 years when an application is made under the relevant Act.

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[15] Section 504(3) of the CYFA delineates four Divisions of the Children's Court but for all practical purposes the Neighbourhood Justice Division and the Koori Court (Criminal Division) simply exercise part of the jurisdiction conferred upon one or both of the other two Divisions. The Neighbourhood Justice Division, set up by section 520A, is restricted in its jurisdiction by section 520C to criminal proceedings and proceedings in relation to intervention orders. The Koori Court (Criminal Division), set up by section 517, is effectively restricted in its jurisdiction by section 518 to criminal proceedings.

[16] See section 515(1) of the CYFA. However, note (as pointed out in section 2.15 of this submission) that the list of 36 child protection applications which the Family Division has jurisdiction to hear and determine pursuant to section 515(1) appears to have omitted a further 7 applications which are referred to in other sections of the CYFA. This is an error which should be corrected.

[17] See section 515(2) of the CYFA.

The Criminal Division of the Court has jurisdiction to hear and determine summarily all offences (other than murder, attempted murder, manslaughter, child homicide, defensive homicide, culpable driving causing death and arson causing death) where the alleged offender was under the age of 18 but, of or above the age of 10 years, at the time the offence was committed and under the age of 19 when proceedings were commenced in the Court. It also has jurisdiction to hear and determine committal proceedings into all charges against children for indictable offences, to hear applications pursuant to the *Bail Act 1977* and to deal with breaches and/or variations of sentencing orders.[18]

The Children's Koori Court (Criminal Division) deals with Koori children who plead guilty or are found guilty of criminal offences and consent to participate in that process. Two Aboriginal Elders or Respected Persons participate with the presiding judicial officer in the sentencing conversation. However, the determination of the appropriate sentence remains with the judicial officer.

## STATEWIDE SERVICE – FAMILY DIVISION

The Children's Court is a court operating across Victoria. The Family Division sits at the following locations:

- Melbourne region: Melbourne (headquarters court), Moorabbin.
- Grampians region: Ballarat (headquarters court), Ararat, Edenhope, Hopetoun, Horsham, Maryborough, Nhill, St Arnaud, Stawell.
- Loddon Mallee region: Bendigo (headquarters court), Echuca, Kerang, Mildura, Ouyen, Robinvale, Swan Hill.
- Barwon South West region: Geelong (headquarters court), Colac, Hamilton, Portland, Warrnambool.
- Gippsland region: Latrobe Valley (headquarters court), Bairnsdale, Korumburra, Moe, Omeo, Orbost, Sale, Wonthaggi.
- Hume region: Shepparton (headquarters court), Benalla, Cobram, Corryong, Mansfield, Myrtleford, Seymour, Wangaratta, Wodonga.

The Melbourne based court is the only venue of the Court that sits daily in both divisions. It currently has 11 magistrates allocated full-time together with the President. On 1 June 2009, the hearing of child protection cases from the Department of Human Services Southern Region commenced at Moorabbin Children's Court. Two Children's Court magistrates from Melbourne sit at Moorabbin on a two-month rotational basis.

The Children's Court has a strong regional presence with magistrates in country areas sitting as Children's Court magistrates in both divisions on particular days. Country magistrates perform the same work as their Melbourne colleagues. If a country court needs assistance with a Family Division contest of four or more days duration, a magistrate from the Melbourne Children's Court will assist by conducting the directions hearing via video link and then travelling to the country to hear the contest.

[18] See section 516(1) of the CYFA. See also sections 516(2) & 516(3).

## CHILD PROTECTION DIVISION OF DEPARTMENT OF HUMAN SERVICES

The Child Protection Division (CPD) of Department of Human Services (DHS) receives reports of suspected child abuse and determines how those reports are to be processed. Some of the cases reported to CPD result in applications to the Family Division of the Children's Court of Victoria.

Cases of child abuse and neglect usually come to the attention of the CPD by way of reports lodged by concerned members of the public or people who are required by law to report suspected abuse.[19]

CPD authorities will determine if a report is one that requires further investigation. All reports are assessed by CPD and:

- are dealt with by way of advice or referral to appropriate support services; or
- are sent for Child Protection investigation; or
- result in no further action.

Not all reports sent for investigation are substantiated and not all substantiations result in applications to the Court. Many families work voluntarily with CPD and are not subject to an application to the Court. Victoria has a strong community sector with a history of supporting families in difficulty. CPD will often refer families to local agencies for assistance and support.

## FAMILY DIVISION CHILD PROTECTION COURT PROCESSES

The Family Division of the Children's Court becomes involved in the life of a child when the CPD decides to invoke the Court's jurisdiction. It may do this by issuing a notice for a future hearing or alternatively, by apprehending the child and seeking immediate orders from the Court in relation to the child's placement.[20]

A diagrammatic representation of the Children's Court process is attached at Appendix 1.

On a proceeding initiated by notice, the placement of the child remains unaffected, at least until the first mention date of the case and generally throughout the life of the case. On an apprehension, the Court will approve consent orders or alternatively determine where the child is placed (for example, with the parents, a suitable person or out of home care) pending the determination of the application. It is permissible for these "apprehension hearings" to be conducted by way of 'submissions' by legal representatives.[21] Interim placement of children is by way of an Interim

[19] The law in Victoria requires certain professionals to make a report to the Secretary of DHS where they form a belief that a child is in need of protection from either physical or sexual abuse**.** A failure to report is a criminal offence. The relevant professionals referred to in the Act include teachers, police officers, youth and social workers, employees of a children's service, medical practitioners, nurses and psychologists. See Part 4.4 of the CYFA.

[20] The Court also hears secondary applications. These are applications to extend, vary, revoke or breach existing orders.

[21] See *Grandell v Hartrick* Unreported Vic. Sup Court 31 Jan 1994 (No 1) & (No 2) 2 Aug 1994

Accommodation Order (IAO). These orders provide for temporary placement of a child with a parent, with a suitable person, in out of home care, in secure welfare, in a declared hospital or in a declared parent and baby unit. If the child is placed with a parent or a suitable person, the parent or suitable person must provide an undertaking to the Court to produce the child at the hearing of the application. A child can be placed with a suitable person provided that CPD has reported (orally or in writing) on the suitability of the person. Placement of a child in secure welfare can only occur if there is a "substantial and immediate risk of harm to the child"[s.263(1)(e)].

The Court may impose any conditions it considers to be in the best interests of the child. Determining interim placement is a significant part of the Court's workload. In 2007-08, for example, the Court made 5,820 IAOs although it is fair to say that the majority of these were uncontested. If a child is placed away from the parents, the case must return to the Court every 21 days until the case is resolved. The only exception is where a child has been placed in secure welfare. That placement can be for no more than 21 days and can only have one extension of no more than 21 days if there are exceptional circumstances. [s.267(2)(c)]

In making decisions about placement of children, "the best interests of the child must always be paramount"[22]. When determining best interests "the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development)" must always be considered. Section 10(3) of the Act lists 18 further matters for the Court to consider in determining what decision or action is in the best interests of the child.[23]

Once interim placement is determined, a case is managed through a mention process. Not all cases require a contested hearing. Indeed, the great bulk of cases are resolved by negotiation, with the Court endorsing particular orders. The Court refers potential contests to a Dispute Resolution Conference (DRC).

For a protection application to be proved, the Court must be satisfied on the balance of probabilities that the child or young person has been –

1. orphaned or abandoned (temporarily or permanently) without anyone to care for him or her; or
2. has suffered, or is likely to suffer, significant harm as a result of physical abuse, emotional abuse, sexual abuse or neglect and the parents have not protected (or are unlikely to protect) the child or young person.

Nearly all of the protection applications that come before the Court involve the second category of case. The Court finds the vast majority of such applications proved. The Victorian legislation is proactive and intervention by DHS is usually timely.

[22] s.10 of the CYFA reproduced as Appendix 5.

[23] The CYFA also details additional decision-making principles for Aboriginal children. In making a decision or taking an action in relation to an Aboriginal child, DHS must consider the principles in s. 12. If it is determined that it is in the best interests of the child to be placed in out of home care, DHS must, in making the placement have regard to the advice of an Aboriginal agency, the criteria in s. 13(2) of the Act and the principles in s.14 of the Act. The principles in ss.13-14 are also relevant to the Court's decision-making.

If the Court is satisfied, on the balance of probabilities, that a child is in need of protection, it must then determine the order to be made in the child's best interests. A summary of the orders the Court can make is contained in Appendix 2.

CPD can apply to the Court for an extension of a supervision order, a supervised custody order, a custody to Secretary order and a guardianship to Secretary order.

## Permanent Care Orders

Permanent Care Orders (PCOs) bear the quality and feel of an adoption style order by granting to the carer guardianship and custody rights. A Court can only make such an order if it is satisfied -

- the child has been out of parental care for at least six months of the previous 12 months and
- reunification with a parent is not in the best interests of the child.

A PCO must contain conditions in relation to parental and sibling access that the Court considers to be in the best interests of the child.

The Court must not make a permanent care order placing an Aboriginal child solely with a non-Aboriginal person/s unless the conditions in s.323 are satisfied. Importantly, the Court cannot make such an order unless it has received a report from an Aboriginal agency and that agency recommends the making of the order.

## Therapeutic Treatment Orders and Therapeutic Treatment (Placement) Orders [24]

These orders have been available since 1 October 2007. The Court can make a Therapeutic Treatment Order (TTO) in respect of a child aged 10-14 years if satisfied that:

- the child has exhibited sexually abusive behaviours; and
- the order is necessary to ensure the child's access to or attendance at an appropriate therapeutic treatment program.

Any statement made by a child when participating in a therapeutic treatment program under a TTO is not admissible in any criminal proceeding in relation to the child.

The Court can make a Therapeutic Treatment (Placement) Order (TT(P)O) if it has made a TTO in respect of a child and is satisfied a TT(P)O is necessary for the treatment of the child. A TT(P)O grants sole custody of the child to the Secretary.

Both orders have a maximum initial period of 12 months and may be extended once for up to 12 months.

[24] Refer sections 244 – 258 CYFA.

## FAMILY VIOLENCE/STALKING ORDERS - THE COMMONWEALTH JURISDICTION

Under the CYFA, the Family Division has jurisdiction to hear and determine applications to make, vary, revoke or extend an intervention order under the *Family Violence Protection Act* 2008 or the *Stalking Intervention Orders Act* 2008, when either the respondent or an affected person is a child. As a result the Children's Court has Commonwealth jurisdiction to vary Family Court orders that conflict with intervention orders made under the *Family Violence Protection Act* 2008, provided that the jurisdiction is exercised by a magistrate (section 68R of the *Family Law Act* 1975)(Cth).

The number of applications to the Court has risen over the past three years and a total of 1,836 complaints for an intervention order were finalised during the 2008-09 period.

### New Diversion to Mediation Program – Intervention Order Proceedings

The Children's Court in partnership with the Dispute Settlement Centre of Victoria (DSCV), implemented a new Diversion to Mediation Program in November 2009.

Each Wednesday, at least one Dispute Assessment Officer (DAO) from DSCV attends the Melbourne Children's Court. Whilst the program concentrates predominantly on stalking intervention order applications, all of the Court's family violence and police applications are also listed on that day. The DAO is provided with all material for the matters listed to assist them in indicating to the Court whether a matter may be suitable for assessment for mediation. A court registrar acts as the intermediary and refers parties to the DAO. The DAO undertakes an assessment to ascertain suitability for mediation. If the DAO deems the case suitable and all parties agree, the case is set down for mediation and the Court will adjourn the matter in order for this to occur. A report is subsequently provided to the Court as to the outcome of the mediation and if the Court agrees, orders are made accordingly.

In cases where mediation has resulted in agreement, it is the Court's view that a better outcome for parties has been achieved with the cause of the conflict addressed and a decreased likelihood of further applications to the Court.

## THE CHILDREN'S COURT CLINIC

The Children's Court Clinic, under the directorship of Dr Patricia Brown, is an independent body within the Department of Justice, which conducts assessments and provides reports on children and their families at the request of Children's Court magistrates throughout Victoria. The Court considers the independence of the Children's Court Clinic assessments in addition to the outstanding service and quality of the reports provided as paramount in assisting in its decision-making process.

The Clinic employs a small number of core staff including clinical and forensic psychologists who have specialist knowledge in the areas of child protection and

juvenile offending. However, the greater proportion of the assessments are carried out by sessional clinicians who are senior in their profession.[25]

The most usual type of referral from the Family Division is for an assessment of child and family functioning, often including assessment of bonding and attachment. The Clinic also makes recommendations to the Court about what should happen in the child's best interests. Another common referral is to assist the Court in determining whether a child is mature enough to provide instructions to a legal representative.

There were 1,085 referrals of children, young persons and their families during 2008/09, representing a 1% increase on the referrals of the previous financial year and a 21% increase over the past three years.

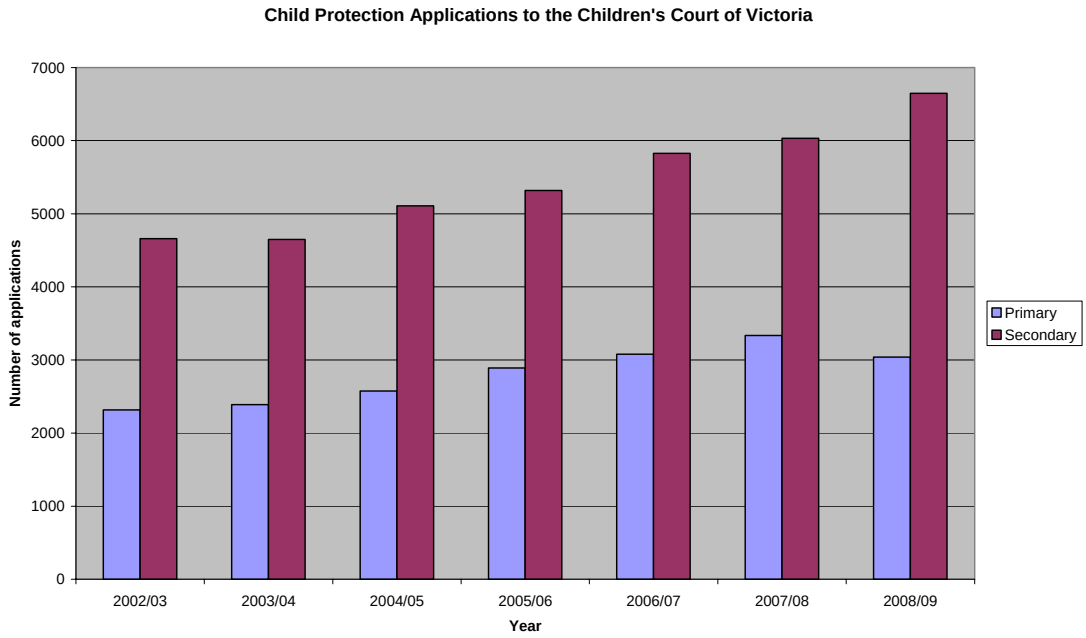
Of the 1,085 referrals for assessment during 2008/09, 313 were criminal cases, 712 were child protection cases and 60 were family violence/stalking matters. Of the total 686 referrals emanated from the metropolitan area and 399 were from country regions of the State.

A clinician submitting a report is available for cross-examination when subpoenaed by a party or required to attend by notice under s. 550 of the CYFA by the child, a parent, the Secretary of the Department or the Court. Section 550 provides that in a contested hearing any party has the right to cross-examine the relevant clinician.

[25] The current director of the Clinic is a clinical and forensic psychologist of many years standing, Dr Patricia Brown.

## FAMILY DIVISION CHILD PROTECTION STATISTICS

In 2008-09, there were 42,851 reports to Child Protection in Victoria. These resulted in 11,217 investigations[26] and 6,344 substantiations (refer Appendix 3 for child protection reports, and substantiations). Although the substantiation numbers have not been rising, there has been significant growth in primary and secondary applications to the Court as identified in the table below.[27]



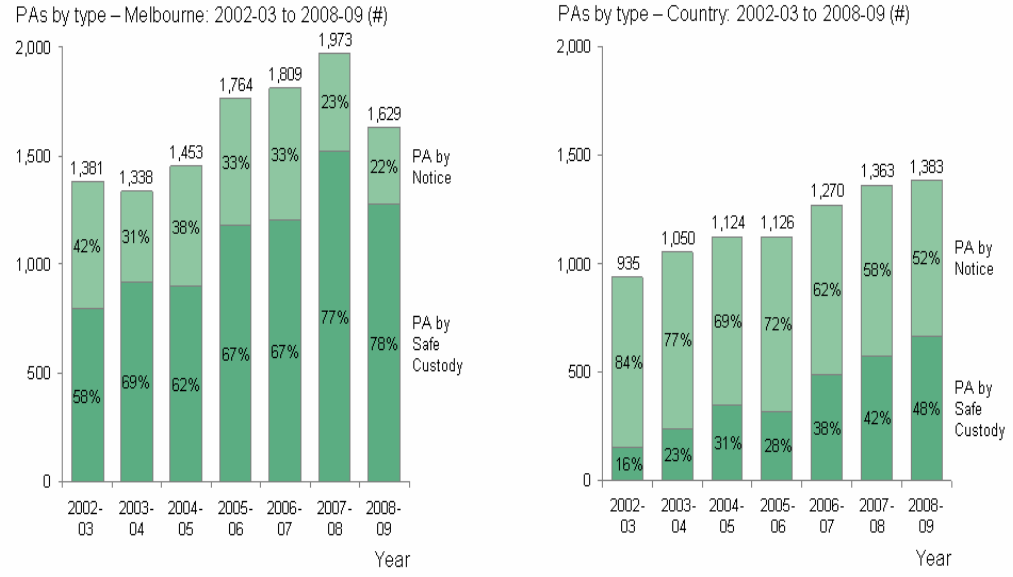

Note: BCG Data analysis

There has been a significant rise in the number of proceedings by way of apprehension. This has occurred at a time when the number of applications coming before the Court has grown considerably. The table below prepared by BCG shows the trends in primary applications in metropolitan and country courts over the past seven years. BCG provides two possible reasons for the increasing proportion of applications by apprehension. First, there is increasing pressure on Department resources relative to community need and second, there are different case management outcomes for the two types of applications.

[26] The Court understands that one of the reasons why not all reports are investigated by DHS is that it often receives multiple reports about the one child. Discussed at p26.

[27] At the same time, there has also been a significant growth in apprehensions compared with cases initiated by notice. An increase in apprehensions will inevitably lead to more "submissions" contests on placement of the child.

## PAs by Safe Custody are more predominant in Melbourne, but clear trend towards their use throughout the State




Source: Children's Court Registry data; BCG analysis

Childrens Court slide.ppt

BCG research also shows that less than three percent of all applications proceed to a final contest.[28] These are cases where all prospects of a mediated solution have been exhausted and there is usually a legitimate area of dispute.

In 2008-09, the Court finalised 1,332 primary applications (or 46.8% of all primary applications) within three months of initiation. A further 890 (or 31.2%) were resolved within six months.[29] This means 78% of protection applications are finalised within six months. It is important, when analysing these figures, to note that the Court made 893 interim protection orders (IPOs)[30] in 2008-09. These orders require a three-month adjournment before a final order can be made.[31]

Another significant measure of the increase in workload relates to the number of orders actually made in the Family Division of the Court. In 2002/03, the Court made 24,287 orders. In 2008/09, this had risen to 43,709 orders. A breakdown of the various types of Child Protection final orders made by the Children's Court over the past seven years is attached as Appendix 4.

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[28] See commentary at p70 and graph at p71.

[29] The court deals with an even greater number of secondary applications. The great bulk of these applications resolve within a very short timeframe (see graph at p71).

[30] Under s.291(1) of the CYFA, the Court may make an interim protection order ('IPO') if it is satisfied that:

(a) a child is in need of protection or an irreconcilable difference exists; and

(b) it is desirable, before making a protection order, to test the appropriateness of a particular course of action.

The maximum period of an IPO is 3 months: s.291(3)(e).

[31] See the Children's Court Annual Report 2008-09.

As at 30 June 2009, 6,100 children were on care and protection orders in Victoria.[32] This translates to a rate of 5.0 per 1,000 children or an increase of 25% over the past five years. A similar increased trend is noted across Australia during the same period, as noted in the table below.[33]

**Rates of children aged 0-17 years on care and protection orders, per 1,000 children, states and territories, 30 June 2005 to 30 June 2009[34]**

| Year | NSW | VIC | QLD | WA | SA | TAS | ACT | NT | Total |
|---|---|---|---|---|---|---|---|---|---|
| **2005** | 5.4 | 4.0 | 6.0 | 3.7 | 4.5 | 6.1 | 6.1 | 7.0 | 4.8 |
| **2006** | 5.8 | 4.3 | 6.5 | 4.2 | 4.8 | 7.1 | 7.4 | 7.3 | 6.6 |
| **2007** | 6.6 | 4.6 | 6.3 | 5.2 | 5.4 | 7.6 | 7.5 | 7.3 | 5.8 |
| **2008** | 7.4 | 5.1 | 6.8 | 6 | 6.2 | 7.7 | 7.0 | 8.4 | 6.6 |
| **2009** | 8.3 | 5.0 | 7.4 | 6.3 | 6.7 | 8.4 | 7.8 | 9.2 | 7.0 |

As at 30 June 2009, Victoria had 5,283 children in out of home care. Most but not all were on court orders. The rate per 1,000 children has risen in Victoria from 3.8 in 2005 to 4.3 in 2009. The increased trend is also evident across Australia. Of the 5,283, 45.2% were in foster care and 37.2% in kinship placements. There were 478 young people in residential care units.

## Over-representation of Indigenous children

Aboriginal and Torres Strait Islander children are more likely than non-indigenous children to be the subject of substantiation in all the States and Territories of Australia, with the exception of Tasmania where data is not available. In Victoria, an Aboriginal child is 10 times as likely to be subject to substantiation as a non-indigenous child.

The issue of over representation, together with the success of the approach of the Koori Court in the Criminal Division, has led to the establishment of a working party to investigate improved processes for Koori families and children in the Family Division of the Court. The Court is actively involved in this process and a discussion paper is being finalised by the Department of Justice.[35]

[32] On 30 June 1995, the number was 4,668.
[33] Child Protection data for Victoria was updated by the Australian Institute of Health and Welfare in 2009 therefore accurate data has only been included from 2005 onwards.
[34] Australian Institute of Health and Welfare Child Protection Australia 2008 – 2009.
[35] Discussed in Option 1

# THE OMBUDSMAN'S REPORT

Findings and comments in the Ombudsman's report, are central to the reasons for the Attorney-General's reference to the VLRC.

The Court therefore takes this opportunity to make comments about the quality of the Ombudsman's research.

Sound policy reasons and clear evidence are required before changing a system that has provided a valuable service to the people of Victoria over a long period of time.

## Lack of consultation

The Court notes that apart from consulting with some workers from the child protection authority, there was no effort by the Ombudsman to consult with any Court users. The Ombudsman did not speak with any families that have attended Court.[36] Nor did the Ombudsman speak with those organisations that represent families and children – organisations such as Victoria Legal Aid, the Victorian Aboriginal Legal Service, the Aboriginal Family Violence Prevention and Legal Service, the Federation of Community Legal Centres, private solicitors or members of the Victorian Bar. The Court understands that no staff from the Ombudsman's office spent any time observing proceedings in any of the Children's Courts in Victoria or spoke to anyone from the Court until after the draft report had been prepared. The President of the Court was only able, after some difficulty and in a very short time frame, to see a copy of the draft chapter on the Court and correct some of the more obvious errors and misconceptions.

## Time spent by child protection workers engaged with court processes

The Ombudsman commented:

> *"Approximately 50% of child protection worker time is spent servicing Children's Court work and subsequent Protection orders, even though only 7.3% of the total number of reports made to the department result in legal intervention being initiated in the Children's Court. This significantly lessens the time in which child protection workers are available to respond to the needs of children under their care. This is a waste of scarce resources*."[37]

The Ombudsman appears to conclude that given the amount of time spent by Child Protection workers "servicing Children's Court work and subsequent protection orders", this implies that a court-based model may be flawed. The Court is not in a position to dispute the assertion that 50% of worker time is spent "servicing" Children's Court work and subsequent protection orders although it would be interested to know the evidence that supports it.

[36] The Court supports thorough consultation with Court users following DOJ ethics approval.
[37] Report at paragraphs 43. This is repeated in paragraph 340 of the Report.

After examining this matter closely the Court remains troubled by the quality of the analysis which has led, in part, to the VLRC reference. The Court takes the view that without further research and proper analysis, little weight can be given to the Ombudsman's conclusion. In this regard, the Court makes the following observations:

- Applications to the Family Division of the Children's Court are usually the most difficult and demanding cases. Therefore, it is to be expected that these cases will be the most time-consuming.
- In 2007-08, there were 41,607 reports to Child Protection. The Department did not formally investigate 73% of these reports. The Department formally investigated 11,217 reports and substantiated 6,365. Of these cases, the Department initiated 3,336 protection applications, approximately 52% of those substantiated. Based on these figures, 50% of child protection work was spent servicing 52% of substantiated cases. The Court maintains that this is an equally valid way of making the analysis. There are two further reasons why simply focussing on the total number of reports may be misleading. First, the 41,607 reports relate to 32,375 children. A significant number of reports are not investigated because there are multiple reports about the one child. The figure of 41,607 needs to be qualified in this way. Second, court applications are not only the result of a report. For example, court process can be initiated by an application to extend a particular order.[38] These applications are not triggered by reports. Similarly, applications for permanent care orders are not generated by a report.
- The following table provides a comparison of reports, investigations, substantiations, protection applications and breach applications in 1997/98, 2002/03 and 2007/08.[39]

| | **1997/98** | **2002/03** | **2007/08** |
|---|---|---|---|
| **Reports** | 33,163 | 37,635 | 41,607 |
| **Investigations** | 14,693 | 12,769 | 11,167 |
| **Substantiations** | 7,357 | 7,287 | 6,365 |
| **PAs** | 2,135 | 2,316 | 3,336 |
| **Breaches** | N/A | 914 | 1284 |

These figures make it difficult to accept an analysis that suggests the Department is not investigating enough cases because of the demands of court. In fact, the Department has been remarkably consistent over many years in only investigating and substantiating a relatively low proportion of total reports. In this regard, it acts in a similar way to every other child protection agency in Australia. [40]

The Court makes two other points –

- The Ombudsman highlights that 30% of matters resolved at court in 2006-07 "did not mandate any formal supervisory order for the Department"; 11.3 % of matters were withdrawn by the Department and 14.2% resolved by way of

[38] For example, supervision orders, custody to Secretary orders and guardianship orders.
[39] Reports, investigations and substantiation data from Australian Institute of Health and Welfare , Child Protection Australia publication; Protection Applications and breach applications BCG and registry data.
[40] Compare reports and substantiations for each State and Territory in Appendix 3.

undertaking. Based on this analysis, the Court is concerned that matters may be initiated at court unnecessarily and that this is significantly contributing to the amount of time workers spend engaging with the court process.

- Further, the Ombudsman highlights that 41.3% of cases in 2006-07 were resolved by way of a supervision order without the child being removed from the care of a parent (this allows the Department to monitor a child's safety with reference to specific conditions). Again, if families were better supported at the front end of the system this may obviate the need to initiate court proceedings. Strong pre-court mediation, provision of appropriate services and other appropriate early intervention programs would lessen the number of matters brought to court. It is the Court's view that the current increase in applications indicates a system that is struggling to provide the appropriate resources supporting early intervention.

We raise these matters to show how the Ombudsman's analysis lacks sophistication and is not particularly helpful. The real issue is how well child protection is resourced to perform its various functions.

# THE ADVERSARIAL NATURE OF THE COURT PROCESS

The Court notes that in broad terms the descriptions of the adversarial system of conducting proceedings, as in the current Children's Court model, refer to a system in which the parties, and not the judicial officer, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward. Unlike an inquisitorial system, the judicial officer does not have responsibility for the evidence collected and the nature of arguments put to the Court. The proceedings are therefore driven by the parties. It is essentially in this environment that criticism has been made about an 'oppositional' type process.[41]

The Court proposes particular reforms in its submissions in response to Options 1 and 2. However, before doing so, there are some preliminary points the Court would like to address.

The Ombudsman's report highlighted comments from some people within Child Protection about the adversarial nature[42] of the Court's processes, its impact upon protective worker morale and the broader issue of staff retention. These comments have utilised the term 'adversarial' in the broader less legalistic sense. The Court makes the following observations in relation to these matters:

- Comments about the contested nature of the child protection system were made *in the context of a small proportion of matters leading to Protection Orders that affect the custody or guardianship of children*."[43]
- Whilst suggestions were made that Victoria was more adversarial than other jurisdictions, the Court notes that such complaints from protection workers are common not only across Australia[44], but also overseas. [45]

[41] In contrast, the Coroner's Court is a specialist inquisitorial jurisdiction. However, the Court notes that even in that system, parties (including families) protest that an inquest has the feel of an adversarial model, with many legal representatives at the bar table and vigorous cross examination.

[42] The Wood Commission in New South Wales considered the issue of "adversarialism". Ultimately, it found the concept was unhelpful because it meant different things to different people. He preferred to focus on ways of strengthening the system. The Court thinks this is a sound approach. It was the approach adopted by the Child Protection Taskforce in its Report to the Premier: see discussion at p.19 of the Taskforce Report.

[43] Paragraph 39 of the Ombudsman's Report.

[44] This complaint was made to the recent inquiries in both New South Wales and in South Australia.

[45] Honourable Judge Leonard P Edwards, noted the same theme about child protection workers and the legal system in his paper "Mediation in Child Protection Cases". Judge Edwards (now retired) was a most distinguished juvenile and family court judge in the United States. He was, for 24 years until 2004, the presiding judge of the Santa Clara County Juvenile Dependency Court. The Family Drug Treatment Court developed by Judge Edwards has become a model for over 300 similar courts now found across the United States. He founded the Juvenile Court Judges Association of California and was co-founder of the Santa Clara County Domestic Violence Council. In 2002 and 2003 Judge Edwards was the President of the National Council of Juvenile and Family Court Judges. He has written and taught widely on a variety of juvenile and family law issues. In 2004, he became the first Juvenile Court Judge to be presented with the prestigious William H. Rehnquist Award for Judicial Excellence by the National Centre for State Courts.

- Those who give evidence in child protection cases must expect to have their views and assessments scrutinised. The outcome of the case will be of profound importance to the child and the future of the family unit. It is likely that the evidence given by a child protection worker will be central to the dispute. It is the Court's view that it is absolutely essential for there to be appropriate training for this function and the provision of appropriate support in their day to day work practices.
- A lack of appropriate resources for the proper functioning of DHS, including proper staffing levels, was clearly documented in the Ombudsman's Report. Such problems have also been consistently identified in the annual reports of the Victorian Child Death Review Committee.[46] It is the Court's view that this has contributed to difficulties faced by protective workers.[47] It is not surprising that workers are stressed by a Court experience that involves them having to shoulder the burden of an under-resourced system in a public forum.

Given this history of an under-resourced system it is the Court's view that court scrutiny of decision-making is critical.

## The Court endorses a "less adversarial trial" process for evidence-based contested hearings

The Court has been a strong advocate for legislative amendments to allow the court process to become less adversarial. In the April 2004 report *Child Protection Outcomes Project,* Kirby, Freiberg & Ward noted:

> "[T]*he Court might consider moving away from the adversarial paradigm towards a more inquisitorial or case management approach, by which the [authors mean] that it take a proactive approach to the cases it handles, the evidence it receives and the material it requires to make decisions.*"[48]

The authors noted that "the Court indicated its willingness to consider such changes" but the Court considered that it was constrained in its ability to be as inquisitorial as it would wish by the nature of the legislation. During a series of meetings with members of the Court and senior officials of the child protection authority in 2004-2005, the Court consistently emphasised its unhappiness with the adversarial nature of the Court process in contested cases. The Court wanted the new legislation then being considered to empower it to conduct proceedings in a more inquisitorial fashion.[49] However, the new legislation did not adopt this approach.

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[46] See – in particular the Annual Reports from 1997, 1998, 2003, 2004 and subsequent reports: The 2004 Annual Report refers to inexperienced, overworked staff being predisposed to "vulnerable case management practices". Subsequent Annual Reports contain further references to problematic responses on the part of protective workers, the nature of the responses being indicative of an over-stretched, under-resourced workforce.

[47] Other sources: 'The Age' on 1 July 2006, a former child protection worker wrote of her experiences in the job. She described how the general rule in child protection "*is that everyone is overworked, under-resourced and under-supported*". She discussed the "enormous amount of administrative work" and described how "management" was part of the problem: "*It occurred to me then that there were disturbing parallels between the way management and clients treat protective workers. In both relationships, protective workers are abused.*"

[48] Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project [April 2004] at p.40.

[49] These meetings were held to enable the Court to express its views about proposals for legislative reform which led to the CYPA being replaced by the CYFA.

## The Court advocates a "three-limbed" less adversarial approach

The Court is of the strong view that child protection hearings should be able to be conducted in a less adversarial way and that this can best be achieved in three ways. First, by strengthening its ADR processes.[50] This is likely to result in cases being resolved more expeditiously and may also result in a reduction in contested hearings.[51] Second, by adopting most of the legislative provisions which underpin the Less Adversarial Trial initiative of the federal jurisdiction in relation to children.[52] Third, by adopting innovative 'problem solving' approaches in the Family Division. The current energy around developing a better process for Koori Families is one example of how a court might respond to particular needs within the community.[53]

## The complaint about "adversarialism" is significantly a complaint about the conditions in the Melbourne Children's Court building

Complaints about the adversarial nature of proceedings in the Children's Court are frequently complaints about the process at the Melbourne Court and particularly the conditions for court users in that building. Complaints are not made about court process at country courts. Nor are they made about process at the Moorabbin Justice Centre. Indeed, the experience at Moorabbin is instructive. Workers from the Child Protection authority are able to attend a court that is local, not crowded and well resourced. It has been made clear to the President of the Court that the Moorabbin experience provides a model for good decentralised practice.[54]

Conditions at the Melbourne Court are poor. In the report of the Taskforce the following comments are made:

> "*Over the past five years, there has been a large increase in cases before the Court. The Family Division area is now too small to contain the large numbers of families, lawyers and protective workers who attend the Court each day. Child protection is emotionally demanding and the overcrowding contributes to the distress, anxiety and agitation of those who are at the Court. Put simply, there are too many people in too small a space. It is not a good place for a child.*"[55]

## The Court has worked, and is working to improve conditions in the Melbourne Children's Court building and the process generally

Over the last seven years, the workload at Melbourne has grown dramatically. There are now too many people in too small a space and this creates tension, antagonism and frustration. The Court has been proactive in trying to improve the conditions for court users –

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[50] The Court's recommendations in this regard are set out in detail in this submission in its response to Option 1.
[51] However, it must be acknowledged that the percentage of contested cases in the Family Division is already very small. Refer to page 35.
[52] The Court's recommendations are set out in detail in this submission in its answer to question 2.15 and its recommended amendments to the CYFA are set out in Appendix 7 & Appendix 8.
[53] Discussed at pages 42 and 74.
[54] See also the comments in the Taskforce Report at p28.
[55] Ibid., p27.

- the Family Division area was redesigned to create a new waiting area outside court 6;
- Court 6 was converted into a court that could be used for Family Division matters. (This was made possible by the refurbishment of Court 9 as a criminal court);
- a special mention court was established for apprehensions, thereby virtually eliminating the regular late sittings of the Court;
- the President of the Court and the Principal Registrar spent significant time in 2008 and early 2009 working with the Department of Justice (and a firm of consultants), to build a budget bid for a stand-alone Children's Court at Dandenong. The whole purpose of this proposal was to improve the conditions at Melbourne and better serve court users in one of Victoria's fastest growing local government areas. Sadly, the Department of Justice was unable to advance the bid. The Court also looked for other options and, after negotiations with the Chief Magistrate, moved to acquire the use of two courts at the Moorabbin Justice Centre. In an effort to ease the pressure at Melbourne, the Court used courtrooms in the Melbourne Magistrates' Court and in the County Court until Moorabbin became available;
- two Family Division Courts were established at Moorabbin for the Southern Region of DHS from July 2009; and
- a working group established by the Court, involving DHS, the Department of Justice (the ADR Directorate) and Victoria Legal Aid (VLA) was established in 2009 and worked throughout that year to develop a best practice model of ADR. The proposals from that working group have been adopted and endorsed by the Premier's Taskforce.[56]

The Taskforce has made a number of recommendations designed to improve the situation at Melbourne. The Court has agreed to implement these recommendations (subject to appropriate funding). The recommendations, designed to reduce the adversarial nature of proceedings at Melbourne Children's Court are:

- a code of conduct for legal practitioners;
- a focus on a more decentralised system by moving Eastern Region cases to the old County Court building; this would provide a better system for managing Eastern Region cases while reducing the number of people in the Melbourne Children's Court building (thus leading to a better system for managing cases from the North-West region); and
- strengthening ADR (part of this involves relocating conferences to an off-site facility; this would free up space on the ground floor and enable structural works to be undertaken resulting in the better use of the Melbourne Children's Court building).[57]

The Taskforce also noted that "*the Children's Court would welcome legislative recognition of a less adversarial approach. The recent amendments to Division 12A of the Family Law Act 1975 prescribing less adversarial trials offer one possible model for the Children's Court.*"[58]

[56] Ibid., pp19-22.
[57] Ibid ., p12.
[58] Ibid ., p19.

# THE VLRC REFERENCE

The Commission has identified four areas where it considers reform may be possible and has offered four options for consideration.

1. New processes that may assist the resolution of child protection matters by agreement rather than by adjudication.

2. New grounds upon which State intervention in the care of a child may be authorised and reform of the procedures followed by the Children's Court when deciding whether to provide this authorisation.

3. The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services.

4. Changing the nature of the body which decides whether there should be State intervention in the care of a child so that it includes non-judicial as well as judicial members.

Whilst the first two options assume that the legal framework of the existing child protection system would remain in place, the third and fourth options involve changes to that legal framework.

All options identified affect the operational or legal framework of the Family Division of the Children's Court of Victoria.

# OPTION 1 – NEW ADR PROCESSES

New processes that may assist the resolution of child protection matters by agreement rather than by adjudication.

1.1 Do you think that the current dispute resolution conference procedure in the Family Division of the Children's Court operates effectively?

1.2 How could the current dispute resolution procedure be improved?

1.3 What other ADR processes could be used for child protection matters?

1.4 Are there some matters that are better suited to ADR than others, such as questions concerning conditions that should be attached to any final order?

1.5 When is ADR inappropriate for child protection matters? What protections need to be incorporated into the processes to protect vulnerable parties?

1.6 At what stage(s) should ADR processes be used in child protection matters?

1.7 Who should conduct ADR processes? What qualifications and standards of practice should ADR facilitators be held to?

1.8 Who should be present during ADR processes?

1.9 What role (if any) should lawyers play in ADR processes?

1.10 Where should ADR processes in child protection matters take place?

1.11 To what extent should ADR processes be confidential?

## ALTERNATIVE DISPUTE RESOLUTION AND THE CHILDREN'S COURT

The Court's submission will deal with this option in a global way rather than responding to each question individually.

### Background

The Children's Court of Victoria has a long standing commitment to and appreciation of Alternative Dispute Resolution (ADR)[59]. This approach is consistent with a universal movement both nationally and internationally which has embraced less adversarial methods to assist with the resolution of child protection matters:

[59] Pre-hearing conferences have been available in the Children's Court of Victoria since 1992.

> *The use of court-based mediation in child protection (juvenile dependency) cases has spread widely over the past five years. As a substitute for contested judicial hearings, mediation produces more effective, longer-lasting agreements that protect child safety on terms acceptable to all parties. Mediation also offers participants opportunities unavailable in contested hearings. Parents, attorneys, social workers, and others work together, asking and answering questions, airing concerns, and ultimately crafting a resolution of the family's unique problems.*[60]

Apart from the more obvious benefits such as the saving of public monies and the freeing up of judicial resources (in non-judicial ADR), there are some benefits which have significant impacts for the child protection jurisdiction.

These benefits include the maintenance of a working relationship between CPD and the family as well as relationships within the family. As discussed in our response to Option 3, the relationship between Child Protection and its client families is inherently conflicted, with the CPD having to balance a supportive/therapeutic role with a "prosecutorial" one. In addition, unlike many civil disputes, there is an ongoing relationship between the parties that is likely to continue beyond the life of the matter.

It is the Court's experience that during a contested hearing, the parties' positions may become more entrenched and polarised as evidence is tested at length and as criticisms are exchanged. A parent's deficits may be briefly canvassed in a report, but when the author of the report is called to give evidence, the parental shortcomings can be laboriously and repeatedly described over many hours in what is effectively a public forum, with the parent finding it extremely difficult to work with the witness again. Similarly, the worker whose professional approach is criticised while they are in the witness box will find it very difficult to engage with the family after the hearing is over.

Preserving the worker/client relationship can therefore be one positive by-product of a successful ADR process. In addition, the Court also sees the strengthening of this relationship as an achievable and most desirable outcome. By providing a neutral forum where views can be freely exchanged, ADR provides a real possibility for areas of agreement to outnumber areas of dispute, thus allowing these relationships to be strengthened.

[60] Hon. Leonard P. Edwards, *Mediation in Child Protection Cases*, Journal of the Center for Families, Children & the Courts 2004, at page 57.

## Interpreting ADR statistics

A review undertaken by the Boston Consulting Group (BCG) in late 2007 indicated that in the first six months of 2006 the court resolved 4,095 applications.[61] 3,724 had orders that were made by consent, were uncontested or were settled at mention. 156 settled at a pre-hearing conference, 181 settled between pre hearing and the contest date. 34 contests ran. This means that 99.2% of applications resolved before final contest. A similar analysis for the first half of 2007 revealed that 98.6% of applications resolved before final contest.

BCG recently undertook further research on primary applications. They found that during 2008-09, of the approximately 2,800 (primary)[62] protection applications, 52% finalised by consent, were uncontested or settled at mention; 25% settled at DRC; 19% settled between DRC and final contest and approximately 3-4% were finalised at contest.

The Court undertook a detailed analysis of the matters referred to DRC at Melbourne for the month of November 2009. That research showed that 28.13% of matters produced a settlement or interim settlement at the DRC.

There is an important point to note about all measurements of the "success rate" of DRCs. When the Court or BCG talks of settlement at DRC they mean cases that settle on the day of the conference. In the example from November 2009 (referred to in the previous paragraph), there were a significant number of cases that were adjourned for a further DRC (7.95%) and a significant number that were adjourned, not to contest but back to a mention (37.78%). The fact that a case is listed for a further mention is usually indicative of a fruitful DRC that, with a little more time and discussion, is highly likely to result in a settlement without the need for a contest. A definition of settlement that only counts settlements on the day of the DRC consistently underestimates the effectiveness of DRCs.

An alternative way of looking at the effectiveness of DRCs would be to measure the number of matters that went from DRC directly to contest. Again, using the example for Melbourne from November 2009, 4.09% of matters went from DRC to an IAO contest and 22.05% of matters went to a final contest. This means that only 26.14% of matters went from DRC to contest. This is a different way of measuring the success of DRCs. Any analysis of DRCs needs to keep these qualifications in mind.

[61] This research related to all applications – primary and secondary.

[62] Note this is the measurement for primary applications**.** It does not include secondary applications. Secondary applications are generally less likely than primary applications to go to final contest

# CURRENT LEGISLATIVE ADR MODELS IN THE CHILDREN'S COURT

## Dispute Resolution Conferences

Prior to October 2007, when the DRC provisions of the CYFA became operational, cases that were potential contests were referred to "pre-hearing conferences" under the relevant provisions of the *Children and Young Persons Act* 1989 (CYPA). These provisions had been in place since 1992 and were subject to review by Magistrate Maughan and Ms Andrea Daglis in 2005.[63] The review was comprehensive and highlighted particular problems with the "pre-hearing process". However, the recommendations from that review were not, it appears, strongly influential in the development of the new model for DRCs that appeared in the CYFA.

The CYFA created two types of conferences, facilitative and advisory. This two-tier model was different to the approach under the old CYPA. The Court did not endorse the introduction of this particular model. In 2006, the President of the Court expressed concerns to the Department of Human Services about the workability of the advisory conference model.[64] It has subsequently transpired that families and lawyers for families will not participate in advisory conferences. It seems the report back provisions for these conferences are regarded as problematic and compromising fundamental principles around confidentiality. This has meant that virtually all conferences in Victoria are currently conducted as facilitative conferences**.** With the failure of the advisory conference, approaches that prevailed under the old pre hearing system have continued under the facilitative conference model. It is the Court's view that the legislative provisions around facilitative and advisory conferences will need to be amended in recognition of the failings of the current model.

Under s.217(1) of the CYFA the Family Division may, on the application of a party or on its own motion, order that any application made to the Family Division be referred for a dispute resolution conference.

It is comparatively rare for the Court to bypass the DRC stage in a contested case. This only occurs where the Court considers that ADR would be unlikely to resolve or narrow the issues in the case. In such a case, the time delay involved in conducting a DRC could not be justified.

The legislation provides that the purpose of a DRC is to give the parties to the application an opportunity to agree or advise on the action that should be taken in the best interests of the child.

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[63] "An Evaluation of Pre-Hearing Conferences in the Family Division of the Children's Court of Victoria" by Jeanette Maughan and Andrea Daglis. The report can be downloaded from the Resources section of the Children's Court website.

[64] On 20 November 2006, the President of the Court wrote a letter to the Executive Director, Office of Children, Department of Human Services, that contained the following paragraph – "*Our current pre-hearing system has the virtue of allowing wide discretion for the convenor in the way the conference is conducted. In discussions with convenors and practitioners in country regions there has been acknowledgement of the flexibility in the current system that allows convenors to move between different roles in the conference process. There is concern that the new system will undermine that strength. Indeed, it is hard to understand why the legislation has developed this two-tier system. Its advantages over the current pre hearing process are not obviously apparent.*"

A DRC is regarded as an exercise in negotiation and joint problem solving. It establishes a process for parties to an application (and other approved persons) to meet together in an environment controlled by an independent convenor. Through the DRC process the participants, with the assistance of the convenor(s), attempt to-

- identify and clarify disputed issues;
- identify and clarify areas of agreement;
- develop options and consider alternatives;
- enhance communication; and
- reach agreement on issues of dispute between the parties in order to avoid – or limit the scope of – a hearing.

However, a convenor has no power to make orders. Whether a case is resolved or not, it is returned to the Court at the end of the conference for a judicial officer to determine the appropriateness of the proposed orders. This ensures appropriate judicial oversight of any agreements reached.

Save for the report provided by the convenor(s)[65], the proceedings of a DRC are confidential. Evidence of anything said or done or admissions made at a DRC is only admissible in court proceedings if the Court grants leave or all the parties to the DRC consent. A court may only grant such leave if satisfied that it is necessary to do so to ensure the safety and well-being of the child.

## The Court is actively engaged in strengthening ADR

The Court has been involved for some time in examining existing ADR arrangements to ensure a best practice model is achieved and to reduce adversarial practices at the Court. In 2007, BCG was commissioned to undertake a review of the capacity and demand issues associated with the Children's Court and identified the importance of reviewing ADR.[66] BCG noted how the "settlement" rate at Melbourne had fallen from 36.8% in 2004-05 to 31.2% in 2006-07. They made five recommendations for improvements to ADR that involved –

- clarifying the role of convenors and reviewing qualifications;
- confidentiality of Pre Hearing Conference (PHC) sessions;
- less adversarial PHC;
- government funding for the appointment of a PHC coordinator;[67] and
- CPD should be represented at PHCs by a worker armed with the authority to make a decision.

In response to the BCG report, the Court initiated a process to develop best practice ADR in the Court.

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[65] After a facilitative conference the convenor provides a report on "*the conclusions reached at the conference*" (see s.218 (2) of the CYFA). It was the matters to be disclosed by the convenor in the report of an advisory conference (see s.219 (2) of CYFA) that has caused the unpopularity and abandonment of this type of conference.

[66] This review resulted in a Family Division being established at the Moorabbin Jutice Centre, the introduction of a "Regional Court Liaison Officer" model, two additional Children's Court magistrates and, the introduction of a special mention list.

[67] Funding was not provided for this position. Discussed at p68-69.

The Court engaged the Directorate of Appropriate Dispute Resolution within the Department of Justice to facilitate this process and established regular meetings and consultations with representatives of the Court, Department of Human Services and Victoria Legal Aid (ADR Working Group).[68] The working group met throughout 2009 and developed a model for a pilot ADR project. The model focussed on proper preparation for the DRC by all participants, proper behaviour by participants, attendance of decision makers, a venue away from the Court (at Melbourne), appropriate funding for legal representatives, investing convenors with authority and the training of all participants, particularly the convenors.

The Children's Court implemented a new DRC model at Moorabbin Court on 1 June 2009 incorporating some of the features of the above model and using a very experienced and respected Registrar as convenor. This model has produced some impressive settlement rates at the conference stage. Between 1 June 2009 and 18 March 2010, the Moorabbin Court conducted 167 DRCs. Of that number, 66 cases (or 39.5%) have settled at DRC. A further 74 cases (or 44%) were adjourned for further mention or further DRC (where the cases may have settled) and only 27 cases (or 16.2%) were listed for contest. Clearly, it is a better outcome for all parties if matters settle at the DRC rather than be further adjourned for another Court event.

Following the release of the Ombudsman's Report in November 2009, the Premier established the Child Protection Proceedings Taskforce to investigate possible changes to Court processes. One of the terms of reference required the Taskforce to "recommend measures designed to reduce the adversarial nature of Children's Court processes including options for appropriate dispute resolution".

The Taskforce effectively adopted the model developed by the ADR Working Group.[69] The Taskforce report made the following comments about the review conducted by the working party and also identified some of the problems with the current system. Interestingly, some of the problems identified by the Taskforce are not problems for the country or Moorabbin. They are predominantly, like other problems within the system, Melbourne Court problems.

> "*In October 2008 the President of the Children's Court requested the Director, Appropriate Dispute Resolution (Department of Justice), to convene an ADR working party to review ADR in the Children's Court and develop a model for good practice. The working party included representatives of the Court, DHS and VLA. The working party reported to the President in late 2009. The Taskforce is grateful for the work done by the working party. That work has enabled the Taskforce to quickly develop a new resolution conference model that could be applied in the Children's Court. The new model is discussed in Appendix A.*
>
> *Currently, dispute resolution conferences are conducted by sessional convenors or court registrars. Registrar convenors conduct conferences in regional courts and sessional convenors conduct conferences at Melbourne.*

[68] The terms of reference included: to review the current approach to ADR in the Children's Court and assess how this approach could be enhanced or improved; to develop ADR models in the child protection system within the Children's Court and to provide a forum for the key stakeholders involved in the child protection system to raise systemic issues in relation to the resolution of matters in the Children's Court.

[69] See the discussion at pages 19 to 22 of the Taskforce Report.

*Registrars are officers of the Court and this may assist in having their authority recognised by all participants. They also work in regional courts where an adversarial culture is less pronounced.*

*The sessional convenors (and the Court) believe that current processes at Melbourne contribute to an undermining of the authority of the Melbourne convenors and that, as a result, the conferences are not as effective as they could be. For example, some lawyers are not well prepared for the conference, are concerned about other cases listed in courtrooms and adopt an adversarial approach. On the other hand, DHS is on occasion not represented by someone with the authority to make a decision and this undermines the effectiveness of the conference*."

The proposed new model is described in Appendix A of the Taskforce report. There are several key changes to the current model. One of those changes is only relevant to Melbourne. The others apply throughout the State. The suggested changes aim to improve the quality of the parties' negotiations and improve outcomes for children. If accepted and funded by Government, the new model will significantly affect the ADR process by :[70]

- conducting conferences at the earliest practical point in the process;[71]
- conducting Melbourne ADR at a venue away from the Court;
- supporting convenors to exercise appropriate authority:
- requiring pre conference preparation by convenors and parties;
- requiring mandatory training and accreditation of convenors;
- ensuring participants are better prepared for conferences;
- addressing practitioner behaviour;
- ensuring CPD is represented by a decision-maker;
- integrating judicial conferences into a comprehensive conferencing process;
- reducing the time spent by families in adversarial court proceedings and Child Protection workers in servicing the Court; and
- reducing court delay.

The Taskforce report also recommended that conferences involving Aboriginal families include an appropriately qualified Aboriginal mediator wherever possible.[72]

## Qualification and training of convenors

The current legislation provides that the Governor-in-Council appoint a convenor on the recommendation of the Attorney-General. The Attorney-General must not recommend a person for appointment unless satisfied that the person is of good character and has appropriate qualifications and experience. Court registrars conduct pre-hearing conferences in rural and regional Courts. The four sessional convenors who currently conduct DRCs at Melbourne Children's Court are not court registrars but have professional qualifications and experience in social work and/or the law.

In the new model for ADR proposed by the Taskforce, convenors in the Children's Court will have to complete mediation training commensurate with national standards

[70] See Taskforce Report at pages 5, 6 and 20.
[71] For a discussion of the appropriate time to refer to ADR, see the discussion under listings at pages 69 – 70.
[72] See Taskforce Report at page 36.

as established by the National Alternative Dispute Resolution Advisory Council (NADRAC). The Taskforce specifically endorsed the following approach to training –

*All convenors will participate in mediation training or will be able to demonstrate sufficient experience to satisfy the NADRAC national mediation accreditation standard as follows:*

- *Training conducted by a training team comprised of at least two instructors where the principal instructor has more than 3 years' experience as a mediator and has complied with NADRAC's continuing accreditation requirements and has at least three years' experience as an instructor; and*
- *has assistant instructors or coaches with a ratio of one instructor or coach for every three course participants in the final coached simulation part of the training and where all coaches and instructors are accredited; and*
- *is a program of a minimum of 38 hours duration, excluding the assessment process; and*
- *involves each course participant in at least nine simulated mediation sessions and in at least three simulations each participant performs the role of mediator; and*
- *provides written, debriefing coaching feedback in respect of two simulated mediations to each course participant by different members of the training team.*[73]

## Lawyers and ADR

It is the Court's view that legal representation of parties is critical to the conduct of good practice ADR. This is consistent with the Taskforce's recommendations regarding improving preparation for court and is consistent with the experience of the Court.

The Taskforce noted in its report that some lawyers at Melbourne were not acting in a way that was consistent with the current ADR guidelines[74] and that the convenors were having difficulty in asserting their authority in such cases.

The Taskforce report noted that under its proposed model -

*The authority of convenors will be made explicit by the Court through a Practice Direction and this will be made clear to the parties and their representatives at each conference. The Practice Direction will set out the detail of the process, including the Court's expectations and will, amongst other things:*

- *clarify the role and the authority of convenors;*
- *require that the decision maker be at the table;*
- *require parties to attend fully prepared. (This practice note should be cross-referenced with conditions of VLA funding); and*
- *address practitioner behaviour.*

[73] See p37 of the Taskforce Report.
[74] Available on the Children's Court website.

The Taskforce also identified the importance of joint training in the new model for lawyers and Child Protection workers -

*Lawyers and Child Protection workers will participate in a joint session on general mediation principles and framework. (In Western Australia, training in the Western Australian model of mediation is a condition of a grant of legal aid.) This would be less onerous than the mediation training. The sessions could be held as 3-hour sessions and would incorporate the following:*

- *general mediation principles and framework;*
- *dealing with conflict;*
- *etiquette, ethics, OHS and confidentiality;*
- *court's expectations of behaviour;*
- *communication skills;*
- *introduction to the Children's Court conference model.*

In addition, VLA will develop a code of conduct for all practitioners in the Children's Court.

## Judicial resolution conferences

In September 2009 *the Courts Legislation Amendment (Judicial Resolution Conference) Act 2009* came into effect. Part 5 of the Act specifically provided a legislative mechanism for the President and Magistrates of the Children's Court to conduct Judicial Resolution Conferences (JRCs); Such conferences take on the form of a number of established ADR models, for example mediation or conciliation.

The Act provides that no evidence is admissible at the hearing of any proceeding in the Family Division of anything said or done by any person in the course of the conduct of a JRC unless the Court otherwise orders, having regard to the interests of justice and fairness. However, it is noteworthy that the legislation does not provide any bar to the admissibility in any other court process of anything said or done by a person in the course of a JRC.

The Children's Court was among the first of the Victorian Courts to apply the legislation, including the preparation of a Draft Practice Direction. The Taskforce Report acknowledges the importance of the Court integrating judicial conferences into a comprehensive conferencing process.[75] The adoption of the draft Practice Direction is awaiting the outcome of government consideration of the Taskforce Report. The report highlights the importance of training in mediation for judicial officers and notes that the implementation of judicial conferencing will not be cost neutral. The Court will advance this form of conferencing as soon as it is made aware of the adoption, by government, of the Taskforce recommendations.

The Court believes JRCs will offer enhanced ADR in particularly complex and entrenched disputes where it is felt that the authority of a judicial officer may assist a resolution. The Court also acknowledges that its current method of conducting Directions Hearings bears many of the hallmarks of a JRC.[76]

[75] See p.6 of the Taskforce Report.
[76] Directions hearings are discussed in more detail at p71.

# OTHER ADR MODELS TO EXPLORE

The Court accepts that the Court should be an option of last resort. It is, therefore, supportive of the establishment of best practice ADR being conducted prior to applications being lodged in court, where appropriate.

## Western Australian "Signs of Safety" Pilot

One ADR model that is worthy of consideration is the WA *Signs of Safety Pilot* that commenced on 9 November 2009. The pilot was developed and implemented through ongoing collaboration between Legal Aid WA, the Department for Child Protection, King Edward Memorial Hospital (KEMH) for Women and the Perth Children's Court.

The pilot has the dual aims of improving the quality and durability of outcomes for children and parents in child protection matters and delivering more cost effective services through the use of mediation at an earlier stage, thereby reducing the number of child welfare matters proceeding to litigation and trial.

The pilot process combines two approaches. The first relates to pre-Court proceedings and involves a lawyer-assisted *Signs of Safety* meeting with a pregnant mother and her family at KEMH. The second concerns post-court applications that involve *Signs of Safety* pre-hearing conferences in relation to child protection proceedings at the Perth Children's Court.

The model incorporates the *Signs of Safety* as a basis of a consistent, evidence based child protection practice framework across all departmental child protection services in WA. The Court notes that the *Signs of Safety* seeks to create a more constructive culture around child protection organisation and practice. Central to this is the use of specific practice tools and processes where professionals and family members can engage with each other in partnership to address situations of child abuse and maltreatment.

## Koori Cases and the Family Division

As noted above, Koori children remain over-represented in the Family Division of the Children's Court, despite the incorporation of the Aboriginal Child Placement Principles in the CYFA.[77]

The Ombudsman's Report criticised the Department, in the context of responses to cases involving Kooris for its '*low level of compliance with practice standards'* and stated there were '*many instances where the department failed to comply with its statutory obligation.'* [78]

It appears that there are real problems with the Department complying with s.12 of the CYFA (convening Aboriginal family decision-making conferences) and in preparing Cultural Plans for every Aboriginal child placed in out-of-home care under a

[77] Refer to discussion at p25.
[78] See Ombudsman's Report at p77.

Guardianship to Secretary Order. The Victorian Aboriginal Child Care Agency reported to the Ombudsman that the number of Cultural Plans prepared only represents 20 per cent of the statutory requirement. The Ombudsman commented that he was: *concerned that there is no formal reporting of compliance with statutory requirements such as Cultural Plans for Aboriginal children which is a significant legislative reform.*[79]

The Court accepts that all those involved in decision-making for Koori children can do better. The Court is determined to develop the learnings from the successful Koori Court initiative in the Criminal Division and translate those learnings into the Family Division. The Court has been keenly participating in the 'Children's Koori Court (Family Division) Project'. The purposes of the project include:

- to improve outcomes for Koori children going through the Family Division of the Children's Court of Victoria;
- to ensure the best interests of Koori children are paramount in Family Division decision-making;
- to improve the decision-making around best interests planning by the Court;
- to improve the participation of Koori family members in child protection hearings;
- to improve adherence to the Aboriginal Child Placement Principles in accordance with the *Children, Youth and Families Act 2005;* and
- to improve the consistency and completion of Cultural Support Plans

In a consensus reached by key stakeholders on the need to adopt a multi-staged approach to improve the child protection process, the range of options being explored include pre-court processes. In particular, options being considered include the wider provision of early intervention programs, Aboriginal Family Decision-making Programs and a more collaborative approach to case planning. In addition, it is the Court's view that legal representation in pre-court conferencing would be of benefit to children and families. This is a matter that is subject to ongoing discussion by those working on this project.[80]

[79] See Ombudsman's Report at para 692 at p126.
[80] For discussion of a possible court process involving Koori families and communities see p42 and 74.

# OPTION 2 – NEW GROUNDS AND SPECIFIC COURT PROCESSES

***New grounds***

New grounds upon which State intervention in the care of a child may be authorised and reform of the procedures followed by the Children's Court when deciding whether to provide this authorisation.

2.1 Are the existing grounds for finding that 'a child is in need of protection' in s 162 of the *Children, Youth and Families Act* 2005 adequate?

2.2 Should there be additional grounds for finding that 'a child is in need of protection' which do not involve proof of fault on the part of a child's parent or other primary carer?

2.3 Should there be a new set of grounds for earlier state intervention in the life of a child where removal of a child is not necessary but where some state supervision or assistance is appropriate?

2.4 Could such a basis for state intervention, authorised by the court, be that 'a child is in need of assistance' or 'at risk of harm?

2.5 Should it be possible for there to be formal parental responsibility contracts, approved by the Court, in circumstances where the parties agree that a child is in need of assistance? If 'yes', what sanctions should apply if a contract is breached?

2.6 If 'yes', what sanctions should apply if a contract is breached?

2.7 Should it be possible to have parental responsibility contracts or orders by consent at any stage of proceedings?

***Specific court processes***

2.8 Should the present time requirement that protection applications commenced by taking the child into safe custody be brought to Court (or before a bail justice) within 24 hours be retained?

2.9 If not, what period of time should apply before Children's Court authorisation of this state intervention is required?

2.10 Should children be required to attend Court when a safe custody application first comes before the Court?

2.11 Should children be required to attend Court at later stages?

2.12 How should children be represented in proceedings before the Family Division of the Court?

| | |
|---|---|
| 2.13 | Do directions hearings serve their intended function or are there better ways of identifying contested issues and managing cases? |
| 2.14 | To what extent (if any) should the children's court adopt an administrative case management approach to child protection matters? |
| 2.15 | Should all (or some) of the provisions of Division 12A of Part VII of the *Family Law Act* 1975 *(*Cth) which seek to encourage Less Adversarial Trials to be adopted in the Children's Court? |

## NEW GROUNDS

## The Court's response to questions 2.1, 2.3 and 2.4

Subject to the response to 2.2, it is the Court's strong view that the existing grounds are adequate and appropriate. The Court answers "yes" to question 2.1 and "no" to questions 2.3 & 2.4.

In 1989 the Victorian legislature passed the *Children and Young Persons Act 1989 (Vic)*(CYPA). The CYPA adopted many of the recommendations of the review of children's law in Victoria conducted by Dr Terry Carney in 1983. Section 162(1) of the CYFA – which came into operation on 23 April 2007 – replicates the grounds for finding that a child is in need of protection that were previously contained in section 63 of the CYPA. These may be summarized as:

(a) abandonment and no other suitable carer;
(b) parent dead or incapacitated and no other suitable carer;
(c) actual or likely significant physical harm from physical injury;
(d) actual or likely significant harm from sexual abuse;
(e) actual or likely emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged;
(f) actual or likely significant harm to physical development or health.[81]

However, the CYFA was strengthened by the addition of section 162(2) which provides that for the purposes of sections 162(1)(c) to 162(1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances. It is important to note that section 162(2) is not a separate ground for proof of a protection application. It is an evidentiary provision which – as it states – explains what evidence is required "for the purposes of subsections (1)(c) to (1)(f)" and may, in certain circumstances, make it easier for the Department to prove one or more of those grounds contained in those sub-sections.[82]

As can be seen, sections 162(1)(c) to 162(1)(f) each contain two limbs. In the absence of parental protection, a child may be found to be in need of protection if-

1. the child has suffered harm of the requisite kind in the past; and/or

2. the child is likely to suffer harm of the requisite kind in the future.

[81] Category (f) is often described as the "neglect" ground.
[82] See, for example, *DOHS v Mr D & Ms W* [2009] VChC 1 at 95. Discussion on "cumulative harm" at p98.

In providing protection for children from likely future harm as well as in relation to past harm, both the CYPA and the CYFA are expressed in similar terms to section 31 of the *Children Act 1989* (Eng). Construing that section in 1996, the House of Lords set the following test for the meaning of "likelihood":

> *"Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not…[L]ikely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.*[83]*"*

The English test of "likelihood" has been universally adopted in Victoria where close to 100 per cent of protection applications are found proved.[84] This is the case now and it has been the case since 1991. Contested cases in the Court are almost always about placement of the child or about access conditions. They are rarely about proof of the protection application or, for that matter, about proof of breach where the Department has alleged a breach of a protection order.

The Court was initially unclear as to the meaning of questions 2.3 & 2.4. Clarification received from VLRC was that question 2.4 related to "less serious grounds for bringing an application" and question 2.3 related to:

> "*the threshold for bringing a protection application and the highlighted concern that DHS may wait until a particular incident to bring a matter to court. This is in situations where the Department have concern for a child and would like to be able to have some type of intermediary intervention that enables them to work cooperatively with the family without a fault based ground. Rather than wait to bring a protection application by safe custody later on when there is an immediate risk of harm to the child*."[85]

The Court strongly encourages and supports the concept of voluntary early intervention, including a regime of referrals to appropriately resourced community agencies or "Child First". However, emphasis should be placed on a requirement that support is conditional on "voluntary intervention" being truly voluntary - that is, no individual's will has been improperly overborne in the process.[86] The Court also supports voluntary pre-court conferences involving families who are believed to be in need of assistance, provided that families are able to access legal assistance at the

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[83] *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at 585 per Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord Mustill agreed). See the Court's detailed discussion of this issue in section 2.15 and the recommendation that this common law test be enshrined in legislation.

[84] This figure excludes the small number of protection applications that are struck out or withdrawn. The most usual instance of this is where there is a live protection application by notice and an incident occurs which leads to the Department issuing a new protection application upon apprehension of the same child. In these circumstances the Court is always asked to strike out the old application.

[85] Email from Myra White to Judi Washington dated 26/02/2010.

[86] The Court includes as "voluntary intervention" cases in which parents are not delighted about working voluntarily with the Department but do so without other pressure to keep the Department "on side".

conference if they so desire.[87] The Court is of the strong view that lawyers play a vital role in bridging the significant power imbalance between the State and the individual citizen.

In this context, the Court was impressed by the pre-court pilot program currently operating in Western Australia at the King Edward Memorial Hospital for Women (which in our opinion is an attractive model for early intervention in some instances). In this program, pregnant women at risk of child protection intervention participate in "*Signs of Safety*" conferences assisted by lawyers.[88] A senior social worker from the hospital advised Judge Grant during a visit to Western Australia in February 2010, that she believed the program was improved by the attendance of lawyers. Comprehensive family decision-making conferences for Koori families offer another model for early intervention.[89]

In the Court's view, there is no need for any defined threshold for appropriate voluntary intervention. It is sufficient that the family members have accepted they need assistance. But if parents or child or both do not agree to Departmental intervention[90], it is the Court's strong view that the Department ought be able to intervene only if there are *prima facie* grounds for invoking the Court process, either by filing a protection application or an application for a temporary assessment order. Despite supporting the concept of voluntary early intervention, the Court does not support a multiplicity of thresholds for non-voluntary State intervention into a child's life. The Court has seen no evidence of cases in which the Department has concern for a child and would like some type of intermediary intervention short of issuing a protective application.

Division 1 of Part 4.8 of the CYFA provides for the making of temporary assessment orders by the Court upon application by the Department made either with or without notice to the parent and child.[91] A pre-requisite for the Department to make an application is that it has "a reasonable suspicion that a child is, or is likely to be, in need of protection".[92] "Suspicion" is a state of mind which falls short of full "belief" but fits the VLRC's description of the Department having "concern for a child".[93] A temporary assessment order enables the Department to gather evidence non-voluntarily, for instance by inspecting the child's residence, interviewing the child or requiring the child to undergo a specified medical or psychological examination. Such an order may be made by the Court if it is satisfied that:

(a) the making of the order is in the best interests of the child; and
(b) it is necessary for the Department to assess whether or not the child is in need of protection; and
(c) the Department cannot properly carry out the investigation or assessment unless the order is made.

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[87] Also discussed in the response to Option 1. To ensure that "voluntary" truly means "voluntary" is one reason we so strongly endorse the provision of legal representation for families at pre-court conferences if they so desire.
[88] More extensive details of this Western Australian ADR pilot program are at p42.
[89] Such conferences in relation to Aboriginal children are already provided for to some extent in section 12 of the CYFA.
[90] It is the Court's anecdotal experience that those who have been the recipients of the State's protection as children are often the most resistant to assistance from it for their own children.
[91] See sections 228-232 of the CYFA.
[92] See section 230(a) of the CYFA.
[93] As referred to in its explanation of question 2.3.

In deciding whether or not to make a temporary assessment order, the matters to be considered by the Court include whether a further investigation and assessment of the matter is warranted.[94]

These provisions were not in the CYPA. The Court understands that the reason for their inclusion in the CYFA was to address a concern of the Department that because most protection applications were proved, there must be a number of more marginal cases that would warrant the bringing of a protection application if more evidence could be obtained to support them. However, these provisions have not been used in practice. In the nearly three years since they were first available, the Court has only made about 10 such orders and does not believe that any other applications have been refused.

The extremely high proof rate of protection applications and the lack of applications for temporary assessment orders support the Court's view that Victorian children are adequately protected by the existing grounds in section 162 and that, save for the addition of a "no fault" ground, no expansion of the grounds is either necessary or desirable.

## The Court's response to question 2.2

The Court supports the addition of a "no fault" ground.

Most – if not all – of the grounds in section 162(1) of the CYFA are predicated in some way or other on fault by a parent.[95] There are some occasions when the Department becomes involved with a child even though the parents are not at fault. The most usual instance is where a teenager goes "off the rails" for no apparent reason. Another fairly common example is where a child is autistic. A third example is where a child has been sexually abused by a sibling or some other person in circumstances where the parents did not know and could not reasonably have known of the abuse. In such cases, there is usually agreement between the Department, the parents and the child that it is appropriate for a protection order to be made so that the child may be provided with services designed to assist him or her. To do this, the Court usually finds that the child is in need of protection under section 162(1)(e), the "emotional abuse" ground.[96] However, that involves the fiction that the child's or the perpetrator's aberrant behaviours are in some way the fault of the parent. Currently, the "no fault" situation is usually dealt with by a notation on the Court file that all parties acknowledge that the parents have not caused harm to the child. However, the Court does not consider such a notation to be adequate. It is for cases like these that it believes the current grounds are deficient and the Court recommends the addition of a "no fault" provision such as:

> *"For the purposes of this Act, a child is in need of protection if harm to the child contemplated by sections 162(1)(c), (d), (e) or (f) exists or is likely to exist through no fault of the parents of the child."*

[94] These matters are detailed in section 231 of the CYFA.

[95] Section 162(1)(b) does not necessarily connote fault in a parent who is "dead or incapacitated". However, in practice, many of the cases involving an "incapacitated" parent involve a situation where a parent is incapacitated because of his or her voluntary ingestion of illicit drugs.

[96] And in the third example given above, proof on section 162(1)(d), the "sexual abuse" ground, as well.

To include such a provision will not increase the number of cases in which protection applications are proved. Its great benefit is to avoid the stigmatization of an innocent parent.

However, the Court does acknowledge that there is a potential problem with a "no fault" provision. It may create more contests with parents arguing that they are not at fault in situations where they clearly are. Parents would certainly have nothing to lose by attempting to avoid a finding that they were at fault.

On balance, the Court considers that the benefit of being able to ensure the provision of services to a child who needs them without having to resort to the fiction of finding fault against an innocent parent outweighs the risk of increased contests. It is the Court's view that a "no fault" ground should be included in the Act.

## The Court's response to question 2.5

The Court will address the question on the basis that the VLRC is suggesting a "parental responsibility undertaking" requiring a parent to do or not do certain things in the best interests of his or her child, rather than the idea of a contract, unilateral or otherwise. Under section 272 of the CYFA, the Court already has power to order a parent to provide such an undertaking in a proceeding on a protection application or on an irreconcilable difference application without the initiating application being proved.[97] In fact, the Court's power under section 272 is broader because it can also be ordered against a child[98] and against the person with whom the child is living.[99]

There are, however, three limitations on section 272 in its current form. The first is that an undertaking cannot be ordered until after a protection application or irreconcilable difference application has been filed with the Court. The second is that section 272 cannot be invoked on any other application. The third is that there is no mechanism for breach proceedings and hence no real sanction for breach.

The Court supports the extension of the section 272 power to pre-court proceedings in circumstances where the undertaking is subsequently presented to the Court for "approval". However, for the reasons given in answer to questions 2.1, 2.3 & 2.4, the Court does not support this extension unless the person giving the undertaking:

- does so voluntarily; and
- is able to access legal representation if he or she wishes prior to entering the undertaking.

If VLRC is intending to give consideration to a contract with obligations on all parties, including families and the Department, the Court would welcome the opportunity to make a submission on such a proposal.

Although it goes beyond the scope of question 2.5, the Court considers that section 272 should be expanded to enable a pre-proof undertaking to be ordered in any application, not just a protection or an irreconcilable difference application. This

[97] Sections 272(1) & 272(2)(b) of the CYFA.
[98] Sections 272(1) & 272(2)(a).
[99] Sections 272(1) & 272(2)(c).

would enable the Court to dispense with the fiction of the "common law undertaking". This was provided in clauses 195-196 of the *Children Bill*, the 'exposure draft' on which the CYFA was based. The Court is unaware of the reason why section 272 became more restricted in the CYFA.

## The Court's response to question 2.6

As previously noted, a significant limitation of a section 272 undertaking is that there is no real sanction for breach. It might be considered that there is little value in setting up the sort of regime contemplated by section 2.5 unless sanctions are also provided. This highlights the importance that a person giving the undertaking or entering the contract (as the case may be) does so with full knowledge of what he or she is committing to and what consequences he or she may suffer for non-compliance with his or her obligations. It also highlights the importance of legal representation being provided, if requested.

In the CYFA there are already sanctions for breach by any party other than the Department of:

- interim accommodation orders;[100]
- interim protection orders;[101]
- supervision orders;[102] and
- supervised custody orders.[103]

Broadly speaking, the sanction is that upon being satisfied of the breach, the Court has power to confirm or vary the breached order or replace it with another order, sometimes a more intrusive order.

Section 135 of the *Magistrates' Court Act 1989* (Vic) enables the enforcement of court orders which are not for the payment of money and this is applicable to Children's Court Family Division orders by operation of section 528(2) of the CYFA. However, the Court considers that the remedies set out in sections 135(3) & 135(4), such as a fine or imprisonment, are generally not appropriate for breach of Children's Court Family Division orders.

The Court recommends that it be provided with the following sanctions for breach of a "parental responsibility undertaking":

- confirm the undertaking or contract;
- vary the undertaking or contract; or
- revoke the undertaking or contract and replace it with a protection order provided that the Court is satisfied that the child is still in need of protection.

[100] See section 269.
[101] See sections 311(c) & 318.
[102] See sections 311(a) & 318.
[103] See sections 311(b) & 318.

## The Court's response to question 2.7

The Court is unsure what this question means. It is already possible for the Court to make orders by consent at any stage of proceedings. This is not something that can be dictated by the parties but is conditional on the Court being independently satisfied that the proposed consent orders are in the best interests of the subject child.[104]

The Court would not oppose provisions which allow it to "approve" a "parental responsibility undertaking" or a "child welfare contract" at any stage of proceedings if it is satisfied that such undertaking or contract is in the best interests of the child.

# SPECIFIC COURT PROCESSES

## The Court's response to question 2.8

***The current position: Apprehensions***

The Court has addressed the issue of apprehensions without judicial authority and a *warrant* model in this section as the VLRC indicated during recent discussions that it was of concern and interest to them.

Section 241(1) of the CYFA provides that if a protective intervener is satisfied on reasonable grounds that a child is in need of protection he or she may with or without warrant take the child into safe custody.

Section 242(2) provides that a child taken into safe custody must be brought before the Court for the hearing of an application for an interim accommodation order as soon as practicable and, in any event, within one working day.

Section 242(3) provides that unless a child is brought before the Court under subsection (2) within 24 hours, he or she must be brought before a bail justice as soon as possible within 24 hours for the hearing of an application for an interim accommodation order.

There are 11 sections in the CYFA that empower a magistrate or the President of the Children's Court to issue a safe custody warrant to apprehend a child whose safety is believed to be compromised in one way or another.[105] Six of those sections authorize a protective intervener to take a child into safe custody with or without a safe custody warrant.[106] The other five sections empower the Court to issue a safe custody warrant upon application by a protective intervener.[107] The Court has a judicial officer on duty 24 hours a day seven days a week to deal with applications for warrants.

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[104] See, for instance, the judgment of Nathan J in *DOHS v Y* [2001] VSC 231.

[105] These are detailed in chapter 5.27.1 of the Research Materials on the Children's Court website.

[106] These are sections 241(1) [child believed to be in need of protection] as noted above, 268 [variation of interim accommodation order], 269 [breach of interim accommodation order], 270 [application for new interim accommodation order], 291 [fail to appear on interim protection order] & 313-315 [breach of protection order].

[107] These are section 237 [temporary assessment order], 243 [child believed to be in need of protection – fail to appear in response to served notice], 247 [therapeutic treatment order], 261 [irreconcilable differences application] & 598 [child absent from placement].

It is the view of the Court that protective interveners[108] should only take a child into safe custody without a warrant if a notification is received indicating a child is in immediate danger and it is not in the best interests of the child to delay the process by preparing an application for a warrant.

Given the significance of the decision to take a child into safe custody, in all other cases, the Court considers there should be judicial oversight, prior to the child being apprehended.

It is the position of the Court that further analysis and research is required in this area, including research on the impact of any policy change on the Department, court users and the Court. In addition, the Act is silent on the basis for deciding between taking a child into safe custody and applying for a warrant. In relation to either procedure it requires a protective intervener to be satisfied on reasonable grounds that a child is in need of protection.

Once a safe custody warrant has been executed, all but two of the 11 sections require that the child be brought before the Children's Court within 24 hours for the hearing of an application for an interim accommodation order. If the apprehended child cannot be brought before the Court within 24 hours, he or she must be taken before a bail justice for the same purpose.[109] The only exceptions are:

- a warrant under section 237 which requires the executing police officer to bring the child to the Secretary to enable the Secretary to exercise powers under the temporary assessment order; and
- a warrant under section 598 which requires the executing police officer to return the child to the address specified in the warrant or, if no address is specified, to a place determined by the Secretary.

***Proposal to extend the 24 hour requirement***

The Court opposes any change to the present requirement that a child taken into safe custody must be brought before the Court within 24 hours.

The fundamental question to be asked is whether extending the 24 hour period to, for example, 72 hours, is in the best interests of a child. There are three matters which are relevant to this issue. First, what are the results of urgent apprehensions brought before the Children's Court. Second, are there any concerns regarding the current decision-making of the Children's Court in the area of apprehensions. Finally, what is the psychological impact of separation on a child. These are discussed in turn.

[108] "Protective intervener" is defined in section 181 of the CYFA as being: (a) the Secretary; or (b) a police officer. However, by a protocol entered into between the then Secretary and the then Chief Commissioner of Police in 1992 in relation to the identical section 64(2) in the CYPA, police do not presently act as protective interveners in Victoria.

[109] See sections 242 to which most of the other sections refer back. As the Court has explained in answer to question 2.8, it does not support any extension of this 24 hour period.

***Results of apprehensions***

It is the experience of the Court that in matters where children are apprehended and brought to court, a significant percentage are returned home on an interim accommodation order (approximately 50%). In many of those cases, the Court, having found that the child was at risk of harm in the care of his or her parent or parents, determined that the risk could be ameliorated and rendered acceptable by court-imposed conditions. For example, the child could be permitted to live with his or her parents with a condition that a third party (often a family member) reside in the home to ensure the child's safety. Other conditions may impose obligations on the parents to attend programs to address their problems. These orders prevent separation distress being experienced by a child whilst ensuring that the child is not at risk of harm.

For those children ordered by the Court to remain out of the care of their primary attachment figure, the Court will usually include in the order conditions in relation to access and counselling which will moderate the psychological effects of separation.

***Current Court decision-making***

In 2007-2008 the Children's Court made 5,820 interim accommodation orders. The majority of these orders were made on the day of apprehension. Section 271 of the CYFA gives a protective worker, a parent or a child aggrieved by the Court's decision the right to appeal to the Supreme Court. Over the last five years there have been an average of two such appeals per year. One of these has been successful.

***Psychological impact of separation on a child***

The Court regularly receives expert opinion that the risk of psychological harm to a child who is removed from his or her primary attachment figure and kept separated from that figure for periods greater than 24 hours far outweighs the benefits which may be achieved by extending the current maximum period. It is the Court's view that the earlier a child and the parents have the right to have the decision reviewed, the less is the risk of separation distress being suffered by the child.

Additionally, many babies who are apprehended are being breast-fed by their mothers and hence are forced by the circumstances of separation to change their feeding habits. The current literature indicates that this can have a profound effect on the infant.[110]

Further, section 10(3)(q) of the CYFA refers to the 'best interests' principle of "the desirability of siblings being placed together when they are placed in out of home care". Despite that, when a number of children from the one family are apprehended and placed in foster care, the Court's experience is that it is relatively uncommon that they are all placed together. Thus, a child in that position finds himself or herself bereft of both parents and siblings.

[110] American Academy of Pediatrics, Section on Breastfeeding. "Breastfeeding and the Use of Human Milk", *Pediatrics* 115(2), 2005, 496-506 quoted in "Healthy Beginnings, Healthy Futures – A Judge's Guide" (2009), American Bar Association, National Council of Juvenile and Family Court Judges and Zero to Three, p.32.

In a recent publication entitled "Healthy Beginnings, Healthy Futures – A Judge's Guide", a number of comments were made about the effects of removing children from their parents. This publication was prepared in 2009 by a team of six professionals drawn from the American Bar Association Center on Children and the Law, The National Council of Juvenile and Family Court Judges and the Zero to Three National Policy Center.[111] It is designed to assist Judges in decision-making regarding children. In a section headed "Ensure frequent parent-child contact", the following opinion is noted:

> *"Professionals working with very young children in foster care often do not understand the extent of the child's distress over being removed from the parent and placed in a strange environment. Remember that very young children grieve the loss of a relationship. Even though the parent has maltreated the child, she or he is the only parent the child has known, and separation evokes strong and painful emotional reactions. The younger the child and the longer the period of uncertainty and separation from the primary caregiver, the greater the risk of harm to the child."*[112]

The opinion continues:

> *"Because physical proximity with the caregiver is central to the attachment process for infants and toddlers, an infant should ideally spend time with the parent(s) daily, and a toddler should see the parent(s) at least every two to three days. To reduce the trauma of sudden separation, the first parent-child visit should occur as soon as possible and no later than 48 hours after the child is removed from the home."*[113]

The Court notes that if the current time limit is increased, there is no guarantee that there would be any access during that period and hence the potential for emotional harm resulting from "the trauma of sudden separation" will be correspondingly increased.

The Californian Blue Ribbon Commission Report on Children in Foster Care 2008, dealt with this question and recommended the following:

Recommendation 1 - Reasonable Efforts to Prevent Removal and Achieve Permanency

> *"Because families who need assistance should receive necessary services to keep children safely at home whenever possible, the Blue Ribbon Commission recommends that the Judicial Council, the California*

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[111] The Judge's Guide was prepared by lawyers and social scientists and overseen by an Advisory Committee that consisted of some of the most respected American social scientists and judicial officers. These include Dr Joy Osofsky (Professor of Public Health, Psychiatry and Paediatrics at Louisiana State University Health Sciences Center), Dr Sheri L Hill (Early Childhood Policy Specialist Seattle WA), Dr Brenda Jones Harden (Institute for Child Study, University of Maryland, College Park MD), the Honorable Pamela L Abernethy (Marion County Circuit Salem OR), and the Honorable Katherine Lucero (Superior Court, Santa Clara County, San Jose, CA). The guidelines are intended for application in not just one state but for the whole USA.

[112] At page 72 citing Goldsmith, D.F., D. Oppenheim and J. Wanlass. "Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care." *Juvenile and Family Court Journal* 55(2), 2004, 1-13. Also citing American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care. "Developmental Issues for Young Children in Foster Care." *Pediatrics* 105(5), 2000, 1146.

[113] Ibid p72. Emphasis added.

*Department of Social Services, and local courts and child welfare agencies implement improvements to ensure immediate, continuous, and appropriate services and timely, thorough review for all families in the system."*

Submissions were received by the Californian Commission seeking to expand the 48 hour window for the detention hearing to 72 hours. The Commission responded that

*"the recommendations already encourage expansion of family group conferencing and other non-adversarial court-and-child welfare-based resolution techniques. The Commission believes that expansion of availability of services must precede advocating for statutory change in time for initial hearing."*

The Commission is also referred to the Layton Report in South Australia (2003) which, *inter alia*, looked at the same question of the 24 hour time frame for bringing children before the court. Recommendation 176 of the report noted:

*"No change is recommended to the time in which an order for custody is required before removal of a child pursuant to Section 18 of the Children's Protection Act 1993."*

The reason given by the author of the Layton Review for Recommendation 176 was as follows:

*"Removal of a child from guardian/or situation of risk is a very serious action. If a child is not to be returned to the guardian the basis for that decision, and the authority for such action, must be placed before the Youth Court as soon as possible."*

The Court is of the view that removal itself has the potential to cause emotional damage to those children and for that reason, it must be done with care and only when absolutely necessary. To bring children before a court within 24 hours ensures that any decision to remove a child can be validated promptly by the Court or alternatively, if removal is judged not to be in the best interests of the child, ensures that the child is returned home as soon as possible, thus reducing the potential for psychological damage.

The Court understands that reasons for the proposal to extend the current timeframe include:

- after an extended period of time the parties will have "cooled down" and therefore are more likely to make rational and informed decisions;

- the 72 hour period gives the Department of Human Services more time to prepare its case and in particular disclose its case to each party; and

- the legal representatives for all the parties will have more time to prepare for the case and in particular, counsel representing children will have an opportunity to get instructions before the case, thus eradicating the need for the children to attend at court.

It is the Court's view that these reasons appear to be primarily convenience based and 'adult-focussed'. It is not the Court's experience in submissions contests that the

Department's cases are usually significantly under-prepared or that the other parties' legal representatives are unduly constrained by the 24 hour rule in their ability to respond to the Department's case. None of these matters, in the Court's view, are persuasive in light of the matters outlined above.

As previously noted the basic principle enshrined in the *Children, Youth and Families Act* 2005 – as in its predecessors – are to protect children and to regard their best interests as paramount.[114] Section 10 of the *Children, Youth and Families Act 2005* sets out the best interests principles (refer to Appendix 5) Of particular note are paragraphs a, b, c, e, f, g, h, i, j, k, m and q of section 10(3). These place emphasis on the stated aim of protecting the family unit and of intervening to place a child out of parental care only if the child is at unacceptable risk of harm in parental care. These principles also accord with Article 3 of the UN Convention on the Rights of the Child and with section 17 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Court submits that the status quo should remain.

## The Court's response to question 2.9

Not applicable

## The Court's response to questions 2.10 and 2.11

***Requirement of children at court***

The Court does not require a child to attend court either when a safe custody application first comes before the Court (an apprehension) or at later stages.

However, whilst the Court does not require a child to attend, there are circumstances in which a child will need to attend.

At the first listing of an apprehension, children mature enough to give instructions will be required to attend court to instruct their legal representatives. The criterion is maturity, not age.[115] The legal representatives will speak to the children to determine their capacity to give instructions and if they are capable of instructing, appear on their behalf. In the event siblings provide different instructions, they will be separately represented.

In addition, there may be circumstances in which it is considered to be in a child's best interests to attend court, for example, a mother breast-feeding, or where there are concerns about siblings being separated. Also, there are occasions when parents bring their pre-school children to court as they do not have anyone else to care for them.

Whilst children may be required to attend court, the Court does not consider children should be present in the court room, without leave of the Court.

The Court supports legal representatives for children being appropriately remunerated by Legal Aid to attend upon the children to obtain their instructions.

[114] See sections 1(b), 8(1) & 10 of the CYFA.
[115] Discussed at p60.

The Court also supports the Taskforce recommendation to replace undertakings by parents or suitable persons with an inherent condition on an IAO that requires that a parent or suitable person to produce a child at court, if required.

Given that on occasions it will be necessary for children to attend Court, there is an urgent need for child care facilities at the Court. The Court has long argued that a child care facility is essential however has been advised that the cost thereof is prohibitive. On any given day in the Family Division of the Court there are many children and families in the waiting areas. As previously stated, the waiting areas are not child or family friendly.

## The Court's response to question 2.12

### *Children's representation in child protection proceedings before the Family Division*

The jurisdiction of the Family Division of the Children's Court is set out in section 515 of the CYFA and has two distinct categories: subsection (1) refers to child protection applications; subsection (2) refers to intervention order applications.[116] The principles governing representation of children are not identical between the two categories.

It is the Court's view that section 524 of the CYFA governs representation of children in the Family Division:

- in child protection applications; and
- in intervention order applications save to the extent it is inconsistent with the *Family Violence Protection Act 2008* (Vic) [in particular section 62 which permits an affected family member who is a child to be represented only by leave] and with the *Stalking Intervention Orders Act 2008* (Vic), these being later enactments than the CYFA.

The Court would strongly prefer that representation of children in both categories of applications in the Family Division were governed by the same principles. It considers that section 62 of the FVPA:

- is contrary to the United Nations Convention on the Rights of the Child; and
- may improperly discriminate against a child and so be contrary to the Preamble and sections 8 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

However, it also believes that question 2.12 is intended to be confined to legal representation in child protection proceedings. It will therefore confine its response to representation in applications falling within Chapter 4 of the CYFA.

### *The United Nations Convention on the Rights of the Child*

The United Nations Convention on the Rights of the Child (UNCROC) sets out the undertakings of the international community in recognizing children as independent persons with their own integrity and human rights. Article 12 of UNCROC in

[116] As noted in item 2.15 of the Court's submission, the list in section 515(1) is not complete.

particular calls for a child to be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child:

> *"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law."*

***Recommendations by the Australian Law Reform Commission***

Based on UNCROC, the joint recommendations of the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission in ALRC Report No.84, published in 1997, would make it mandatory for representatives to act for both verbal and pre-verbal children in child protection cases and would require such representatives to go much further than acting on the basis of the child's instructions or the child's wishes.[117] For example, in relation to pre-verbal children the recommended tasks of such representatives would include-

- investigating all relevant facts, parties and people;
- subpoenaing all documents;
- retaining experts as needed;
- observing the child in the caretaker's setting and formulating optional plans;
- challenging the basis for experts and agency conclusions in order to ensure accuracy;
- advocating zealously for the legal rights of the child including safety, visitation and sibling contact; and
- ensuring that all relevant and material facts are put before the Court.

Given that this is not the present state of the law in relation to child representation in Victoria under the CYFA, a question may arise as to whether it should be.

**Models of child representation**

There are six models of child representation which can be distilled from various jurisdictions and from various writings, including the ALRC report and an Issues Paper No.18 entitled "*Speaking for ourselves: children and the legal process*" which the ALRC released as a prelude to its report:

1. '**The non-representation model'**: children are not represented at all.
2. **'The traditional model'**: employing an advocate whose role is to argue a case strictly upon the child's instructions.
3. **'The best interests model'**: employing an advocate who presents and argues his or her own professional view as to the child's best interests, even if this is inconsistent with the child's expressed wishes on the issue.

[117] ALRC Report No. 84, [13.30] p.273.

4. **'The counsel assisting model'**: employing an advocate as objective investigator assisting decision-makers to reach a fully informed assessment of the child's needs and how those needs can best be met.
5. **'The comforter model'**: employing an advocate as professional companion for the child, explaining the process to the child and answering questions.
6. **'The Tasmanian model'**, a hybrid model: employing an advocate to take instructions from the child and act on those instructions unless the advocate considers the child unable or unwilling to give instructions. In those cases, the advocate will represent the child's best interests, which are assessed by a social scientist.

**Current Victorian Model of child representation – Ss. 524(2), (4), (10), (11)**

Currently, child representation in child protection proceedings usually involves model 2 – **'the traditional model'** – but in exceptional circumstances it involves a minor variation of model 3 – **'the best interests model'**.

**Model 2 – 'The Traditional Model'**

Section 525(1) of the CYFA provides that, subject to section 524, a child who, in the opinion of the Court, is mature enough to give instructions must be legally represented in the Family Division in each of the 30 child protection application types listed therein. Seven child protection proceedings have been omitted from the list in section 525(1). They are:

- applications to vary or revoke undertaking [section 279];
- applications to vary or revoke interim protection order [sections 299(e) & 303(g)];
- application to extend an interim accommodation order (IAO) [section 267];
- applications to extend therapeutic treatment order/TT (placement) order [sections 255-6].

The Court can see no logical reason why these applications, other than an application to extend an IAO were omitted from the list. The Court presumes that they have been omitted by a drafting error in the same way that these seven applications were excluded from the Court's jurisdiction as defined in section 515(1).[118] In the Court's view this should be corrected.

If a child who, in the opinion of the Court, is mature enough to give instructions is not legally represented in any of the 30 proceedings referred to in section 525(1), then sections 524(2) and 524(3) of the CYFA:

- require the Court to adjourn the hearing to enable the child to obtain legal representation; and
- prohibit the Court from resuming the hearing unless the child is legally represented except if the Court is satisfied that the child has had a reasonable opportunity to obtain representation and has not done so.

[118] See the Court's response to Question 2.15.

However, these obligations do not apply to:

- cases where the Court has granted leave under section 524(8) for the child to be represented by a non-lawyer;
- cases falling within section 216, i.e. where, upon an application for extension of a custody or guardianship to Secretary order, the Court is satisfied that the child has agreed on the terms of the order and that the making of the order is in the best interests of the child.

Sections 524(9) & 524(10) of the CYFA provide that a non-lawyer granted leave to represent a child in a Family Division proceeding and a legal practitioner representing a child in any proceeding must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.

The test for maturity or non-maturity is not the distinction between verbal and pre-verbal children. On general advice from the Children's Court Clinic, the cut-off point below which a child is normally regarded as not mature enough to give instructions is the child's 7th birthday. That is not to say that in any particular case a younger child cannot be represented under section 524(2) or an older child must be represented for the legislation is based on maturity rather than the specific age of the child. The accepted practice is the 7th birthday. Though younger children are generally not legally represented, from time to time the presiding judicial officer does request that a young child be spoken to by an experienced legal practitioner to determine whether the child is mature enough to give instructions.

**Model 3 – 'The Best Interests Model'**

Section 524(4) of the CYFA provides that if, in exceptional circumstances, the Court determines that it is in the best interests of a child who, in the opinion of the Court is not mature enough to give instructions, for the child to be legally represented in a proceeding in the Family Division, the Court must adjourn the hearing of the proceeding to enable that legal representation to be obtained.

Section 524(11) of the CYFA provides that a legal practitioner appointed under section 524(4) to represent a child who is not mature enough to give instructions must:

(a) act in accordance with what he or she believes to be in the best interests of the child; and
(b) to the extent that it is practicable to do so, communicate to the Court the instructions given or wishes expressed by the child.

Sections 524(4) and 524(11) have been in operation since 23/04/2007. There were no equivalents to these provisions in the predecessor *Children and Young Persons Act 1989* (Vic). Nor, interestingly, were there any such provisions in the *Children Bill*, upon which the CYFA was based.[119] The Court believes that the late inclusion of sections 524(4) and 524(11) – which were welcomed by the Court – followed representations by Justice Fogarty.

[119] See clauses 433 & 434 of the *Children Bill*.

The Court notes that it has not overused this provision and the pre-condition of "exceptional circumstances" has not been diminished in its application. In the nearly three years since the Court was given this power, it has exercised it in 33 cases statewide. The experience of the Court is that legal representatives appointed under section 524(4) have generally assisted the Court to make decisions in the best interests of the represented child.

**The Court is unanimous on Models 1 & 5**

**Model 1:** The Court does not agree with the proposition that as the child protection authority is required by government direction to act as a model litigant[120] and is required by law to have regard to the best interests of the subject child in making any decision or taking any action under the CYFA,[121] legal representation for a child is not required. Whilst, it is true that only a small percentage of the disposition recommendations made by the authority are not accepted by the Court,[122] a child's rights are in issue as a result of the authority's intervention into his or her life and therefore a general right to separate legal representation is required.

The Court unanimously rejects any dilution of the current level of child representation. It is also strongly of the view that in the event that pre-court mediation is subsequently adopted, children should be legally represented in such mediation at no less than the current level in court proceedings.

The Court does not support systems in which children are rarely represented or not represented at all.

The Court submits that Model 1 is inconsistent with Australia's obligations under Article 12 of UNCROC.

**Model 5:** The Court sees no need for **'the comforter model'** – the advocate as professional companion for the child, explaining the process to the child and answering questions. To adopt this model would be a backward step for the rights of children generally.

**The Court is not unanimous on Models 2, 3, 4 & 6**

The one area in the Court's overall submission to the Victorian Law Reform Commission in which it does not present a unanimous view is whether the *status quo* should remain or whether all representation of children in child protection proceedings should be based on some type of **'best interests model'**.

**Status Quo proponents – Model 2 & restricted Model 3 approved (with minor legislative amendments recommended)**

It is the experience of those members of the Court who urge the retention of the ***status quo*** – and they form the majority – that the current system of child representation is

[120] See the discussion in Chapter 4.1.6 of the Research Materials on the website of the Children's Court of Victoria www.childrenscourt.vic.gov.au.
[121] See sections 8(2) & 10 of the CYFA.
[122] The Court is referring to recommendations made by the Department as to the outcome of litigation.

effective, does appropriately protect children's rights and promote their interests and does assist the Court to make decisions in the best interests of the subject children.[123]

A child's instructions and wishes are not determinative of any case. Under section 10(3)(d) of the CYFA they are to be "given such weight as is appropriate in the circumstances". If they are not in the child's best interests, they will be given no significant weight. But to the supporters of the *status quo*, children are usually good assessors of what is going on in the home (whether it is the family home or out of home care) and usually good assessors of safety issues. In this regard, the effect of separation grief on a child's emotional wellbeing and safety must not be ignored. In an address entitled "Children and Children's Rights in the Context of Family Law", given in Brisbane in June 2003, Hon Justice Alastair Nicholson AO RFD, former Chief Justice of the Family Court of Australia, said:

> "When it comes to views expressed by young children it may well be that courts place too little weight on them. The Children's Issues Centre at the University of Otago, New Zealand, concluded from a study they conducted in 1997:
>
> > *"'One of the most important conclusions to be drawn from our study is that children do have views about their lives after parental separation and that they are highly capable of expressing their views. Even children as young as five years of age can talk about their feelings and what situations mean to them despite the complexity of the experiences . . . the view that children's capacities to understand and participate have been underestimated (Mayall 1994, Simpson 1989) is reinforced for us by this study.*[124]"

If there is any valid criticism of the *status quo*, it is that legal practitioners sometimes do not spend sufficient time with their child client and do not have updated instructions from their client. But that is not the fault of the model and it is not a valid reason to replace it.

In addition, it appears to the supporters of the *status quo* that only Models 2 and 6 properly accord with Australia's requirements under Article 12.1 of UNCROC:

> "*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*."

A child's right to express his or her own views "freely" cannot be given effect to by an adult intermediary massaging the child's views in a way that the adult considers to be in the child's best interests. Such a paternalistic departure from the UNCROC principles falls into the category of adults knowing best and children being seen and not heard. Hence, the proponents of the *status quo* reject Models 3 and 4 as being both unnecessary and as contrary to Australia's obligations under UNCROC.

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[123] In *M v Ors v M & Ors* [1993] 1 VR 391 at 393, commenting on the predecessor legislation, said: *"It is clear that the Children's Court, in hearing and determining a protection application, is exercising a jurisdiction for the benefit of children."* That dicta has now been given statutory effect by sections 8(1) and 10 of the CYFA.

[124] Access and Other Post-Separation Issues – A Qualitative Study Research Report, University of Otago, July 1997.

The absence of sections 524(4) & 524(11) in previous legislation was a significant gap which was seen by the Court as occasionally not being in the best interests of subject children. The Court strongly approved their late inclusion in the CYFA and all current members of the Court urge their retention.[125] The proponents of the *status quo* are untroubled by the limitation of section 524(4) to cases involving "exceptional circumstances". The limitation does not contravene UNCROC. While it falls a long way short of the joint recommendations of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in ALRC Report No.84, which urge representation for both verbal and pre-verbal children in child protection cases, the supporters of the *status quo* consider that section 524(4) adequately protects the rights of all children.

In relation to Model 1, the Court has referred to the obligations on the child protection authority to act as a model litigant and to have regard to the best interests of the subject child in making any decision or taking any action under the CYFA. That is a significant distinction between the private law domain of the federal jurisdiction – where none of the parties are subject to those constraints – and the public law domain of the Children's Court. As we have said, there are only a small percentage of cases in which the authority's disposition recommendations are not in the best interests of the child. There can be no doubt that if the Court was to take the view that it was contrary to the best interests of a particular pre-mature child to be without legal representation, the Court would find that constituted an "exceptional circumstance" and would appoint a legal representative pursuant to section 524(4).

However, the proponents of the *status quo* have seen no evidence in the nearly three years of its operation that section 524(4) is failing to protect the rights of any pre-mature children. While in theory Model 6 – the **'Tasmanian hybrid model'** – sounds admirable in that all children are legally represented one way or the other, it is significantly more costly than the Victorian *status quo*. It also adds an additional party in some cases. There is no evidence that Model 6 would justify the resultant additional cost and complexity.

The only change which the proponents of the *status quo* recommend is the removal of the clause "having regard to the maturity of the child" from the end of sections 524(9) & 524(10) of the CYFA. Those sections currently provide that a non-lawyer granted leave to represent a child in a Family Division proceeding and a legal practitioner representing a child in any proceeding "must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child." This change is recommended because it is sometimes quite impracticable for a legal practitioner to act in accordance with instructions or wishes of the child client no matter how mature the client is and how reasonable his or her instructions. A not uncommon example is where a child wishes to be placed in the care of a parent but the parent is not willing to have the child in his or her care. The impracticability of a child's instructions is not necessarily a reflection of immaturity on the part of the child. It might equally be a reflection of immaturity or unreasonableness on the part of the parent. But the Court is highly unlikely to force a child upon an unwilling parent for to do so would usually be a recipe for disaster. So a legal representative should not be forced to act on instructions in such a case. To

[125] The proponents of the 'best interests' model urge their retention in the event that Model 3 or Model 4 is not introduced across the board.

remove the words "~~having regard to the maturity of the child~~" will not derogate from a child's rights. It will simply mean that the legal representative will not have to ignore or bend the law.

**<u>*'Best Interests'* proponents – Model 4 approved – Model 3 a second choice</u>**

It is the experience of those members of the Court who urge the adoption of a broad '**best interests'** based system of child representation that:

- the *status quo* is not working properly in the Children's Court; and
- a system akin to that in operation in the federal jurisdiction would better assist the Court to protect children's rights and promote their interests and would give the Court a sounder basis on which to make decisions in the best interests of children generally.

'Separate' child representation under sections 68L and 68LA of the *Family Law Act 1975* (Cth) requires the advocate to present and argue his or her own professional view as to the child's best interests, even if this is inconsistent with the child's expressed wishes on the issue.[126] In the Federal Model the separate representative "should act in an independent and unfettered way in the best interests of the child."[127] There is case law authority for the proposition that the Independent Children's Lawyer in the federal jurisdiction (ICL) should act as objective investigator assisting decision-makers to reach a fully informed assessment of the child's needs and how those needs can best be met. This is Model 4: **'the counsel assisting model'**. In reality, most ICLs put in the considerable time and effort required to act as a model 4 advocate, while others tend to operate under Model 3: **'the best interests model'**.

In his aforementioned address in June 2003, Hon Alastair Nicholson AO RFD (former Chief Justice of the Family Court of Australia), said:

> *"For several years after the Act's passage the role of the child's representative was unclear, as the legislation provided no guidance. The jurisprudence developed gradually in response to pragmatic concerns raised in contested cases. These included issues such as how significant are the child's instructions, what material is privileged, how does the child representative liaise with court counsellors and expert witnesses, and how does representation make a child a party to the proceedings?*[128]
>
> *In 1994 in the case of Re K*[129] *the Full Court of the Family Court reviewed the role and functions of the child's representative and suggested a list of criteria to be considered as indicia of the need for a child to have independent representation. Without repeating these verbatim, they include cases involving allegations of child abuse (whether physical, sexual or psychological), where the child is apparently alienated from one or both parents, where none of the parties is legally represented and where it is proposed to separate siblings…"*

[126] ALRC Issues Paper No. 18, p.19
[127] See *Bennett* (1991) FLC-92-191.
[128] For a useful account of this topic see Representing the Child's Best Interests in the Family Court of Australia, Report to the Chief Justice, September 1996, Family Court of Australia.
[129] *Re K* (1994) FLC 92-461.

We interpose to say that this list effectively includes virtually every case which is likely to be within the Family Division of the Children's Court. Justice Nicholson continued:

> *"In Re K the Full Court pointed out that the failure to provide representation for all children affected by family law proceedings may be a breach of Australia's international obligations, particularly UNCROC.*
>
> *It is, of course, one thing to provide representation and another to be satisfied that it is effective. A Committee consisting of representatives of the Family Court, Government, the Federal Magistrates' Service and the legal profession has now settled guidelines for child representatives…which lay down minimum standards for the conduct of child representatives in areas such as the relationship with the child, the information the child should receive, case planning and additional skills and information required for those representing indigenous children, and children with disabilities…The guidelines also stipulate that a child who is unwilling to express a wish must not be pressured to do so, and must be reassured that it is his or her right not to express a wish even where a sibling may want to express a wish."*

His Honour also stated:

> *"Of course, what a child may want is not necessarily what is most appropriate for the promotion of his or her best interests. Recognising this, the guidelines require the child's representative to act according to what she or he considers to be in the best interests of the child. This, where the child is verbal, requires the legal representative to seek to provide the child with the opportunity to express his or her wishes in circumstances that are free from the influence of others."*

Those members of the Court who urge the adoption of a broad **'best interests'** model recommend the adoption of minimum standard guidelines for child legal representation similar to those which have been adopted by the Family Court and the Federal Magistrates Court.[130] The guidelines indicate not only the significant role of the ICL but also the thought that has gone into ensuring that the 'best interests' model serves the interests of the children involved.

The proponents of a broad **'best interests'** model:

- have found the representation of children on an instructions model generally quite unsatisfactory and of little benefit to either the children in question or the Court;
- consider that to some degree the lack of efficacy is due to the poor funding model behind the appointment of legal representatives in the Children's Court.

They make the following observations of child legal representation in the Children's Court:

1) Practitioners usually only see the children they represent at Court on the day of the hearing. Instructions are taken in the sometimes crowded, chaotic confines of the Family Division by lawyers who hold a large number of other files for the day. Given the file loads of the various practitioners, it is difficult to see how the children could spend more than 15 minutes with their lawyers in such

[130] The Guidelines for Independent Children's Lawyers can be found on the Family Court of Australia website.

circumstances. With such time and venue constraints the critics of the current model would question how children can gain an understanding of what is occurring, develop an appropriate relationship with their lawyer or be able to give clear, reasoned instructions?

2) Many children appear to give their representatives only the most basic of instructions, stating little more than where they might wish to live or whom they might wish to have contact with. Such instructions may well be limited in scope due to the age of the child, the nature of the child's circumstances or the brief nature of their meetings with their legal representatives. However, armed with such instructions lawyers appear and continue to appear for the duration of contested hearings of several days, such lawyers never calling witnesses, rarely asking questions of forensic value and being limited in their submissions. The assistance provided to the Court is of minimal value.
3) There appears to be a certain degree of confusion on the part of practitioners as to how to deal with instructions from young people. For instance, it occasionally happens that when parties with the exception of the child are in agreement as to how a matter should be resolved, the lawyer for the child has indicated that the matter should settle as per their colleague's proposal on the basis that their child client has "not opposed" the making of the proposed orders. How this can occur on the instructions model is incomprehensible. One wonders how the Court's decision is communicated to the young person and how, on an ethical basis, a practitioner acting on the basis of instructions can make such concessions.

The members of the Court who are critical of the *status quo* believe that in many cases children's lawyers have real concerns about the viability of their instructions and the risk to their clients if those instructions were adopted by the Court, yet they feel constrained by those same instructions and either repeat them to the Court or pass them on with some thinly veiled suggestion that the Court might consider not placing too much importance on such instructions. For a lawyer to adopt either of these approaches in a case where he or she has real concerns about a child's instructions is worrying and places the practitioner in an invidious ethical position.

By contrast, the best interests model, at least as implemented in the Family Court and the Federal Magistrates Court, provides the Court with so much more. The child's wishes, if the child is capable of expressing same, are always clearly communicated to the court and the ICL then has to assess all the available evidence and form (and communicate) an independent view as to what is in the child's best interests.

The ICL meets with the child away from the Court environment and usually debriefs the child (assuming the child is old enough) at the conclusion of the litigation. In addition the ICL will strategically subpoena witnesses and documents and may even pursue orders for the preparation of forensic reports. Most importantly, the ICL has often taken on a role which is akin to that of a mediator, assisting the parties to reality check their own cases, meeting with each parent and their practitioners and assisting them to find common ground with a view to resolving matters.

The role of the ICL is one which requires much preparation, thought and, in due course, action. Further, the role involves actively assisting the Court both in a substantive manner and by encouraging settlements where appropriate. The ICL also has a much closer professional relationship with the child, thereby ensuring that the level of engagement with the Court process on the child's part is maximised.

Child representation in the Children's Court is almost entirely funded by Victoria Legal Aid. A system based on Model 4 – **'the counsel assisting model'** – is the system recommended by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in ALRC Report No.84. It is the system which those members of the Court who oppose the continuation of the *status quo* strongly urge should be adopted in the best interests of the children the subject of child protection proceedings in the Family Division of the Court. It is acknowledged that this model will be substantially more expensive than the *status quo* because significantly more preparation is needed by the child representative. Without proper funding – and therefore without proper preparation – model 4 is not viable.

A system based on Model 3 – **'the best interests model'** – will neither be as good nor as expensive as model 4. It is the second choice of those who oppose the *status quo*. Model 3 is also likely to require increased funding but surely it is inappropriate to derogate from the rights of our most disadvantaged children merely on the basis of financial considerations.

Thirdly, on the question of cost, it is the view of those magistrates dissatisfied with the *status quo* that by introducing the ICL model there will be a significant decrease in disputation and, as a result, a commensurate decrease in cost to the community. This is the experience in the federal jurisdiction and there is no reason why it should not be the case in the Children's Court.

If a broader 'best interests' system is adopted, sections 524(10) and 524(11) of the CYFA will need to be redrafted.

**No Representation by parent – representation by non-lawyer – Section 524(8) CYFA**

Section 524(8) prohibits a parent from representing a child in the Family Division but permits the Court to grant leave to a non-lawyer, other than a parent, to represent the child except in cases where legal representation is obtained pursuant to section 524(4). The Court does not believe any change is needed to this sub-section. The Court strongly agrees that it is inappropriate for a parent to represent a child in child protection proceedings.

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. In any event, the section as it stands leaves the issue in the hands of the presiding judicial officer in any case and this, we believe, is appropriate.

As we have explained above, if the *status quo* is retained a minor amendment should be made to section 524(9) by removing the concluding words "having regard to the maturity of the child". However if a broader best interests system based on Model 3 is adopted, section 524(9) will need to be redrafted along the lines of section 524(11).

**One lawyer, multiple children – Sections 524(5)-(7)**

Section 524(5) provides that with the leave of the Court, more than one child in the same proceeding may be represented by the same legal practitioner. Section 524(6) allows the Court to grant such leave only if satisfied that no conflict of interest will

arise. Section 524(7) allows the Court to withdraw such leave if satisfied that a conflict of interest has arisen in the course of the proceeding.

Section 524(5) has never been strictly complied with. Nor could it be complied with in practice. In its strict sense it is unworkable. In reality a legal practitioner assigned several children to represent never seeks leave but continues to represent each of those children without express leave unless a conflict becomes evident to him or her. That reality is based on efficiency and pragmatism. In the Family Division most assignments of a child legal representative occur at the time of apprehension of the child. Until a legal representative has taken instructions from each of the multiple children, he or she will not know whether a conflict of interest exists and therefore will not be in a position to provide the Court with the information which the Court would require in order to make an informed decision under section 524(6).

The Court believes it would be more appropriate for sections 524(5)-(7) to reflect reality. It would therefore recommend that these sections be replaced by the following:

> (5) The same legal practitioner may represent more than one child in the same proceedings only if satisfied that no conflict of interest exists or is reasonably likely to arise in the course of the proceeding.

# LISTINGS, CASE MANAGEMENT AND DIRECTIONS HEARINGS

## The Court's response to questions 2.13 And 2.14

### *Workload and resourcing*

In 2002-03, 7,080 applications were initiated in the Children's Court of Victoria. Applications to the Court since then have been growing at the rate of 6 % per annum. In 2008-09, 10,108 applications were initiated. During the same period, the number of orders the Court made in child protection matters rose from 24,287 to 43,709. This massive increase in workload has had a profound effect on the Court.[131] For example, in 2002-03, the listing delay from pre-hearing conference (now called dispute resolution conferences) to final contest was 7.8 weeks. By 2007-08, this time had grown to 17.8 weeks. With the appointment of additional judicial officers and registry staff on 1 July 2008 that figure was reduced to 14.8 weeks (as at 30 June 2009).

In November 2007, BCG produced a report that examined the immediate needs of the Melbourne Children's Court. It made "short term recommendations" designed "to relieve the Court from its immediate lack of capacity" and longer-term recommendations for implementation over a three-year period. On the latter point, BCG recommended the appointment to the Court, over a three-year period, of four

[131] There has also been another significant trend which has affected the Court's workload. In 2002-03, the Department commenced applications by way of apprehension in 58% of cases at Melbourne and 16% of cases in the country. By 2008-09, the figures were 78% and 48% respectively. These changes are important for two reasons. First, apprehensions are more likely to require "submissions time". Secondly, apprehensions are less likely than applications by notice to settle at a mention hearing.

additional judicial officers and fourteen additional staff. In early 2008, the Court was advised that it had been successful in its budget bid. Additional judicial officers and registry staff would be appointed to the Court over a three-year period. In July 2008, two magistrates, one acting magistrate and five registry staff commenced at the Court. In early 2009, Judge Grant received advice that the additional judicial and registry staff would not be funded. Because of this decision, the Court does not currently have the number of judicial officers and registry staff it requires to deal with its workload. Inevitably, delays have worsened.

Plans to "case manage" particular cases – for example, Koori cases or infant cases - cannot be implemented because the Court does not have the resources to perform functions outside the existing and burgeoning workload.

***Listings and the docket system***

Some courts are well resourced to "docket" cases.[132] They are not high volume State courts. The Court is unaware of any summary, high volume, State courts that are able to docket cases. The Children's Court does not have the capacity to do so.

BCG looked at this issue in 2007 and again in 2010. They concluded that the Children's Court at Melbourne did not have the capacity to docket cases.

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

At the present time, it is not possible for the Court to allow magistrates to run their own diaries and determine their own lists. Any effort to docket cases would require a significant increase in the number of magistrates, registrars and courtrooms.

However, the Court is involved in managing cases. Members of the Court actively ensure that cases are dealt with as expeditiously as possible. Magistrates sitting in the mention court scrutinise adjournment applications. The Court rarely hears parties opposing such applications. It is almost always the magistrate questioning the reason for an adjournment. Some years ago, the Court was subject to unfounded criticism for granting too many adjournments. It is the Court's understanding that this criticism is no longer made. Research undertaken by BCG in 2007 showed that Departmental delay accounts for 35% of the adjournment applications and parent delay for 34% of the applications.[133]

[132] A case is "docketed" when it is allocated to one particular judicial officer during its lifetime.

[133] 15% of matters are adjourned pending court process, 8% for further action to be undertaken and 6% for other unavoidable circumstances. Sometimes, adjournments are built into the system by specific legislative requirements. For example, interim protection orders require an adjournment of up to 90 days to "test the appropriateness of a particular course of action". In 2008-09, the court made 893 such orders. Because the matter is not resolved until it returns to court, these orders automatically result in a "further mention" and add 90 days to finalisation times.

Representatives from BCG recently made a presentation on their latest research findings to the judicial officers at Melbourne. The data was helpful and we noted their suggestion that the Court should refer cases to DRC if the case has already had three mentions. They formed this view because the research showed that 59% of applications that resolved at the mention stage, resolved by the third mention.[134] These cases remain within the Court for less than 2.5 months. It was noted that the Court does not have the resources to refer every application to a DRC and, in those circumstances, the Court should not refer those matters to a DRC when the matter is likely to settle without one.[135] On the other hand, the Court has accepted the Taskforce recommendation that mediation should occur as early as possible in the process. The BCG work offers guidance on one appropriate referral point. It is not, of course, conclusive. Some cases will be referred earlier in the process and there may be some rare cases where it will be reasonable to refer at a later stage.

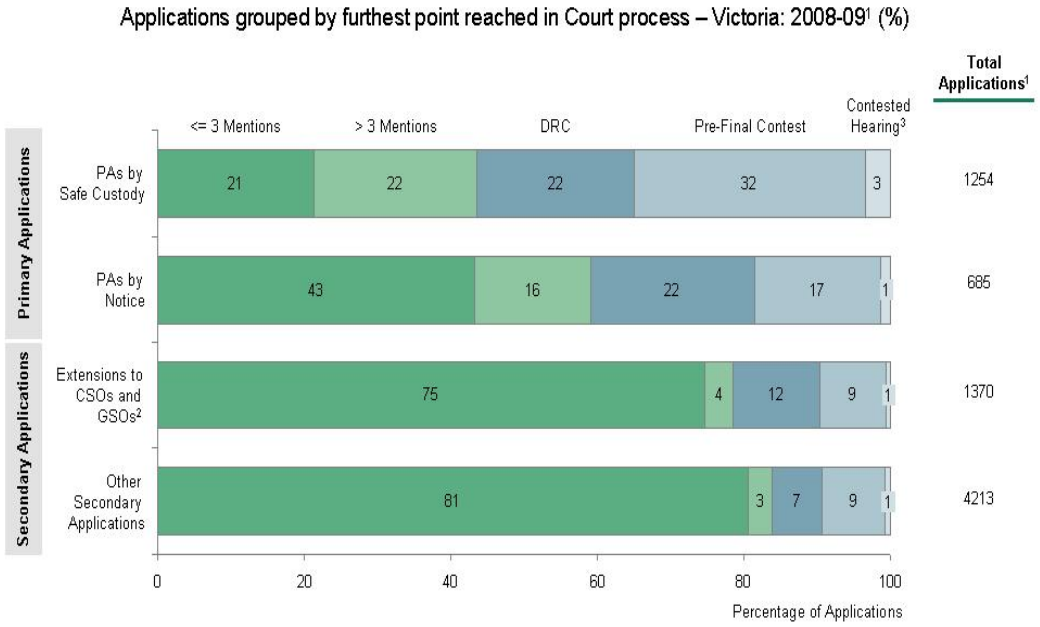
The work of BCG confirms the Children's Court is a court where more than 97% of cases resolve through a negotiated settlement endorsed by the Court. The graph reproduced below shows the progress of cases through the Court in 2008-09 and the point in the process where they resolved. By far the largest number of applications made to the Court were secondary applications. Importantly, the great majority proceeded expeditiously with 75% of extensions and 81% of all other secondary applications resolved within a very short timeframe. The progress of these matters could not be described as "adversarial" – it is the opposite, their progress is remarkably smooth. However, the protection applications by safe custody (apprehensions) have a significant percentage of cases (32%) that do not resolve until later in the process and are more likely to proceed to contest. It is these cases particularly, that will benefit from a stronger ADR process aimed at reducing the cases that move through to the directions hearing stage.[136]

[134] BCG counts an appearance before a Bail Justice as a first mention. This distorts the figures for mentions in the Court because a Bail Justice hearing is not a court mention and yet it is counted as such. This means the mention statistics are overstated. Thus less than three mentions may in fact mean that in some cases, less than two mentions in the Court. Also, see footnote 136.

[135] Similarly, in Western Australia, the guidelines for pre-hearings state at 7.2-"protection applications shall be referred to as a "Signs of Safety" pre-hearing conference at the discretion of the Court but referrals will not be made in respect of matters which appear likely to resolve expeditiously or that the Court considers are not appropriate for such a conference".

[136] BCG has counted a Bail Justice hearing as a first mention. This distorts all the statistics. A Bail Justice hearing is not a first mention in the Court and yet it has been counted as such. Therefore, the figures presented in the graph on this page are not completely accurate as they may include an appearance before a Bail Justice as a first mention.

## PAs by Safe Custody most likely to proceed past mention




1. All Applications for which final orders were made in 2008-09. This figure excludes Applications relating to siblings with identical hearings 2. Custody to Secretary Orders and Guardianship to Secretary Orders 3. Estimated from monthly listing reports
Source: Children's Court Registry data; BCG analysis

### *Directions hearings*

Matters that are not resolved at DRC are either referred for further mention (this usually indicates the case is close to resolution), or further ADR or for contest. Any matter to be adjourned to contest will be placed before a magistrate who will make enquiries about the case and authorise its listing for contest. The matter will be listed for a directions hearing to be held prior to the contest date. [137]

In 2007, BCG recommended the judicial officers of the Court be more "rigorous at directions hearings". This has occurred. Instead of listing directions hearings three days before the contest, they are now listed 10 to 14 days before the contest. The files are provided to the judicial officer the day before the hearing. This allows for proper preparation. The hearings are listed at 9.30am in the special mention court and the judicial officer can manage them throughout the course of the day. The hearing provides an opportunity for the parties to participate in an informal but rigorous conference involving a judicial officer who will encourage negotiation around an appropriate resolution of the matter. If the case does not resolve, the Court will attempt to narrow the issues between the parties and settle the mechanics of the case. A large number of matters settle at these hearings. If the first hearing is frustrated for some reason, or the parties need some more time to negotiate, the Court will list the case for a second directions hearing (before the same magistrate) to proceed prior to the contest date.

[137] Experience shows that directions hearings are generally more "successful" when they are held at a time that is relatively close to the contest date. On the other hand, the Court is concerned at the current delay between the DRC date and the date for final contest. It would be of benefit to the process if the Court was able to reduce the delay between the DRC and the final contest.

The Court has identified some problems with directions hearings that should be addressed. One issue is that the Department frequently fails to comply with a procedural order to lodge updated reports prior to the hearing date. The Court accepts that this is often because a worker is carrying a heavy workload. However, for the proceedings to be effective, the reports need to be read by all parties before the day of the directions hearing. Another issue is that the fees paid for an appearance by lawyers at directions are, in the Court's opinion, far too low. The hearing is demanding and time consuming and lawyers should be remunerated accordingly. The Court would prefer a system that enabled the barrister briefed for the contest to appear at the directions hearing. Current funding arrangements do not allow this to occur.

Directions hearings are now being conducted in a way that anticipates how the Court may operate a judicial conferencing process. The Court will continue to develop plans for incorporating judicial conferencing into a complete ADR package.

In addition, if the legislative amendments suggested by the Court on less adversarial trials[138] were adopted, the Court would be able to be much more proactive in managing cases that are likely to proceed to a contest.

***Contests***

The Court lists aggressively. It makes no excuse for that. No matter how rigorous and well developed its mediation processes may be, there will always be cases that go through to contest. Inevitably, there will always be contests that settle on the day of the contest and there will always be contests that are adjourned on the day of the contest. The Ombudsman quoted the experience of one regional manager who complained of the practice of multiple contested hearings being listed in anticipation of some settling. The quote is immediately followed by that of another regional manager who acknowledged that the Department contributes to delays *"because of work demands where we go along [to Court] and seek adjournments, or are not as well prepared as we should be for Court"*. BCG did not make any recommendation about the Court altering its listing process for contested hearings.

## Problem solving approaches

The Court has always shown a commitment to innovative problem solving approaches. In the Criminal Division, for example, we have Koori Courts at Melbourne and Mildura, we have sex offence lists at country courts and at Melbourne, we have an intensive bail diversion program for young Koori offenders from the North West suburbs of Melbourne and we have the ROPES Program.[139]

Critically, the Court has been resourced to support Koori Courts. This is important because Koori Courts are resource intensive and can only operate if they are properly

[138] See our submission in relation to Question 2.15.

[139] The ROPES program is a joint venture between Victoria Police, the Children's Court of Victoria and community agencies. One of the program's primary objectives is to turn a young offender's negative contact with police and courts into a positive outcome. The program brings together the young offender and the police informant in a series of physical challenges requiring trust and co-operation, designed to break down the barriers between them and to help each to see things from the other's perspective. For further details, see Chapter 11.15 of the Research Materials on the website of the Children's Court of Victoria.

resourced. The other programs – except for the sex offences lists - do not place disproportionate resource demands on the judicial officers or registry staff of the Court. The Court introduced a sex offences list at Melbourne without being resourced to do so. However, the list is only available at Melbourne and only sits once per month. The Magistrates' Court has absorbed the resource implications for country sex offences lists.

In intervention order cases, the Court has been proactive in developing a program with the Dispute Settlement Centre of Victoria (DSCV) to offer mediation to parties in stalking matters and some family violence matters.[140]

In the Family Division, the Court has endeavoured to improve conditions at Melbourne for families, workers, lawyers and court users. The Court:

- introduced the special mentions court to deal with apprehensions (this stopped the regular late night sittings that were becoming a feature of the court in 2007 and 2008);
- re-designed the space at Melbourne to create a sixth Family Division Court. (This also created an additional waiting area by colonizing interview rooms that had been on the "criminal side" of the building);
- established two courts at Moorabbin for Southern Region cases, thereby moving about 23% of the workload out of the Melbourne Court; and
- established a working group that developed a best practice ADR model for our court. (The Premier's Taskforce has adopted the proposals of that working group).

The Court continues to press for the use of additional courtrooms to reduce the pressure on the Family Division of the Melbourne Children's Court. The Premier's Taskforce has recommended the government fund the use of two courtrooms in the old County Court building. This would enable the Court to transfer applications brought by the Eastern Region of the Department to a new venue. If this were to occur, another 20% of work would be transferred out of the Melbourne Court. This would relieve the over-crowding at the Melbourne Court.

In addition, if the Court is successful in its submission to move ADR off site, the ground floor at Melbourne could be re-developed to create more waiting areas for Departmental staff and ease pressure on the first floor.

The Court has long maintained there should be appropriate childcare facilities at the Court. This has been resisted because of the expense involved. The Court supports a proposal to limit the attendance of children at the Court.[141] However, there will always be cases where children are at Court and, in such cases, the children should be properly supported. We understand the Family Court does have childcare facilities.

There are four types of cases within the Family Division where intensive case management would be appropriate. These areas are:

- cases involving Koori families;
- infant cases;
- drug and family treatment models; and
- sexual abuse cases.

[140] Discussed at p. 20.
[141] Discussed at p. 56.

### *A Koori Family Division proposal*

The Court is already active in developing the proposal around the Koori Family Division program. This proposal has been discussed in another part of our submission.[142] However, it is not resource neutral. In summary, the Court would like to mange Koori cases in an intensive way from the first listing. The Court would refer such cases to the Koori list. One magistrate would manage the cases as they progressed through the Court. Aboriginal agencies, support services and community members would participate in a process that would focus on the best interests of the Koori child and recognise the strengths of cultural support. The Court would be supported by an Aboriginal Liaison Officer. Any non-judicial ADR would also involve an appropriately qualified Aboriginal mediator wherever possible.

### *0-3 Years Model*

For some time, the Court has wanted to pilot an intensive case management system for infant cases. A therapeutic or problem solving approach would be beneficial in infant cases. However, such approaches place particular demands upon a Court. They are notoriously resource intensive. The cases require intensive management by one judicial officer. They take more court time than the "normal" process and they often remain within the Court for a long period - this is because they are frequently subject to adjournment with judicial oversight. Again, the Court would need support to introduce this process.

### *Family Drug Treatment Courts*

"Family Drug Courts" or "Family Dependency Treatment Courts," began in Reno, Nevada, in 1995, and seek to do what is in the best interests of the family by providing a safe and secure environment for the child while intensively intervening and treating the parent's substance abuse and other co-morbidity issues. We understand that this approach has resulted in better collaboration between agencies and better compliance with treatment and other family court orders necessary to improve child protection case outcomes.

> *"A family dependency treatment court is a court devoted to cases of child abuse and neglect that involve substance abuse by the child's parents or other caregivers. Its purpose is to protect the safety and welfare of children while giving parents the tools they need to become sober, responsible caregivers. To accomplish this, the court draws together an interdisciplinary team that works collaboratively to assess the family's situation and to devise a comprehensive case plan that addresses the needs of both the children and the parents. In this way, the court team provides children with quick access to permanency and offers parents a viable chance to achieve sobriety, provide a safe and nurturing home, and hold their families together."*[143]

Drug and alcohol abuse problems have been a rising feature of concern for the Court in the last decade. The Court is therefore keen to adopt this type of model which

[142] Discussed at p. 42.

[143] Center for Substance Abuse Treatment, Bureau of Justice Assistance & National Drug Court Institute. (2004). *Family Dependency Treatment Courts: Addressing Child Abuse and Neglect Cases Using the Drug Court Model Monograph*. Washington, DC: US Department of Justice.

recognises that a coordinated holistic approach is necessary to break the cycle of substance and child abuse and addresses the complexity of problems facing families.

***Sexual abuse cases***

Finally, the Court has learnt much from the establishment of a sex offence list in the Criminal Division. The Court is interested in developing a similar type of list in the Family Division.

## The Court's response to questions 2.15

Section 215(1) of the CYFA provides that the Family Division of the Court:

(a) must conduct proceedings before it in an informal manner;
(b) must proceed without regard to legal forms;
(c) must consider evidence on the balance of probabilities; and
(d) may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary.

The Court submits that most of the provisions of Division 12A of Part VII of the *Family Law Act 1975* (Cth) (FLA) should be incorporated into the CYFA in lieu of sections 215(1)(a), 215(1)(b) and 215(1)(d).

***Section 215(1)(c)***

The Court believes that no modification ought be made to the substantive effect of section 215(1)(c). In part its view is based on the fact that some 98.5% of protection applications made to the Family Division by the Department are proved and that there are virtually no successful appeals to superior courts from its decisions.

In *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)*[144] Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly and Lord Mustill agreed) held that in section 31(2)(a) of the Children Act 1989 (Eng), a provision which is in similar terms to section 162(1)(d) of the Victorian CYFA:

> *"Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not…[L]ikely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."*

For the avoidance of doubt, the Court believes that the common law test for likelihood of future harm in section 162(1) be incorporated into the CYFA to make it clear that the legal test for "likelihood" is not balance of probabilities.

[144] [1996] AC 563 at 585.

***Sections 215(1)(a) and 215(1)(b)***

Paragraphs (a) and (b) of section 215(1) appear to give the Family Division of the Court very broad powers to conduct proceedings as informally as it considers appropriate in any particular case. However, in *Re Watson; Ex parte Armstrong*[145], the earliest superior court case on the interpretation of a similar provision originally in the FLA empowering the Family Court to proceed without undue formality, the High Court by majority granted a wife's application for a writ of prohibition against Justice Watson continuing to hear Family Court proceedings further. One of the impugned statements of Justice Watson was as follows:

> "[T]*his will sound a strange comment but the proceedings in this Court are not strictly adversary proceedings. The matter in which I am involved is more in the nature of an inquiry, an inquisition followed by an arbitration."*

A majority of the High Court (Barwick CJ, Gibbs, Stephen & Mason JJ) disagreed[146]:

> *"The judge called upon to decide proceedings of that kind is not entitled to do what has been described as 'palm tree justice'. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down…He must follow the procedure provided by the law. The provisions of s.97(3) of the Act, which require him to proceed without undue formality, do not authorize him to convert proceedings between parties into an enquiry which he conducts as he chooses."*

*Re Watson; Ex parte Armstrong* was a financial dispute. The case of *Lonard*[147], also decided in 1976, was a custody dispute. The Full Court of the Family Court in the latter case drew a distinction between the two and held that judges would find it necessary to exercise more extensive powers of inquiry in children's matters. However, in *Wood and Wood,*[148] the Full Court of the Family Court set aside an order of a trial judge which had dispensed with both *viva voce* evidence and cross-examination, on the basis that the best available evidence had not been available at first instance which, it noted, was of particular importance in cases involving children. Since that time the High Court and the Family Court appear to have approved a somewhat more informal approach in children's matters. For instance, in a dissenting judgment in *Re JRL; Ex parte CJL*[149] Dawson J said – in dicta not inconsistent with the majority views:

> *"Proceedings in the Family Court in relation to the custody, guardianship or welfare of or access to a child are, in an important respect, not of the ordinary kind…Thus the jurisdiction being exercised in this case, whilst essentially judicial, was not entirely inter partes because the paramount consideration was the welfare of the child. In this respect it was a jurisdiction analogous to the jurisdiction of the Court of Chancery in wardship cases which was of a special kind, permitting procedures which would not be permitted in judicial proceedings of the ordinary kind. See In*

[145] (1976) 136 CLR 248.
[146] Ibid. pp.257-258.
[147] (1976) FLC 90-066.
[148] (1976) FLC 90-098.
[149] (1986) 161 CLR 342.

> *re K (Infants) [1965] AC 201…Nevertheless there proceedings remained judicial proceedings. Neither their special nature nor the requirement in s.97(3) that the court should proceed without undue formality relieved the court of the obligation to observe, where applicable, the procedures which are followed by courts acting judicially in order to ensure impartiality and fairness."*[150]

In *Re Lynette*[151] the Full Court of the Family Court said:

> "[I]*t is well established that proceedings in relation to the best interests of children are not strictly adversarial. The wellspring for the departure from a strictly adversarial approach to proceedings is to be found in the Court's obligation to treat the best interests of the child the subject of proceedings as the paramount consideration."*

Despite the above dicta, the Commonwealth Parliament clearly accepted that the provisions of section 97(3) of the FLA – not dissimilar in effect to sections 215(1)(a) and 215(1)(b) of the CYFA – were not sufficient to provide a proper platform on which to base the Family Court's "Less Adversarial Trial" initiative. The Children's Court takes the same view of sections 215(1)(a) and 215(1)(b). See for instance the judgment of Magistrate Power in *DOHS v Ms B & Mr G*[152].

It is conceded that proceedings in the Family Division of the Children's Court are not entirely adversarial in nature and because of the over-riding "best interests" considerations the Court has power – and in some instances a duty – to inquire about issues which it considers relevant to the best interests of the subject child. See the similar characterization of proceedings under the *Children Act 1989 (UK)* in *Oxfordshire County Council v M*[153]. This is especially so where the parties are not on a 'level playing field', e.g. where the Department is legally represented and a parent is not [see for instance the Family Court case of *T and S*[154] in which the mother, unrepresented until the 6th day of the trial, had been faced with the Herculean task of cross-examining an expert witness called by the father who had testified that she suffered from a histrionic personality disorder and of cross-examining the father about allegations that he had perpetrated domestic violence on her throughout the relationship]. Under the current court model the power of the Court to make a proper inquiry about best-interests matters is quite limited. However, it is conceded, as the Full Court of the Family Court also conceded in *T and S*, that the Court and its procedures are not equipped – and are most unlikely to be funded in the future – to conduct proper inquisitorial proceedings in the European sense.

In a paper entitled "Restructuring Child and Family Courts", delivered at a conference in Capetown, RSA in April 2003, the former President of the Children's Court, Judge Coate pointed out the significant concerns which the Children's Court had about the current model and called for a number of changes:

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[150] At p.373. See also *M v M* (1988) 166 CLR 69 at 76; In *Re P (a child) and the Separate Representative* (1993) FLC 92-376; *D and Y* (1995) FLC 92-581; *C and C* (1996) FLC 92-651; *U v U* (2002) 211 CLR 238.
[151] (1999) FLC 92-863 at 86,203.
[152] [2008] VChC 1 at 27-28.
[153] [1994] Fam 151.
[154] [2001] Fam CA 1147.

*"In the last couple of years it has become the firm view of the full time judicial members of the Children's Court of Victoria that this model is in need of an extensive rethink. There is a strongly developing view amongst the members of the Court that some aspects of the current system would be greatly improved by changes such as the following:*

*(a) An independent skilled investigative team that is not a party to the action with appropriate training and an understanding of how the legal system works;*
*(b) A statutory power available to the Court to direct the attendance of a witness or the production of a document;*
*(c) A court hearing that was an inquiry rather than an adversarial battle;*
*(d) A capacity to order further expert assessments or examinations to assist in the first stage of the decision-making process of deciding whether or not the child was in need of protection."*

The power referred to in point (b) of Judge Coate's paper has since been given to the Court in section 532 of the CYFA.

The Court now is strongly of the view that by operation of sections 557(1)(e) and 560 of the CYFA it does have the power referred to in point (d). However, removal of the ambiguity inherent in sections 557(1) and 560 is recommended by the Court to make it clear beyond doubt that a "pre-proof" additional report can be ordered by the Family Division at any time in the course of a proceeding.

Point (a) is dealt with in the Court's response to VLRC Option 3.

The Court believes that point (c) in her Honour's paper needs urgent attention to enable the Family Division to run less adversarial trials without being fettered by a restrictive interpretation of sections 215(1)(a) and 215(1)(b). The Court takes this view for three reasons.

The first focuses on potential harm. It needs little explanation to accept that there is potential for an adversarial battle in any Family Division proceedings to do significant harm to the future relationships of those involved in the battle and hence the potential for harm to children whether they are directly or only indirectly involved in it. This does not just mean family relationships. It also includes relationships between family members and professionals involved with the child and/or other family members.

The second reason is structural and focuses on the nature of judicial decision-making. It is the strong opinion of the Court that the adversarial model does not provide an optimal stage for judicial decision-making in the Family Division of the Children's Court. In discussing this in *DOHS v Ms B & Mr G*[155], Magistrate Power said of the adversarial model:

*"It is a system, refined over centuries in the common law world, whose primary function is to determine which of one or more conflicting issues of past fact is more likely to be correct. But conflict of past fact is not the central issue in the majority of Family Division proceedings. The issue is usually what is the best future outcome for the child within the framework of either an uncontested or a very lightly contested factual matrix."*

[155] [2008] VChC 1 at 27-28.

The third reason is that the Court is impressed by the Less Adversarial Trial approach trialled and adopted by the Family Court of Australia and accepts and endorses the comments of Margaret Hamilton, one of the proponents of that approach:

> *"The change, from a traditional common law approach to a less adversarial trial, has significant implications, not only for the conduct of family law litigation but also for the conduct of litigation as a whole. It represents a bold step towards bridging the gap between common law systems of litigation and the European civil law system. So far as family law is concerned, the change received legislative force with the passage of Division 12A of Part VII of the Family Law Act 1975 (Cth)…*
>
> *In children's cases, Division 12A swept away restrictive rules of evidence and the control of proceedings was placed in the hands of the judge, rather than the parties or their legal representatives. The focus is a future looking one, geared to the needs of the child. As a consequence of the new procedures, parties are no longer free to conduct litigation as a forensic war between each other at the expense of the interests of the child. At the same time the best features of the Court's highly developed system for mediation and resolution of disputes has not only been preserved but also enhanced…*
>
> [However], *there was never any suggestion that a complete departure from the traditional adversarial processes in children's cases would be supported. The issue was always seen as one of balancing procedural fairness with a recognition of the special nature of children's matters. In Northern Territory of Australia v GPAO (1999) 196 CLR 553, the High Court made it clear that there were limits to the way in which the paramountcy principle of the welfare of the child enabled the Court to depart from ordinary rules of procedure and evidence…In T and S (2001) FLC 93-086 at 88,522…Nicholson CJ, Ellis & Mullane JJ commented that, although proceedings involving the welfare of children are not strictly adversarial in the usual sense, they should not be equated with inquisitorial proceedings, and noted that 'the Court and its procedures are simply not equipped to conduct inquisitorial proceedings'."*[156]

***Recommended replacements for sections 215(1)(a), 215(1)(b) and 215(1)(c)***

The Court considers that with minor amendments sections 69ZN, 69ZO, 69ZP, 69ZQ and 69ZR of the FLA would provide a very sound platform to enable the Family Division of the Children's Court to run less adversarial trials. The most important of these amendments is to ensure that the "best interests principles" in sections 8(1) and 10 of the CYFA are expressly incorporated into these replacements so that there can be no question about whether they are applicable or not.

The Court believes that sections 215(1)(a), 215(1)(b) and 215(1)(c) in Part 4.7 of the CYFA should be replaced with the draft provisions contained in Appendix 7.

The Court has omitted section 69ZQ(1)(g) of the FLA because:

- it is not in the best interests of children generally to fetter the Court's discretion in this way; and

[156] See "Finding A Better Way" (Family Court of Australia, April 2007).

- it does not sit at all comfortably with the power to make an interim protection order in section 291 of the CYFA or with the power in section 560 of the CYFA to order the preparation of an additional report from the Children's Court Clinic; and
- there is already a general duty imposed on the Family Division by sections 530(8), 530(9), 530(10) and 530(11) of the CYFA to avoid the granting of adjournments to the maximum extent possible.

If these or similar amendments are made, the hearings will need to be better prepared by the parties (especially by the legal representatives for the parents and the subject child). This in turn will require a change to the fee structure of Victoria Legal Aid which sets a low fee for attendance at a directions hearing and which does not provide any fee for preparation for the hearing.

***Section 215(1)(d)***

In providing that the Family Division of the Court may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary, section 215(1)(d) of the CYFA appears to give the Court free rein in determining the admissibility of evidence and the weight to be afforded to it. One might think from this that the only test for admissibility is relevance.

This broad interpretation of section 215(1)(d) is supported in a roundabout way by sections 4 and 8 of the *Evidence Act 2008* (Vic). Section 4(1) of that Act provides, *inter alia*: "This Act applies to all proceedings in a Victorian Court". In the dictionary annexed to that Act, paragraph (b) of the definition of "Victorian Court" is broad enough to include the Children's Court. But having given the *Evidence Act* to us with one hand in section 4(1), Parliament has taken it away with the other hand in section 8: *"This Act does not affect the operation of the provisions of any other Act." And to emphasize this, Parliament has included note 4 to section 4 stating: "Provisions in other Victorian Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by section 8 of this Act. <u>These include section 215 of the CYFA.</u>"* [emphasis added].

Over the years there have been several judicial interpretations of similar provisions which have to some extent fettered the plain words of the section. For example in *A & B v Director of Family Services*[157], Higgins J said in relation to a similar provision in section 93(3) of the *Children's Services Act 1986* (ACT):

> *"[I]t should be recognised that such provisions do not render the rules of evidence irrelevant. They should still be applied unless, for sound reason, their application is dispensed with…The proper approach to the application of the rules of evidence in the face of such a provision was considered by Lockhart J in Pearce v Button (1985) 65 ALR 83 at 97; 8 FCR 408 at 422. His Honour said-*
>
> > *'…a judge should be slow to invoke it [a power to dispense with compliance with rules of evidence] where there is a real dispute about matters which go to the heart of the case.'"*

In *Weinstein v Medical Practitioners Board of Victoria*[158] the Court of Appeal discussed the operation of a similar provision in s.52(1)(c) of the *Medical Practice*

[157] (1996) 20 Fam LR 549 at 553-4.
[158] [2008] VSCA 193.

*Act 1994* (Vic). In rejecting a submission that the words "may inform itself in any way it thinks fit" should be regarded as redundant but holding that the words were subject to an overriding obligation to accord procedural fairness, Maxwell P said at [28]-[29]:

> *"The words 'may inform itself…' were plainly intended to have work to do: cf. Project Blue Sky Inc v ABA (1998) 194 CLR 335, 382 [71] (McHugh, Gummow, Kirby & Hayne JJ). They have a meaning and a purpose quite distinct from the meaning and purpose of the words 'not bound by the rules of evidence'…For the purposes of 'determining the matter before it', the panel is authorised to 'inform itself in any way it thinks fit' subject always to the overriding obligation to accord procedural fairness. This conclusion accords with what was said by McInerney J when considering analogous provisions in Wajnberg v Raynor and Melbourne and Metropolitan Board of Works [1971] VR 665. As Weinberg JA pointed out in argument, an equivalent power is conferred on the Family Division of the Children's Court: s.215(1)(d) of the CYFA."*

Although this statement was *obiter dicta* so far as the CYFA is concerned, it would take a brave magistrate to disregard it in proceedings in the Children's Court. Yet it is not difficult to think of cases in which it would not be in the best interests of a subject child to accord full procedural fairness to another party. One example which happens often relates to the giving of evidence by children. It is unknown for a child to give *viva voce* evidence in proceedings in the Family Division no matter how significantly the child's representations impact on the rights of another party to the proceeding. This gives rise to a potential conflict between sections 8(1) and 10 of the *CYFA* on the one hand and section 215(1)(d) on the other.

***Recommended replacements for section 215(1)(d)***

It is the Court's strong view that the procedural fairness qualification to section 215(1)(d) referred to by the Court of Appeal should be expressed to be subservient to the best interests of the subject child. Further, the Court agrees with Margaret Harrison that the provisions of Subdivision D of Division 12A of the FLA – "Matters relating to evidence" – are one of the cornerstones of the bold amendments associated with the legislative endorsement of the Family Court's Less Adversarial Trial approach.

The Court considers that with minor amendments sections 69ZT, 69ZV and 69ZX of the FLA would provide a very sound platform – in combination with the amendments described above - to enable the Family Division of the Children's Court to run less adversarial trials. The most important of these amendments is in our previous recommended sections 215A(1) and 215A(3) which expressly incorporate the "best interests principles" into our Division 1A of Part 4.7. We believe that section 215(1)(d) in Part 4.7 of the CYFA should be replaced with the draft provisions contained in Appendix 8.

***Should the recommended amendments be restricted to child protection proceedings?***

The jurisdiction of the Family Division of the Children's Court is set out in section 515 of the CYFA and has two distinct components: subsection (1) refers to child protection applications; subsection (2) refers to intervention order applications.

Unfortunately, because of a drafting error, the list of 36 child protection applications which the Family Division has jurisdiction to hear and determine pursuant to section 515(1) does not contain a further seven applications which are referred to in other sections of the CYFA. The omitted applications are:

- application to extend therapeutic treatment order [section 255(1)(a)];
- application to extend therapeutic treatment (placement) order [section 255(1)(b)];
- application to extend interim accommodation order [section 267];
- application to vary undertaking [section 279];
- application to revoke undertaking [section 279];
- application to vary interim protection order [section 299(e)]; and
- application to revoke interim protection order [section 303(g)].

While the Court accepts that each individual section itself confers jurisdiction on the Court to make the order to which the section refers, the Court would wish that the unintended omissions from s.515(1) be corrected.

In the recommended amendments which we have detailed in appendices, "Family Division proceeding" – used in lieu of "child-related proceedings" – will need to be defined. Should it include intervention order proceedings for which the Children's Court has jurisdiction under section 515(2) or be restricted to Chapter 4 child protection proceedings?

The *Family Violence Protection Act 2008* (Vic) and the *Stalking Intervention Orders Act 2008* (Vic) both came into operation on 08/12/2008. Both Acts contain some provisions which are not entirely consistent with related provisions in the CYFA. The most obvious example is in relation to the legal representation of children where there is a clear conflict in policy between section 524 of the CYFA and section 62 of the FVPA and a patent inconsistency where a child is neither the applicant nor the respondent to proceedings in relation to a family violence intervention order. Other examples of potential inconsistency include:

- FVPA/section 65 ["Evidence"] cf. CYFA/section 215(1)(d);
- SIOA/section 20 ["Rules of evidence not to apply in certain cases"] cf. CYFA/section 215(1)(d).

To the extent of any inconsistency, it is the Court's view that the FVPA and the SIOA, being the later enactments, prevail. However, the Court considers that there should be an express acknowledgement in the respective Acts as to which of the various conflicting or potentially conflicting provisions should prevail.

On the one hand the Children's Court would wish any replacements for section 215(1) of the CYFA to apply "across the board" to both components of the Court's Family Division jurisdiction. That would certainly assist in contested cases in which there are joint child protection applications and intervention order applications. It is undesirable that the one Court is required to apply two different sets of statutory provisions on procedure and evidence in the one hearing. On the other hand, the Court acknowledges the undesirability of the provisions on procedure and evidence applicable in intervention order proceedings in the Children's Court being different from those applicable in intervention order proceedings in the Magistrates' Court.

On balance, the Court favours restricting the operation of its recommended new Division 1A of the CYFA to Chapter 4 child protection proceedings and leaving procedure and evidence in intervention order proceedings to be controlled by the FVPA and the SIOA. This would also dovetail with the jurisdiction of the Neighbourhood Justice Division which is defined in section 520C(4) of the CYFA as including intervention order applications but not child protection applications. It would also dovetail with the current arrangement whereby metropolitan Children's Courts other than Melbourne and Moorabbin also hear intervention order applications but not child protection applications.

# OPTION 3 – CREATION OF INDEPENDENT COMMISSIONER

The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services.

3.1 Does the Secretary of the Department of Human Services have too many functions under the *Children, Youth and Families Act* 2005?

3.2 If yes, should some of those functions be given to an independent statutory commissioner?

3.3 Could the commissioner have a role to play in any pre-court ADR mechanisms?

3.4 Could the commissioner be responsible for the carriage of proceedings before the Children's Court?

3.5 Could the commissioner have the 'first instance' capacity to authorise State intervention in 'safe custody' cases?

3.6 Could the commissioner be capable of appointment as the guardian or custodian of a child in need of protection if there is no other suitable person?

3.7 If the commissioner is appointed as the guardian or custodian of a child, could the commissioner have the authority to exercise some functions currently fulfilled by the Children's court such as issues of access?

3.8 Should decisions of the commissioner be subject to merits review in the Children's Court?

3.9 How should the independence of any new statutory commissioner be secured?

## INTRODUCTION

The Children's Court of Victoria strongly supports the establishment of an independent statutory commissioner – largely analogous to the Office of Public Prosecutions – with overall responsibility for:

- the carriage on behalf of the State of Victoria of all court or tribunal[159] proceedings and all coronial inquests in which the Secretary to the Department of Human Services[160] is a party or an intervener;
- the provision of legal advice to the Secretary both generally and in relation to any court, tribunal or coronial proceedings in which the Secretary has an interest; and

[159] By "tribunal proceedings" we mean (a) case plan review proceedings or (b) information recording review proceedings in the Victorian Civil and Administrative Tribunal pursuant to section 333(1) of the CYFA.

[160] The Secretary to the Child Protection Division of the Department of Human Services is the administrative head of that division and is hereinafter referred to as 'the Secretary'. The Department of which 'the Secretary' is the head is hereinafter referred to as 'the Department'.

- the provision of ongoing training to employees of the Secretary in general forensic legal matters, including but not limited to evidence-gathering, evidence-giving, report writing and general court craft.

## The Court's response to question 3.1

The Court believes that the Secretary does have too many functions under the CYFA.

At present, the Department performs a number of functions, including the inherently contradictory dual roles of both assisting children and families and initiating and conducting court proceedings involving those same families in child protection cases and sometimes in intervention order cases.

Given the conflictual nature of those two roles, it is not surprising that tensions often exist between the Department and the family members, particularly at Court. The removal from the Department of the responsibility to conduct litigation in which it is effectively pitted against family members and sometimes against its own child clients is likely to contribute to a reduction in the Department's perception of tension between it and the Children's Court.

Further, it is the Court's experience – in this instance consistent with the Ombudsman's observations – that child protection workers sometimes struggle with their obligations to the Court. The Ombudsman noted:

- *"One regional manager explained that over half of their staffing group had less than two years experience and so they not only struggled with the role of a child protection worker but also how to write court reports and give competent evidence in the Children's Court."*[161]
- *"The Medical Director of the Victorian Forensic Paediatric Medical Service commented on the inexperience of the workforce and expectations placed on them: 'I worry that fairly junior people have a lot of responsibility to take cases to the Children's Court … I really worry about the training and the expertise of some of the child protection workers in handing matters up … I think it's most unfair on the workers to expect them to take on this role.'"*[162]

As we have earlier observed, difficulties faced by child protection workers in their dealings with the legal process are not merely a Victorian phenomenon. They are universal.[163] It is worthwhile quoting The Honourable Judge Leonard P. Edwards' opinion about the very similar American experience:

> *"The court system presents problems for child protection agencies that they continue to struggle with today. First, in order to participate in court proceedings, they have had to create and maintain staff familiar with the law. This has meant hiring lawyers to present the agency position in court as well as developing legal expertise among the social worker staff to interpret court orders. Second, to obtain approval for their actions, child protection agencies have been required to learn how legal decisions are made, how evidence must be gathered, and how court procedures dictate*

[161] Ombudsman's Report at para 296. p57.
[162] Ombudsman's Report at para 297. p57.
[163] Refer to discussion at p28.

*the presentation of evidence. Third, they have had to learn about the formality of court proceedings, the power of the judge, and the power that attorneys have to shape court proceedings.*

*For the line social worker, the formality of court proceedings and the adversarial process have presented the most difficult problems. Nothing in their training prepares social workers for evidence collection, report writing, and direct and cross-examination under the rules of evidence. Many social workers find the court process to be an overly formal setting, demeaning and inhospitable, where the truth is sacrificed for procedural rules and the free exchange of information and ideas is difficult, if not impossible."*[164]

The Court notes that there has long been a perception of tension between the Department and the Court. Justice Fogarty's 1993 observations still resonate today:

*"A significant reason for the existence of the Children's Court is that it stands independent of the Department, the children and the parents and represents the community in the determination of these extremely difficult and delicate issues which are likely to have a profound, perhaps permanent, effect on the lives of the young children involved. Consequently, it is necessary for the Court to be independent and to be seen to be independent, especially from the Department which is a party in every proceeding before it. It must have the confidence of the parents who come before it and the confidence of the community that it will act in an independent way in accordance with the legislation.*

*At times I was left with the impression in discussion with some officers of the Department, that they would really like to regard the Court as a natural extension of the Department and that they are uncomfortable with its independence. Whilst that view was not articulated in a direct way, it is important that even at a subconscious level that attitude be recognized and rejected. I felt at times, both at a high level within the Department and from speaking with some workers, that there was a view that because a notification of abuse had been investigated by the Department and because it had reached a conclusion as to what order should be made, there was something obstructive about a process by which those opinions and views were independently assessed and at times rejected."* [165]

Given the multiplicity of the Department's functions, these perceptions of tension are not entirely surprising. Currently the Department is:

- a party to proceedings in the Children's Court;
- the agency that generally initiates and conducts the proceedings;
- the investigating body for reports made to the Department; and

[164] Judge Leonard P. Edwards, "Mediation in Child Protection Cases". Judge Edwards' impressive background is detailed at footnote 43.

[165] "Protective Services for Children in Victoria" (1993), pp.142-143. We also note that in a review of the child protection system conducted in 2004 Kirby, Freiberg & Ward made similar findings (at p.40 of their report dated April 2004) about the Department's attitude to the Court: "In his 1993 report, Justice Fogarty noted (p.74) that senior people within the Department of Human Services adopted inappropriately critical attitudes of the Court and legal structures generally and that this ethos permeated down to the workers. He noted the criticisms that the Court is regarded as too legalistic and that there were too many delays which adversely affected the interests of children and others (p.142). These criticisms continue."

- the authority charged with the responsibility of delivering assistance to children and families.

The Court believes that this broad range of not entirely complementary functions can and does from time to time result in the Department demonstrating a lack of objectivity in the way in which matters are litigated by it in the Children's Court and sometimes makes it difficult for the Department to perform properly the function of a model litigant.[166]

Departmental staff retention issues are a problem on both a national and international basis. In the Court's experience, protective workers are overworked and significantly under-resourced. In addition, young workers are not trained and prepared sufficiently rigorously for the requirements of the court process. The unhappiness of their court experience results from the Department's own work environment in crisis.[167] In the Court's view, provision by the commissioner of the requisite training in general forensic legal matters would go a long way to resolving the stress of legal proceedings on child protection workers.

## The Court's response to questions 3.2 and 3.4

Yes.

The creation of an independent statutory commissioner to fulfil, *inter alia*, the role of model litigant for the State in child protection and related proceedings, would remove – or at least reduce – the bulk of the problems referred to in answer to question 3.1. It would also return the focus of the Department's role to the investigation of reports and the provision of services needed to promote the best interests of Victoria's most disadvantaged children.

The Court believes that the *Public Prosecutions Act 1994* (Vic)[168] provides a good starting point for new legislation governing the functions, powers, terms and conditions of an independent statutory commissioner and the functions of his or her Office. The functions that should be removed from the Department and given to the independent commissioner are:

- carriage of the Department's legal cases;
- provision of legal advice; and
- provision of forensic legal training to the Department's staff.

The Department's cases for whose carriage the commissioner would have responsibility should include:

1. all child protection proceedings in the Family Division of the Court; and
2. all intervention order proceedings in the Family Division of the Court or in the Magistrates' Court in which a delegate of the Secretary is the applicant on behalf of a child client; and

[166] Refer to Chapter 4.1.6 in Research Materials on the website of the Children's Court of Victoria: www.childrenscourt.vic.gov.au.
[167] Refer to "Adversarialism" at pages 28-29.
[168] Act No. 43 of 1994 including amendments up to 01/01/2010.

3. all appeals to a higher court[169] resulting from proceedings of types 1 or 2 whether the Secretary is the appellant or the respondent; and
4. all proceedings in the Family Court of Australia or the Federal Magistrates' Service in which the Secretary seeks to intervene and all appeals to a higher court resulting from such proceedings; and
5. all proceedings in the Victorian Civil and Administrative Tribunal in which the Secretary is a party and all appeals to a higher court resulting from such proceedings; and
6. all proceedings in the Coroner's Court in which the Secretary is involved and all appeals to a higher court from findings or orders made in such proceedings.

It is the Court's view that the creation of such a body to perform the function of an independent model litigant on behalf of the State in child protection proceedings and related proceedings:

- would reflect the community's view of both the importance and serious nature of the State's role in such cases;
- would be a strong statement about the manner in which the State government views these important cases;
- would assist in reducing the current level of tension that the Court is aware has long existed between families and the Department and their respective legal representatives;
- would prevent the disruption of court proceedings caused by the Department's decision-makers often not being present at court and sometimes not being easily contacted by telephone;
- would ensure that a forensic legal analysis is conducted of the evidence likely to be required to achieve the optimum outcome, bearing in mind that the optimum outcome must also be the achievable outcome which is considered to be in the best interests of the subject child;[170] and
- would ensure that the Department of Human Services does not litigate cases which an independent legal representative considers to be:
  - without merit factually or legally or both;
  - unsupported by sufficient evidence; or
  - generally not in the best interests of the subject child to litigate.

The Department's Court Advocacy Unit (CAU) currently performs most of the functions that the Court considers should be transferred to the independent commissioner. From comments that often reach the Court, we believe that the CAU is not able to perform nearly as independent a role as it would like or as it should because its clients often do not accept its forensic legal advice.

CAU lawyers are often placed in the invidious position of having to ask for cases to be stood down, sometimes for hours, until the senior DOHS' staff member responsible for giving instructions is available to do so. These instructors usually do

[169] The term "appeal" is used loosely as a generic term to include appeals in the strict sense, appeals by way of re-hearing, Order 56 or other reviews, cases stated – in short all higher court proceedings that derive from proceedings in a lower court.

[170] The requirement that the Secretary must have regard to the best interests principles set out in Part 1.2 of the CYFA in making any decision or taking any action under the CYFA is contained in section 8(2).

not actually attend Court so, when located, contact is by telephone. Hence, they will not have heard everything that has transpired in Court. This is not a good way of conducting cases. The appointment of an independent commissioner to conduct child protection and related cases could be expected to stop this practice.

The Court would wish the role of the independent statutory commissioner to be largely analogous to the independent prosecutorial role of the Director of Public Prosecutions and his Office. Just as a lawyer prosecuting a criminal case on behalf of the OPP[171] takes instructions from the informant police officer or his nominee but is not bound to follow those instructions if he considers it imprudent to do so, so a lawyer acting on behalf of the independent statutory commissioner would take instructions from a protective worker but would not be bound to follow them if he considered it was not in the best interests of the subject child to do so. He would act as a truly independent model litigant on behalf of the State.

The appointment of specialised independent lawyers, skilled in court advocacy, would assist a more efficient disposition of matters in the Family Division of the Court.[172]

There is, however, one role which the Court believes should not be given to the independent statutory commissioner. The Court understands that in a meeting between the VLRC and the Director of the Children's Court Clinic on 15/02/2010, it was tentatively suggested by a VLRC representative that the Children's Court Clinic be transferred to the commissioner's Office.[173]

The Court does not understand the rationale behind such a move. Although the proposed commissioner would be an independent statutory authority, his or her Office would also be responsible for the conduct of cases on behalf of one of the parties to every piece of child protection litigation in the State. This approach could give rise to an apprehension of bias by the other parties.

[171] OPP = Office of Public Prosecutions; DPP = Director of Public Prosecutions.

[172] It should be remembered that prior to May 1993, the task of representing the Department in the Family Division was performed by the Victorian Government Solicitor. Observations from that time by magistrates who still sit in the Children's Court are that the process was efficient and served the Court well. At that time, the workload of the Court was confined to five courts (including Family and Criminal Division matters). Since then the case load in the Children's Court has "exploded" and now 11 courts (including Moorabbin JC) are required to deal with cases in both Divisions, cases which appear to be becoming ever more complex and difficult. Now, more than ever before, an independent, specialised group of lawyers is required to conduct the Department's cases in the Family Division.

[173] It is interesting to note that from March 1993 to June 1994 the Children's Court Clinic was transferred into the Health and Welfare Department and subsequently into the Protective Services Division of the then newly created Department of Health and Community Services. That was ultimately seen to have had a negative impact on the public perception of the Clinic as a provider of independent advice to the Children's Court. Hence, on 1 July 1994 the Clinic was returned to the Department of Justice.

## The Court's response to question 3.3

No.

The Court supports voluntary pre-court conferences in appropriate cases involving families who are believed to be in need of assistance, provided that families are able to access legal assistance at the conference if they so desire.[174] Appropriate cases in this context are cases in which the Department has already been engaged voluntarily with the family for some time. It is important to note that this does not include children who have been apprehended as a matter of urgency.

The Court can see advantages if the Department is legally represented in pre-court ADR as well, at least in complicated cases where it is necessary to ensure that discussion about the disputed facts can occur with all parties having a proper understanding of the legal concepts and the framework of the court processes.

However, the Court does not support the commissioner being involved in pre-court deliberations just as it considers it generally inappropriate for the OPP to be involved – other than occasionally in the provision of advice – in pre-charge criminal proceedings. It is the role of the police informant to investigate and gather evidence in relation to an alleged offence. It is the role of the independent prosecuting agency to prepare the case for court and present the evidence in court. This two-stage process of firstly, investigation and secondly, court presentation removes the potential for partiality in the way that court cases are conducted.

The independence of a DPP-like commissioner and his or her lack of partiality has the potential for being adversely affected if he or she is involved in the confidential – and hopefully frank – discussions which are to be encouraged at a pre-court ADR conference.

Although the Court favours the Department generally being legally represented in pre-court ADR conferences, this should be done either by lawyers employed or briefed by the Department or by properly trained and competent para-legals employed by the Department.[175]

## The Court's response to question 3.5

No.

One might as well ask should the DPP have first instance capacity to investigate an alleged offence or authorize the arrest of an alleged offender. That is the role of the police. It is the proper role of a protective intervener[176] to initiate State intervention in 'safe custody' child protection cases. It is also part of the Court's role to hear

[174] Refer response to Questions 2.1 & 2.3-2.6 of these submissions.

[175] Para-legals have been entitled to represent the Secretary in proceedings in the Family Division since mid 1993 when section 82(3)(c) of the CYPA came into operation pursuant to Act No.10/1993. That section has been replicated in section 215(3)(c) of the CYFA.

[176] 'Protective intervener' is defined in section 181 of the CYFA as being: (a) the Secretary; or (b) a police officer. However, by a protocol entered into between the then Secretary and the then Chief Commissioner of Police in 1992 in relation to the identical section 64(2) in the CYPA, police do not presently act as protective interveners in Victoria.

applications brought by the Department for the issue of safe custody warrants and to determine whether or not to authorize intrusive State intervention in the life of a child.[177]

For the same reasons as given in the answer to question 3.3, the Court believes that for a DPP-like commissioner to be involved in authorizing State intervention in safe custody cases has the potential to compromise his or her independence. The Court is certainly concerned that the proportion of proceedings initiated by apprehension appears to have substantially increased in recent years in comparison with applications by notice. This is especially so at Melbourne Children's Court. Despite that, it is rare to find an apprehension which has involved a gross abuse of State power. The best way to rein in the increase in the proportion of apprehensions is by appropriate training of protective interveners, not by shifting that aspect of their role to a DPP-like commissioner.

## The Court's response to questions 3.6, 3.7 and 3.8

The Court is opposed to the propositions in options 3.6 & 3.7. The additional roles for the commissioner suggested in these options opens the door to conflicts of interest.

**3.6**: It is inappropriate that the commissioner – responsible for the conduct of litigation in respect to which the subject child may well have a contrary view – should be capable of appointment as guardian or custodian of the child. This proposition strips away the armour of independence that makes the Court's view of the commissioner's proper role so attractive and is almost certain to result in a conflict of interest. How could the commissioner be seen to act independently and at the same time conduct litigation involving a child for whom he or she was the custodian or guardian, for instance a contested application to extend that child's custody order?

The Court submits that the Secretary should remain seized of the role of custodian or guardian of a child who is in need of protection in the absence of a suitable parent or some other suitable person. That is properly its role as the provider of assistance and support services to children who are in need of protection and to their families.

**3.7**: Let us postulate a typical case if proposition 3.7 were adopted. The commissioner conducts a case and succeeds in obtaining a finding from the Court that the child is in need of protection. The Court then makes a protection order in respect of the child which, if proposition 3.6 were adopted, vests custodial rights for that child in the commissioner. The commissioner – by then the custodian of the child – steps in and exercises the judicial or quasi-judicial power of determining appropriate conditions to be placed on the original judge's order, including important and often controversial conditions such as access with the non-custodial parent. The exercise of such a power has the potential to significantly affect future litigation and the parent's chances for reunification: it should not be given to the commissioner.

If one or more of the other litigants are aggrieved by the decision of the commissioner-cum-custodian-cum-judge, question 3.8 asks whether they should be able to seek "a merits review" by the Children's Court, presumably by the original judicial officer who made the decision that the child was in need of protection. How

[177] The Court's powers in relation to safe custody warrants are detailed in Chapter 5.27 of the Research Materials on the Children's Court website.

can the commissioner exercise judicial power in the same case that he or she has been prosecuting? Any merging of prosecutorial and decision-making powers – even if it is constitutionally valid – is so fundamentally conflictual that it could confidently be expected to destroy any litigant's trust in the objectivity and independence of the commissioner.

Quite apart from the patent conflict of interest and the potential constitutional minefield inherent in option 3.7, the proposition seems to us not to give proper consideration to the holistic nature of any decision which must be made in the best interests of a child. A child is an entity. His or her welfare requires a holistic determination based on all of the evidence. The experience of the Court is that the evidence required to make a proper determination of whether a child was – and remains – in need of protection, is generally largely the same as the evidence required to determine the appropriate protection order (if any) and the appropriate conditions on such order, including access conditions where appropriate. To split the decision-making between the Court and the commissioner is not in the Court's view in the child's best interest.

**3.8**: Given these answers and given the role the Court proposes for the commissioner, there is no need for any sort of "merits review" system. Of course, in the event that propositions 3.6 & 3.7 were to be adopted, there must be some system of review and presumably the reviewer ought be the Children's Court.

## The Court's response to question 3.5

There is little doubt that the *Public Prosecutions Act 1994* (Vic) has resulted in a prosecutorial authority in this State which is fiercely independent of the police. Legislation along the lines of that Act – but modified to include the somewhat expanded role the Court envisages for the commissioner – would ensure that the commissioner remains independent of the Department.

# OPTION 4 – COURT, PANEL OR TRIBUNAL?

Changing the nature of the body which decides whether there should be State intervention in the care of a child so that it includes non-judicial as well as judicial members.

4.1 Is the function of deciding whether 'a child is in need of protection' an exercise of judicial power?

4.2 Is it desirable to change the composition of the Family Division of the Children's Court to include people other than judicial officers in decision-making panels?

4.3 What people other than judicial officers should comprise decision-making panels?

4.4 What qualifications, if any, should they have?

4.5 Upon what terms should any non-judicial members of the Family Division of the Children's Court be appointed?

4.6 If some or all of the functions currently performed by the Family division of the Children's Court are to be performed by panels of people should those functions be retained by the Children's Court or should they be exercised by a tribunal?

4.7 If these functions are to be exercised by a tribunal should that tribunal be a division or specialist list of VCAT?

4.8 If these functions are to be exercised by a tribunal should a new Protective Tribunal be established to deal with a range of matters where the state intervenes in the lives of people for their protection?

The Court submission will deal with this option in a global way instead of responding to each question separately.

## IS THE FUNCTION OF DECIDING WHETHER A 'CHILD IS IN NEED OF PROTECTION' AN EXERCISE OF JUDICIAL POWER?

The Court engaged Senior Counsel to provide an opinion regarding this question. In his opinion dated 23 March 2010, Mr Peter Hanks QC drew three conclusions.

**Conclusion 1:**

- *The function, conferred on the Children's Court, of deciding whether "a child is in need of protection" falls within the paradigm of judicial power.*

In support of the conclusion, Senior Counsel stated:

*The function conferred by the CYF Act on the Children's Court, of deciding whether "a child is in need of protection", lies at the heart of judicial power.*

- *The function will involve the determination of a controversy between the Secretary to the Department of Human Services, on the one hand, and (typically) the parent or parents of a child, on the other hand. The controversy is likely to involve disputed questions of law and disputed facts.*

- *The determination of that controversy has immediate consequences relating to the rights of the child and the child's parents.*

- *The decision, once made, is binding and authoritative (even if subject to appeal).*

- *The decision is made by reference to defined criteria (as set out in s 162(1) of the CYF Act).*

**Conclusion 2:**

- *That characterisation has no constitutional implications, because the State can confer judicial power on a body that is not a court.*

**Conclusion 3:**

- *If it is seen as desirable that the Children's Court remain a State court in which the Commonwealth can vest federal jurisdiction (that is, the judicial power of the Commonwealth), it is important to ensure that the Children's Court retains the basic characteristics of a court – performing only those functions that are compatible with the exercise of judicial power and being constituted principally by judicial officers with protected tenure and remuneration.*

In relation to the third conclusion, it is important to note that the Family Division has jurisdiction to hear and determine applications to make, vary, revoke or extend an intervention order under the *Family Violence Protection Act 2008* (FVPA). As a result the Children's Court has Commonwealth jurisdiction to vary Family Court orders that conflict with intervention orders made under the FVPA, provided that the jurisdiction is exercised by a magistrate (section 68R of the *Family Law Act 1975*) (Cth).

Senior Counsel has advised, "that if the Children's Court were to be constituted otherwise than by judicial officers (of the kind that presently constitute the Court), the Children's Court would cease to be a permissible recipient of any part of the judicial

power of the Commonwealth. That is, the Children's Court could no longer exercise the powers that are currently conferred on it by provisions in the *Family Law Act 1975* (Cth)."

The Family Division of the Children's Court deals with applications under the FVPA where there are child complainants or child defendants. In 2008-09, the Children's Court finalised 1,836 of these applications. Cases from suburban courts are often adjourned into Melbourne where the parties would benefit from the services available at the Melbourne Children's Court or where proceedings will be contested and the expertise of a specialist Children's Court magistrate is required.

There is a strong connection between family violence and child protection. It is not uncommon in the Children's Court for there to be concurrent proceedings in both the child protection list and the family violence list, with common facts and allegations. It is particularly helpful for families in this position and those charged with assisting them to have their matters dealt with by one judicial officer at one hearing. The need to maintain the close integration between child protection applications and family violence applications supports the preservation of both jurisdictions within the Children's Court. If child protection is moved out of the Court, family violence matters will – because of their possible connection to associated Family Court orders - inevitably remain within the Court.

It is difficult to see any rationale for families to be involved in two separate yet similar litigious matters before different bodies. The parties would be required to attend different venues on a greater number of occasions, unlike the current situation in which, wherever possible, the Children's Court adjourns and determines the matters on the same date. In addition, separate hearings before different bodies would require witnesses to give evidence on more than one occasion with the potential for inconsistencies to emerge within the separate proceedings. Furthermore, now that the Department is able to apply for intervention orders on behalf of family members, the creation of a separate tribunal for child protection matters would mean that protective workers would be pursuing parallel, concurrent and factually similar applications in two separate jurisdictions.

## WHAT IS THE POLICY OR EVIDENCE BASE FOR DEPARTING FROM THE CURRENT CHILDREN'S COURT MODEL?

In 2000, the *Children And Young Persons (Appointment of President) Act 2000* was enacted which created the office of President of the Children's Court and established the Children's Court as an independent court, separate from the Magistrates' Court of Victoria. The Act reflected the importance of increasing the specialisation and authority of the Children's Court and elevated the status of the Court by creating a separate court from the Magistrates' Court.

As noted by the Attorney General during the introduction of the legislation:

> *The bill is good legislation…. Having a stand-alone Children's Court constitutes an upgrading of the status of the Children's Court and allows for the best possible expertise to sit in judgment on Children's Court matters. The proposal has been argued in this state for 17 years and has finally been introduced by the Bracks Labor government.*

In 2003 and 2004, there was an extensive review of the primary legislation that governs child protection in Victoria. This review, overseen by the Department of Human Services, led to the proclamation of the CYFA which, among other things, governs the operation of the Children's Court of Victoria. In the second reading speech in support of the CYFA, the then Minister said – "*The Children's Court will remain central to the statutory system of child protection."*

The CYFA has as one of its main purposes - "*to continue the Children's Court of Victoria as a specialist court dealing with matters relating to children*."

This recent decision to maintain a specialist Children's Court for child protection cases was an appropriate acknowledgement of the importance of judicial decision-making in the area of child protection. It also recognised that a decision concerning the removal of a child from his or her family is a decision of such profound importance to a child's future and the future of a family unit that it ought to be made by a court.

Given the broad consultation which occurred during this most recent review, the Court is struggling to understand the policy or evidence base that supports a substantial departure from the current court based model. Nor has the Court during meetings with court users, heard any person or agency express a view that it would be desirable to move away from a court based model. As noted throughout this submission however, the Court is constantly working to refine the process to enable it to be responsive to the needs of the community and to continue to produce outcomes which are in the best interests of children.

The Ombudsman's report has been influential in suggesting there may be a need for an alternative framework to a court-based model. The Court has already detailed the problems and failings in the Ombudsman's report and yet it is on the basis of that flawed report that there comes a suggestion that the Court model should be departed from.

If the concern is about the legalistic or formal nature of the Court process, the conclusions of the Leyton Review in SA are relevant: "*it is not necessary to change the system in order to discourage an inappropriate or excessively formal approach in the court*."

As noted at page 30, the Court recognises the environmental pressures created by the Melbourne building and its associated legal culture and is keen to continue to address the situation. However, it is important to note that these are "environmental" issues that are not reflected at the Family Divisions in Victorian rural locations or the Family Division at the Moorabbin Court. It is not the Court model that needs to be addressed but the problems at Melbourne. This is a critical distinction.

It is, of course, essential that the Victorian community be convinced that there is a sound policy and evidence basis to make fundamental changes to a long-standing court model. It is only when this is established that consideration of non-court based models can be entertained.

## The Court's decision-making – appeals

The Court is, of course, accountable for every decision that it makes. In the 2008-09 year, the Children's Court made 5,691 interim accommodation orders. These are orders that provide where a child will live pending the final determination of the matter. If a party considers that the Court has made an order that is not in the best interests of the child that party may seek an immediate appeal hearing before the Supreme Court. Such appeals are very rare. In the last 12 months, the Court is aware of one appeal by the Department. It was dismissed.

Similarly, the Court is accountable for every final order it makes. If it is considered that the Court has made an error of law in its decision-making, a party can appeal to the Supreme Court of Victoria. In addition, if a party is aggrieved by the decision of the Children's Court, it can appeal to the County Court of Victoria. In the latter case, a judge of the County Court will re-hear the matter. Such appeals are rare. When they do occur, it is just as likely to be an appeal by a family member as it is to be by the Department of Human Services.

Certainly, there is no evidence to support the suggestion that the judicial officers of the Children's Court are regularly making incorrect decisions. The evidence, in fact, supports the contrary proposition.

## The Court's decision-making – high frequency contact orders for infants and cumulative harm

Some people have commented on these two aspects of the Court's decision-making.

Below is a summary of the Court's position on "high frequency contact orders for infants" and "cumulative harm". For a full and detailed discussion of these two issues, the reader is referred to the Research Materials on the Children's Court website. [178]

### *High frequency contact orders for infants*[179]

The Court is of the view that there is no unanimity among professionals as to what is an optimal frequency of access between an infant and a non-custodial parent. It is clear that every case must be considered independently and on its facts. A case which demonstrates this view is *DOHS v Ms B & Mr G*[180] in which a respected child psychiatrist, Dr P, said that *"there certainly is evidence that a prolonged period out of the care of your primary carer in the first months of life can be quite disruptive to your sense of self-organisation"*. He also expressed the view that there was no one answer which applied across the board but one ought be guided by how the particular infant reacted to a particular frequency of access: "*I'd give it a period of trial*."

A study by Professor Cathy Humphries and Ms Meredith Kiraly entitled "Baby on Board" includes some criticism of Children's Court orders involving "high frequency access" between an infant and a parent. The authors acknowledged that one of the

[178] The Children's Court website: www.childrenscourt.vic.gov.au. (Research Materials 4.14 and 4.15).
[179] The Court's response in relation to a commission having authority to fulfil functions relating to issues such as access in response to Question 3.7.
[180] [2008] VChC 1.

limitations of their research was that they were not able to gain the views of any parents. A full analysis of this research work is included in the Court's Research Materials previously referenced. The Court does note that whilst the authors concluded that a period of court-ordered high frequency parental contact did not improve the rate of family reunification, it considers that the ultimate aim of contact should generally be to develop the best possible parent-child relationship, whether reunification is ultimately achieved or not. This is consistent with paragraphs (a), (b) and (k) of section 10(3) of the CYFA. Of course, that will not mean high frequency contact in every case. Every case depends on its own particular facts.

The Court is aware of the view expressed in the American Judicial Guidelines 1999 which, *inter alia*, provide as follows[181]:

> *Because physical proximity with the caregiver is central to the attachment process for infants and toddlers, an infant should ideally spend time with the parent(s) daily, and a toddler should see the parent(s) at least every two to three days. To reduce the trauma of sudden separation, the first parent-child visit should occur as soon as possible and no later than 48 hours after the child is removed from the home*."

As previously noted, these guidelines were prepared by both lawyers and social scientists and overseen by an Advisory Committee consisting of some of the most respected American social scientists and judicial officers, including Dr Joy D. Osofsky, a world authority on child development.[182]

While the Court understands the pressure that facilitation of high-frequency access places on the system, a proper determination of access frequency must be child-focussed. Given the divergence of professional views on this issue and given that decisions about a child's welfare ought be made holistically and on a case by case basis, the Court is of the view that it is currently giving proper attention to all relevant considerations as part of its decision-making.

***Cumulative harm***

"Cumulative harm" was introduced into legislation by section 162(2) of the *CYFA* which provides that for the purposes of proving harm pursuant to subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances. From the Court's perspective, this legislation was hardly necessary as it had long been part of the common law and therefore applied by this Court. It had expression, *inter alia*, in dicta of Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord

[181] At p.72 of "Healthy Beginnings, Healthy Futures: A Judge's Guide", a publication compiled in 2009 by a team of six professionals drawn from (i) the American Bar Association Center on Children and the Law, (ii) the National Council of Juvenile and Family Court Judges and (iii) the Zero to Three National Policy Center.

[182] Dr Osofsky is Professor of Public Health, Psychiatry & Paediatrics at Louisiana State University Health Sciences Center. She is also President-elect of one of the organisations which produced the guidelines, Zero to Three, a non-partisan, research-based resource for American federal and state policy makers and advocates on the unique developmental needs of infants and toddlers. Shortly prior to the storms that devastated New Orleans, Dr Osofsky had accepted an invitation – we believe from the Victorian child protection authority - to visit Victoria and speak to interested persons about her specialist subject but unfortunately she had to cancel her plans as a consequence of the New Orleans disaster.

Mustill agreed) in *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)*[183] in interpreting very similar English child protection legislation:

> "*Facts which are minor or even trivial if considered in isolation, when taken together, may suffice to satisfy the court of the likelihood of future harm*."

Ms Robyn Miller[184] when explaining the rationale for the inclusion of section 162(2) in the CYFA said as follows:

> "*One of the unintended consequences of the practice, which developed from the Children and Young Persons Act 1989, is that intake and initial investigations were increasingly based on episodic assessments, which were focused on immediate risk and safety, and less focussed on the developmental wellbeing of children, and patterns of abuse and neglect over time.*"[185]

The Court submits this is the correct analysis. The legislative provisions were not introduced because of some problem with the Court's application of the principle but because child protection workers were not applying the principle in their daily work.

## THE REQUIREMENT FOR NEW MODELS TO BE CONSISTENT WITH THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) provided a new framework for the protection and promotion of human rights in Victoria. The Charter is based on the notion that all arms of Government should contribute to the protection and promotion of human rights in Victoria.

Section 17(2) of the Charter affords special protection to children in recognition of their vulnerability due to age. Under the Charter, children are entitled to the enjoyment of all rights, as human beings except where they do not meet the eligibility criterion.

In addition, section 17(1) recognises *that families are the fundamental group unit of society and are entitled to be protected by society and the State*. Section 13 also provides that a person has the right *not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with*. [186]

Consistent with the Charter therefore, any removal of a child from a family unit must be carried out only where it is lawful and where it is not arbitrary.

Further, section 24 of the Charter requires that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The Court understands that the purpose of the right to a fair hearing is to ensure the proper administration of justice and is

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[183] [1996] AC 563,591.
[184] The Principal Child Protection Practitioner in the child protection authority.
[185] "*Cumulative Harm: A Conceptual Overview*" (December 2006) at p.11.
[186] Article 3 of the United Nations Convention on the Rights of the Child provides similar protections. See Appendix 6

concerned with procedural fairness. What constitutes a fair hearing will of course depends on the facts of the case and will require a weighing of a number of public interest factors.

The fair hearing obligation will also require that the institution of the court or tribunal as well as each of the individual members of the court or tribunal must be competent, independent and impartial.

Policy makers and the VLRC will therefore need to give careful consideration to matters raised under the Charter in any proposal to create a new model for dealing with the Family Division jurisdiction (including creating a new court or tribunal; altering the jurisdiction of a court or tribunal; amending the way evidence is presented in a court or tribunal etc.).

Any new model must consider whether it adequately takes into account the best interests of the child as a paramount consideration and that processes are fair and transparent.

The European Court of Human Rights has stressed the central importance of a fair trial in matters that separate children from the family unit. (Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms):

> *There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.*

A few examples of orders and conditions in the Family Division which affect human rights include:

- an interim accommodation order placing a child outside the family unit (section 17);
- a condition requiring a child or parent to undergo medical treatment. Such a condition would interfere with the right to not be subjected to medical treatment without consent (section 10);
- a condition limiting contact between family members might also be seen as an interference with not only the right to family life but the right to freedom of movement (section 12);
- those cases where substantive orders such as therapeutic treatment orders (TTO) or therapeutic treatment placement orders (TTPO) are made, the rights affected are significant. For example, a TTO can require that a child aged 10-14 who has exhibited sexually abusive behaviours participate in an appropriate therapeutic treatment program (medical treatment without consent); and
- finally, as part of an order, where the Court finds there is a substantial and immediate risk of harm to a child, the Court can place a child in a secure welfare service. This is a serious matter which raises a child's fundamental right to liberty (section 21).

In contested matters in the Children's Court, it is not unusual for families to have an extensive protection history stretching back several years or for there to be several parties participating. In addition, it is common for at least one of the parties to suffer

from an impediment that limits their ability to fully participate in the litigation, eg, immaturity (in the case of children), physical disability, intellectual disability, mental illness or substance abuse issues.

The Family Division of the Children's Court deals with serious and complex matters. It also deals with our most vulnerable citizens. It is difficult for the Court to analyse alternative models, without appropriate details of those models being outlined. However, it is the Court's view that weighing relevant public interest factors and with the best interests of children as a paramount consideration, a court remains the most appropriate forum for the determination of Family Division matters in Victoria.

## THE SCOTTISH CHILD PROTECTION MODEL

The Court has taken some time to examine Scotland's Children's Hearings system which commenced on 15 April 1971. This system is a dual model which deals with both child protection and criminal law matters.

In relation to child protection cases, it appears that under the relevant legislation the local authority (probably similar to our local councils), has a general responsibility for promoting social welfare in an area and specifically it has a duty to inquire into and tell the Reporter of cases of children who may be in need of compulsory care measures, to provide reports on children for children's hearings and to implement supervision requirements imposed by children's hearings.

The Reporter is an official employed by the Scottish Reporter Administration. Included in the Reporter's duty is to decide whether a case should be referred to a children's hearing and arranging such hearings. It is understood that the Reporter also provides support, legal advice and input to the children's hearing and to panel members.

Children's hearings decide whether a child requires compulsory measures of care and, if so, which measures are appropriate. A children's hearing consists of a chairman and two other members drawn from the children's panel. It must not be wholly male or female. Scottish ministers appoint a children's panel for each local authority area. The members hold office for such period as the minister specifies; they may be removed by him or her at any time, but only with the consent of the most senior judge in Scotland. The children's panel comprises a group of people from the community who come from a wide range of backgrounds, are unpaid and give their time voluntarily. Children's hearings may also appoint a safeguarder for the child.

Hearings are usually conducted in the child's home area and the layout is relatively informal with the participants usually sitting around a table.[187]

Under Scottish law a children's hearing is regarded as a tribunal. Its members are considered to enjoy judicial immunity from proceedings for wrongful detention and defamation, in the same way as judges of their lower courts.

[187] The Court also notes that current Children's Court hearings are heard closest to a child's home and are required to be conducted with as little formality as possible.

The children's hearing may only consider the case of a child where it has been referred to them by the Reporter and where certain "grounds of referral" are established, either by agreement with the child and his parent or by a decision of the Sheriffs Court. Therefore, in the absence of agreement, a decision by a judge on the grounds of referral, after hearing appropriate evidence, is essential before the children's hearing can consider the case.

The Sheriff, who is any judge of the local Sheriffs Court, has the following main roles in the process:

(a) to grant a warrant for continued detention of a child in a place of safety, pending a hearing, in certain circumstances;

(b) to adjudicate on whether the grounds of referral to the children's hearing are established, where the child or his parent does not accept them;

(c) to hear appeals against decisions of children's hearings.

The Court makes the following observations regarding the Scottish model. That:

- it is based on what appears to be a localised model, with panels based in regions who are responsible for its operations;
- it is based on a model which combines child protection with criminal matters;
- the panel members are unpaid volunteers;
- without agreement as to the facts, a children's hearing will not proceed;
- a court model is retained with a judge to determine the facts;
- urgent orders for removal are authorised by a court comprising of a judge; and
- the Scottish model is currently under review (discussed below).

The Scottish children's hearing process is currently undergoing reform *in order to protect the system from emerging European Convention of Human Rights challenges*[188]. It also appears that their equivalent child protection authority is in crisis[189] and the Scottish panels have struggled to cope with significant increases in referrals. [190]

The Court also understands that the Government introduced a Bill on 23 February 2010, (which creates a new national body called the Scottish Children's Hearings Tribunal, provides better access to legal representation and makes changes to the role of the reporter) after delaying its introduction as the previous iteration was the subject of strong divergent views from stakeholders. The Policy Memorandum supporting the new Bill notes that there *has also been recognition for a number of years now, including amongst the Hearing's system's strongest supporters that it is not working*

[188] 'Whitewash' Fear Over Child Abuse Review, news.scotman.com, 5 March 2010, Children's Hearing Rethink Urged, BBC News, 17 August 2009, Row As Controversial Children's Bill Put Back To Next Year, Herald Scotland, 28 August 2009, Shake-Up For Children's Panel System, Scotland-on-Sunday, 2 August 1998

[189] Failings 'Put Children At Risk', BBC News, 26 November 2009, Brandon Muir Child Protection Services Still Failing, TimesOnline, 23 June 2009, Child Protection 'Overstretched', BBC News, 13 July 2009, Moray Child Protection Condemned, BBC News, 12 February 2009, Aberdeen Child Protection Slated, BBC News, 13 November 2008, Resignation After Care Criticism, BBC News, 1 February 2007, Child Services 'Need Improvement', BBC News, 25 January 2007

[190] Care Reaches Highest Level for Almost 30 years, The Scotsman, 25 February 2010

*as effectively as it might or should. Key concerns include: inconsistency within the Hearing system…limited opportunity for the child to participate effectively...and the potential for challenges to the system under the European Convention on Human Rights."*

The Court notes the following in relation to the Scottish model:

- that the current ADR model is preferred as it can operate without the need to settle facts; and it doesn't require a decision to be made by a third party – it is worked out between the parties – adopting an ADR philosophy;
- it still requires the retention of a court structure;
- referring part of the decision-making unnecessarily fragments the system; and
- as noted above, it is premised on conditions that don't exist in Victoria.

## THE ENGLISH CHILD PROTECTION MODEL

The Court has examined the English child protection model and makes the following observations:

- child protection proceedings are usually held in the Family Proceedings Court, which is essentially a court-based model;
- the Family Proceedings Court, not only hear cases of child welfare, but also child custody, visiting rights for parents who no longer live in the family home, reclaiming maintenance and divorce hearings - similar to Australia's Family Court;
- matters are heard by a bench of three **lay** magistrates, collectively called a Bench; and
- The Bench is supported by a legally qualified Court Clerk. One magistrate has been trained to take the chair and the other two are referred to as 'wingers'. Although the chair speaks on behalf of the bench, all three magistrates have equal decision-making responsibility.

In the Court's view, a positive feature of the UK model is the fact that the local authorities have a duty to continue to promote the welfare of children until the age of 21 years. Apart from this feature, the Court notes that the UK model appears to retain a court based approach using lay magistrates based on the old *justice of the peace* system.[191] The use of lay magistrates is not unique to their child protection courts. The English legal system uses lay magistrates across their justice system including criminal hearings.[192]

Victoria abolished a similar justice of the peace system (aside from the execution of documents), many years ago.

The Court further notes that the English child protection system has been subject to high level review many times since World War II.

[191] They are not paid but may claim expenses and an allowance for loss of earnings and do not usually have any legal qualifications.

[192] Magistrates hear criminal matters but cannot normally order sentences of imprisonment that exceed 6 months (or 12 months for consecutive sentences), or fines exceeding £5000.

## THE PROPOSAL FOR NON-JUDICIAL MEMBERS TO PARTICIPATE IN DECISION-MAKING REGARDING CHILD PROTECTION

### Other Australian reviews of Children's Court Models

There have been two recent reviews of child protection systems in Australia. One in New South Wales and the other in South Australia.

The NSW inquiry (Wood Commission) looked at the "Scottish model". In its submission to the NSW inquiry, the Department of Community Services (DOCS) submitted:

> *"Research suggests that tribunals, particularly those not involving legally trained personnel can fail to provide procedural fairness due to lack of proper reasoning, lack of proper representation, failing to apply legal principles, perceptions of bias and formation of views prior to the hearing. Anecdotal evidence and research findings in the first decade of the operation of the Scottish Children's Hearing system indicated that informality led to procedural laxity as well as wide variations in practice between hearings. This is supported by 2007 research into the relationship between social work recommendations to Scottish Children's Hearings and the decisions taken, which found that widely different policies and practices operated between different regional localities throughout Scotland. There is a risk that a failure to provide procedural fairness can lead to complex, costly and formal appeal processes*."

The NSW Inquiry did not favour a model of decision-making that included lay, volunteer panels because they "*often lack the rigour and experience in decision-making that is necessary in such a sensitive and complex area*".

The NSW Inquiry also concluded that it did not consider it necessary to replace the existing model of decision-making by their Children's Court.

## THE PROPOSAL TO REPLACE THE CHILDREN'S COURT WITH A TRIBUNAL BASED MODEL

### The Family Court and adoption cases

In Australia, it is accepted that private law cases involving children should be dealt with by the Family Court. In 2004, the former Chief Justice of the Family Court, (Nicholson CJ) was asked for his views on a tribunal system to hear family law cases. He replied:

> *"I think tribunals don't have the independence that courts have and they're very much subject to the possibility of appointments not being renewed if the tribunal's not following the line that that particular government wants, so you take away an essential aspect of independence with a tribunal."* [193]

[193] Transcript of interview on Radio National, "The Law Report" – 6 April 2004.

The former Chief Justice was even clearer in 1995 when asked to comment on whether child protection matters should proceed before a tribunal rather than a court:

> "….. *I view the suggested solution of a tribunal as no solution at all. Experience suggests that tribunals are no better and may well be worse than courts in performing the decision-making function. Their drawbacks include liability to political interference, either indirectly or by the removal of the tribunal if its approach is disapproved of by government, expense (three decision makers instead of one), lack of security of tenure and a lack of independence resulting from concerns about re-appointment."* [194]

The Children's Court adopts these views and notes the critical importance of independent and fearless decision-making in the area of child protection.

The Court also adopts the comments to the NSW inquiry made by Magistrate Mitchell (the then Senior Children's Court magistrate in NSW):

> *"Although it is possible to find some jurisdictions where the tribunal model is followed – Norway and Denmark which are cited in the Green Paper along with a couple of African States, most jurisdictions with which New South Wales associates itself follow the judicial model. These include England and Wales, New Zealand, most of the United States and every State and Territory of the Commonwealth. It is submitted that ours is a society in which it is expected that such fundamental rights and interests as are involved in care cases should be dealt with by the Courts."*[195]

Child protection adjudication requires determination of issues between a powerful government agency, and a number of different parties including, parents (often two competing parents), each child (often with separate representation if mature enough to give instructions), and frequently a grandparent or competing grandparents. Over the last few years the Children's Court has heard difficult and complicated cases involving multiple parties and complex issues. For example, in 2006, the Court had one case that proceeded for 80 days. In 2008, another case proceeded over 50 days. A court is the appropriate place for these complex and difficult matters to be determined.

There is no evidence to suggest that a tribunal would manage these cases in a "less adversarial manner" as tribunals have jurisdiction to hear contested matters in the same way as a court.

Cases in the Children's Court involve a very wide spectrum of factual disputes. The Court is required to determine whether the child is in need of protection and if so, what orders the Court should make to ensure the child is protected. The Court may be required to make findings on issues as complex as whether a baby has been shaken; whether a child has been sexually abused; whether a particular type of parenting is excusable in terms of culture; whether a particular regime of drug rehabilitation is likely to meet with success; whether a parent's particular mental health deficit is likely to be inconsistent with "good enough" parenting.

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[194] Law Institute Journal, April 1995 at page 309.
[195] See Magistrate Mitchell's submission at para 53, p. 20.

As noted by Magistrate Mitchell in NSW:

> *"These are the types of issues that in many comparative jurisdictions are dealt with by superior courts such as the Family Court of Australia and the High Court of England and Wales. It is submitted that care cases are not primarily administrative matters to be dealt with extra judicially."*[196]

Child protection cases can either be straight forward or complex. They can be quickly conceded or heavily contested. In every case, the outcome of the case will have profound implications on the future lives of children, young people and families. Some cases before the Children's Court will involve orders that change guardianship. Some cases will result in permanent care orders. In either case, the decision is of such importance it must be made by a Court.

In Victoria, the importance of judicial involvement in, and oversight of, adoptions is accepted. These matters are heard and determined in the County Court of Victoria. It is the Court's view that the same approach should be maintained for child protection cases. [197]

## THE CONNECTIONS BETWEEN CHILD PROTECTION, FAMILY VIOLENCE AND THE CRIMINAL DIVISION

As noted above, the Scottish child protection system deals with most alleged criminal offenders under the age of 16 years.[198] The system is an integrated one that treats offending behaviour as indicative of family problems to be addressed.

The New Zealand model is different to the Scottish model in a number of ways. Importantly, it deals with child protection in a court-based system. Nevertheless, it is similar to Scotland in the way it adopts an integrated family based approach to alleged offenders. In New Zealand, alleged offenders under 14 are not processed as criminal offenders but referred to Family Group Conferencing. This integrated response recognises the interconnections between criminal behaviour and child protection.

Victoria deliberately moved away from an integrated hearing approach but has maintained physical co-location of the Divisions (as well as joint administration of the Divisions). In recognition of the interconnections between the two Divisions, the Court has been given power to refer a defendant in the Criminal Division for investigation by the Secretary of the Department of Human Services if:

- it considers that there is prima facie evidence that grounds exist for the making of a protection application in respect of the child;[199]
- it considers there is prima facie evidence that grounds exist for an application for a therapeutic treatment order (TTO) in respect of the child.[200]

Generally, referrals in the first category have not resulted in intervention by the Secretary.

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[196] See Magistrate Mitchell's submission at para 54, p. 21.
[197] Permanent care orders are effectively Children's Court adoptions.
[198] See footnote 10
[199] s.349 (1)(b) of CYFA
[200] s.349 (2)(b) of CYFA

The second category of referral has resulted in a number of cases where the Secretary has intervened. If a young person is assessed as suitable to undergo a TTO (or the related therapeutic treatment placement order), the criminal proceedings are adjourned pending the determination of the application in the Family Division. If that Division grants the application, the charge/s in the Criminal Division are adjourned until the therapeutic treatment is completed. The charges will be struck out if the young person successfully completes the order.

It is the Court's view that any proposal to sever the Family Division from the Court and locate it in a tribunal will inevitably disrupt the interaction between the two Divisions. This disruption will be even more profound in the area of family violence.

There is a strong correlation between family violence and child protection. As noted previously, under the CYFA, the Family Division has jurisdiction to hear and determine applications to make, vary, revoke or extend an intervention order under the *Family Violence Protection Act 2008* or the *Stalking Intervention Orders Act 2008*, when either the respondent or an affected person is a child. As a result the Children's Court has Commonwealth jurisdiction to vary Family Court orders that conflict with intervention orders made under the *Family Violence Protection Act 2008*, provided that the jurisdiction is exercised by a magistrate (section 68R of the *Family Law Act 1975*)(Cth). Only a body with the basic characteristics of a Court can be the repository of Commonwealth judicial power. This inevitably means that family violence matters – because of their possible connection to Family Court orders -will be heard in a court. We have already explained the difficulties with having child protection matters dealt with at a venue away from the Children's Court while family violence matters are being dealt with in the Children's Court.[201] The need to maintain the close integration between child protection applications and family remedies under the FVPA supports the preservation of both jurisdictions within the Children's Court.

# CHILDREN'S DECISION-MAKING FUNCTIONS AT VCAT

## The Children's Court of Victoria - a strong statewide system

The Children's Court of Victoria operates a statewide system across Victoria. Country magistrates deal with urgent apprehensions and manage matters with a high level of competence. If a matter is to proceed to a contested hearing of four or more days duration, the Melbourne Court will assist by providing a magistrate to conduct the directions hearing and hear the final contest.

All magistrates assigned to regional areas have spent at least three months working in the Melbourne Children's Court, participated in regular professional development, have access to resource materials and the support of the President or magistrates at Melbourne at any time.

The Children's Court operates an integrated and efficient system that relies on close cooperation and understanding between the Children's Court and the Magistrates' Court. It is hard to imagine how a panel system or a tribunal system could possibly match the quality service that is currently provided to country Victoria.

[201] See the discussion at page 94 and 95

In addition, the Court has recently established two Family Division courts at Moorabbin. It did so by working with the Chief Magistrate. These Courts service the Southern Region offices of Child Protection at Cheltenham, Frankston and Dandenong. The initiative has received strong support from Child Protection. The establishment of the Court at Moorabbin is an example of the flexibility, efficiency and strength of our current court based system.

It is clear from the Taskforce report that Child Protection would prefer further decentralization of the Children's Court with the use, where possible of local courts, rather than bringing families and workers into Melbourne. The Taskforce committed in principle to decentralisation and recommended contingency plans to ease the pressure at Melbourne in the short term. The Court is prepared to move Eastern Region cases to the old County Court building as soon as government agrees to this. Again, it is the current Court based system that offers the best opportunity for achieving a responsive, efficient and, if appropriate, decentralised system.

In addition, if a matter is to be fully litigated -some matters are incapable by their very nature of a negotiated settlement - then it is the Court's strong view that overly informal, fast-tracked procedures, with an emphasis on cost-effectiveness, are not in the best interests of the child or the community. Properly safeguarding the interests of the participants in child welfare proceedings, whose participants include some of the most marginalised members of the Victorian community, requires a Court to be the decision maker not a tribunal.

The importance of a statewide service is relevant in the discussion of VCAT and any alternative model.

## One VCAT President's Review of VCAT

The former President of the Victorian Civil and Administrative Tribunal (VCAT), Justice Bell, reviewed VCAT at the request of the Attorney-General and released his report *One VCAT President's Review of VCAT* in March 2010. As noted in that report, VCAT was established in 1998 as a 'super tribunal' with its purpose to provide fast, cheap, efficient and fair access to justice.

The main areas of tribunal jurisdiction are residential tenancies, civil claims, guardianship and planning. Apart from the Human Rights Division which includes the Guardianship and Administration List with powers to make orders appointing a guardian or administrator for a person aged 18 years or over who has a disability, the VCAT underlying operating philosophy appears to be the antithesis of the approach required for Child Protection matters.

As part of the review, Justice Bell conducted community consultations across Victoria with a wide range of community, industry and professional stakeholders. Whilst he found the Tribunal improved access to justice and equitable outcomes (and there was virtual unanimity about the tribunal being a necessary feature of Victoria's justice system), he also found there were serious deficiencies in the accessibility of justice to the Victorian community. Criticisms identified in the consultation include:

- excessive delays in being listed and getting a decision. This was noted as *strong across the board;*

- inappropriate behaviour by some members;
- inconsistency in procedure and result. This was noted as *a strong point of criticism*; and
- people in outer-suburban and country Victoria have relatively poor access to the tribunal. This was noted as *a very strong criticism revealed in the community consultations*.

There is also no existing evidence suggesting that ordinary litigants found VCAT to be less adversarial than other courts in Victoria.

The Court submits that, there is no evidence to show that a tribunal model would provide the necessary statewide service; or provide a consistent approach to decision-making; or result in a timely approach to the resolution of matters; or provide a less adversarial approach.

The Court is also concerned at the findings of Justice Bell regarding the poor utilisation of the tribunal by culturally and linguistically diverse (CALD) communities and Koori communities:

> *There is poor utilisation of the tribunal by CALD and Koori communities. A number of access barriers appear to stand between these communities and the tribunal. A major cause is disengagement between these communities and the institutions of government generally. Part of the solution involves greater engagement between the tribunal and such communities, which is hard to achieve with the present metro-centric model of the tribunal's service delivery. The tribunal's record of engagement with the Koori community is particularly disappointing, despite the conspicuous efforts of some members to do something about it.*

## The Mental Health Review Board

The Court would oppose any proposal to move Family Division matters currently in the Children's Court towards a board type model, similar to the Mental Health Review Board. It would be difficult to draw any comparisons between systems, as the jurisdictions are so different, but the Court notes:

- the Board exercises administrative decision-making powers;
- Board hearings area carried out at a patient's location;
- Board hearings are closed to the public[202];
- there are usually few parties present;
- the panel comprises three members;
- Board hearings are relatively short and vastly less complex than child protection proceedings can be; and
- evidentiary matters differ widely.

[202] Children's Court hearings are currently open to the public unless otherwise ordered by a magistrate. Also note Section 24 of the Charter and the requirement for a public hearing.

## A FINAL COMMENT

In every State and Territory in Australia, and in England, Wales, New Zealand and the majority of American States, a Court is rightly regarded as the most appropriate body to review a decision by a child protection agency to intervene in the life of a family.

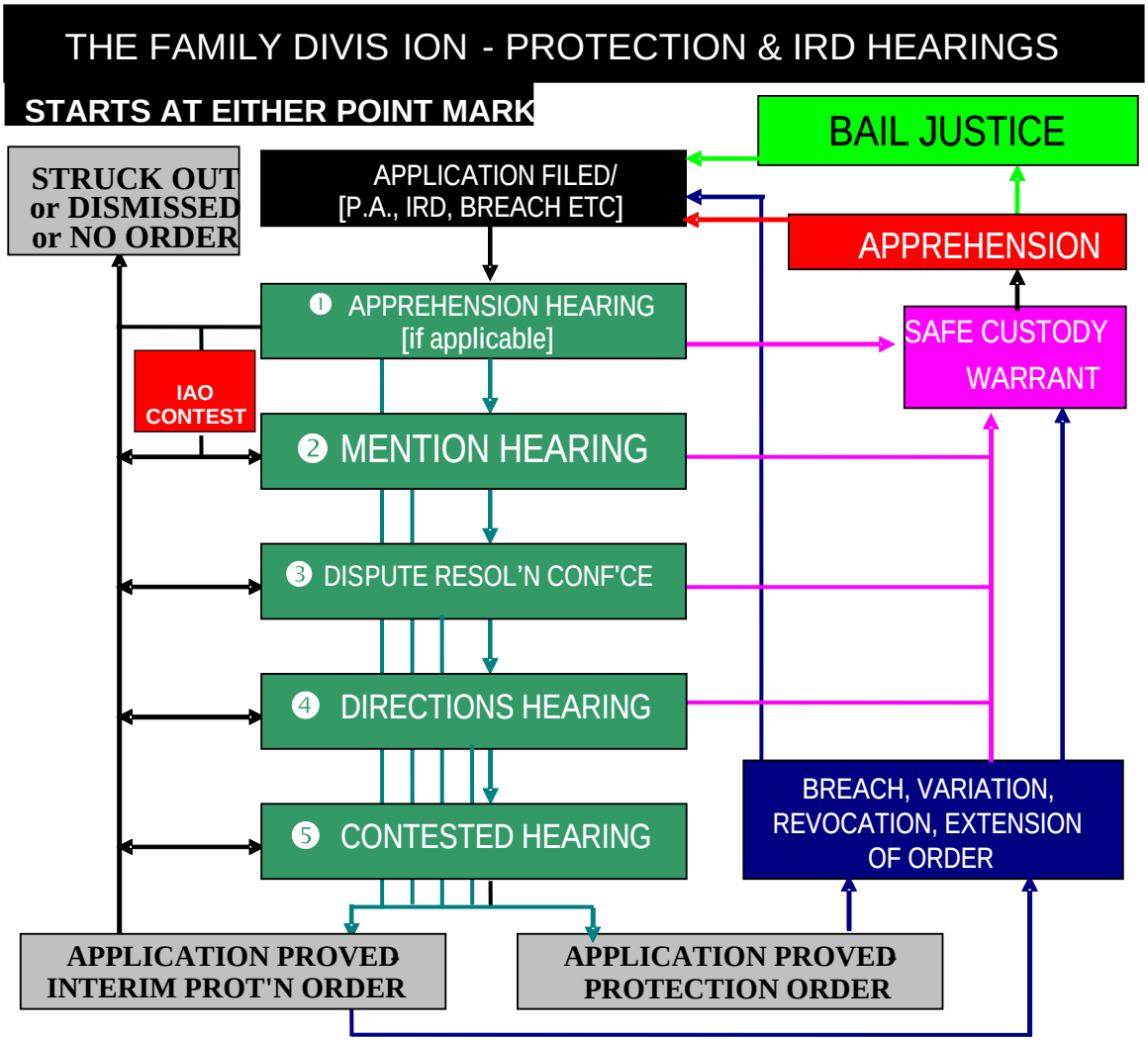
In 1993, Justice Fogarty prepared a report on the child protection system in which he concluded:

"In my view the Children's Court must maintain its position of independence and integrity and if anything that position should be reinforced rather than diminished."

With respect, that conclusion was correct then and is correct now.

# APPENDIX 1

## The Children's Court Family Division
## Child Protection and Irreconcilable Difference Process



# APPENDIX 2

## A summary of the orders that the Court can make in the Family Division

- An undertaking requires modest intervention in the life of the family. These are cases where the family have responded positively to supports and the protective concerns have been significantly addressed (Undertaking given by family member(s) – s.278[203]).
- Other orders allow the child to remain within parental care subject to supervision by the Department of Human Services (DHS). In these cases the family is willing to work with the DHS and the Court is satisfied the child will be safe while that occurs. The Court may attach conditions to such order requiring family members to, for example, attend counselling for drug and alcohol abuse, undergo drug testing, take the child to medical appointments, undertake family violence counselling, attend a parenting course, etc. These orders may be a short-term Interim Protection order (usually three months – s.291) or a longer final order called a Supervision order (usually six to twelve months – s.280). Supervision orders can be extended.
- Other orders will place the child with an appropriate person whilst DHS works towards the placement of the child with a parent. These may be a short-term Interim Protection order (usually three months – s.291) or a longer final order called a Supervised Custody order (usually six to twelve months – s.284). The latter order can only be made if the Court is satisfied that the child is likely to return to the parent during the currency of the order. The order is supervised by DHS and converts to a supervision order when the child is placed back with the parent (s.286). Supervised Custody orders can be extended. Another somewhat similar order is the Custody to Third Party order (s.283). However, this order does not provide DHS with supervisory powers and cannot be extended. Hence, Custody to Third Party orders are relatively rare.[204]
- A Custody to Secretary Order (CTSO) under s287 allows DHS to decide where the child or young person should be placed. This is generally in out of home care, for example, with a relative, family friend, foster carer or at a residential unit.[205] Such an order will usually have conditions attached. In the case of an Aboriginal child, the Court may impose a condition incorporating a cultural plan for the child (s.287(1)(d)(ii)). In some cases, the plan will be re-unification with the parents and the conditions on the order will be designed to facilitate that. A CTSO grants custody of the child to DHS but guardianship remains with the parent(s). The order remains in force for a period of up to 12 months and can be extended. Even if reunification is not likely, such orders will often contain access conditions to ensure the child or young person has ongoing contact (sometimes supervised) with his or her parents and siblings.
- In cases where reunification is not in the best interests of the child, the Court may make a Guardianship to Secretary order or, in some cases, a Custody to

[203] References to sections refer to the CYFA.
[204] In 2007-08, the Court only made eight of these orders.
[205] In some cases, a child on a Custody to Secretary Order may be placed in the care of a parent but this is relatively uncommon, at least early in the life of such order.

Secretary order.[206] Guardianship orders are made where no other order will provide the necessary protection for the child. The making of such an order indicates that the protective concerns cannot be managed within the family, where the parents are unlikely to be able or available to make guardianship type decisions for the child and the prospects of re-unification are remote in point of time. These orders place both custody and guardianship with DHS. The Court cannot attach any conditions to a guardianship order. The order may be of up to 2 years duration and can be extended.

- The Court can make a long term guardianship order if the child is aged 12 or over, there is a person with whom the child will live for the duration of the order, both the Secretary and child consent to the making of the order and the making of the order is in the child's best interests.

[206] The Court also hears applications for permanent care orders and may make such orders if the child has been out of parental care for at least 6 months of the previous 12 months, and if satisfied that reunification with a parent is not in the best interests of the child.

# APPENDIX 3

## Child Protection Australian statistics[207]

### Reports to child protection

| YEAR | NSW | VIC | QLD | WA | SA | TAS | ACT | NT | TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| **04-05** | 133,636 | 37,523 | 40,829 | 3,206 | 17,473 | 10,788 | 7,275 | 2,101 | 252,831 |
| **05-06** | 152,806 | 37,987 | 33,612 | 3,315 | 15,069 | 13,029 | 8,064 | 2,863 | 266,745 |
| **06-07** | 189,928 | 38,675 | 28,511 | 7,700 | 18,434 | 14,498 | 8,710 | 2,992 | 309,448 |
| **07-08** | 195,599 | 41,607 | 25,003 | 8,977 | 20,847 | 12,863 | 8,970 | 3,660 | 317,526 |
| **08-09** | 213,686 | 42,851 | 23,408 | 10,159 | 23,221 | 10,345 | 9,595 | 6,189 | 339,454 |

### Substantiations by child protection agencies

| YEAR | NSW | VIC | QLD | WA | SA | TAS | ACT | NT | TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| **04-05** | 15,493 | 7,398 | 17,307 | 1,104 | 2,384 | 782 | 1,213 | 473 | 46,154 |
| **05-06** | 29,809 | 7,563 | 13,184 | 960 | 1,855 | 793 | 1,277 | 480 | 55.921 |
| **06-07** | 37,094 | 6,828 | 10,108 | 1,233 | 2,242 | 1,252 | 852 | 621 | 60,230 |
| **07-08** | 34,135 | 6,365 | 8,028 | 1,464 | 2,331 | 1,214 | 827 | 756 | 55,120 |
| **08-09** | 34,078 | 6,344 | 7,315 | 1,523 | 2,419 | 1,188 | 896 | 858 | 54,621 |

[207] Australian Institute of Health and Welfare publication – "Child Protection Australia 2008-2009".

# APPENDIX 4

## Breakdown of child protection final orders in the Family Division

| Order / Year | 2002-3 | 2003-4 | 2004-5 | 2005-6 | 2006-7 | 2007-8 | 2008-9 |
|---|---|---|---|---|---|---|---|
| **Custody to Secretary** | 970 | 962 | 1155 | 1102 | 1133 | 1273 | 1293 |
| **Custody to third Party** | 8 | 8 | 9 | 8 | 9 | 8 | 12 |
| **Extension of Custody** | 1055 | 1129 | 1171 | 1317 | 1352 | 1212 | 1202 |
| **Extension of Supervised Custody** | 0 | 0 | 0 | 0 | 0 | 6 | 52 |
| **Extension of Supervision** | 0 | 0 | 0 | 0 | 18 | 211 | 286 |
| **Extension of Guardianship** | 613 | 581 | 583 | 619 | 579 | 463 | 424 |
| **Guardianship to Secretary** | 285 | 278 | 266 | 292 | 302 | 258 | 261 |
| **Interim Protection Order**[208] | 810 | 887 | 943 | 998 | 973 | 891 | 897 |
| **Long-Term Guardianship** | 0 | 0 | 0 | 0 | 7 | 62 | 43 |
| **Permanent Care** | 132 | 169 | 216 | 173 | 215 | 277 | 233 |
| **Refusal to make Protection order** | 124 | 155 | 157 | 157 | 118 | 77 | 98 |
| **Supervised Custody** | 13 | 11 | 3 | 2 | 29 | 151 | 205 |
| **Supervision Order** | 1306 | 1315 | 1454 | 1425 | 1767 | 1894 | 1858 |
| **Undertaking-Application Proved** | 111 | 89 | 136 | 171 | 123 | 128 | 175 |
| **Undertaking - Other** | 82 | 129 | 164 | 131 | 219 | 230 | 178 |
| **Struck Out** | 433 | 416 | 432 | 411 | 542 | 502 | 462 |
| **Dismissed** | 33 | 22 | 27 | 10 | 30 | 27 | 27 |
| **TOTAL** | **5975** | **6151** | **6716** | **6816** | **7416** | **7670** | **7706** |

[208] S.291(1)(b) is made after determining that a child is in need of care and protection or there are irreconcilable differences but where the court considers it desirable before making a final order to test the appropriateness of a particular course of action.

# APPENDIX 5

## Section 10 of the Children, Youth and Families Act 2005

**10 Best interests principles**

(1) For the purposes of this Act the best interests of the child must always be paramount.

(2) When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.

(3) In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—

(a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;

(b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;

(c) the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;

(d) the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances;

(e) the effects of cumulative patterns of harm on a child's safety and development;

(f) the desirability of continuity and stability in the child's care;

(g) that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child;

(h) if the child is to be removed from the care of his or her parent, that consideration is to be given first to the child being placed with an appropriate family member or other appropriate person significant to the child, before any other placement option is considered;

(i) the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent;

(j) the capacity of each parent or other adult relative or potential care giver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child;

(k) access arrangements between the child and the child's parents, siblings, family members and other persons significant to the child;

(l) the child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity;

(m) where a child with a particular cultural identity is placed in out of home care with a care giver who is not a member of that cultural community, the desirability of the child retaining a connection with their culture;

(n) the desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities;

(o) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;

(p) the possible harmful effect of delay in making the decision or taking the action;

(q) the desirability of siblings being placed together when they are placed in out of home care;

(r) any other relevant consideration.

# APPENDIX 6

## UN Convention on the Rights of the Child

Article 3 of the UN Convention on the Rights of the Child states as follows:-

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

2. Parties undertake to ensure the child such protection and care as is necessary for his or her well being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take appropriate legislative and administrative measures.

3. Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health and suitability of their staff, as well as competent supervision.

# APPENDIX 7

## Recommended replacements for sections 215(1)(a), 215(1)(b) & 215(1)(c) of the CYFA.[209]

### PART 4.7 – PROCEDURE IN FAMILY DIVISION

### Division 1A – Principles for conducting proceedings

**215A Principles and their application**

*Application of the principles*

(1) The Court must give effect to the principles in this section:

(a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to a Family Division proceeding; and

(b) in making other decisions about the conduct of a Family Division proceeding.

Failure to do so does not invalidate the proceeding or any order made in it.

(2) Regard is to be had to the principles in interpreting this Division.

*Principle 1*

(3) The first principle is that for the purposes of this Act the best interests of the child concerned must always be paramount.

Note: Section 10 details the "best interests principles".

*Principle 2*

(4) The second principle is that the Court is to consider the needs of the child concerned and the impact that the conduct of the proceeding may have on the child in determining the conduct of the proceeding.

*Principle 3*

(5) The third principle is that the Court is to actively direct, control and manage the conduct of the proceeding.

*Principle 4*

(6) The fourth principle is that the proceeding is to be conducted in a way that will safeguard:

(a) the child concerned against violence, abuse and neglect; and

(b) the parties to the proceeding against violence.

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[209] The underlined text is where the amendments differ from the *FLA* provisions. We have changed "proceedings" to "proceeding" because the latter is the term primarily used in the *CYFA* as defined in section 3. Likewise we have changed "court" to "Court" because the latter term is used throughout the CYFA and is defined in section 3.

*Principle 5*

(7) The fifth principle is that the proceeding is, as far as possible, to be conducted in a way that will promote cooperative and child-focused interaction between the parties.

*Principle 6*

(8) The sixth principle is that the proceeding is to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

*Principle 7*

(9) The seventh principle is that the Court must decide disputed issues of past fact on the balance of probabilities.

*Principle 8*

(10) The eighth principle is that in determining the likelihood of future harm for the purposes of sections 162(1)(c) to 162(1)(f), the Court must decide whether there is a real possibility, which cannot sensibly be ignored having regard to the nature and gravity of the feared harm, of the requisite harm being suffered by the child in the future.

**215B This Division also applies to proceedings in Chambers**

The President, a magistrate or an acting magistrate who is hearing a Family Division proceeding in Chambers has all of the duties and powers that the Court has under this Division.

Note: An order made in Chambers has the same effect as an order made in open court.

**215C Powers under this Division may be exercised on Court's own initiative**

The Court may exercise a power under this Division:

(a) on the Court's own initiative; or

(b) at the request of one or more of the parties to the proceeding.

**215D General Duties related to giving effect to the principles**

(1) In giving effect to the principles in section 215A, the Court must:

(a) decide which of the issues in the proceeding requires full investigation and hearing and which may be disposed of summarily; and

(b) decide the order in which the issues are to be decided; and

(c) give directions or make orders about the timing of steps that are to be taken in the proceeding; and

(d) in deciding whether a particular step is to be taken-consider whether the likely benefits of the step justify the costs of taking it; and

(e) make appropriate use of technology; and

(f) if the Court considers it appropriate-encourage the parties to engage in a dispute resolution conference; and

(g) deal with the matter, where appropriate, without requiring the child's physical attendance at court.

(2) Subsection (1) does not limit subsection 215A(1).

(3) A failure to comply with subsection (1) does not invalidate an order.

**215E Power to make determinations, findings and orders at any stage of proceedings**

(1) If, at any time after the commencement of a Family Division proceeding and before making final orders, the Court considers that it may assist in the determination of the dispute between the parties, the Court may do any or all of the following:

(a) make a finding of fact in relation to the proceeding;

(b) determine a matter arising out of the proceeding;

(c) make an order in relation to an issue arising out of the proceeding.

Note: For example, the Court may choose to use this power if the Court considers that making a finding of fact at a particular point in the proceedings will help to focus the proceedings.

(2) Subsection (1) does not prevent the Court doing something mentioned in paragraph (1)(a), (b) or (c) at the same time as making final orders.

(3) To avoid doubt, the President or a magistrate or acting magistrate who exercises a power under subsection (1) in relation to a proceeding is not, merely because of having exercised the power, required to disqualify himself or herself from a further hearing of the proceeding.

**215F Use of Children's Court Clinic**

To avoid doubt, the Court may exercise the power invested by section 560 at any time during a Family Division proceeding.

# APPENDIX 8

## Recommended replacements for section 215(1)(d) of the CYFA.[210]

**215G Rules of evidence not to apply unless Court decides**

(1) These provisions of the *Evidence Act 2008* (Vic) do not apply to a Family Division proceeding:

(a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;

Note: Section 26 is about the Court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

(2) The Court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 2008* not applying because of subsection (1).

(3) Despite subsection (1), the Court decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceeding if:

(a) the Court is satisfied that the circumstances are exceptional; and

(b) the Court has taken into account (in addition to any other matters the Court thinks relevant):
(i) the importance of the evidence in the proceeding; and
(ii) the nature of the subject matter of the proceeding; and
(iii) the probative value of the evidence; and
(iv) the powers of the Court to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

(4) If the Court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceeding, the Court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.

(5) Subsection (1) does not revive the operation of any rule of law that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.

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[210] The underlined text is where the amendments differ from the *FLA* provisions. We have changed "proceedings" to "proceeding" because the latter is the term primarily used in the *CYFA* as defined in section 3. Likewise we have changed "court" to "Court" because the latter term is used throughout the CYFA and is defined in section 3.

## 215H Evidence of children

(1) This section applies if the Court applies the law against hearsay under subsection 215G(2) to a Family Division proceeding.

(2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceeding solely because of the law against hearsay.

(3) The Court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).

(4) This section applies despite any other Act or rule of law.

(5) In this section:

**child** means a person under 18.

**representation** includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.

## 215I Court's general duties and powers relating to evidence

(1) In giving effect to the principles in section 215A, the Court may:

(a) give directions or make orders about the matters in relation to which the parties are to present evidence; and

(b) give directions or make orders about who is to give evidence in relation to each remaining issue; and

(c) give directions or make orders about how particular evidence is to be given; and

(d) if the Court considers that expert evidence is required – give directions or make orders about:

(i) the matters in relation to which the expert is to provide evidence; and

(ii) the number of experts who may provide evidence in relation to a matter; and

(iii) how an expert is to provide the expert's evidence; and

(e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceeding.

(2) Without limiting subsection (1) or section 215E, the Court may give directions or make orders:

(a) about the use of written submissions; or

(b) about the length of written submissions; or

(c) limiting the time for oral argument; or

(d) limiting the time for the giving of evidence; or

(e) that particular evidence is to be given orally; or

(f) that particular evidence is to be given by affidavit; or

(g) that evidence in relation to a particular matter not be presented by a party; or

(h) that evidence of a particular kind not be presented by a party; or

(i) limiting, or not allowing, cross-examination of a particular witness; or

(j) limiting the number of witnesses who are to give evidence in the proceeding.

(3) The Court may in a Family Division proceeding:

(a) receive into evidence the transcript of evidence in any other proceedings before:
(i) the Court; or
(ii) another court; or
(iii)a tribunal;
and draw any conclusions of fact from that transcript that it thinks proper; and

(b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii); and

(c) Specific inclusion of vate interviews of children – check whether admissible under the evidence act 2008

(4) The Court must not in, a Family Division proceeding, direct under:

(a) subsection 126B(1) of the *Evidence Act 2008*; or

(b) any other law relating to professional confidential relationship privilege;

that evidence not be adduced if the Court considers that adducing the evidence would not be in the best interests of the subject child.