Part 5: The law and the courts

Chapter 15:

Realigning court processes to meet the needs of children and young people

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Key points

- Where a child is at the centre of a legal process, the law and its institutions should encourage the child's voice to be heard as much as possible. This can be done by formally recognising the child as a party to the protection proceedings in their own right, ensuring they are heard in all proceedings either through the child providing instructions to an appropriately trained and accredited children's lawyer or, where they do not have the capacity to provide instructions, by an appropriately trained and accredited lawyer representing the best interests of the child. However, a child should not be required to attend court unless the child has the capacity to understand the proceedings and expresses a desire to attend court.
- There are immediate opportunities to improve the court experience of children and their families by decentralising the Melbourne Children's Court and by improving existing court facilities to be more child and family friendly.
- The current legal processes under the *Children, Youth and Families Act 2005* should be modified to promote a more collaborative problem solving approach to protection applications with a focus on child-centred agreements. The Inquiry supports in-principle three of the five options raised in the Victorian Law Reform Commission's *Protection Applications In The Children's Court: Final Report 19*. These are Option 1, which proposes new structured and supported processes for achieving appropriate child-centred agreements; Option 2, which proposes a range of legislative reforms with respect to the protection application processes, case docketing and child legal representation; and Option 4, which proposes that the Victorian Government Solicitor's Office represent the Department of Human Services in protection matters.
- The Inquiry has not commented on every recommendation by the Victorian Law Reform Commission but has focused on those reforms the Inquiry considers fundamental to realigning current court processes to meet the needs of children. In some instances, the Inquiry has disagreed with, or proposed a modification to, the approach proposed under the Victorian Law Reform Commission's reform options.
- There are a number of protective orders available under the *Children, Youth and Families Act 2005* that serve different purposes but may lead to overlapping outcomes. Some orders are rarely used under the Act. The current range of orders should be reviewed with a view to removing those orders that are rarely used and consolidating those that may produce overlapping outcomes. The goal should be simpler and more easily accessible statutory child protection laws.
- A specialist Children's Court should be retained in the statutory child protection system. The scope and purpose of its role should be focused on: determining the lawfulness of the State's intervention in the life of a child; the appropriate remedy once the court has determined a child is in need of protection; and the conditions that affect a child's right to contact with their parents and others who are significant in the life of the child. The Court should be established and continued under a separate Children's Court of Victoria Act.
- Conditions relating to the long-term placement of a child with the Department of Human Services or a third party should be determined by the department, with the exception of a child's contact with parents and others who are significant in the life of the child. Such contact should be determined by a court. Any disputes over departmental decisions should be subject to ordinary administrative review processes.

15.1 Introduction

In developing recommendations to reduce the incidence and negative impact of child neglect and abuse in Victoria, the Inquiry was asked to consider the structure, role and functioning of the statutory child protection system and the interaction of the courts with government departments and agencies. The Inquiry was also asked to consider possible changes to the processes of the courts referencing the work of, and options put forward by the Victorian Law Reform Commission (VLRC) in its *Protection Applications In The Children's Court: Final Report 19*. Briefly, the options for reform raised by the VLRC were:

- Option 1 – New structured and supported processes for achieving appropriate child-centred agreements;
- Option 2 – A range of legislative reforms to the *Children, Youth and Families Act 2005* (CYF Act) with respect to the way protection applications were brought before the Children's Court, the way children are represented at court, and the way matters are heard at court;
- Option 3 – The creation of a new Office of Children and Youth Advocate to provide independent representation of children at all stages of the protection process and to convene the new pre-court conference model proposed by the VLRC;
- Option 4 – Reforming the representation model for the Department of Human Services (DHS) to enable the Victorian Government Solicitor's Office (VGSO) to represent the department; and
- Option 5 – Strengthening the current statutory oversight and reporting powers of the Office of the Child Safety Commissioner (OCSC).

Along with the written and verbal submissions made to the Inquiry on the Children's Court of Victoria (Children's Court) and the Victorian Civil and Administrative Tribunal (VCAT), the Inquiry also considered the Victorian Ombudsman's *Own motion investigation into the Department of Human Services Child Protection Program* Report (Ombudsman's 2009 Report).

The Ombudsman's 2009 Report was the catalyst for both the VLRC report and the creation of the Victorian Government's 'Child Protection Proceedings Taskforce' and its 2010 Report (Taskforce report). The Taskforce comprised the Secretaries of the Department of Justice (DOJ) and DHS, the President of the Children's Court, the Child Safety Commissioner and the Managing Director of Victoria Legal Aid (VLA).

The Children's Court of Victoria

While the Inquiry notes the role of the Supreme Court of Victoria and VCAT in relation to statutory child protection processes, the Children's Court was the focus of submissions to, and consultations by the Inquiry. The Inquiry therefore has largely confined its recommendations regarding the courts to the Children's Court. In doing so, the Inquiry consulted with the President and the magistrates of the Children's Court.

There were a range of views expressed to the Inquiry about the operation of the Children's Court by parents, carers, DHS staff, members of the legal profession, and community service organisations (CSOs). However, the Inquiry identified key (and, for the most part, common) issues arising in all these sources of information. These covered jurisdictional, process, environmental, institutional and cultural aspects of the Court, and fall into three categories that form the bases of the Inquiry's consideration of court processes in this chapter:

- Accessibility of the Court for children and young people, and their families (discussed in section 15.3);
- Adversarialism and the court environment (discussed in section 15.4); and
- Structural and statutory reforms in and of the Court (discussed in sections 15.5 and 15.6).

15.2 An overview of the Children's Court, court processes and key orders

Within the Australian legal framework, the High Court of Australia and the state and territory Supreme Courts have a broad, supervisory duty to protect the interests of children (*Secretary, Department of Health and Community Services v. JWB and Another* (1991) 175 CLR 218). In Victoria the CYF Act vests that role in the Children's Court. The Children's Court hears matters concerning children except in the context of family law disputes. These are heard in the Family Court of Australia or in the Federal Magistrates Court of Australia.

The Children's Court is headed by a President who holds the position of a County Court judge and comprises a number of full-time and part-time Magistrates. The Court sits on a full-time basis as the Melbourne Children's Court with a dedicated court building in Melbourne. It also currently sits at the Moorabbin Justice Centre and, on designated days using common court facilities administered by the Magistrates' Court, across regional Victoria.

As noted in Chapter 3, the Family Division of the Children's Court hears applications from DHS under the CYF Act for determining whether a child is in need of protection and for the granting of various protection and other orders related to children. The court processes are initiated through 'protection applications'. Protection applications are made when DHS believes, following a report and investigation, that a child is in need of protection. There are two ways in which a protection application can be made:

- 'By notice' – under section 243 of the CYF Act, where a notice is issued by a Registrar of the Court on application by DHS, to the parent(s) and the child or children requiring them to appear in court for the hearing of the application; and
- 'By safe custody' – under sections 241 and 242 of the CYF Act, where it is inappropriate to follow the notification process, DHS or Victoria Police act to remove the child from his or her parents or caregivers and take the child into 'safe custody'. This can be done with or without a warrant obtained from a magistrate or from a bail justice. A comprehensive description of the various applications and associated processes appears in chapter 3 of the VLRC report and on the Children's Court's website (Children's Court of Victoria 2011, chapter 5) and consideration of proposed reforms to this process is in section 15.5.4.

Figure 15.1 depicts the current process for initiating, negotiating and determining protection applications before the Family Division of the Children's Court.

If the Court has determined, on hearing a protection application, that a child is in need of protection, it can grant a number of protective and related orders under the CYF Act at the request of DHS. The key types of orders are set out in Table 15.1.

The Inquiry considers the protection application processes and the range of statutory orders available under the CYF Act in section 15.5.

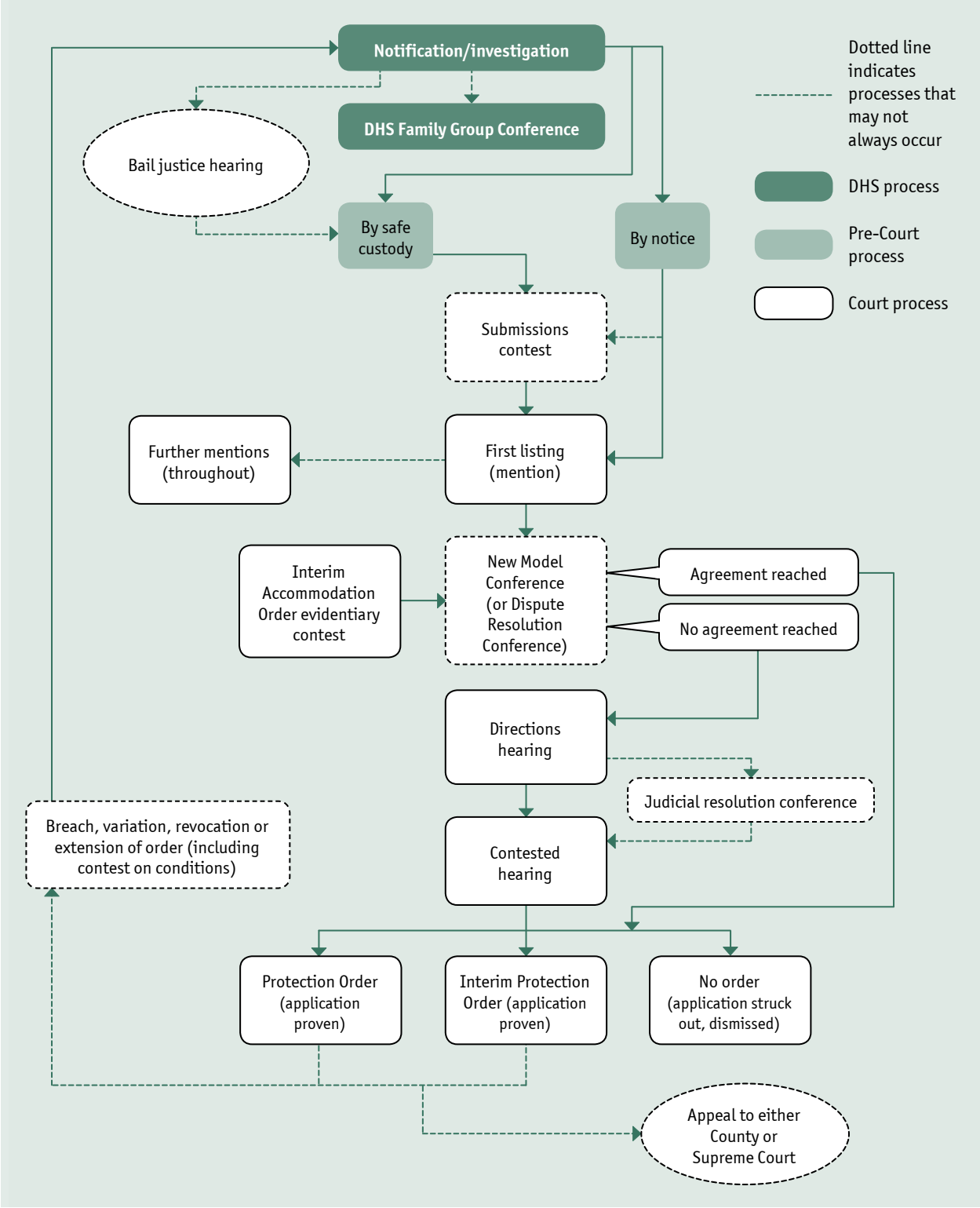
The Children's Court is more than a place where orders are made. It is a forum in which a child's voice can be heard, and where parents and DHS come to state their cases. The Court is also a physical environment in which legal and child protection professionals, magistrates, and children and their families interact.

Not all child protection matters go to court. In 2008-09, for example, less than 3 per cent of primary applications by safe custody and notice lodged in the Children's Court reached the stage of a 'contested hearing' between DHS and the parents before a magistrate (Children's Court submission no. 2, pp. 28-29). Nevertheless, as noted by the OCSC submission:

> ... the prospect of [contested] proceedings and the belief as to how they will be resolved casts a long shadow over child protection practitioners and vulnerable children and families (p. 12).

The current concerns around the processes, the decisions, the environment, and the perceived culture of conflict and disrespect between professionals within the court environment are acknowledged by the Inquiry.

Figure 15.1 Current process for child protection applications to the Family Division of the Children's Court



Source: Inquiry analysis

Table 15.1 *Children, Youth and Families Act 2005*: orders and enforceable agreements

Order type	Summary of order effect
Temporary Assessment Order	To allow DHS to undertake an investigation where it reasonably suspects a child is in need of protection and in circumstances where the parents do not cooperate.
Interim Accommodation Order	To enable a child to be placed with either a parent or another person or organisation on a temporary basis until the main or primary application by DHS is finalised.
Interim Protection Order	To test the appropriateness of a particular course of protective action before a final course of action is determined.
Undertaking	To require a parent or a person with whom a child is living to agree to do or refrain from doing certain things. This may include any condition the Court thinks appropriate. A protection application need not be proven by DHS for an undertaking to be entered into.
Protection Order Undertaking	To require a parent or a person with whom a child is living to agree to do or refrain from doing certain things. This may include any condition the Court thinks appropriate. A protection application must first be proven by DHS.
Supervision Order	To direct that a child remains in the care and custody of his or her parents. This arrangement is supervised by DHS for a certain period of time with any conditions the Court determines.
Custody to Third Party Order	To place a child in the care and custody of a named person that is not DHS or a community service organisation for a limited period of time.
Supervised Custody Order	To transfer a child to the care of a person other than his or her parent for a limited period of time. The ultimate goal of this order is reunification of the child with his or her parents.
Custody to Secretary Order	To place the child into the custody of the Secretary of DHS for a limited period of time. DHS determines where the child should live (either with a community service or foster carer). Reunification with the child's parents is not the ultimate goal of this order.
Guardianship to Secretary Order	To grant the custody and guardianship of the child exclusively to the Secretary of DHS for a limited period of time. The Court has no power to impose conditions on the order as the Secretary effectively exercises the rights of the parents.
Long-term Guardianship to Secretary Order	To grant the custody and guardianship of a child who is 12 years and over exclusively to the Secretary of DHS. This order may last until the child turns 18 years of age. Both the child and the Secretary must consent to the order being made.
Permanent Care Order	To grant the custody or guardianship of the child exclusively to a person or persons named in the order (not being the child's parent or the Secretary of DHS). This order may remain in force until the child turns 18 years of age or is married. It is available where the child's parent, or the child's surviving parent, has not had the care of the child for at least six months (or for periods totalling six months) of the last 12 months.

Source: Inquiry analysis

15.3 Children and the Children's Court: making the Court and the legal system more accessible and more sensitive to the needs of children

15.3.1 A child's right to be heard in child protection proceedings

Applications in the Family Division involve important decisions about children and young people's lives. It is a matter of policy, law and human rights that children have an opportunity to have their voices heard in matters that affect them (*DOHS v. Sanding* [2011] VSC 42 Bell J).

The Inquiry heard from many stakeholders as to how children's voices are best represented in court processes. Some options submitted to the Inquiry focused on broader system reforms to reflect children's needs, such as:

- Developing advisory committees, committees of management, service planning and service reviews, and through the resourcing and supporting of the establishment of family advocacy and self-help groups (Centre for Excellence in Child and Family Welfare, Melbourne Public Sitting);
- Better equipping intake officers and child protection practitioners with interviewing and assessment skills (UnitingCare Gippsland submission, p. 16); and
- Providing cultural training for child advocates (Bendigo and District Aboriginal Co-Operative, Bendigo Public Sitting).

Other submissions suggested options for reform targeted at incorporating the individual child into specific decisions that concern them such as:

- Using 'less adversarial processes' in order to properly hear the child's voice (Connections UnitingCare, pp. 3, 15; OCSC, attachment c.);
- Appointing an independent Children's Court advocate (Youth Affairs Council of Victoria, p. 18); and
- Giving age-appropriate explanations of court decisions to children (Goddard et al. Child Abuse Prevention Research Australia, p. 2).

The child as a party to protection proceedings

In Victoria children do not formally have the status of a party in relation to a child protection matter. In jurisdictions such as Western Australia, South Australia, Queensland, the Northern Territory and the Australian Capital Territory children are a party to protection proceedings and in most of those jurisdictions the status of the child being a party to the proceedings is linked to an entitlement to legal representation (VLRC 2010, p. 317).

The Inquiry endorses the proposal that a child who is the subject of a protection application be a party to the proceeding, regardless of the child's age (VLRC 2010, p. 317). This would require legislative amendment. In reviewing the legislation, consideration should be given to:

- Any negative effect that the usual court processes might have on children (for example, the service of certain documents detailing allegations could cause a child some distress); and
- Any conflicts of interest that may arise through the legal representation of both child and parent as parties to the proceedings.

Recommendation 53 of this chapter addresses this issue.

Representing the child in proceedings and capacity

Across Australian jurisdictions, the way in which children are represented by lawyers in child protection matters depends on whether a child is considered capable of understanding the issues and directing a lawyer as to the child's wishes. This is known as 'capacity to give instructions'. In most Australian jurisdictions and in England and in New Zealand capacity is not defined by reference to age in the legislation. In some states in the United States, the legislation specifies ages from between 10 years and over to 14 years and over (Hughes 2007).

In Victoria a child is represented by a lawyer (generally a VLA-employed or VLA-funded lawyer) if it is considered that the child is old enough to give instructions to the lawyer on their views (s. 525(1) of the CYF Act). This is known as a 'direct representation model'. In 1999 the Victoria Law Foundation, in conjunction with the Children's Court Clinic, developed guidelines for lawyers. These guidelines suggest that a child may be mature enough from the age of seven to give instructions to a lawyer, although every child will be different. Compared with other jurisdictions, this threshold is low and should be raised to be broadly consistent with other jurisdictions.

In New South Wales children under the age of 12 years are presumed to be incapable of giving instructions, unless it is shown otherwise. Children aged 12 or over are presumed capable of giving instructions unless shown otherwise (*Children and Young Persons (Care and Protection) Act 1998*).

The capacity of the child to provide instructions is subject to various factors pertinent to that child including factors such as development of cognitive ability, age, trauma experienced, and the levels of stress or anxiety they may experience when facing a court event and a lack of understanding of court processes (Block et al. 2010, pp. 660-661).

Further 'situational factors' to be highlighted are: the ways in which interviews with children are conducted to elicit their views and understanding of the issues, and addressing anxiety about the impact their accounts might have on familial relationships (Best 2011, pp. 23-24); risk that a child may experience interview fatigue if interviewed too many times by too many people or that their wishes may not represent their best interests (Commission for Children and Young People and Child Guardian 2009, p. 9) and the relational aspect between the child representative such as a lawyer and the child including the lawyer's own perception of the child and their competence (Cashmore & Bussey 1994, pp. 319-336).

As will be discussed below, the Inquiry considers that a child or young person should not be required in court unless they wish to attend, and have the capacity to understand the proceedings. Of course, there may be instances where the child's presence in court is unavoidable. In those cases, in line with the Inquiry's proposed simpler system, and endorsing the recommendation in the VLRC report, the Inquiry considers that the current combination of a direct representation model and a best interest model should continue.

The Inquiry considers, on balance, that the age of seven set out in the Victorian Law Foundation guidelines is too low a threshold as one of the guiding factors in assessing capacity. The Inquiry also considers that the New South Wales threshold of 12 years may unduly preclude, if not disenfranchise, children capable of providing instructions from being heard in proceedings. Acknowledging that there is no precise answer to this issue, the Inquiry considers that a more appropriate threshold of 10 years should be set in the legislation. However, recognising that various factors will determine a child's capacity to give instructions in the particular circumstances of the proceedings, the Inquiry supports the development of updated guidelines to assist decision-makers to assess capacity. Recommendation 54 of this chapter addresses these points. These guidelines should be reviewed periodically by the proposed Commission for Children and Young People to ensure their currency.

Representation of children by lawyers or others

There is no uniformity of rules relating to the representation of children in matters affecting them across Australian jurisdictions. A summary of the various approaches can be found in the VLRC report (VLRC 2010, appendix n, pp. 488-489.) The VLRC report and a number of submissions to the Inquiry commented on the possibility of introducing alternative models for the representation of children by lawyers (Connections UnitingCare submission, p. 12; Ms Tainton, VLA, Geelong Public Sitting; VLA submission no.1, pp. 15-16; VLRC 2010, pp. 325-331).

In South Australia a child must be represented in all child protection matters, unless they make an 'informed and independent decision' not to be represented. Children are represented on a direct representation model where they are mature enough, or otherwise on a best interests model.

In Western Australia the Children's Court may order a separate legal representative to act on the direct instructions of the child if the child is mature enough (determined by the Court on a case-by-case basis) and wishes to give instructions, and in any other case, on the best interests of the child. This approach is endorsed in the VLRC report, which also contains a comprehensive comparison of various Australian and international representation models (VLRC 2010, pp. 325-331).

In New South Wales where the child is not capable of providing instructions, an independent legal representative may be appointed and, in special circumstances, a 'guardian *ad litem*' may also be appointed to provide instructions to the independent legal representative (see box). A guardian *ad litem*, literally 'litigation guardian', is an adult appointed by a court or by law to stand in the shoes of another person who is incapable of representing him or herself as a party to the proceedings and to provide instructions to the lawyer.

While the Inquiry considered the merits of appointing child specialists to instruct on behalf of infants and children incapable of providing instructions, the Inquiry considers on balance that introducing a guardian *ad litem* system would entail an additional and expensive process in the statutory system without a demonstrable benefit over and above the use of properly trained and accredited lawyers. Accordingly, the Inquiry concludes that specialist lawyers should represent children in child protection proceedings either on a direct representation basis, where a child has capacity to give instructions, or on a best interests basis, where a child does not have capacity (see Recommendation 53).

The Inquiry considers that the accreditation and training process for specialist lawyers must involve a substantive component on infant and child development, child abuse and neglect, trauma and child interviewing techniques in order to be able to assess capacity. Training requirements for independent children's lawyers in the statutory child protection system should be aligned with the training required of, and provided to, independent children's lawyers practising in the family law jurisdiction.

Guardian *ad litem* appointments in New South Wales

Section 100 of the New South Wales *Children and Young Persons (Care and Protection Act) 1998* (the Act) enables the NSW Children's Court to appoint a guardian *ad litem* (guardian) for a child or young person when there are special circumstances to warrant the appointment and the child or young person will benefit from the appointment.

A guardian is responsible for instructing (not representing) in legal proceedings for a person, where that person is:

- Incapable of representing him or herself;
- Incapable of giving proper instructions to his or her legal representative; and/or
- Under legal incapacity due to age, mental illness or incapacity, disability or other special circumstances in relation to the conduct of the proceedings.

The NSW Department of Attorney General and Justice (DAGJ) established a panel structure for people eligible for appointment as a guardian in particular proceedings pursuant to an order of a court or tribunal. A panel was developed to provide guardians for Children's Court matters but it is understood this service has expanded to assist people with incapacity in all NSW courts.

It is understood that at present there are approximately 12 appointments under this panel structure mainly based in the Sydney metropolitan area, but the NSW Government is seeking to recruit statewide to provide guardians across the state. Guardians are required to apply to DAGJ for the position and if successful are appointed for three year terms. They are required to undergo a Working with Children Check. For appointments, the desired qualifications or experience are:

- Qualifications in social, health or behavioural sciences or related disciplines, or equivalent experience;
- Mediation, advocacy and decision making skills;
- Ability to communicate effectively with various professionals and family members;
- Basic knowledge of legal proceedings and the legal process; and
- Knowledge of issues affecting children and young people, people with illness, disability or disorder that may affect their decision-making capacity.

The NSW Government has also published a *Guardian Code of Conduct* and a Schedule of Fees depending on the activity required of the guardian.

Children attending court

Although reports, consultations and submissions argued that a child's voice must be incorporated into proceedings in the Children's Court, and that representation is a critical part of this, there was a broad consensus that children should not attend court unless it is absolutely necessary. For example, CREATE Foundation recommended that children under 13 years should not attend Court (CREATE Foundation submission, p. 13). The Law Institute of Victoria noted that children's attendance at court is not always desirable, particularly at the later stages of a case, but that they should be given the option of attending if they wish and as is appropriate to their level of maturity (Law Institute of Victoria submission, p. 7; appendix, p. 6).

Unlike other states and territories, in Victoria, children are required to appear at court if it is a protection application by safe custody, unless they are of 'tender years' (s. 242, CYF Act). If the application is by notice the Secretary of DHS may issue a notice directing the child and the child's parent to produce the child to appear at the application and failure to comply could result in the issue of a warrant to take the child into safe custody (s. 243, CYF Act). The CYF Act allows a child to be served a copy of the protection application if over 12 years of age and the child is not a party to the proceeding.

With the exception of the Northern Territory, across Australia a child who is the subject of child protection proceedings is not required, but has the right to, appear in matters that affect the child. In New South Wales and the Northern Territory, the court may order the child to appear. A summary of the state and territory provisions can be found in the VLRC report (VLRC 2010, appendix n, pp. 488-489).

In the federal family law system children are not present at court for proceedings (although they may attend to visit family members). Under section 100B of the *Family Law Act 1975* (Cwlth), there is no right of appearance for children in a family law proceeding unless a court order is made and the Inquiry notes that the Family Court and Federal Magistrates Court do not generally consider it appropriate for children to be at court (Family Law Courts 2011).

The Children's Court submitted that, although children should be represented in matters before the Court, children should not be required to attend Court unless the child has the capacity to understand the proceedings and has expressed a wish to be at court (Children's Court submission no. 2, p. 41). The Inquiry visited the Children's Court and witnessed the crowded corridors of the Family Division, with parents, workers, lawyers and children and the stressful environment for all concerned.

Consistent with this approach it is expected that VLA-funded lawyers will be made available to take instructions from the child in a suitable location, preferably the location at which they are being cared for, and not at court. While the Inquiry appreciates that in certain circumstances a court meeting is unavoidable the Inquiry considers it inappropriate for any court building to be used, as a matter of practice, as a de facto office by legal practitioners in this jurisdiction. A court is no place for a child or young person.

Recommendation 53

The *Children, Youth and Families Act 2005* should be amended to provide that:

- A child named on a protection application should have the formal status of a party to the proceedings;
- A child who is under 10 years of age is presumed not to be capable of providing instructions unless shown otherwise and a child who is 10 years and over is presumed capable of providing instructions unless shown otherwise;
- A child who is not capable of providing instructions should be represented by an independent lawyer on a 'best interests' basis; and
- Other than in exceptional circumstances, a child is not required to attend at any stage of the court process in protection proceedings unless the child has expressed a wish to be present in court and has the capacity to understand the process.

Recommendation 54

The Victorian Government should develop guidelines to assist the court, tribunal, or the independent children's lawyer to determine whether the child is capable of giving direct instructions and to provide criteria by which the presumption of capacity can be rebutted.

15.3.2 The environment at the Melbourne Children's Court

Facilities in the Family Division have been roundly criticised as being 'cramped, crowded and uncomfortable … not conducive to resolving what are deeply private sensitive and anxiety-provoking issues' (Anglicare Victoria submission, p. 38). Both the VLRC report and the Taskforce report identified a number of issues with the environment of the Children's Court. These comments are acknowledged by the Children's Court (Children's Court submission no. 2, p. 31; Victorian Government 2010a, p. 27; VLRC 2010, pp. 354-357).

These criticisms accord with the Inquiry's observations of the current environment at the Family Division of the Melbourne Children's Court. The environment is simply not conducive to productive outcomes for children and their families. Improving it should be a priority reform for the Victorian Government. The Inquiry considers that an adequately funded court decentralisation program (discussed further in section 15.3.3) should drive reforms on this issue.

The Children's Court advised the Inquiry that it expects to hear DHS Eastern region child protection applications in two designated court rooms at the newly developed William Cooper Justice Centre (Children's Court submission no. 2, p. 32). This should alleviate some of the burden on the over-crowded Melbourne court.

The Inquiry notes that, compared with the Family Division, the Criminal Division has a much lower volume of cases before it and rooms may be available for hearing Family Division matters. The Children's Court advised the Inquiry that where Children's Courts in regional Victoria do not have the infrastructure to be able to offer separate locations to each Division, the Court aims to keep the two Divisions separate through scheduling of different session times or days for hearings. The Children's Court further advised that, in recent times, the Melbourne Court now utilises one Criminal Division courtroom for the hearing of Family Division matters and, in times of high demand, intends to use these rooms for hearing Family Division matters.

The Inquiry understands that there are reasons for the physical division of the Melbourne Court into Family and Criminal divisions, such as the security concerns that are attached to the processes of any criminal court, and as a way of addressing the unfortunate and historical conflation of child protection with criminal law. In consultations, the Children's Court observed that the separation of the divisions protects Family Division parties from the potential violence and hostility of those attending the Criminal Division and that the constant presence of law enforcement in the Criminal Division could be upsetting for already distressed Family Division clients. However, given the volume of matters before the Melbourne Children's Court, the Inquiry notes that the hearing of matters in the Criminal Division, if appropriately managed, may be an appropriate short-term solution to the stretched resources of the Family Division.

15.3.3 Decentralisation of the Family Division of the Children's Court: meeting the needs of children in regional Victoria

The Children's Court sits at a number of locations in metropolitan and regional Victoria. However, the Family Division sits daily only in the Melbourne Children's Court and the Moorabbin Justice Centre. The Melbourne Children's Court deals predominantly with protection matters from the DHS North and West Metropolitan region and Eastern Metropolitan region, while the Moorabbin Court deals with matters from the DHS Southern Metropolitan region (unless there is a security risk or one of the parties is in custody in which case the matter would be heard at the Melbourne Children's Court). Magistrates sit as the Children's Court at other locations on set days as announced in the *Government Gazette*.

Although the Family Division has a presence in metropolitan and regional Victoria, infrequent sittings at the various court locations can mean that matters relating to children in outer metropolitan and regional Victoria must be heard in the Melbourne Children's Court. For example, where a matter has a 'return date' that does not fit in with the Court's sitting dates in the relevant region, or where there is not enough time in the sitting day to hear all matters from that suburb or region. In those cases, parties and, in many cases, children are required to travel into the city to have the matter heard.

Even where a child is not required to attend court, they and their siblings require care when their parents attend. If this care cannot be obtained it is likely that the child will accompany their parents. Reducing this outcome, and making the Children's Court more accessible for families should be a priority reform for the Victorian Government. Supervised play areas and recreational areas for older children should be developed at all courts in which children may be present.

Submissions to the Inquiry discussed the need for the Children's Court to 'decentralise' and sit with greater frequency in suburban and rural courts. The Taskforce report made similar recommendations, with the proviso that regional court facilities be refurbished appropriately to accommodate children and families. That report also noted that the courts could be appropriately serviced by VLA and private lawyers acting for families and children. The Children's Court itself acknowledges that some matters currently heard in the Melbourne court should be heard in regional courts but is particularly concerned that there are no suburban courts with the capacity (or facilities) to hear Family Division cases (Children's Court submission no. 2, p. 32). Table 15.2 shows the proportion of children under child protection orders by the region in which they live.

Table 15.2 Protective orders issued, by location of child, 2009-10

Child location (DHS region)	Location of children: protection orders issued in 2009–10 (%)
Barwon-South Western	11%
Eastern Metropolitan	12%
Gippsland	9%
Grampians	7%
Hume	9%
Loddon Mallee	13%
North and West Metropolitan	24%
Southern Metropolitan	15%
Interstate/overseas	Less than 1%
Total	**100%**

Source: Information provided by DHS

Decentralisation of the Family Division of the Court to a higher-volume metropolitan location would ease the pressure on the Melbourne Children's Court. The Victorian Government should provide the appropriate level of funding to the Children's Court to enable it to commence its decentralisation process in the immediate to medium term and to recruit and/or relocate specialist magistrates from the Melbourne court to these areas. The process should be mindful of the special needs of clients of the Family Division. For example, care should be taken to limit the cross-over of Family Division matters with criminal matters in general courts (where specialist Family Division facilities are not being established), and counselling support should be available.

The Inquiry supports recommendations 10 and 11 of the Child Proceedings Taskforce, which note that DOJ should, in improving the physical environment of the Children's Court, consider the amenity of courts for children and other court users and be guided by the principle that the Children's Court should operate on a decentralised model. The Inquiry is not proposing the establishment of new dedicated Children's Court facilities for each DHS region. Based on demand, decentralisation would mean scheduling more sitting days for the Family Division in locations outside the Melbourne CBD for those DHS metropolitan and regional areas with high demand. It would also mean adapting, where possible, existing Magistrate's Court facilities or other customised facilities to enable the Family Division to sit as a separate court.

Recommendation 55

The Children's Court should be resourced to decentralise the Family Division by offering more sitting days at Magistrates' Courts or in other customised facilities in those Department of Human Services regions with high demand. Existing court facilities should be adapted as appropriate to meet the needs of children and their families.

15.3.4 Decision making processes by the Children's Court

Submissions on decision making by tribunals

Some submissions argued that the Children's Court as a body is inherently inflexible, and that a new model of child protection proceedings is necessary to properly meet the needs of children and young people involved in the statutory protection system (Anglicare Victoria, pp. 37-38; The Salvation Army, p. 24). In its submission to the VLRC, the Children's Court argued that a tribunal structure is inappropriate for the decisions made in the Children's Court and reiterated those concerns to the Inquiry (Children's Court submission no. 2, appendix 1). These concerns are discussed later in this section.

The Centre for Excellence in Child and Family Welfare proposed a combination of 'Local Area Children and Young Persons Tribunals'. The tribunals would consist of panel members appointed by the Attorney-General to deal with orders not relating to custody or guardianship. Higher magnitude orders would remain with the Children's Court (Centre for Excellence in Child and Family Welfare submission, p. 29). A variation on this model was proposed by Connections UnitingCare, whereby the local area panel would make recommendations about the appropriate form of intervention, and submit this recommendation to the court for consideration (Connections UnitingCare submission, p. 12).

The OCSC recommended the establishment of a central 'Children's Safety and Wellbeing Tribunal'. The tribunal would be independent of the VCAT and would oversee eight regional tribunals supported by DOJ infrastructure. It would replace the Children's Court and would comprise a registrar and a panel of three members from a pool of members with diverse skill-sets (OCSC submission, attachment 2).

The Scottish panel model

In Scotland a children's hearing system convenes specialist volunteers on a case-by-case basis to decide protection and juvenile justice applications. This model was advocated by a number of community welfare bodies. A modified Scottish model was proposed by the joint submission by Anglicare Victoria, Berry Street, MacKillop Family Services, The Salvation Army, Victorian Aboriginal Child Care Agency (VACCA) and the Centre for Excellence in Child and Family Welfare (Joint CSO submission), under which a standing panel with a mix of full-time specialist panel members would be established, supplemented by volunteers on a case-by-case basis (Joint CSO submission, pp. 53-54). Others expressed support for a multidisciplinary expert panel-based or tribunal model instead of a court (CatholicCare submission, pp. 20-21; VACCA submission, p. 7). The purpose of a multidisciplinary model is to promote a non-legalistic child welfare solutions-focused hearing system when determining protection applications.

In its 2011 Interim Report, the United Kingdom's Family Justice Review discussed the potential for expanding the Scottish model of panels to child protection matters in England. The review noted that, while a combination of court and panel hearings may lead to quicker and more flexible decisions, the cost of such a model has been felt in the lack of consistency in panel decision making. The review also found that, because panels were required to review supervision requirements for care arrangements, children may have been experiencing a heightened sense of impermanence to their care arrangements. The review concluded that introducing a panel system in England and Wales would not offer sufficient advantage over a court-led process, and rejected suggestions for a tribunal system on similar grounds (Family Justice Review 2011, pp. 116-117).

Pursuant to its terms of reference, the VLRC considered the Scottish model for resolving statutory child protection disputes. The VLRC did not, however, make any recommendations in relation to whether the model should be adapted for use in the Victorian statutory child protection process. The Inquiry understands that this is linked to the VLRC's view that non-judicial determination models are inappropriate for the resolution of child protection disputes due to constitutional complexities, common law principles, and the nature of the rights of the parties involved (VLRC 2010, pp. 208-212). As will be discussed further in this section, the Inquiry agrees with this assessment.

Tribunal models in the Victorian statutory child protection system

The Inquiry also received submissions commenting that judicial, rather than non-judicial, member oversight was an appropriate or necessary safeguard in balancing and determining children's and families' rights (Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLSV), p. 9; Mr Fanning, p. 4; Victorian Forensic Paediatric Medical Service, p. 19; VLA submission no. 1, p. 4).

In principle, the Inquiry found no legal impediment to the statutory creation of a tribunal-based model. Victoria already uses tribunals such as VCAT to determine legal rights. In the Commonwealth sphere, there are tribunals such as the Administrative Appeals Tribunal and Fair Work Australia. These tribunals may comprise both judicial and non-judicial members that interpret and apply legislation and make binding, yet reviewable, decisions.

While VCAT's flexibility makes it an attractive option for dispute resolution, the Inquiry finds that a tribunal model is not the appropriate legal model for the determination of the lawfulness of State intervention in child protection matters and determining fundamental rights such as the alteration of a child's relationship with his or her parents. However, VCAT will have a greater role in reviewing the administrative decisions of DHS if the Inquiry's proposal to realign the role of the Children's Court in the statutory child protection system is implemented (see Finding 14 and Recommendation 64).

Child protection matters are not simple disputes between private parties. They involve a fundamental State intervention in family relationships. In Australia, the role of the courts is to provide independent oversight of administrative or executive decision making. This is known as the 'separation of powers' between the executive and the judiciary. It is pertinent to observe that currently in all Australian jurisdictions policy makers have determined through legislation that a specialist court should determine protection applications in the statutory child protection framework.

Another consideration is how a tribunal would interact under the legislative arrangements for recognising orders under the Commonwealth *Family Law Act 1975* and family violence legislation. As noted in the VLRC report, a further and significant difficulty with a tribunal deciding child protection matters is that VCAT is not a 'court' under Chapter III of the Australian Constitution and is therefore incapable of exercising Commonwealth powers such as those under the Family Law Act. The Children's Court has also flagged the difficulties arising when a tribunal has jurisdiction to issue protection orders under the CYF Act, but the courts have jurisdiction to make orders under the Family Law Act, the *Family Violence Protection Act 2008*, or the *Personal Safety Intervention Orders Act 2010*. The introduction of a tribunal model would have negative ramifications for an already fractured system of federal and state laws.

The Victorian Civil and Administrative Tribunal

VCAT was established under the *Victorian Civil and Administrative Tribunals Act 1998*.

It is headed by a Supreme Court judge and Vice Presidents who are County Court judges. The tribunal also consists of full-time, part-time and sessional non-judicial members with a range of backgrounds and expertise. All members are Governor-in-Council appointees for five-year terms.

VCAT sits in three divisions: the Administrative Division; the Civil Division; and the Human Rights Division. Within each division are specialist subject lists ranging from health and privacy, to mental health, to residential tenancies to planning and environment and guardianship. In 2010-11, 86,890 cases were lodged with VCAT of which 86,015 were finalised and VCAT used 95 hearing venues (VCAT 2011, p. 5).

VCAT is based in Melbourne but conducts hearings around Victoria using suburban and regional Magistrates' Court buildings, the Neighbourhood Justice Centre (NJC) in Collingwood, community centres and hospitals (particularly in the Guardianship and Mental Health lists if participants were unable to attend a VCAT venue). VCAT notes that it has sought to improve access by trialling twilight hearings to 7.00 pm at the NJC, piloting Saturday morning hearings in Broadmeadows and increasing service delivery by permanently locating staff at regional locations such as Bendigo, Geelong, Mildura and Moe with the aim of expanding to Ballarat, Wangaratta and Warrnambool (VCAT 2011, pp. 12-13).

VCAT currently plays a relatively small role within the statutory child protection system. It can review case plans prepared by DHS and review decision relating to information recorded on the DHS central register under sections 331 and 333 of the CYF Act when internal review processes have not resolved the dispute. These matters are considered within the General List of the Administrative Division. In 2009 VCAT reviewed 12 case planning decisions by DHS (VLRC 2010, p. 103) and in the 2010-11 financial year, nine applications were lodged with the Tribunal (Inquiry VCAT consultation).

Finding 14

On balance, the Inquiry finds that a specialist Children's Court should continue to have the primary role in determining the lawfulness of a proposed intervention by the State in a child's life. This requires a careful weighing of the rights and interests of the children, as viewed by the State, against the rights and interests of their parents or caregivers. The Inquiry considers that a judicial officer is best qualified to make this determination. However, this does not mean the court should be involved in administering orders or case-managing care plans.

15.4 Adversarial character of statutory child protection legal processes

'Adversarialism' means different things to different people (Victorian Government 2010a, p. 19). This means that the perception that the Children's Court is 'overly adversarial' can be difficult to comprehensively address. At its simplest, 'adversarialism' refers to the traditional common law method of presenting a case in court rooms that requires parties, not the judge, to define the issues in dispute, investigate their alleged facts and test each other's evidence through arguments put to the court. Adversarial principles are incorporated into Australian law through tradition, rules of evidence, and rules of civil and criminal procedure.

The adversarial system can be contrasted with the European inquisitorial system, where the judge or arbiter is responsible for advancing the matter. However, both adversarial and inquisitorial systems 'reflect particular historical developments rather than ... strict practices', and 'no country now operates strictly within the prototype models of an adversarial or inquisitorial system' (Australian Law Reform Commission (ALRC) 2000, p. 101). Furthermore, adversarial processes do not prevent the judge from managing a court and the fact-finding process. As noted in a paper presented at a conference hosted by the Australian Institute of Judicial Administration in May 2010:

> In a well-designed justice system the question should not be whether the judge should manage the fact finding process, but rather, when and how? (Cannon 2010, p. 10).

General criticisms of the adversarial system are that it does not account for resource imbalances that may be present between the parties, that it encourages lengthy trials, and that it concentrates on 'proof' rather than 'truth' (King et al. 2009, p. 3).

15.4.1 Adversarialism and the Children's Court

Almost all submissions commenting on the Children's Court considered whether the current adversarial model of litigation is appropriate in statutory child protection matters. Many of the submissions, including that of the Children's Court submission no. 1 (p. 47), called for an expanded use of alternative styles of litigation, such as the 'Less Adversarial Trial' (LAT) Family Court model.

A submission from the Centres Against Sexual Assault (CASA) argued that the effect of contest-driven dispute was that evidence and recommendations of child protection practitioners are discredited by lawyers for the parents, and that informed advice as to the best interests of children can be discarded (CASA Forum, p. 11). On the other hand, some submissions doubted whether an adversarial approach to a dispute is necessarily at odds with the best interests of the child (AFVPLSV, p. 5).

As mentioned above, adversarial processes are incorporated into Australian law through tradition, and rules of evidence and procedure. In relation to the Children's Court, section 215(1)(d) of the CYF Act states that the Family Division 'may inform itself on a matter in such manner as it thinks fit despite any rules of evidence to the contrary'. The VLRC notes that the Children's Court has taken a narrow interpretation of this provision, and that this narrow interpretation has prevented the exercise of more inquisitorial approaches to the admission of evidence by magistrates (VLRC 2010, pp. 90-91). The Court did not comment on this matter in its submissions to the Inquiry.

The Inquiry considers that, ultimately, a contests-driven culture will remain unless the judicial officer in charge of the hearing sets the expectations of how parties and lawyers should conduct their cases.

'Docketing' of cases

One method of encouraging a more inquisitorial approach to the admission of evidence and the management of matters through the court process is the use of a 'docket' system. A docket system simply assigns a matter to one judicial officer who is then responsible for monitoring the matter through the system. In the Family Division, in simple terms, this would mean 'one child, one magistrate'.

The benefit of a docketed court system is that magistrates become familiar with a child's individual circumstance. This may increase consistency in decision making relating to a child, and reduce the potential for issues to be re-litigated. The Inquiry also notes that a docketing system would assist in addressing concerns raised in submissions and

consultations going to the amount of time child protection practitioners and community service officers spend in preparing for and attending court. For example, a submission from community service provider Ozchild noted that community service workers sometimes spend long periods at the court waiting to be called as witnesses, which has a significant impact on workload management and resources (Inquiry DHS consultations; OzChild submission, p. 18; Victorian Alcohol and Drug Association submission, p. 12). The possibility of introducing a docket system was supported by the VLRC, although the VLRC noted that the Court would require support in piloting or otherwise introducing the system, and may be difficult in cases requiring emergency or short-term orders (VLRC 2010, p. 307-11).

In its submission to the Inquiry, the Children's Court considered that a form of docketing is being developed for matters involving Aboriginal families, and matters involving sexual abuse allegations. While matters would not be assigned to individual magistrates, matters would be assigned to specialist lists, which would allow for greater consistency and case management in matters of this kind. Specialist lists are a way by which courts can organise the various cases that come before them grouped around the specific subject matter of the case. These lists allow court resources (including judges or magistrates, court registry staff and other support staff) to be better organised and practised in managing the court process for those cases from their commencement at court to completion of hearing. The proposed creation of specialist 'Koori' and 'Sexual Abuse' case lists in the Family Division are discussed in greater detail in section 15.5.3. The Children's Court generally supported the introduction of a docketing system to the Family Division but considered that the introduction of such a system would need to be properly investigated and resourced, and particular attention given to how this would operate in regional Victoria (Children's Court submission no. 2, pp. 46-47).

Recommendation 56

The Children's Court should develop a case docketing system that will assign one judicial officer to oversee one protection matter from commencement to end. In order to evaluate the effectiveness of the system, the system should be piloted at an appropriate court location. The Department of Justice should support the Children's Court to establish the system.

The Less Adversarial Trial model

A much-discussed alternative to the contests-driven culture for child protection applications is the LAT model of the Family Court. Under Division 12A of the Family Law Act, judges of the Family Court use inquisitorial methods to focus on the issues and on arrangements that are in the best interests of the child. This is set out in Principles 1 and 2 of Division 12A (section 69ZN of the Family Law Act):

- Principle 1 – The court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.
- Principle 2 – The court is to actively direct, control and manage the conduct of the proceedings.

Section 69ZX of the Family Law Act sets out the Children's Court's general duties and powers relating to evidence, such as giving directions and making orders about the matters in relation to which the parties may give evidence and how such evidence should be given.

The LAT model allows parties to speak directly to the judge and requires the judge (rather than the lawyers) to determine how the trial will run, for example, by limiting evidence to what the judge thinks is relevant to the issues in dispute (Family Court 2011, p. 2). Evaluations of the model in the Family Court have shown an increase in satisfaction with outcomes, particularly a greater contentment with the process and better emotional stability for children after court (Family Court of Australia 2011). The Inquiry also notes that both the Children's Court and the Law Institute of Victoria support the adoption of such a model (Children's Court submission no. 1, p. 47; Law Institute of Victoria submission, attachment 1, p. 9).

The VLRC found that the conduct of matters under Division 12A of the Family Law Act is an excellent model. The Inquiry agrees and considers that the model should be adapted for inclusion in the CYF Act. The Inquiry endorses the VLRC report's recommendations regarding the LAT model of the Family Court (VLRC 2010, pp. 314-317). The Inquiry notes that the VLRC is of the view that a docketing system should support such a case management approach.

The Inquiry recommends that the Children's Court be empowered, through legislative amendment, to conduct matters in a manner similar to the way in which the Family Court of Australia conducts matters under Division 12A of the Family Law Act. This is a medium-term recommendation that would be assisted by the evaluation of a pilot docketing system in appropriate court locations across Victoria.

Recommendation 57

The Children's Court should be empowered under the *Children, Youth and Families Act 2005* to conduct hearings similar to the Less Adversarial Trial model used by the Family Court under Division 12A of the Commonwealth *Family Law Act 1975*.

15.4.2 Court culture

Submissions to the Inquiry and Panel consultations reinforced the findings of previous reports that the Children's Court environment, particularly in the Melbourne Children's Court, is stressful for children and young people, their families, their carers, child protection practitioners, lawyers, and other professionals involved in the statutory child protection process.

The Inquiry makes recommendations in this chapter that aim to reduce children and young people's exposure to the Children's Court more generally, and at properly directing matters away from the currently chaotic corridors of the Melbourne Children's Court. In relation to the tension between child protection practitioners, lawyers and the Court, the Inquiry notes that stakeholders acknowledge that the culture between DHS, magistrates, private practitioners and VLA could be more collaborative, informed and respectful (Children's Court submission no. 1, p. 45; Children's Court submission no. 2, p. 32; Inquiry DHS Metro Workforce forums and consultations; Inquiry consultation with Law Institute of Victoria; Victorian Government 2010a, p. 26; VLA submission no. 1, pp. 5-6; VLA submission no. 2, p. 2; VLRC 2010, pp. 233-235; Victorian Ombudsman 2009, pp. 56-59).

The adversarial process itself is notoriously exacting on the already stretched resources of child protection practitioners. As one submission put it, 'few people speak well when under attack' (Humphreys & Campbell submission (b), p. 3). The Inquiry considered submissions that argued that child protection practitioners should be, but are not, treated as expert witnesses in the current adversarial process.

The Inquiry, in consultations with child protection practitioners, received almost universal input that at the Children's Court at Melbourne, but not elsewhere, they were not treated with respect by some magistrates, and often not by the legal profession. The Humphreys and Campbell submission (b) (p. 3) reflected this input, noting a 'court culture where denigration of child protection practitioners is part of the process'. The Children's Court, and the legal practitioners in it, do not agree with this input.

Child protection practitioners as witnesses

There are two elements to the role of child protection practitioners as witnesses in Children's Court proceedings. First, witnesses should always be treated with proper courtesy in giving evidence. There is no place in a court, or in legal conference, for bullying, sarcasm or denigration. Second, is the legal categorisation of a witness as an expert. As to this, the foundational principle is that a matter is appropriate for expert evidence if it is relevant, is beyond the competence of ordinary people, and requires special skill, knowledge or training. A witness is received as an expert if they are so qualified. Child protection practitioners, as a category, fulfil these criteria. Identifying and assessing the risk to a child's safety in the child's living arrangements is a key specialist task in child protection work. This involves collecting data, assessing it, and forming proper judgments about how the capacity of the parents or householders and the issues in the child's environment interact and will interact, and in turn how they are impacting, and will impact, upon the child's safety. This specialist skill is acquired through academic study and professional training, internal specific training in risk assessment, professional supervision and on-the-job experience. This is properly regarded by the law as expertise.

There are two further considerations.

Under section 215(1)(d) of the CYF Act the Family Division of the Children's Court 'may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary'. It is speculative whether this facilitative provision has had an unintended consequence of blurring the perception of child protection practitioners as the expert witnesses that in law they are. Second, child protection practitioners need to understand that testing, properly conducted and judicially controlled, of their evidence is both appropriate and necessary. In this respect, it is essential that child protection practitioners receive relevant and sufficient training in court process, both to assist the court and in fairness to themselves. The sufficiency of such training is important and should be a component of the training services provided by the new training body discussed in Chapter 16. Importantly, the completion of an accredited training course as contemplated in Chapter 16 should operate to qualify child protection practitioners as expert witnesses in the assessment of the current and future safety of a child in their living arrangements. The Inquiry also notes and supports current initiatives in this regard, including the Victorian Child Protection Legal Conference conducted in Melbourne in June 2011 under the auspices of VLA, DOJ and DHS.

The Inquiry considers that the Children's Court has a responsibility to ensure witnesses experience the court process in a way that minimises the stress that even experienced child protection professionals have reported that they feel in court. The Inquiry acknowledges the Children's Court submission no. 2 (p. 9) that the experience of child protection practitioners is also influenced by a range of factors, including their work environment and a lack of training in court processes. Nevertheless, the Children's Court has a responsibility to all witnesses to ensure that they understand court processes. The Inquiry notes that this responsibility extends to conference convenors and will be increasingly important with the adoption of less adversarial trial reforms.

Professional culture at court

Some submissions saw the experience of child protection practitioners as at least partly the result of a disjunction between the Court and the DHS approach to reunification and parental access. The Court was typically characterised as promoting higher levels of parental access than DHS. Proposed action to address this issue was the mentoring of regional magistrates (Foster Care Association of Victoria submission, p. 15) and training of magistrates in the impact of trauma, problematic attachment and cumulative harm on child development (OzChild submission, p. 19).Reforms aimed at improving this culture canvassed by submissions, consultations and previous reports include:

- Reporting 'bad behaviour outside the courtroom' to the judicial officer handling the case, to the President of the Children's Court, and or to the relevant professional bodies, such as the Law Institute of Victoria, the Legal Services Commissioner or the Bar Council (Children's Court submission no. 2, p. 32). In consultations, the Inquiry heard that such complaints are rarely received by the appropriate body or office;
- Funding the Children's Court to appoint a director who, along with other Court staff, will manage behaviour in the corridors of the Court (VLRC 2010, p. 361);
- Increased and formalised collaborative training to foster professional understanding (Victorian Government 2010a, p. 26; VLRC 2010, p. 235);
- The development of a memorandum of understanding between the VLA and DHS (Victorian Government 2010a, p. 12). The Inquiry understands that the development is underway, and that a code of conduct for practitioners is also in development (Inquiry DOJ consultation);
- Developing a process for accreditation of lawyers working in the Children's Court (Children's Court submission no. 2, p. 32). The Inquiry notes that this accreditation program is currently in development and supports this positive step taken by the government and the Law Institute of Victoria;
- A revised fee structure for private practitioners to provide incentives for lawyers to see children away from court (Victorian Government 2010a, p. 22);
- The introduction of accredited training of conference convenors (VLRC 2010, pp. 218-219);
- The expansion of the panel of lawyers practising at the Melbourne Children's Court (Children's Court submission no. 2, p. 32); and
- Increased training of child protection practitioners in court preparation, privacy and Appropriate or Alternative Dispute Resolution (ADR) processes (Victorian Government 2010a, pp. 33-35). Chapter 16 sets out the Inquiry's findings in relation to strengthening workforce capability.

Through its consultation with the OCSC and the Inquiry's Reference Group, the Inquiry heard that the first step required to establish a more collaborative and respectful culture is the development of a common language between professionals involved in child practice, including child protection practitioners and lawyers (Eastern Region Family Violence Partnership submission, p. 1).

The VLA expressed the view that joint training between lawyers and child protection practitioners should be mandated by statute (VLA submission no.1, cover letter to Inquiry). The Inquiry does not believe a statutory response is warranted as joint training programs should be capable of effective implementation by government without requiring prior legislative authority. However, the Inquiry notes as part of the ongoing work to foster collaboration and a common understanding between child protection practitioners and lawyers, the efforts by DHS, VLA and DOJ to promote joint training conferences such as the Child Protection Legal Conference held on 16 and 17 June 2011. The Inquiry considers that these conferences could be held more regularly with a view to implementing a more structured and accredited professional development program for both professions and could be part of the responsibilities of the new sector-wide training body proposed in Chapter 16.

The Inquiry endorses the measures outlined above and considers that specialisation training for legal professionals should be replicated with appropriate adaptions for magistrates sitting in the various locations of the Children's Court. Such training could usefully be developed with the courts, the Judicial College of Victoria and with the assistance of experienced professionals including from the Victorian Bar, the Law Institute of Victoria, DHS Principal Practitioners and the new statutory clinical board proposed in Chapter 18 and is addressed by Recommendation 58.

The issue of monitoring and the conduct of legal professionals was raised in the Melbourne Public Sitting of 28 June 2011. The Inquiry notes that there are three categories of legal professionals who work for or are associated with VLA in Children's Court matters: duty lawyers, in-house lawyers and private practitioners, who sit on a Children's Court practitioner panel that is convened under section 29A of the *Legal Aid Act 1978*.

In a submission to the Inquiry, VLA noted that it is not possible to exercise the same degree of control over the conduct of the 24 private legal practitioners who comprise the VLA's Children's Court panel as it does over the duty lawyers and in-house VLA lawyers (Ms Judy Small, VLA, Melbourne Public Sitting). However, the VLA submission also noted that a code-of-conduct (following a recommendation in the Taskforce report) being developed for all practitioners in the Children's Court was close to being settled and proposed for implementation in 2012.

Although private practitioners may be removed from panels (section 30(10) *Legal Aid Act 1978*), according to VLA this has rarely occurred as legal professionals are reluctant to complain about their colleagues, and reports of poor behaviour are often too vague to proceed with disciplinary action (Ms Judy Small, VLA, Melbourne Public Sitting). The Inquiry appreciates that lawyers may be hesitant to report conduct that may be fuelled by overwhelming caseloads and stressful environments. Nevertheless, lawyers are under professional obligations to maintain an appropriate standard of conduct under the *Legal Profession Act 2004* and the *Professional Conduct and Practice Rules 2005*. Legal professionals and stakeholders in the Children's Court are aware that clients within the Court are among the most vulnerable and disadvantaged members of the community and may be unlikely or unable to pursue complaints regarding conduct that falls short of acceptable professional levels. Complaints in relation to conduct that exacerbates the tensions of an already stressful environment can, and should, be made to the Victorian Legal Services Commissioner and, where relevant, to VLA.

In consultations, the Inquiry also heard that the workloads of VLA private practitioners are excessive. This is due in part to the fact that the pool of professionals on the Children's Court Panel is quite small and that the current levels of remuneration for practitioners in this jurisdiction are low - both factors impact on the quality of service (Ms Judy Small, VLA, Melbourne Public Sitting). The Inquiry also notes that the family law jurisdiction is often viewed as a more attractive area of practice for lawyers compared with the Children's Court jurisdiction. The Inquiry draws attention to the desirability of increasing the pool of practitioners sitting on the VLA Children's Court Panel, but notes that this will be difficult unless the current, relatively poor levels of remuneration offered to professionals operating in the Court is addressed.

Matter for attention 13

It is desirable that there be an increase in the current pool of legal practitioners sitting on the Victoria Legal Aid Children's Court Panel while consideration is given to improving the current levels of remuneration offered to lawyers practising in the Children's Court jurisdiction.

Recommendation 58

Appropriate training in infant and child development, child abuse and neglect, trauma, and child interviewing techniques should be developed and provided to lawyers practising in the Children's Court jurisdiction and in the Victorian Civil and Administrative Tribunal, having regard to the training offered to independent children's lawyers in the family law jurisdiction. This training should be a prerequisite for any lawyer seeking to represent a child on a direct representation or best-interests basis in proceedings before the Children's Court and should be an accredited course.

Appropriate education should be provided to judicial officers exercising the jurisdiction of the Children's Court and members exercising the jurisdiction of the Victorian Civil and Administrative Tribunal. The Victorian Government should consult with the relevant professional organisations and also seek the assistance of the Judicial College of Victoria in developing an appropriate professional education program.

15.4.3 Legal representation of the Department of Human Services in child protection proceedings

The VLRC report noted concerns about the ability of the Court Advocacy Unit (CAU) of DHS to effectively represent DHS in child protection proceedings. Based on the VLRC's consultations the report noted the following concerns:

- A conflicted role for DHS as it was both assisting children and families and then also initiating proceedings and seeking intervention orders (effectively switching from collaborative to adversarial);
- The current role of child protection practitioners included performing the type of work a solicitor would perform such as filing court documents and drafting affidavits; and
- The sometimes poor relationship between CAU lawyers and child protection practitioners particularly when CAU's legal advice was disregarded or CAU lawyers were forced to make untenable arguments to court (VLRC 2010, pp. 388-389).

As part of its reform options, the VLRC report proposed that the VGSO represent DHS and conduct child protection cases on behalf of the State in the Children's Court (VLRC 2010, option 4, p. 398). The benefits of the using the VGSO as identified by the VLRC included:The VGSO's independence from the department;

- VGSO lawyers' litigation and case management experience; and
- The respect for the VGSO among the judiciary and members of the profession (VLRC 2010, p. 394).

The VLRC qualified this recommendation by considering the possible use of a 'mixed representation' model if service capacity was compromised. The VLRC proposed that DHS could be represented in the metropolitan areas by the VGSO, by private law firms contracted through the Government Legal Services Panel (a panel of 20 law firms that are contracted to provide a range of services to government departments in various specialities of law), and by members of the CAU.

The VLRC also noted the mixed representation model would need to take account of the different representation practices in metropolitan and regional areas given VGSO and panel law firms only service DHS metropolitan areas and DHS consider continuing arrangements with private solicitor firms in the regional areas or consider whether VGSO solicitors should be posted to regional areas (VLRC 2010, pp. 398-399).

The Inquiry has heard that there are difficulties with the current arrangement for DHS representation in some regional areas. For instance, a complaint raised by VLA was that in the Wimmera region child protection practitioners either had to represent the department themselves or use local private practitioners which in turn reduced the pool of available lawyers to represent children or families (VLA, Horsham Public Sitting). The Inquiry has also received submissions in support of VLRC's Option 4 (Children's Court no. 1, pp. 5-6; Federation of Community Legal Centres (Victoria), pp. 20-21; Youthlaw, p. 5).

DHS advised the Inquiry that it has recently restructured its legal services section. The CAU has been re-titled as the Child Protection Litigation Office (the CPL Office) to better reflect the nature of the case management and representation that is undertaken by that new unit and its central role within the DHS child protection program. Importantly, the CPL Office has also entered into arrangements for solicitors from the VGSO to be seconded to the department.

The Inquiry notes that while this arrangement should help ease the current burden on child protection practitioners appearing in regional courts and cover any shortfall in the capacity of the VGSO to represent DHS in all protection proceedings across the state in the immediate term, this arrangement does not fundamentally resolve the conflict of interest issue that has been raised by stakeholders.

In view of the steps that have already been taken by DHS and the VGSO to train and use VGSO solicitor advocates in child protection proceedings, the Inquiry recommends that, in the medium to long term, the VGSO represent DHS in all child protection proceedings before the Children's Court and at VCAT across the state. VGSO solicitors should also brief barristers engaged to represent DHS in contested hearings. A clear delineation between DHS staff and their legal representatives in contested proceedings is considered by the Inquiry to be a long-term benefit with respect to strengthening relationships between families and child protection practitioners, the more efficient conduct of a matter at court and to improving the relationships between the legal practitioners who practise in this jurisdiction.

However, the Inquiry considers there to be an ongoing role for in-house lawyers from the CPL Office. The in-house lawyers can play a valuable role in representing DHS at the new pre-court Child Safety Conferences canvassed in section 15.5.1 and in other pre-court negotiations where appropriate. In light of these proposed changes, the Inquiry considers the office should be renamed.

The Department of Human Services Child Protection Litigation Office

This recently created office is led by a newly appointed Assistant Director, Litigation who reports to the Director of DHS Legal Services. It is understood at present that there are 33 staff consisting of 25 lawyers, four paralegals and four administrative staff.

The structure of the CPL Office has been organised into four units: East, South, North, and West, each of which is responsible for the child protection work flowing from the corresponding regional offices of DHS. A unit is overseen by a unit manager to ensure files are properly allocated and to oversee any 'inactive files'. The members of each unit share responsibility for all the cases for their designated region, cover all court appearances, take urgent calls and do whatever is required to work in partnership with their region.

It is understood that senior lawyers in each of the units visit their designated regions to advise and support and, where possible, train groups of child protection practitioners in the regional offices. This allows legal issues to be discussed and addressed from the earliest point of statutory intervention, and enhances the quality of preparation of the matters that proceed to court. DHS advises that it anticipates a reduction in the number of instances where matters that have been listed before the court need to be withdrawn or rescheduled for want of more thorough legal preparation. DHS advises that there has been strong support from child protection practitioners and the staff of the CPL Office for the move to a regionally organised structure.

A rotating pool of four or five solicitor advocates seconded from the VGSO support the DHS solicitors. The primary role of the VGSO advocates is to handle many of the urgent safe custody applications and mentions that would otherwise have been briefed to barristers. The VGSO advocates are also allocated matters from each of the regions. DHS advises that as a result the CPL Office is no longer as reliant on briefing barristers for more straightforward applications and for urgent applications by safe custody.

The retainer arrangement with the VGSO is being reviewed on an annual basis. DHS advises that the intention is to continue this arrangement pending the next review in March 2012.

Recommendation 59

The Victorian Government Solicitor's Office should represent the Department of Human Services in all child protection proceedings in the Melbourne Children's Court and other metropolitan and regional Children's Court sittings and at the Victorian Civil and Administrative Tribunal. Department of Human Services lawyers should represent the department at the pre-court conferencing stage.

15.5 Structural and process reforms for protection applications and the Children's Court

The impact of legal proceedings on child protection practitioners has been made clear to the Inquiry as discussed in section 15.4.2. The broader impact of current court and legal processes under the CYF Act on the capacity of DHS to manage caseloads has also been highlighted in previous reviews of the statutory child protection system. For instance, the Taskforce report observed that protection applications by safe custody were likely to require more mentions at court than protection applications by notice and that safe custody applications were increasing as a proportion of overall applications. Cases were therefore taking longer to resolve and this conclusion was supported by analysis from the Boston Consulting Group (BCG). The BCG analysis indicated that while in 2002-03 around 19 per cent of primary applications were still pending resolution after six months, in 2008-09 this figure had increased to 31 per cent (Victorian Government 2010a, p. 18). This increase has had dual impact on both the resources of the Children's Court and on DHS.

The Children's Court itself has acknowledged the difficulty with time delays based on the number of applications it deals with, noting that in 2009-10, it resolved 46.8 per cent of primary applications within three months of the first hearing and 77.8 per cent of cases within six months of the first hearing but a significant proportion of cases involved the issuing of interim protection orders, which require the court to adjourn proceedings for three months before they can be finalised. The Children's Court further noted that in the small percentage of cases that proceed to contest the time delay between the date of a dispute resolution conference and date of final contest had doubled from nine weeks in 2002-03 to 18 weeks by the end of July 2011 (Children's Court submission no. 2, p. 13).

Accordingly, a number of structural reforms are canvassed in the following sections to help divert as many cases away from the court environment as appropriate and to clarify the role of the Children's Court in the statutory child protection system.

In summary, the reforms relate to:

- Early conferencing: pre-court conferencing;
- Early conferencing: conferencing as part of the court process;
- Specialist lists;
- Commencement of protection applications by DHS;
- Reviewing the current range of statutory protection orders under the CYF Act; and
- Realigned court processes for statutory child protection proceedings.

15.5.1 Early conferencing: pre-court conferencing

One of the key reforms canvassed in the VLRC report is the proposal for a new system for determining protection application outcomes. The reform would be based on a conferencing process built on 'a graduated range of supported, structured and child-centred agreement-making processes' (VLRC 2010, p. 214). At the centre of this reform would be a mandated early conference (in appropriate cases), once a protection application is initiated.

The driving principle behind early conferencing is to ensure that protection concerns can be discussed and agreement reached on outcomes that are based on the views of the child or young person, their families, carers, DHS and those whose expertise may assist the parties to reach agreement in a non-court and 'non-adversarial' setting. A criticism raised with the Inquiry by the Children's Court is that parties often will only seriously start talking with each other about resolving protection concerns in the court building. The VLRC noted the majority of protection matters are informally settled at court (VLRC 2010, p. 209). Every submission to the Inquiry that commented on the use of ADR processes supported the use of conferencing, in appropriate circumstances, to resolve protection concerns early. The Inquiry commends this principle.

The Family Group Conference model

The VLRC proposed a model based on the New Zealand Family Group Conference system promoting an early conferencing process and set out in some detail the critical aspects it believed was necessary for a similar Family Group Conference model to work in Victoria. The Inquiry notes that DHS currently conducts Family Group Conferences, although as stated by the VLRC and submissions to the VLRC, these are not mandated by the CYF Act, are not part of DHS statewide practice and are held in small numbers (VLRC 2010, pp. 238–239). The critical features of the Family Group Conference model proposed by the VLRC were:To entrench Family Group Conferences following commencement of a protection application as the general rule under the CYF Act unless exceptional circumstances existed (such as refusal to attend by a family member, convenor considers a Family Group Conference to be inappropriate, or where an emergency exists necessitating the matter being taken to court);

- To allow Family Group Conferences to be conducted in a three-stage process being: detailed information sharing between parties at the start of the conference; a time for private family deliberation during the conference; followed by the coordinator seeking the family group's agreement with the referral source (being DHS) on whether a child is in need of protection and if so, an appropriate strategy to address the need;
- To permit a wide group of people to attend the Family Group Conference including the child, parents, carers, extended family, professionals and members of that family's community with an interest in the child and the family to be determined by the conference coordinator in discussion with the parties;
- To require conference coordinators to be independent of DHS and the Court and to be accredited with appropriate qualifications and training (the VLRC considered VLA as suitable for developing and running the Family Group Conference model based on its experience in running the Roundtable Dispute Management program in the family law jurisdiction);
- To allow parties, particularly parents, access to legal representation and advice at the Family Group Conference; and
- To facilitate Family Group Conferences to be held at suitable locations around metropolitan and regional areas across the state, that are not at courts, and possibly using departmental facilities (VLRC 2010, chapter 7).

The Family Care Conference model

The Children's Court proposed to the Inquiry an alternative early conferencing model of Family Care Conferences based on the South Australian Youth Court practice. The critical difference would be that the Court Conferencing Unit would run the conferences and it would borrow on the current New Model Conferencing (NMC) practices that were being piloted in the Melbourne Children's Court through 2010-11. The advantages that the Court proposed a Family Care Conference would have over the Family Group Conference were: the independence of the Court as a facilitator; the similarity of the Family Group Conference to the pre-hearing NMCs currently run by the Court once a matter is in court; and the benefit of

utilising an established process with practice standards with an existing body and infrastructure rather than creating a new body to run the Family Group Conference process (Children's Court submission no. 1, pp. 37-38).

Signs of Safety Conference model

Another model that the Inquiry considered was the Signs of Safety (SOS) conferencing model that is in operation in Western Australia. This model was endorsed by the Taskforce in its report. The SOS model occurs once protective applications have been filed with the Children's Court and is a pre-hearing conference. It requires all parties to meet at a venue outside the court to discuss the protective concerns and proposals held by the Western Australian Department of Child Protection. The parties are legally represented but lawyers do not play an advocacy role in these conferences. The conferences are co-convened by a senior mediation accredited lawyer from Legal Aid Western Australia and a senior social worker from the Department of Child Protection. The conference uses a strengths-based approach to dispute resolution and adopts the SOS framework and language that both lawyers in this jurisdiction and child protection practitioners are trained to use.

The SOS conference model underwent a pilot phase in Western Australia and was evaluated in 2011. That evaluation found the SOS conferencing model to be successful, noting in particular that there was a high level of engagement with the pilot, cancellations of planned conferences were rare, that conferences had resulted in clear time and court savings, and had the confidence of the judiciary. The evaluation also noted that there were a lack of skilled and independent facilitators for the meetings and a lack of preparation often resulted in time delays or unclear expectations of participants at the conferences (Howieson & Legal Aid Western Australia 2011, pp. 9-11).

The Inquiry's proposed model

Having considered the detailed analysis in the VLRC report and the comments of DHS and the Children's Court, the Inquiry proposes the following for a new pre-court conference process.

DHS to continue with Family Group Conferences – The Inquiry notes that Family Group Conferences are currently conducted by DHS as an earlier intervention practice. The Inquiry believes the current model of department-run Family Group Conferences should continue as they are aimed at helping at-risk families with a view to averting a formal statutory child protection process. DHS should be adequately resourced to conduct Family Group Conferences in a more consistent and coordinated manner across the state.

New statutory Child Safety Conference prior to court – The CYF Act should mandate a conferencing process that occurs prior to court where possible and where appropriate. If an application has commenced through safe custody which, drawing on the VLRC report, the Inquiry proposes should be re-termed as an 'emergency removal', then the matter should still proceed, where appropriate, to a pre-court conference. It is important that this statutory mechanism be used to divert appropriate cases away from court.

There are circumstances in which a statutory pre-court conference would be inappropriate. These circumstances should be stated in the CYF Act. Consistent with the Inquiry's proposals in Chapter 9 for new statutory child protection processes in response to serious reports of abuse, such as physical or sexual abuse and family violence, it is likely to be inappropriate for protective concerns based on such allegations to be dealt with through a pre-court conference. In other cases, the conference might be deemed inappropriate on a case-by-case basis due to safety or security concerns. It may also be inappropriate where the parties agree due to the circumstances that such a conference would serve no purpose (for example, where a voluntary agreement has already been entered into at a DHS-convened Family Group Conference, or where the parties agree that a court order is more appropriate due to the parent's inability to comply with a voluntary agreement).

This new statutory conference could be named 'Child Safety Conference' to distinguish this from the current non-mandatory Family Group Conference convened by DHS and to reinforce the focus on the safety of the child. As the Child Safety Conference is intended to divert matters from court, administrative responsibility for the implementation of these conferences should be with DHS and not with the Children's Court. However, due to the proposed structure and conduct of these conferences as discussed below, DHS would be required to enter into an implementation agreement with VLA.

Structure and conduct of a Child Safety Conference – The Inquiry agrees with the principles put forward by the VLRC for the conduct of these conferences, which include: broader group participation; lawyer-assisted resolution; and use of appropriate and transparent conference practice standards. This early stage conference is designed to keep children, parents and other interested parties away from a court setting by achieving outcomes that are focused on the child's safety and wellbeing.

The Inquiry recommends that the conference adopt an aspect of the Western Australian SOS conference model, namely that the conference be co-convened by two convenors from VLA and DHS. In Western Australia, the co-convenors are a senior lawyer from Legal Aid Western Australia who is accredited in mediation and a senior social worker from the Department of Child Protection (DCP). A similar approach should be taken with the use of senior practitioners from VLA and DHS who have appropriate experience and qualifications in child protection and in mediation practice. However, the Inquiry is mindful of the concerns that may arise for the parties and indeed the convenors on the matter of independence. In order to ensure separation between the convenors and the parties and to minimise any perceptions of bias or identification with the parties, the Inquiry recommends that the convenors should be:

- Accredited in mediation and ADR practice;
- Appointed for fixed terms for the exclusive purpose of convening Child Safety Conferences; and
- As far as is possible, be based near the conference venues.

The benefit of this proposal is that government can draw on existing professionals to conduct these conferences and it does not require the creation of new statutory offices for conference convenors or a separate organisation to host the conferences. Accordingly, the Inquiry does not consider there to be a need for an Office of Children and Youth Advocate to convene these statutory conferences as proposed in Option 3 of the VLRC report.

As these conferences are intended to occur outside a court context the Inquiry does not agree with the recommendation by the Children's Court that the Court Conferencing Unit take responsibility for convening these conferences.

Hosting of conferences: metropolitan and regional areas – The Inquiry agrees with the VLRC that existing VLA facilities at the Dispute Roundtable Management program could be utilised to facilitate these conferences in Melbourne, while DHS facilities could be considered for hosting conferences in outer metropolitan or regional areas. However, the Inquiry recommends that where existing facilities are to be used, and those facilities are not currently configured for conferencing, they should be modified to ensure they provide appropriate child and family-friendly environment and are set aside for the predominant purpose of facilitating the conferences. VLA and DHS would need to coordinate the allocation and availability of conference convenors to facilitate conferences across the State.

This approach would also better enable the Children's Court and its conferencing unit to manage the proposed expansion of its current NMC services to other metropolitan areas and to regional courts.

Setting standards – Conference practice standards should draw on the SOS and NMC practice standards, with the basic structure and standards of the conference to be specified in the CYF Act. The Inquiry has viewed the 'strengths-based' conferencing practices that apply in both SOS and NMC conferences and considers these to be an effective way of drawing out the voice of children and their parents and allowing them to meaningfully engage to find solutions that would support their family.

A joint collaborative approach – Fundamental to the success of this conferencing model is the desire to collaborate by all practitioners and professionals involved with the conference. This clearly depends on the successful implementation of the training reforms discussed in section 15.4.3 and in Chapter 16.

15.5.2 Early conferencing: conferencing as part of the court process

Currently, the CYF Act allows the Court to refer a protection matter to a Dispute Resolution Conference (DRC). The Act enables a conference to be either: facilitative (where the parties with the assistance of convenors are encouraged to reach agreement on the action that is in the best interests of the child); or advisory, where the convenor considers and appraises the matters in dispute and provides a report to the Court on the facts of the dispute and possible outcomes (ss. 217 – 219, CYF Act).

The CYF Act already empowers the Children's Court to order the attendance of parties other than DHS and the parents including the child, other relatives of the child, if the child or parent is Aboriginal a member of their Aboriginal community with their agreement, or in the case of a child from an ethnic or culturally and linguistically diverse background a member of that child's community, or if the child or parent has a disability, an advocate for the child or parent (s. 222).

DRC convenors are Governor-in-Council appointments on the advice of the Attorney-General although the Inquiry notes the Children's Court has recommended to the Victorian Government an amendment to the CYF Act to allow convenors to be appointed by the President of the Court due to the administrative burden on the Court associated with preparing Governor-in-Council appointment documentation (Children's Court submission no. 2, p. 13). The Inquiry understands that this proposal is to be addressed by the Victorian Government.

New Model Conferences

Following the Taskforce report in 2010, the Children's Court, in conjunction with DHS and VLA developed its NMC program.

NMCs are currently held for protection matters at the Melbourne Children's Court arising from the DHS North and West Metropolitan region while traditional DRCs continue to be conducted by court registrars in Moorabbin and other regional courts. NMCs are held either at the VLA Roundtable Dispute Management (RDM) building or at the Melbourne Children's Court building. The Court advises that NMCs will be expanded for cases arising from Southern and Eastern Metropolitan DHS regions once facilities at the William Cooper Justice Centre in central Melbourne are made available (Children's Court submission, no. 2, p. 33).

The Children's Court issued detailed *Guidelines for New Model Conferences,* which took effect from 31 January 2011. In summary, the guidelines:

- Set out when the Court is likely to order a NMC with, as a general rule, cases unlikely to resolve expeditiously being referred for a NMC at the second mention;
- Require parties to undertake information exchange at least seven days prior to the NMC;
- Require the NMC to maintain a child focus and to hear the voice of the children directly or indirectly through the child's lawyer;
- Set out the responsibilities and role of the convenor as well as the parties during an NMC;
- Stress that lawyers are there in a non-adversarial capacity and to represent their client in a problem-solving environment; and
- Encourage families and relevant community members to be involved to contribute to a resolved outcome rather attending to advocate for any one party (Children's Court submission no. 1, appendix c).The Inquiry notes the guidelines could be strengthened by expressly recognising the contribution that other parties with an interest in the child's best interests can participate at a NMC (with the agreement of the parties). This should include elders or respected members of the Aboriginal community, senior representatives from newly arrived migrant communities or culturally and linguistically diverse communities and professionals (including CSOs).

The Inquiry notes that NMCs are currently held at the VLA's RDM building and at the Melbourne Children's Court building. The NMCs work on a strengths-based approach to allow the parent and the child or young person, if present, to 'take ownership' of their situation and to express their views throughout the conference. The legal representatives for the parents do not take an advocacy role at the conference but speak for their clients as needed and formalise negotiated outcomes. The facilities at the RDM building, a dedicated conferencing facility, are superior to the Children's Court conferencing facilities. The Inquiry notes the RDM building is predominantly used for family law conferences and the constraints on the court's ability to hold all NMCs off-site due to operational delays with the facilities at the William Cooper Justice Centre.

An issue of concern, as is acknowledged by the Children's Court in its submission, is the extraordinarily high rate of NMC cancellations. From the statistics provided by the Court close to 40 per cent of scheduled NMCs do not take place on their listed date (Children's Court submission no. 2, p. 35). The Children's Court's submission notes that cancellations have occurred for various reasons including the convenor, a party or representative from DHS being unavailable, a party being ill, a case not being ready or a Family Violence Intervention Order has been issued preventing the NMC from taking place.

Subsequent data provided to the Inquiry by the Children's Court indicated that from August 2010 to October 2011, of the 77 NMCs cancelled prior to the date of the conference:

- 53 per cent of cancellations were due to a party (other than DHS) being unavailable (reasons unspecified) or being ill;
- 13 per cent of cancellations were due to the case not being ready to proceed;
- 9 per cent of cancellations were due to DHS being unavailable;
- 8 per cent of cancellations were due to a convenor being unavailable; and
- 17 per cent of cancellations were due to other reasons.

The data also showed that for the same time period, of the 92 conferences that were cancelled on the day of the conference:

- a concerning 84 per cent of cancellations were due to a party (other than DHS) failing to attend (reasons unspecified) or due to illness;
- 8 per cent of cancellations were due to a party not having a lawyer or the case not being ready to proceed;
- 1 per cent of cancellations were due to DHS failing to attend; and
- 7 per cent of cancellations were due to other reasons (Inquiry consultation with Children's Court).

The Children's Court has advised that it is considering strategies to address this problem by allowing the conference intake officer to focus engagement with the parents, the sending of SMS reminders to conference participants, and also possibly listing a directions hearing one week prior to the scheduled conference to ensure it is ready to proceed on the date (Children's Court submission no. 2, p. 36). While the Inquiry considers the need for a directions hearing might add a further process burden, the Inquiry supports these initiatives by the Court.

The Inquiry considers that the legal representatives of the parties should bear greater responsibility in ensuring that their clients are able and willing to attend on the day. For instance, every time a client fails to attend a NMC, resulting in a cancellation without 24 hours prior notice, the Court may require the legal representative to explain to the magistrate why their client did not attend and what steps they took to secure their client's attendance. If those steps were inadequate, the Court should be communicating its concern to VLA. VLA should implement fee penalties for lawyers who fail to take adequate steps to ensure their client's attendance at the NMC, and lawyers who repeatedly fail to do so should not be engaged. This aspect should also be addressed in the code of conduct being proposed for practitioners in 2012.

The Inquiry also supports the proposals being developed by the Children's Court and DOJ in consultation with the Aboriginal community to use Aboriginal co-convenors for NMCs involving Aboriginal families and the creation of a specialist sub-committee to enable children to better participate in the NMC process. The Inquiry notes that this should be done in the context of the principle, which is supported by the Children's Court, that children should not be involved with the Court unless they express a desire and it is in their interests to do so. The Inquiry understands an evaluation process of the NMC program is currently being undertaken on behalf of the Court.

Recommendation 60

Protection concerns should be resolved as early as possible using a collaborative problem-solving approach with a child-centred focus and minimising where possible, the need for parties to go to court. This means that:

- The Department of Human Services should, where appropriate, use voluntary Family Group Conferencing as a matter of practice to prevent matters from reaching the protection application stage;
- Where a matter has reached the protection application stage, parties must try to resolve the protective concern, where appropriate, through a statutorily mandated Child Safety Conference set out in the *Children, Youth and Families Act 2005*; and
- Where a matter is before the Children's Court, parties should, where appropriate, go through a New Model Conference and the Children's Court should be supported to implement this model of conferencing across the state.

Finding 15

The Inquiry notes an evaluation of the Children's Court New Model Conference is being undertaken. The Inquiry generally supports the structure and process of the New Model Conference but is concerned with the current levels of cancellation due to non-attendance at these conferences.

Recommendation 61

Victoria Legal Aid should implement fee penalties for lawyers who fail to take adequate steps to ensure their clients' attendance at a New Model Conference and lawyers who repeatedly fail to do so should not be engaged by Victoria Legal Aid. This should also be addressed in the code of conduct being proposed for practitioners in 2012.

15.5.3 Specialist lists

Child sexual abuse allegations in protection matters

There is a need for children and young people who may have been the subject of sexual abuse to be treated with particular care. When these children are the subject of a protection application by DHS it is important for their safety and wellbeing that the protection application is resolved as expeditiously as possible in the Family Division of the Children's Court.

Submissions to the Inquiry have called for better court processes to expedite protection applications in the Family Division that involve an allegation of sexual abuse through the creation of a specialist list (OCSC, attachment c, pp. 9-10), with regard to the provision and testing of evidence (VLA submission no. 1, p. 19) and specialist training for magistrates hearing such matters (Humphreys & Campbell (b), pp. 4-6). As discussed in section 15.4.1, specialist lists assist the court to organise its resources and develop specialist expertise, based on the subject matter of the case, to better manage a case from commencement through to completion of hearing.

The issue arises in the context of a low rate of substantiations of sexual abuse, an issue that is discussed in Chapter 14, where the Inquiry recommends amendment to the CYF Act to make clear the standard of proof is the balance of probabilities and no further qualifications be added to that test. A model that has been raised by stakeholders and was considered by the VLRC was the Magellan program used in the Family Court and Federal Magistrates Court for family proceedings where allegations of abuse of children have surfaced (see box).

The Children's Court has indicated its strong support for the creation of a specialist list and notes its ongoing work with the assistance of a cross-disciplinary working group to develop a suitable model for implementation in the Family Division (Children's Court submission no. 2, p. 42). The Inquiry supports this work.

The Magellan case management program

The Magellan program was piloted in the Melbourne Registry of the Family Court in 1998 and has subsequently been implemented in all states and territories where the Family Court sits except in Western Australia, which has a state-based Family Court. That court runs its own specialist program called Columbus.

The program involves:

- A specialist team within the court registry that comprises one or two specialist judicial officers and dedicated staff to deal with cases involving sex abuse allegations;
- A steering committee comprised of key interagency stakeholders; and
- Interagency cooperation between police, child protection services, hospitals, private lawyers, community centres and counselling services (VLRC 2010, p. 161).

Some of the key aspects of the program are:

- A focus on children involved in the dispute;
- A judge leading and managing the proceedings from commencement to end and within tightly managed timeframes;
- A designated court-ordered independent children's lawyer for every child that is funded by legal aid (Family Court, Information Sheet).

The VLRC noted that recent reviews of the Magellan program identified the following benefits of the program since its introduction into the Family Court:

- The length of time to resolve matters was reduced through fewer court events and a reduction in disposition times;
- There was greater inter-agency collaboration and involvement; and
- Potentially lower levels of distress for the children involved (VLRC 2010, p. 161).

Koori list in the Family Division

Another area in which the care outcomes for a vulnerable sector of our community should be strengthened is the creation of a supportive and collaborative legal environment for Aboriginal children and youth who might be in need of care and protection. The over-representation of, and the particular issues facing, Aboriginal children in the statutory child protection system has been discussed in Chapter 12. One of the major themes for improvement from that chapter is the better take-up of Aboriginal Family Decision Making processes outside of the court environment and is the subject of Recommendation 34 in Chapter 12.

The Inquiry heard calls for the establishment of a specialist Koori list in the Family Division based on the Koori Court in the Criminal Division of the Children's Court to better meet the needs of Aboriginal children and their families in the court system (AFVPLSV submission, p. 23; VLA submission no. 1, p. 19). The strengths of such a list are:

- The creation of a space and environment for Aboriginal children and their families and potential carers to be heard in a culturally appropriate manner
- The training of magistrates to oversee the list;
- The provision of continuity with respect to cases; and
- The incorporation of aspects of the earlier conferencing or problem solving model that has been proposed by the VLRC and is supported in principle by the Inquiry.

Consultation with the Children's Court and stakeholders indicates that not all aspects of the Koori Court model can be translated into the Family Division, particularly with fully contested hearings, but considers that a trial list could be piloted at a suitable court location or locations to assess its level of success.

The Children's Court is currently working to investigate options to improve the processes for Aboriginal children and families at court (Children's Court submission no. 1, p. 22) and is seeking to develop a specialist list. It noted that it has sought, and not received, funding from the Victorian Government to appoint a Koori Support Program Manager as part of a DOJ sponsored Koori Family Support Program which has been ongoing since mid-2009 (Children's Court submission no. 2, p. 41). The program was established to consider various non-adversarial Aboriginal specific strategies at pre-court, court and post-court stages (VLRC 2010, p. 30).

The Inquiry endorses the work of DOJ, the Children's Court and key stakeholders to develop and implement specialist Sexual Abuse and Koori lists in the Family Division. A pilot program could be run in the Melbourne Children's Court or another suitable court location to evaluate the effectiveness of the lists.

Recommendation 62

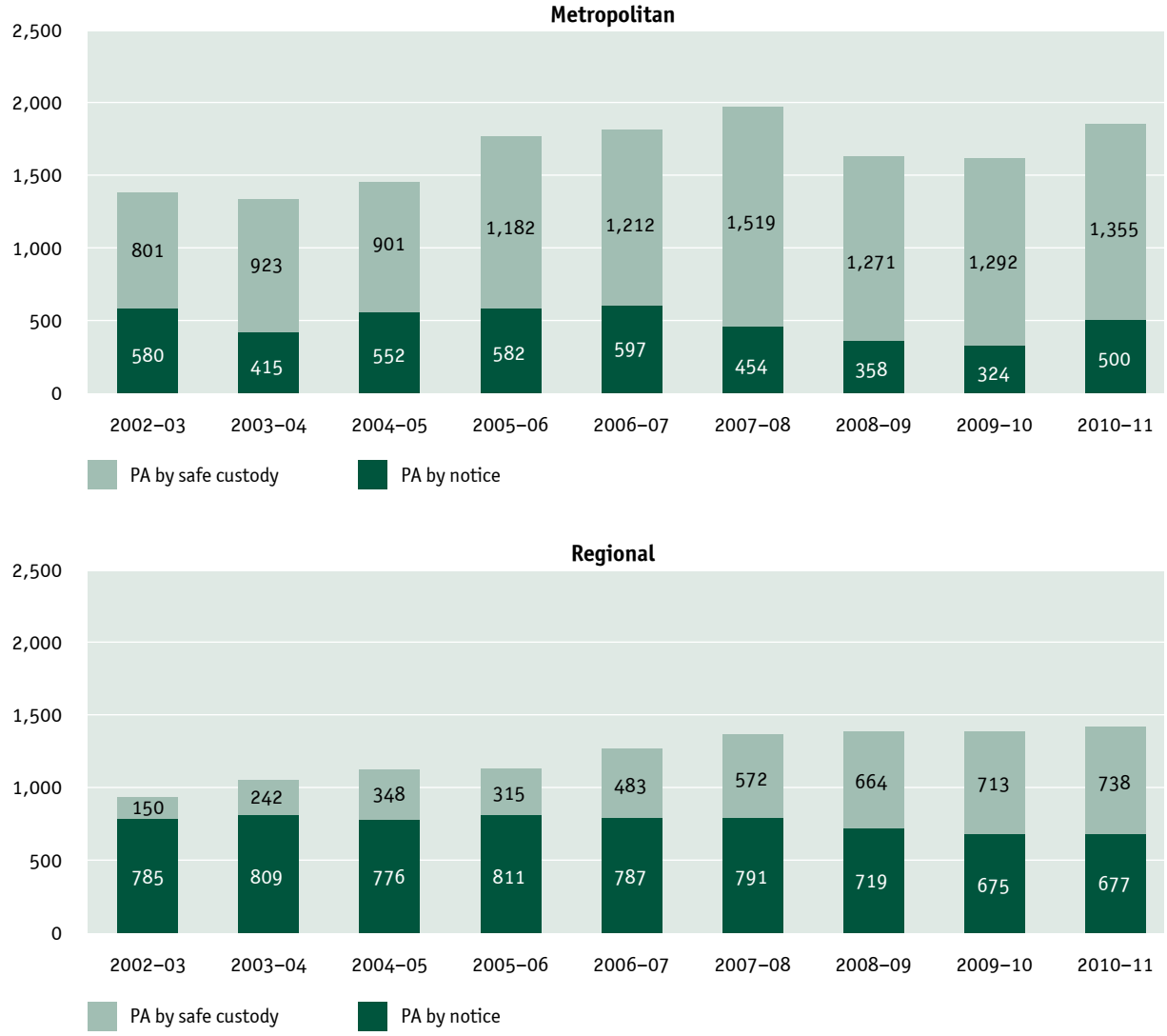
The Children's Court should establish specialist Sexual Abuse and Koori lists in the Family Division. The court should be resourced to create and implement these lists as a matter of priority. To ensure these lists are suitable for implementation across the state, a pilot could be run in the Melbourne Children's Court or another suitable court location.

15.5.4 Commencement of protection applications by DHS

The VLRC proposed a new way of commencing applications (VLRC 2010, Option 2). Under this option, all protection applications would commence by notice. However, the VLRC proposed that where a protective concern was formed, DHS would commence a formal action by requesting a Family Group Conference rather than filing an application at court. The VLRC considered that only in exceptional circumstances should DHS seek to remove a child by safe custody or, as termed by the VLRC, through an 'emergency removal'. Even where an emergency removal was required, the VLRC proposed that DHS should first obtain an 'emergency removal order' from the Court and if a child was removed without an order, the protective intervener should apply to the Court for an order within one working day of the removal (VLRC 2010, pp. 297-300).

The Inquiry supports the principle of commencing protection applications by notice but considers that such a reform proposal must also be flexible to reflect the nature of child protection intervention. A matter that links the court process to statutory child protection intervention is the way in which protection applications are brought by DHS to the Children's Court. The Inquiry notes the significant increase in the proportion of protection applications brought by safe custody compared with applications by notice from 2002-03 to 2010-11 (see Figure 15.2).

Figure 15.2 Protection applications to the Children's Court by notice and safe custody, metropolitan Melbourne and regional Victoria, 2002-03 to 2010-11



Source: Information provided by the Children's Court of Victoria

The Inquiry received submissions on the increasing proportion of protection applications made by safe custody as compared with those made by notice, and the impact of this trend on the court's ability to meet the needs of vulnerable children in a timely and efficient manner. The following reasons were suggested for the rise in applications by safe custody:

- An increase in DHS workload (Children's Court submission no. 1, p. 17);
- DHS 'is focusing on the hard cases' (Children's Court submission no. 2, p. 22);
- DHS 'continues to focus on 'event' based interventions rather than intervening earlier to support the family' (Children's Court submission no. 2, p. 23);
- DHS is seeing more children and families with increasingly complex, multiple needs and this results in a higher incidence of crisis events (Inquiry consultation with DHS);
- Applications by safe custody are given priority at court (Inquiry consultation with DHS); and
- Legal advice is given that there is insufficient evidence for an application that would have proceeded by notice. A crisis event then triggers the safe custody application process (Inquiry consultation with DHS).

The VLRC also noted in its report that from consultation with child protection practitioners, applications by safe custody offered benefits that were not readily obtainable with an application by notice, such as it was the only way to get the court to make an order immediately and to attach conditions. The VLRC noted:

> Compared to a safe custody application, a protection application by notice is a relatively slow and less certain way for a child protection worker to secure a court order with protective conditions (VLRC 2010, p. 290)

Given the variety of reasons put to the Inquiry, and acknowledging a statutory child protection system that is currently subject to significantly increasing demand, the Inquiry considers that mandating all protection applications to commence by notice would not properly reflect the range of circumstances that may give rise to a protection application. In all matters, the safety of the child must remain the paramount concern.

The Inquiry considers with the sum of recommendations proposed by the Inquiry for changing the current statutory child protection system in Chapter 9 and court processes in this chapter there should be less of an emphasis on obtaining court orders except in those cases that require a significant intervention. In future, when DHS files a protection application by notice, following the current process in the CYF Act, the Act will require the parties to attend a Child Safety Conference as part of the earlier statutory intervention process proposed in section 15.5.1. The Child Safety Conference is the process by which the parties can discuss protective concerns and what actions should be taken. The process of filing a protection application by notice with the court will allow tracking of how often a statutory intervention requiring a decision by the court is required after this conferencing process.

Clearly, protection applications requiring an emergency removal will continue to be required where the child's safety is at risk. However, once the immediate safety concern has been met, the parties and the court may decide that a Child Safety Conference is the most appropriate mechanism for resolving protective concerns if the immediate safety concerns have passed.

The Inquiry does not support the creation of new classes of orders (being emergency removal orders, interim care orders and short-term assessment orders) as proposed in Option 2 of the VLRC report. This would be inconsistent with Inquiry proposal to reduce the current range of orders and simplify the process (see sections 15.5.5 and 15.5.6 below). The Inquiry also considers that it is appropriate to retain the current 24 hour time limit in section 242 of the CYF Act when there is an emergency removal, particularly as a child or young person would no longer be required to attend court and the VGSO is to represent DHS in all child protection proceedings.

15.5.5 Reviewing the current range of statutory protection orders under the Children, Youth and Families Act 2005

The law and legal institutions should be simple and accessible to children and young people. In order for this to occur, the legislation should be clear as to when different institutions and decision makers should be engaged to meet the needs of children. The Inquiry considers that a court should not be involved in case management and case planning particularly in rapidly changing situations. There are other bodies with expertise more suited to case planning, provided that they are guided by transparent principles and practice, are accountable and are appropriately monitored. Chapter 21 proposes new oversight and regulation mechanisms and processes to ensure that this occurs.

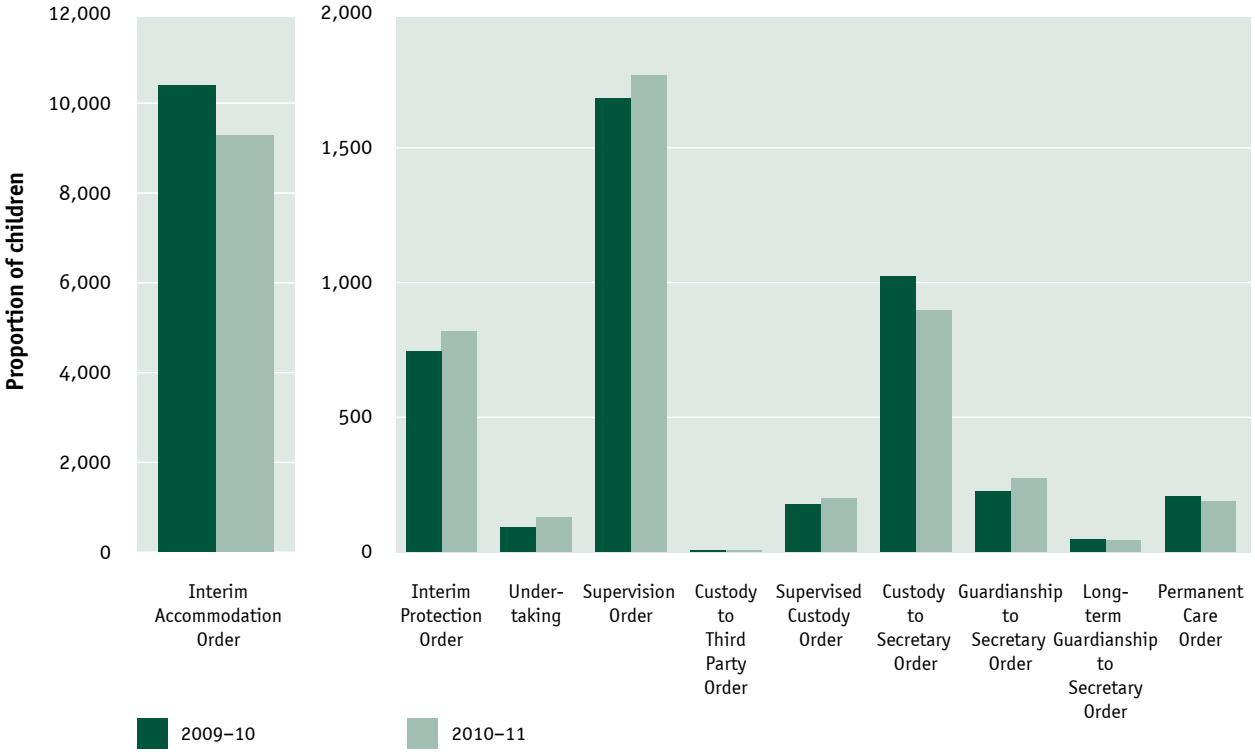
Further, the system of statutory orders should allow sufficient flexibility for DHS and the parties to best meet the needs of children. The current range of orders and the conditions that may be attached to these can lead to protracted negotiations or disputes that do not serve the interests of children and do not enable DHS to act quickly to protect children. The Inquiry is concerned about the number of court events that are currently attached to each protection application including changes to orders and disputes over conditions.

Current orders and conditions attached to orders

With that in mind, the Inquiry examined the current range of protection orders that DHS may seek from the court under the CYF Act from the protective intervention stage to the final order stage under Parts 4.8 to 4.10 of the Act. A summary of the 12 key orders or enforceable agreements is in section 15.2 (see Table 15.1). The Inquiry does not include secondary orders such as Therapeutic Treatment Orders and Therapeutic Treatment Placement Orders as part of this discussion. Figure 15.3 illustrates the orders most frequently the result of protection applications before the Court in 2009-10 and 2010-11. As previously noted in Chapter 9, the number of orders issued below does not reflect the number of children as more than one order may be made with respect to any one child or young person.

The total number of Interim Accommodation Orders issued in 2009-10 was 10,392 orders and in 2010-11 was 9,726 orders. The total number of final protective orders, issued in 2009-10 was 5,780 orders and in 2010-11 was 6,336 orders. Interim Accommodation Orders made up the majority of orders issued in 2009-10 and in 2010-11 followed by Supervision Orders and Custody to Secretary Orders.

Figure 15.3 Protective orders issued by the Children's Court, 2009-10 and 2010-11



Source: Information provided by DHS

The conditions attached to the orders will vary depending on the type of order sought by DHS, the particular circumstances of the child and their family and what type of matters DHS seek to address through its intervention. With the exception of Guardianship to Secretary Orders, where no conditions can be imposed by the Court, a list of standard conditions has been developed by the Court in consultation with key stakeholders that may be attached to various protection and related orders.

These conditions are contained in a *Standard Conditions on Family Divisions Orders* form or the 'Pink Form' (reproduced in VLRC 2010, appendix k, p. 471). There are 31 types of conditions outlined on the form and include:

- Visits from and cooperation with DHS;
- Accepting support services;
- Counselling;
- Anger management;
- No cohabitation or contact with child (other than during access);
- Psychological or psychiatric assessment and/or treatment;
- Paediatric assessment and/or treatment;
- Alcohol/drug assessment or testing;
- Abstinence from drugs or alcohol;
- Curfew on a child or young person;
- No physical discipline of child;
- Not exposing a child to violence;
- No threats to or assaults of DHS staff;
- Child's health check-ups or assessments – either with a doctor or with a Maternal and Child Health Nurse; and
- Attendance at school.

The form is used as part of negotiating conditions on court orders on a daily basis in the Children's Court. The form is filled in by the legal representative for DHS once negotiations with the parties are complete and it is then tendered to the court as part of the 'minutes' of consent.

DHS should typically seek conditions in the best interests of a child based on the particular circumstances of the case and the order being sought. The use of the standard form does not preclude DHS or another party requesting other conditions (such as respite care) in the child's best interests based on considerations in section 10 of the CYF Act.

Protection orders in other jurisdictions

The Inquiry considered the comparable categories of care and protection orders available under the equivalent statutes in certain other Australian jurisdictions (see Table 15.3).

Table 15.3 Principal categories of care and protection orders in other Australian jurisdictions

Jurisdiction	Types of orders
New South Wales	• Emergency Care and Removal Orders • Examination and Assessment Orders • Interim Care Orders • Other Interim Orders • Orders accepting Undertakings • Supervision Orders for 12 months • Order Allocating Parental Responsibility (to either one parent or to the Minister or to another specified party) • Contact Orders (with condition on frequency and duration, supervision or denying contact).
South Australia	• Investigation and Assessment Orders • Undertakings (12 months) • Custody Orders to various parties (12 months) • Guardianship Orders to the Minister or other parties (12 months) • Guardianship Orders to the Minister or other parties (to 18 years). The Children's Court is empowered to make ancillary orders to complement these primary orders.
Queensland	• Temporary Assessment Orders • Court Assessment Orders • A generic category of Child Protection Orders with different specified functions such as: – undertakings; – contact; – supervision; – custody to the Chief Executive or custody to a suitable person a member of the child's family but not being the parent; – short term guardianship to the Chief Executive; and – long term guardianship to the Chief Executive or to a suitable person being a member of the child's family, or a suitable third party.
Western Australia	• Supervision Orders • Time limited Protection Order (placement with Chief Executive Officer for up to two years) • Protection Order (placement with Chief Executive Officer, to the age of 18 years) • Special Guardianship Order (placement and parental responsibility with a person who is not the parent or the Chief Executive Officer, to the age of 18 years).

Source: Inquiry analysis

The Inquiry considered in some detail the statutory child protection scheme in Western Australia. Under the *Children and Community Services Act 2004* (CCS Act) the Children's Court of Western Australia is empowered to make four primary types of protection orders:

- A supervision order allowing a child to remain with their family where parents retain responsibility (with any conditions ordered by the court);
- A time-limited protection order being a maximum two year placement with the Chief Executive Officer (CEO) of DCP (with no provision for conditions);
- An order placing a child with the CEO of DCP up to the age of 18 years (with no provision for conditions); and
- A special guardianship order placing a child with parental responsibility with someone other than the CEO of DCP or the parents up to the age of 18 years, with the only condition attached being the level of parental contact.

For reporting purposes, DCP categorises time-limited protection orders where a child is placed with DCP and an order placing a child with DCP up to the age of 18 as 'care orders' (as the child is in the care of the CEO of that department). DCP categorises supervision orders and special guardianships orders as 'non-care orders' (as the child is with a parent or third party). In 2010-11, DCP made 847 new protection applications of which 613 resulted in care orders and 61 non-care orders for a total of 674 new orders being made by the Children's Court (DCP 2011a, p. 22).

In respect of all these orders DCP is required to file a plan for how the child's wellbeing will be managed during the order. Critically, there are no 'breach of conditions' provisions in the CCS Act requiring parties to return to the court. The only course available to the parties unhappy with the level of compliance with an order is to return to court to seek a discharge of the order. Every other decision by DCP with respect to the administration of the order can be subject to an internal DCP administrative review process (a Case Review Panel) or further review by the Western Australian State Administrative Tribunal, but not the court.

The Western Australian Children's Court may also make interim orders (section 133) with a broad discretion about what conditions that interim order may cover, noting that it is time limited and in force until parties return to court at a later date.

Generally, the range of orders in child protection legislation in different states serve similarly broad purposes: allowing the court to ensure the child's immediate safety on an interim basis; undertakings by parents; allowing the child to reside with one or both parents but with State supervision; transferring the care and custody of the child from the parents to another party for a specified time; or transferring care and guardianship of the child to another party until they reach the age of 18 years. The CYF Act is more prescriptive in relation to the scope and functions of the various orders that the Act provides.

Comments to the Inquiry on current orders under the *Children, Youth and Families Act 2005*

Very few submissions to, or consultations with, the Inquiry commented on the current range of orders under the CYF Act. The key bodies that commented to the Inquiry were the Children's Court and DHS. The Children's Court expressed the view that, with the exception of Temporary Assessment Orders and Custody to Third Party Orders that 'are used sparingly and seem to serve no current purpose', the current range of orders under the CYF Act were generally appropriate (Children's Court submission no. 2, pp. 39-40).

DHS provided the Inquiry with two options for simplifying the current range of orders. The first option was to collapse all orders into a generic category of 'Protective Orders'. Under this option, the court would make a protective order that would cover the following matters:

- The placement of a child with a person or organisation (such as parent, suitable person, out-of-home care service, secure welfare or declared parent baby unit or hospital);
- The custody of the child (for example, with parent(s), DHS, another suitable person such as kinship carer or an Aboriginal agency);
- The guardianship of the child (for example, with parent(s), DHS, another suitable person such as a kinship carer or an Aboriginal agency);
- The level of DHS involvement (whether DHS should remain involved); and
- The length of the order.

Under this option DHS would attach a case plan to the protective order but there would be no conditions attached to the order.

The second option proposed by DHS would realign court orders to relate only to the care and supervision of children. There would be two categories of orders:

- A 'Care Order' would involve the transfer of legal guardianship or custody to DHS or non-government agency, permanent carer or a suitable third party such as a kinship carer. The court would determine the length of the order and to which party guardianship or custody of the child is given. While a case plan would be attached to the order, there would be no conditions attached to the order. Due to the significance of the intervention, these orders would be sought as a last resort.
- A 'Supervision Order' would involve the child remaining under the responsibility of their parents or possibly a kinship carer while DHS is authorised to supervise or direct the level and type of care to be provided to the child. The court would determine the length of the order and a case plan will be attached to the order. However, there would be no conditions attached to the order (Inquiry consultation with DHS).

Proposed modification of orders under the *Children, Youth and Families Act 2005*

While the Inquiry is attracted to the options proposed by DHS for a simpler structure for orders, the Inquiry also considers that the role of the court should extend to determining those conditions that:

- Fundamentally alter the relationship between parents and their children or between children and siblings or other people significant in children's lives; and
- Might be considered more intrusive on an individual's rights.

The types of conditions that would fall in this category are conditions relating to child-parent or child-sibling contact, exclusion of individuals from a child's life, or conditions that involve the parents or caregivers undergoing some form of treatment or drug and alcohol screening.

To that end, the Inquiry considers the Western Australian scheme as instructive for minimising the role a court plays in care or case planning. This approach would not, however, signal a fundamental transformation to the current scheme in the CYF Act.

What this means for the current scheme of orders is:

- Maintaining the status quo with respect to shorter term orders - Supervision Orders, Undertakings and Interim Orders, that is, the Court determines all conditions and the length of order;
- Maintaining the status quo with respect to Short Term Guardianship to Secretary Orders and Long Term Guardianship to Secretary Orders, that is, the Court does not determine conditions;
- Modifying the current Permanent Care Order so that the Court can only make conditions on child-parent contact, sibling contact and contact with other people who are significant in the life of the child (removes power to make condition on incorporating a cultural plan for Aboriginal children);
- Modifying the current Custody to Secretary Order so that a Court can only make a condition concerning child-parent contact, sibling contact and contact with other persons who are significant in the life of the child and the length of order; and
- Modifying the current Supervised Custody Order so that a Court can only make a condition concerning child-parent contact, sibling contact and contact with other persons who are significant in the life of the child and the length of order.

However, the Inquiry considers the current range of orders can be better grouped using the terminology proposed by DHS under its Option 2. To reflect their temporal application, orders should be classified as 'Interim Orders' (to the point a protection application is proven) and 'Final Orders' (on proof of the protection application).

Further, those orders that involve the removal of a child from both parents should be termed 'Care Orders' and those that involve the child remaining with one or both parents should be termed 'Supervision Orders'.

In view of the key stakeholder comments provided to the Inquiry, the Inquiry considers that a consolidated system of orders would include:

- Removing Temporary Assessment Orders and Custody to Third Party Orders as specific categories of orders from the Act on the basis that these are rarely, if ever used;
- Creating a generic category of 'Interim Order' which may cover a broad range of matters including those currently provided for by Interim Accommodation Orders and Temporary Assessment Orders; and
- Renaming Interim Protection Orders as either a 'Temporary Supervision Order' or 'Temporary Care Order' depending on whether the child remains with one or both parents while testing the suitability of the proposed protective action.

The remaining protective orders would be organised as shown in Table 15.4.

Table 15.4 Consolidated categories of orders under the *Children, Youth and Families Act 2005*

Non-supervision/non-care	Supervision	Care
Undertakings (without supervision)	Undertakings (with supervision)	Temporary Care Order
	Temporary Supervision Order	Custody to Secretary Order
	Supervision Order	Supervised Custody Order
		Guardianship to Secretary Order (short and long term)
		Permanent Care Order

Source: Inquiry analysis

The Inquiry recognises that a number of stakeholders are concerned with the ability of DHS to consistently make the right decisions or set the right conditions when intervening. The Inquiry also notes that the VLRC proposed that the Children's Court be given concurrent jurisdiction with VCAT to hear case planning reviews (VLRC 2010, p. 344). However, the Inquiry considers, in view of its proposed reforms to DHS practices, the governance and oversight mechanisms, and the quality of the workforce, that DHS should have the future capacity to determine those conditions that do not fundamentally alter the relationship between children, their parents and other people who are significant in the life of the child or do not fundamentally intrude on individual rights.

Review of conditions set by the Department of Human Services

The CYF Act currently requires the Secretary to prepare and implement procedures for internal reviews of DHS decisions and a copy of the procedures to be given to children and parents (s. 331). In practice the review is done by a regional manager. Once that review process is completed a child or parent may apply to VCAT (s. 333).

As noted in section 15.3.4, VCAT currently has a small role in the current statutory scheme where it decides case planning reviews. If DHS is to play a greater role in setting conditions to orders, similar to the legislative scheme in Western Australia, it is feasible that more DHS decisions will be reviewed by VCAT.

While the Inquiry was unable to consider the resource implications for VCAT arising from an increase in reviews of DHS decisions, it wishes to note the following two matters for consideration and implementation by the Victorian Government.

Any case planning reviews are currently heard within the General List of the Administrative Division of VCAT. Given the specialist nature of child case planning decisions the Inquiry considers that the legal framework supporting children will be bolstered if VCAT, subject to future case demand, establishes a specialist Child Protection List. The Inquiry also considers that members on that list should have appropriate qualifications and experience in child abuse and neglect and in child health and wellbeing.

A related matter is a change to the representation model for parents and children who may be affected by case planning reviews at VCAT. The Inquiry notes that if parents or children require assistance for representation at VCAT reviews, they must seek special consideration under the current legal aid guidelines, as VLA does not routinely fund VCAT reviews (VLRC 2010, p. 342). This is an access to justice concern. The legal aid guidelines administered by VLA should be amended to enable children and parents who seek review of DHS decisions at VCAT to be eligible to legal aid representation without requiring special consideration.

Finding 16

The role of the Children's Court is to determine the lawfulness of the statutory intervention by the State and the appropriate order if a child is found to be in need of protection. Accordingly, the role of the Children's Court is to determine:

- Whether a child is in need of protection;
- The appropriate remedy or order to enable the State to intervene in the child's best interests;
- The length of the order (if appropriate to the type of order sought); and
- Conditions relating to child-parent contact or contact with siblings and other persons who are significant in the child's life (if appropriate to the type of order sought) and conditions that intrude on individual rights namely the exclusion of individuals from a child's life and drug and alcohol screening.

Recommendation 63

The current scheme of protective orders under the *Children, Youth and Families Act 2005* should be simplified. This can be achieved by reviewing the scope and objectives of each order and their current utility. Consideration should be given to:

- Removing Custody to Third Party Orders as a category of order from the *Children, Youth and Families Act 2005*;
- Removing Temporary Assessment Orders as a category of order from the *Children, Youth and Families Act 2005*;
- Creating a general 'Interim Order' which could incorporate the current functions of an Interim Accommodation Order and a Temporary Assessment Order;
- Renaming 'Interim Protection Order' as either a 'Temporary Supervision Order' or 'Temporary Care Order'; and
- Consolidating the current range of protection orders into categories of 'Interim' and 'Final' orders and into categories of 'Care' and 'Supervision' orders while maintaining the range of purposes that the various orders currently serve.

Recommendation 64

A specialist Child Protection List should be created in the Victorian Civil and Administrative Tribunal in order to hear any reviews of decisions by the Department of Human Services on conditions. The Victorian Civil and Administrative Tribunal should be resourced to ensure that the members who would determine disputes within that specialist list have appropriate qualifications and expertise in child abuse and neglect and child health and wellbeing. The current legal aid guidelines should be amended to enable parties who seek a review of decisions by the Department of Human Services at the Victorian Civil and Administrative Tribunal to be eligible to obtain legal aid representation without requiring special consideration.

15.5.6 Realigned court processes for statutory child protection proceedings

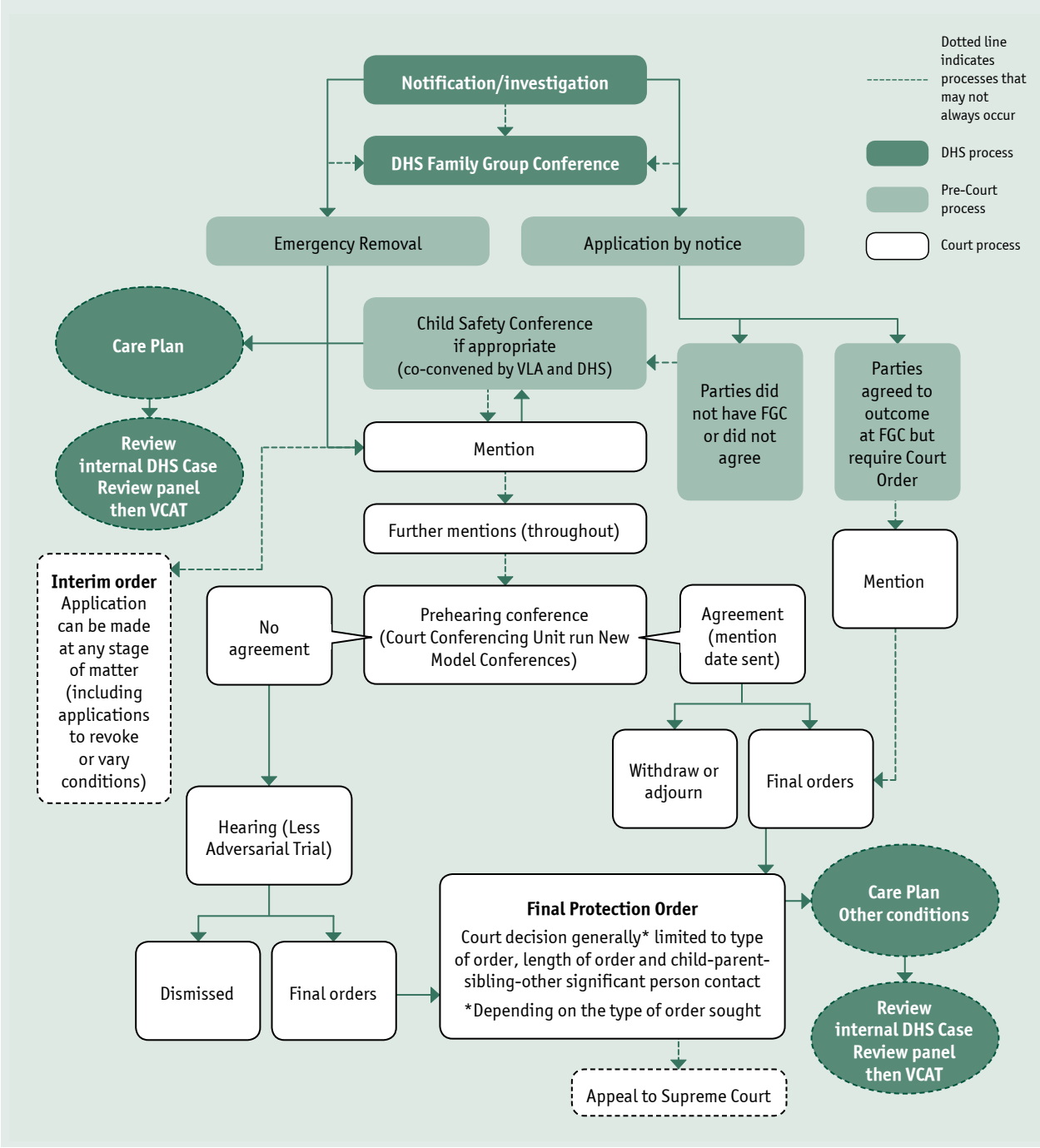
The Inquiry has recommended a reduction in the range of statutory orders and a redefinition of the Children's Court's role. The Inquiry has also recommended an increased emphasis on earlier conferencing to minimise, where possible, the need for parties to go to court to resolve their disputes. In section 15.2, the Inquiry sets out the current processes for determining protection applications (see Figure 15.1). Figure 15.4 depicts the Inquiry's proposed process for statutory intervention by DHS.

Process where the Department of Human Services issues a protection application by notice

Figure 15.4 outlines the following stages:

- The parties are mandated by the CYF Act to attend a new Child Safety Conference, unless it is inappropriate according to the Act. DHS puts forward a case plan with its proposed conditions.
- If there is agreement at the conference, the plan becomes a signed agreement (however, the plan does not necessarily have to be signed at the conference if, for example, the DHS proposed plan changes as a result of negotiations). The parties retain copies of the agreement. There is no court involvement.
- If there is no agreement on DHS proposed conditions or if there is a future dispute over the conditions, parties can seek an internal review through an internal case review mechanism administered by DHS. If there is no resolution following the case review mechanism, the review of the decision will be by VCAT.

Figure 15.4 Proposed protective intervention and application processes



Source: Inquiry analysis

Process where the Department of Human Services immediately acts to remove child – a protection application by emergency removal

Figure 15.4 outlines the following stages:

- The child is removed and DHS will bring an application to court within 24 hours as is currently the case under the CYF Act. The terminology for the CYF Act should, consistent with the findings of the VLRC, be updated to remove any criminal connotations associated with the issuing of warrants and undertaking protection applications by safe custody. A warrant should be re-termed an 'Emergency Removal Order' and the process should be renamed as an 'Emergency Removal'. However, the Inquiry does not agree with the substantive process reforms recommended by the VLRC in relation to emergency removals proposed under its Option 2.
- The Children's Court may decide to dismiss the application or issue an Interim Order covering interim accommodation and other matters that are necessary to ensure the child's safety and wellbeing and the situation at the parents' or primary caregivers' home. The Inquiry does not agree with the VLRC recommendation to create further specific categories of orders in relation to emergency removals as proposed under its Option 2. If the Court has issued an interim order or the emergency has passed and DHS believes the protection concerns still exist, the parties must attend a Child Safety Conference (unless it is inappropriate). DHS puts forward a case plan with proposed conditions.
- If there is agreement at the conference, a copy of the signed plan is filed with the Court, and if appropriate, the Interim Order is discharged and the protection application is settled. If there is disagreement on DHS proposed conditions in the case plan then parties can seek an internal review through the DHS case review panel or if unhappy with review decision, seek further review by VCAT.
- If there is no agreement on outcomes including the type of order that DHS might seek, then the protection application is revived or remains on foot and DHS proceeds to seek a final order from the Court.
- During the mention stage, the Court may decide that the matter could be resolved by further conferencing. As is currently the case, the Court will decide whether the matter be referred for negotiation through a NMC that is convened by the Court Conferencing Unit.
- If there is agreement at the NMC as to the order and, depending on the type of order, the attached conditions, an order by consent is made by the Court. The matter does not proceed to contested hearing.
- If there is no agreement, the matter proceeds to a contested hearing which, as proposed by the VLRC and the Inquiry, should now follow the LAT model.
- If there is a dispute over conditions then, depending on the type of order sought and whether or not the dispute is over contact between a child and parent/sibling/significant others, the dispute would be over an administrative decision by DHS that can be resolved by an internal DHS case review mechanism and finally by VCAT.

15.5.7 Court of record

It has been suggested to the Inquiry that making the Children's Court a 'court of record' would enable a body of case law to be developed to inform decision making within the system (Australian Childhood Foundation submission, p. 6). The Inquiry notes that the Perth Children's Court (s. 5, *Children's Court of Western Australia Act 1988*), the Children's Court of New South Wales (s. 4, *Children's Court Act 1987*), and the Youth Court of South Australia (s. 5, *Youth Court Act 1993*) are established as 'courts of record' under their legislation.

Due to the specialist nature of the Children's Court and the utility of its decisions for child protection practitioners and other professionals, the Inquiry also considers that in addition to making transcripts available, the Children's Court should be supported to publish its decisions. The Court has indicated to the Inquiry that it does not object to this occurring noting that all proceedings are currently recorded with transcripts available to the parties for a fee, and that some of its decisions are currently published in de-identified form on its website (Children's Court submission no. 2, pp. 40-41).

The Court has also stated that the types of decision that should be published for citation purposes are those that raise points of principle and are not fact – specific decisions (based on the Court of Appeal decision in *R v. Smith* [2011] VSCA 185 at [32, 33]). The Inquiry agrees that the type of decision of the Court that should be published is one that involves more than the application of settled principles to facts. However, the Inquiry also considers that the Court should make transcripts of all its hearings and decisions available to the public subject to the restrictions of section 534 of the CYF Act.

Recommendation 65

The *Children, Youth and Families Act 2005* should be amended to confirm the status of the Children's Court as a court of record. The Children's Court should be appropriately resourced to enable decisions to be published on the Children's Court's website in de-identified form. Transcripts should also be made available to the public in de-identified form.

15.6 The enactment of a separate Children's Court of Victoria Act

The Inquiry has previously considered and concluded that a specialist Children's Court is an important part of a statutory child protection system that meets the needs of children. It is appropriate and necessary for a judicial body to determine the lawfulness of State intervention in child protection matters and to determine fundamental rights such as the alteration of a child's relationship with his or her parents and siblings.

At present the Children's Court is formally constituted in the CYF Act. However, it is towards the end of the Act where the Court's existence is affirmed in section 504(1) which states:

> There continues to be a court called "The Children's Court of Victoria".

At a fundamental level, the Inquiry considers that it is appropriate to signify the status and character of the Children's Court as a part of the separate judicial arm of the State by having a separate Act relating to it. This legislative arrangement applies to the Children's Courts in all other states and the Inquiry considers it should apply in Victoria. It also applies to all other Victorian courts.

There are currently numerous substantive references to the Children's Court throughout the CYF Act before the provisions relating to the Court itself are found. A new Act would enable the rationalisation of the manifold sections embedded through miscellaneous parts of the CYF Act into a coherent unity. It would bring clarity and transparency to the functions and operations of the Court. It would facilitate the removal of DHS, a major litigant before the Court, from the administration of the legislation that supports the Court. As Mr Justice Fogarty correctly observed in his 1993 report *Protective Services for Children in Australia*:

> ... 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 that it will act in an independent way in accordance with legislation (Fogarty 1993, pp. 142-143).

The Inquiry records the undoubted fact that the Children's Court is independent, and considers the legislative framework should reflect that independence.

Finally, the creation of a separate Act for the Children's Court would facilitate placement of the administration of the Court in the Courts Executive Service, or if applicable DOJ, as is the case with all other Victorian courts. Currently, the Children's Court is the only Victorian court whose legislation is administered by two ministers – the Minister for Community Services and the Attorney-General – and by two Departments, DOJ and DHS. A separate Act would address this anomaly.

The Inquiry is conscious that the present placement within the CYF Act of the provisions relating to the Children's Court reflects both historical development and the proper need for the Court to function within the complex of provisions for support and protection of children and young persons. The Inquiry reaffirms that need but considers that the need can be fulfilled by an appropriately drafted separate Act, reflecting the Court's relevant but separate part in the complex of provisions of support and protection for children and young people.

Accordingly, the Inquiry recommends:

- The creation of a separate Act entitled 'The Children's Court of Victoria Act';
- The Act contain the current provisions in the CYF Act relating to the Children's Court, appropriately modified; and
- Appropriate revision of the CYF Act consequent upon removal of the provisions relating to the Children's Court.

The Inquiry is conscious that this task would be a substantial legislative exercise. However, the Inquiry considers that both jurisprudential and practical considerations warrant that exercise.

The Inquiry further considers that the other legislative and administrative reforms recommended in this Report, including those relating to DHS and the Children's Court Clinic in Chapter 18, should not be treated as dependent upon the recommendations in this section being considered or implemented. Many of those reforms are time critical and should not be delayed by the implementation of Recommendation 66.

Recommendation 66

A new Children's Court of Victoria Act should be created and that Act should contain the current provisions in the *Children, Youth and Families Act 2005* relating to the Children's Court, appropriately modified. *The Children, Youth and Families Act 2005* should be revised consequent upon removal of the provisions relating to the Children's Court.

15.7 Conclusion

The Inquiry has focused on those areas in the statutory child protection system in which a child and their family's experience of the legal process can either be avoided, where appropriate, or made less traumatic. Those areas are: simplifying the legislation and the overall court processes; enhancing the experience of children, their parents or caregivers and all those with an interest in the safety and wellbeing of the child or young person in the legal system; and providing the best opportunity for the voices of children and young people to be heard.

In doing so, the Inquiry acknowledges the significant body of work that informed the VLRC reform options for court processes in the statutory child protection system. The Inquiry also notes the steps that have already been taken by key institutions, agencies and professional bodies to improve the current court environment, the relations between lawyers and child protection practitioners, and acknowledges the substantial resource commitment required from the Victorian Government to implement these reforms.

Nonetheless, the Inquiry considers that the implementation of the proposed reforms outlined in this chapter, particularly in relation to: giving a child a voice at court; placing greater emphasis on collaborative problem solving processes to resolving protection applications through process and training changes; and decentralising the court, will ensure that vulnerable children and their families will be afforded every opportunity to be heard and to build a more respectful and collaborative dialogue with DHS to ensure the best interests of these children are met.