

Part 2: Victoria's current system and performance

Chapter 3:

Victoria's current system

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Key points

- The approaches adopted by governments to child protection issues reflect a wide range of historical, social, cultural and environmental factors.
- Victoria's approach, which is in line with other Australian states and major countries such as the United Kingdom, Canada and the United States, is based on balancing two key principles:
 - the rights and responsibilities of parents to care for their children and their right to privacy; and
 - if abuse or neglect is suspected, the rights of children to protection and the responsibility of government to intervene in the 'private' setting of the family.
- This approach varies from many European countries where there is a greater emphasis on the view that children are best cared for within their family and therefore centre on family unity and working with vulnerable families in caring for children;
- Significant changes have occurred in Victoria's approach to child protection since European settlement including:
 - the view as to what constitutes child abuse and neglect has widened significantly;
 - the role of the State has changed from non-intervention in the family to one of a high level of responsibility for protecting children seen to be at risk of abuse and neglect;
 - significant changes in the pivotal and significant role played by community service organisations; and
 - a growing emphasis on linking family support services to the statutory child protection service.
- The legislation for Victoria's statutory child protection system forms part of a broader framework of laws for Victorian children and young people covering child-focused, family-focused and community-focused laws.

3.1 Introduction

Victoria's system for protecting children is a product of historical trends and changes in this area of social policy as various governments have responded to the issues at hand since the settlement of Victoria. Society's and government's understanding of what constitutes child abuse and neglect has changed over time and so in turn has governments' responses through policy and legislation. Child protection in Victoria has evolved since the 19th century, often in line with other jurisdictions; however, from the outset, community service organisations (CSOs) have played a major role.

The laws governing Victoria's child protection system forms part of a broader set of Victorian and Commonwealth laws that affect the safety and wellbeing of children and young people. These laws aim to provide a system for allowing children to live in circumstances that are as safe, stable, and as responsive to their needs as possible.

This overview chapter is therefore in two main parts. The first part (sections 3.2 to 3.4) provides the following:

- An overview of Victoria's current approach to statutory child protection in Victoria;
- A brief history of the major legislative and policy developments, focused on the period from the 1980s onwards; and
- Information on the scale and dimensions of the current system – activities and service interventions; range of organisations; and activity and resource levels.

The second part of the chapter (sections 3.5 to 3.7) provides an overview of the relevant Victorian and Commonwealth laws relating to child safety and wellbeing including their specific purposes and how they relate to each other.

3.2 Victoria's current approach to child protection

Each society has its own unique set of historical, social, cultural, environment and governance factors that influence the approach adopted to child protection issues. However, the broad approaches adopted by societies and governments to protect children from, and respond to, suspected abuse and neglect are generally described in terms of:

- What constitutes child abuse and neglect;
- The overall orientation of society and government's response to the issue;
- The specific activities undertaken and services provided; and
- The role of the legal system.

While there is broad agreement that the high level goal of all child protection systems is to protect children, the overall orientations adopted by societies and governments have tended to fall into two major groups: the child protection orientation and the family services orientation (The Allen Consulting Group 2003, p. vii).

The child protection orientation – the approach adopted in Australia, the United States (US), United Kingdom (UK) and Canada – emphasises the individual rights of parents and children. Governments recognise the rights and responsibilities of parents to care for their children and the right to privacy. If abuse or neglect is suspected, the government also recognises the rights of children to protection and the responsibility of government to intervene in the 'private' setting of the family. The primary focus is the child's best interests, which may require the early intervention of government through protective and statutory-based interventions. The potential for coercive intervention and removal of a child from his or her family by the government of the child is therefore present at an early stage of investigations and working with families.

The family services orientation approach is adopted in a number of European countries such as Sweden, Germany and the Netherlands. It adopts the overall view that children are best cared for within their family and places the emphasis on family unity and working with vulnerable families in caring for children. Features of this orientation are the emphasis on broad-based government and community support for all families in caring for children and greater use of interventions that are voluntary rather than statutory.

The different orientations above reflect a variety of historical and cultural factors, along with the nature of the legal system. In practice, the approaches of government inevitably cut across these broad characterisations, with many jurisdictions that adopt the child protection orientation, including Victoria, broadening the range of services provided over time, particularly through formalised links to focus family services on supporting vulnerable families.

Historically, in Victoria and elsewhere in Australia, the protection and response to vulnerable children has generally been equated with the statutory child protection system as outlined in the prevailing legislative framework, currently the *Children, Youth and Families Act 2005* and the *Child Wellbeing and Safety Act 2005*. An outline of this legislation is provided in section 3.6.1.

Under the current legislative framework, the Victorian statutory child protection system covers the following activities and services:

- Receiving and responding to reports of concerns about children and young people including investigation and assessment where appropriate;
- Providing support services (directly or through referral), where harm or a risk of significant harm is identified, to strengthen the capacity of families to care safely for children;
- Initiating intervention where necessary, including applying for a protection order through the Children's Court and placing children or young people in out-of-home care to secure their safety;
- Ensuring the ongoing safety of children and young people by working with families to resolve protective concerns;
- Working with families to reunite children who were removed for safety reasons with their parents as expeditiously as possible;
- Securing permanent out-of-home care where it is determined that a child is unable to be returned to the care of his or her parents, and working with young people to identify alternative supported living arrangements where family reunification is not possible; and
- The registration and monitoring of community organisations providing protection care and accommodation, and those employed or engaged as out-of-home carers.

A distinctive characteristic of the Victorian system for caring for children when the State becomes their guardian is the significant involvement of CSOs in providing care and services for these children. Even though CSOs have been a central element of the system for protecting children in Victoria for more than 100 years, Victoria has never developed a comprehensive and well-articulated set of policies and practices for the involvement, development and independent regulation of these organisations as part of their substantial and significant role in the child protection system. The roles and regulation of CSOs are considered in Chapter 17 and Chapter 21.

3.3 The historical development of Victoria's statutory child protection system

Concerns about child welfare and safety have been a feature of Victoria since early settlement. This section focuses on the major developments since the 1980s. An overview of Victoria's history of children protection from settlement is set out in the following box.

Several key points emerge from an historical perspective on child protection in Victoria:

- The role of the State has changed from non-intervention in the family to one of a high level of responsibility for protecting children seen to be at risk of abuse and neglect;
- What constitutes child abuse and neglect has widened significantly;
- The economic and social conditions of the day affect the reasons why children enter state care;
- CSOs have played a significant and distinctive but changing role over time; and
- Statutory intervention can cause harm to children as well as protect children from harm.

The early 1980s witnessed the beginnings of major reviews and significant structural changes to Victoria's approach to child protection issues. At that time the powers to receive, investigate and take action in relation to child abuse reports were exercised by the Children's Protection Society and the Victoria Police. The Victorian Government's service involvement had generally been confined to providing services where the Children's Court had made court orders; this was done through the predecessor of the Department of Human Services (DHS).

Victoria's child protection system from European settlement to the 1990s

The history of Victoria's child protection system is relevant to understanding current policies and services. In addition, the historical background for Aboriginal children is significantly different from that of non-Aboriginal children, and Chapter 12 outlines some of the key features relating to Aboriginal children and families and their involvement in Victoria's child protection system. The following historical overview is based on several sources (Bialestock 1966; Birrell & Birrell 1966; Jaggs 1986; Scott & Swain 2002; Tierney 1963).

From the early days of European settlement in Victoria in the 19th century, children left destitute by parental death or desertion were a concern to the community. Similar to the early development of schools and hospitals in the 19th century, in Victoria child welfare was seen as the responsibility of churches and philanthropic organisations, not government.

During the economic depression of the 1890s community concern extended to children subject to abuse and neglect by parents in impoverished urban areas. This gave rise to the Victorian Society for the Prevention of Cruelty to Children (now the Children's Protection Society), which was modelled on the US and UK equivalent organisations, and which was granted limited statutory powers to investigate suspected cases of child abuse and neglect. Most of their cases involved child neglect rather than physical abuse, and by today's standards, physical abuse had to be severe before parents were prosecuted. This was because parents (and teachers) were seen to have a right to chastise children by beating them.

While child sexual abuse was a serious criminal offence, and was not unknown, few such cases came to light. Generally, because of contemporary notions of the family and the State, there was a marked reluctance on the part of governments in the 19th century to 'interfere' in the private domain of the family, or to assume financial responsibility for children whose parents were unable to care for them.

The early 20th century witnessed significant advances in the broad field of what was called child welfare, and there was a steady growth in the role of government. Notable achievements included the development of maternal and child health services, day nurseries, kindergartens, and the creation of the Children's Court.

The passing of the Children's Welfare Act 1924 led to the establishment of the Victorian Child Welfare Department, which was responsible for children

found to be 'in need of care and protection' by the Magistrates' or Children's courts. It was the role of the Victorian Society for the Prevention of Cruelty to Children, and to a greater degree, the police, to investigate suspected child abuse and neglect and bring cases to court. Compared with today, the number of investigations was very low until the 1970s.

However, in the post-war period the number of children in out-of-home care was relatively high compared with today, given the smaller population of the time. For example, by the 1960s, at any point in time there was an estimated 5,000 children in Victorian children's homes, 3,000 of whom were state wards and 2,000 of whom were privately placed by their families. The reasons for private placements included parental alcohol abuse, illness and family breakdown. The modern income security system with supporting benefits for single parent families did not exist at that time. If parents failed to make payments for their child, the child often became a ward of the state. The majority of children in care were in institutions run by CSOs that received a small subsidy for each child from the government. Siblings were very often separated due to age and gender segregation.

There was significantly less use of foster care in Victoria than in other states. Research in the 1950s and 1960s by John Bowlby and others on the effects of institutional care on young children led some CSOs to move away from institutional care and develop family group homes and foster care programs. The *Social Welfare Act 1960* allowed for: the creation of rudimentary services to prevent children entering care; the professionalisation of the child welfare workforce; and the beginning of deinstitutionalisation, with children's homes being progressively closed over the next two decades.

It was many years later that state wards from the post-war period spoke collectively about their experiences of abuse and emotional deprivation while in care. In 2009 the then Prime Minister, Kevin Rudd, made an apology to the Forgotten Australians on behalf of the nation, as he had done previously to Aboriginal people who belonged to the Stolen Generations.

In the early 1960s US medical specialists using X-rays identified previously undetected fractures in young children that had been inflicted by their parents, and the term "battered baby syndrome" was coined. Research in the mid-1960s at the Royal Children's Hospital in Melbourne by the police surgeon Dr John Birrell and his paediatrician brother, Dr Robert Birrell, identified a similar group of severely physically abused young children in Australia. At the same time Dr Dora Bialestock, the

medical officer who examined children admitted to state care in Victoria, published her research on the pervasive developmental delay in infants brought into care. Public and professional awareness of child physical abuse increased markedly in the 1970s.

The 1970s was also the period in which there was growing concern being expressed by Aboriginal communities about the number of Aboriginal children in state care, and especially about those Aboriginal children in non-Aboriginal foster and adoptive families who had lost connection with their own families. This period saw the development of Aboriginal community controlled organisations such as the Victorian Aboriginal Child Care Association, which helped bring about a change in attitudes and policies towards Aboriginal children in the child welfare system.

It was not until the 1980s, after the feminist movement took up the issue of rape law reform, that child sexual abuse first came to be generally recognised as a serious social problem. Specialist counselling and advocacy services funded by the state government were created to respond to the needs of sexually abused children.

By the 1990s there was growing awareness of the serious psychological effects of children witnessing family violence, and this came to be seen as a major and common form of emotional or psychological abuse. By the early 21st century the problem of child neglect began to receive renewed attention, assisted by medical research on early brain development that demonstrated the serious and permanent effects that deprivation and cumulative harmful events can have on a young child.

3.3.1 The Carney Committee

From 1982 to 1984 a committee chaired by Dr Terry Carney (the Carney Committee) conducted a comprehensive review of the Victorian child welfare system. The report contained 343 recommendations. The principal recommendation of the Carney Committee was that all responsibility for coercive intervention should lie exclusively with the State, given the consequences of such intervention for the child's future and that the Children's Protection Society should no longer be authorised to undertake investigations into child protection matters. It further recommended that responsibility for investigation and intervention be vested in the then Community Welfare Services Department and the police under a 'dual track system'. In 1985 the Children's Protection Society ceased its statutory activities.

The Carney Committee also made a range of other high level and significant recommendations including:

- The state government should increase its financial commitment to child, family and community services;
- More services were required to support and strengthen families;
- More attention was required to school attendance and attainment issues for children in care;
- Services should be geared towards family reunification wherever possible;
- The protection of children should be a 24/7 operation;

- There should be voluntary (non-mandatory) reporting of child abuse and neglect, no central register of abuse but rather community service providers to lead information sharing where necessary; and

- Case planning, including conferences for out-of-home care, should be established.

In relation to the Children's Court, the Committee recommended that the courts be restructured by separating them into two divisions: the Family Division and Criminal Division in recognition of the differing philosophies that inform criminal and protection matters. The *Children's Court (Amendment) Act 1986* was passed to give effect to this recommendation.

In 1986, two years after the Carney Committee concluded, the government commissioned a Victorian Law Reform Commission (VLRC) *Report on Sexual Offences Against Children* as part of a general review of the law relating to sexual offences. In November 1988 the final report comprising 42 recommendations was finalised. The key recommendations in the report regarding the child protection system were:

- There should be a broad independent review of the child protection system;
- The review should provide advice on a system of child protection that will enable government and non-government agencies to work more effectively both individually and collectively;
- The review should advise on joint investigation and case management procedures between the police and community services; and
- The review should give advice in relation to the proposed central register of child abuse.

3.3.2 The Fogarty reports

Prior to receiving the final VLRC report in August 1988, the government requested Mr Justice Fogarty, as part of his appointment as the inaugural chair of the Victorian Family and Children's Services Council, to inquire into the operation of Victoria's child protection system and to advise on measures to improve its effectiveness and efficiency; this was undertaken with Ms Delys Sargeant, the Deputy Chair of the Council. An interim report in February 1989 was damning of the state of statutory child protection services in Victoria and recommended that statutory child protection should be constituted as 'a narrowly based emergency intervention service' for children at risk of harm and should not be confused with long-term welfare programs.

Other key recommendations in the Fogarty interim report were to:

- Provide specialist magistrates for the Children's Court;
- Establish a single track system conducted by the Department of Community Services and substantially changing the police role;
- Establish an after-hours service conducted by the department;
- Increase the budget for child protection services; and
- Establish a child at risk register (Fogarty & Sargeant 1989).

In 1989 the Victorian Parliament passed the *Children and Young Persons Act 1989*. The intent of this legislative framework has been summarised as:

... designed to correct welfare practices of the 1960s and 1970s that saw children too readily removed from their parents' care and negligible emphasis placed on family preservation. The Act, hence, established conditions for the exercise of statutory authority in family life and directed that reunification be given a primary consideration for child protection (The Allen Consulting Group 2003, p. 26).

Adopting recommendations from the Carney Committee, the new Act:

- Included principles to guide decision making in the court;
- Revised the grounds for protection applications, to focus on past harm or risk of future harm to the child;

- Included the Aboriginal Child Placement Principle;
- Generally provided for children in Family Division proceedings who are mature enough to provide instructions to be directly represented;
- Created a new and flexible range of dispositional powers, ranging from minimum intervention (voluntary undertakings) to maximum intervention in the child's life (permanent care orders, where guardianship and custody are vested in the State);
- Granted powers to protective interveners to take a child immediately into safe custody for 24 hours prior to getting a court order; and
- Established the Children's Court as a specialist court, headed by a senior magistrate, albeit still connected to the Magistrates' Court.

In 1990 Victoria was the only state other than Western Australia not to have provisions for mandatory reporting of suspected child abuse. However, this changed following the murder of Daniel Valerio in September 1990. Daniel was two years and four months old when his stepfather beat him to death. In the period prior to his death, several professionals had come in contact with Daniel but failed to intervene, and there was confusion between police and the Department of Community Services as to which agency was investigating. In November 1993, following the July 1993 report of Mr Justice Fogarty referred to below, by the *Children and Young Persons (Further Amendment) Act 1993*, the Victorian Government introduced mandatory reporting of suspected serious physical or sexual abuse of children for medical practitioners, nurses and police, and later, in July 1994, for teachers and school principals. In the year following the introduction of mandatory reporting, reports of suspected child abuse and neglect increased by 38 per cent.

In July 1993 Mr Justice Fogarty completed a final report on Victoria's child protection system and the subsequent introduction of mandatory reporting. The report expressed the view that under the new Act, the Children's Court and protection workers were placing too much emphasis on the child remaining with the family and not enough on the right of the child to be protected. The report also recommended, in line with earlier recommendations by the Carney Committee, that the Children's Court be separated from the Magistrates' Court and headed by a judge of County Court status, and that appropriately qualified people be appointed directly to the court to reflect the court's specialisation and improve its reputation (Fogarty 1993).

The *Children and Young Persons (Miscellaneous Amendments) Act 1994* clarified that in making orders under the Act, the court's paramount consideration should be the 'need to protect children from harm, to protect their rights and to promote their welfare'. The recommended structure for the Children's Court was implemented with the passing of the *Children and Young Persons (Appointment of President) Act 2000*.

Given the problems and confusions of the dual track system, under which the police shared responsibility for child protection with child protection services, the system was discontinued in 1994.

3.3.3 The Child Protection Outcomes Project

The next round of major reforms to the child protection system and legislative framework stemmed from a major review initiated in 2002 by DHS. The review, known as the *Child Protection Outcomes Project*, undertook a fundamental assessment of the appropriateness of the legislative, policy and program frameworks that determine the direction and boundaries of current policy and program responses. The review was conducted in three stages: policy and evidence review; community consultation; and reform proposals. As in a number of other jurisdictions, the review represented a response to increasing demand for child protection services, which was placing pressure on the system and government funding, as well as concerns that the changing characteristics and circumstances of vulnerable children and families may require changes to the child protection system. In this context, increasing consideration was being given to formally and actively locating statutory child protection services within a broader child welfare framework.

The first stage (policy and evidence review) strongly endorsed the overriding importance of an effective emergency and statutory response to episodic cases of grave maltreatment such as severe physical and sexual abuse. However the review also pointed out that the changes in the client population since the 1989 legislation were increasingly shifting the problems to be addressed to ones of a chronic and relapsing nature. Child neglect and emotional abuse constituted two-thirds of all cases.

In summary, the review concluded:

- The statutory basis of child protection drives the process and treatment of families which was constraining the responses available and the flexibility to meet the differing needs of families, children and young people;
- The system was based on discrete episodes: notify, investigate, intervene or close. However, the high level of re-notifications and resubstantiations suggested that child abuse and neglect is not a point-in-time event and addressing the underlying issues requires sustained support; and
- Despite the concerns of those notifying, families who are at lower risk often fall outside the mandate of the legislation, with the potential risk that these issues become more chronic over time (The Allen Consulting Group 2003, p. 73).

Based on this broader view of the protection and welfare of vulnerable children, the DHS review proposed four key elements for a future approach:

- A community partnership for the protection and welfare of children supported by new infrastructure, processes and governance arrangements;
- A new model for intake, assessment and referral;
- A range of service responses that are appropriate for a wide variety of child protection concerns, problems and circumstances presented by families; and
- A focus on reducing out-of-home care where possible, but also greater permanency and stability for children in care who are not able to return to their families.

The second stage (community consultation) established that there was broad agreement on the reform directions and the critical message that 'the most effective response to support vulnerable families and protect children from harm involves an integrated, unified broad-based system, of services which aims to protect child wellbeing and protect children' (Freiberg et al. 2004, p. 1). The review's panel also recommended that intermediate or quasi-legal responses to children be expanded to enable child protection practitioners to work together with families away from the legal system and for extended periods of time (Freiberg et al. 2004, p. 38).

The third stage (policy reform) culminated with the passage of the *Children, Youth and Families Act 2005*. Significant provisions in the Act, which consolidated and up-dated the *Children and Young Persons Act 1989* and the *Community Services Act 1970*, were:

- The 'best interests principle' requiring that 'the best interests of the child must always be paramount' for all persons working under the Act and that consideration must always be given to the need to protect children from harm, to protect their rights and promote their development;
- A new focus on addressing cumulative harm, meaning that a number of small incidents of neglect, for example, constitute significant harm;

- Capacity for new alternative dispute resolution approaches;
- Creation of the category of pre-birth reports;
- Greater emphasis on stability in a child's development;
- Strengthening the participation of Aboriginal families and communities in decision making processes;
- Creation of two new types of orders – temporary assessment orders designed to strengthen DHS' investigatory powers and therapeutic treatment orders for young people aged 10 to 14 years who exhibit sexually abusive behaviours; and
- New processes for the registration and regulation of CSOs.

Statutory role for community service organisations

Importantly, the Act also formalised the broadening of the statutory child protection system to include a legislative authorised family support approach. This formal recognition of the role of family services provided the legislative basis for the introduction of the Child FIRST and Integrated Family Services initiative established within 24 sub-regions throughout the state over a three year period 2006-2007 to 2008-2009.

Under this new framework, professionals including mandated reporters and members of the public can report concerns about children directly to statutory child protection services or by referral to Child FIRST, the intake service for community-based family services. After receiving a referral from a person with concerns about the wellbeing or safety of a child, Child FIRST must report the matter to statutory child protection services if they consider the child in need of protection.

Strengthened provisions for Aboriginal children

The strengthened provisions for Aboriginal children and the Aboriginal community represented a further important step in the recognition of the history of colonisation and its impacts on Aboriginal children and families today. Chapter 12 provides an historical overview of the major policy and legislative frameworks impacting on Victoria's Aboriginal community and Aboriginal children.

A focus on early childhood development

This new legislative framework coincided with the broader debate and evidence on the critical role of a child's early years to the subsequent wellbeing and development of children and young people and the responsibilities and benefits for government and society of a broadly focused and active child development focus. This broader approach was reflected in the *Child Wellbeing and Safety Act 2005* that was designed to provide 'a legislative framework' of overarching principles to guide the delivery of child, youth and family services within Victoria, which will apply to universal, secondary and tertiary child, youth and family services (Parliament of Victoria, Legislative Assembly 2005a, p. 1,365).

This Act established the Victorian Children's Council to provide the Premier and Minister for Children with independent and expert advice about policies and services, and the Children's Services Co-ordination Board to support co-ordination of child-related government action taken at the local and regional levels. At this time the Minister for Children was also responsible for child protection. The Act also detailed the legislative functions and powers of the Child Safety Commissioner. These functions include advising the Minister responsible for child protection about child safety issues, advocating on behalf of children in out-of-home care and undertaking inquiries and reporting on the deaths of children known to child protection services.

In summary, the current legislative framework and broad institutional arrangements in Victoria represent the outcome of a sustained period of major focus on child protection issues that commenced in the early 1980s. These debates have spanned:

- The changing nature of community views about what constitutes child abuse and maltreatment and expectations of government action;
- The appropriate legal framework, principles and processes;
- The importance of specific provisions for Aboriginal children;
- The responsibilities and roles of government and community organisations;
- The balance between statutory/forensic interventions and intensive child and family support; and
- Statutory child protection as distinct from the broader child health and wellbeing services.

3.3.4 Recent developments

Following the establishment of the current legislative framework, and the strengthened and linked family services platform, a range of initiatives and practice improvements have been introduced focusing on out-of-home care capacity and quality, case management and support arrangements for kinship care, additional child protection staff and piloting of placement prevention programs.

More recently, services for young people in out-of-home care and leaving care have been enhanced, along with early intervention programs to help vulnerable parents cope with the challenges of child rearing. Given the concern of the current government for the independence of the Child Safety Commissioner, a commitment to establishing an independent commissioner for children and young people who would report directly to Parliament has been made.

Child protection workforce and practice issues are receiving significant attention both in Victoria and elsewhere. In Victoria, the Minister for Community Services has outlined a range of child practice operating practices and workforce reform proposals (DHS 2011m).

3.3.5 Developments elsewhere in Australia

Debates about the scope and nature of child protection services are evident across all or most jurisdictions in Australia and many other countries.

At the national level in Australia, the Council of Australian Governments (COAG) initiated and agreed in 2009 on *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020*. The framework outlined the importance of a broad approach extending beyond statutory child protection services to vulnerable children and their families. The framework identified a set of actions and strategies to achieve the high-level outcome that 'Australia's children and young people are safe and well' including six supporting outcomes:

- Children live in safe and supportive families and communities;
- Children and families access adequate support to promote safety and intervene early;
- Risk factors for child abuse and neglect are addressed;
- Children who have been abused or neglected receive the support and care they need for their safety and wellbeing;
- Indigenous children are supported and safe in their families and communities; and
- Child sexual abuse and exploitation is prevented and survivors receive adequate support.

The framework notes, that it 'does not change the responsibilities of Governments. States and Territories retain responsibility for statutory child protection, as the Australian Government retains responsibility for providing income support payments' (COAG 2009e, p. 9).

However, as noted elsewhere in this Report, this division blurs a number of important issues at the federal and state government interface, including the role of education, health and the income security system in overall family wellbeing, the efficient provision of a range of family and parenting services and the income support and tax arrangements surrounding the foster care system. It is noted that sharing of information between statutory child protection services and Commonwealth institutions such as Centrelink and Medicare has been a recent development.

3.4 The dimensions of Victoria's system

The statutory child protection system has historically been defined in terms of the range of child protection investigations, out-of-home care and related services outlined in section 3.2. The reporting by DHS and at the national level by the Australian Institute of Health and Welfare (AIHW) and the COAG auspiced annual *Review of Government Service Provision* on the protection and care of children and young people adopts this traditional framework, although in recent years this has been generally extended to include intensive family services developed and linked to statutory child protection processes.

Based on the AIHW framework the following snapshot summarises key dimensions of Victoria's statutory child protection activity using 2010-11 data.

There were 55,718 child protection reports involving 41,459 individual children or a rate of 33.5 children in reports per 1,000 Victorian children aged 0 to 17 years:

- 13,941 children were the subject of completed investigations, an investigation rate of 9.8 per 1,000 Victorian children;
- Of these, there were 7,643 cases where child abuse or neglect was substantiated involving 7,327 children or a substantiation rate of 5.9 children per 1,000 Victorian children aged 0 to 17 years;
- 3,691 new protection orders were issued and the number of children on protection orders at end-June 2010 totalled 6,735, a rate of 5.4 per 1,000 Victorian children aged 0 to 17 years;

- 8,473 children had at least one out-of-home care placement during the year or a rate of 6.9 per 1,000 Victorian children and at June 30 2011, the number of children in out-of-home care totalled 5,678 or a rate of 4.6 per 1,000 Victorian children aged 0 to 17 years; and
- Intensive family support services were commenced during the year involving 4,976 Victorian children aged 0 to 17 years (information provided by DHS, initially for inclusion in the 2011 *Report on Government Services*).

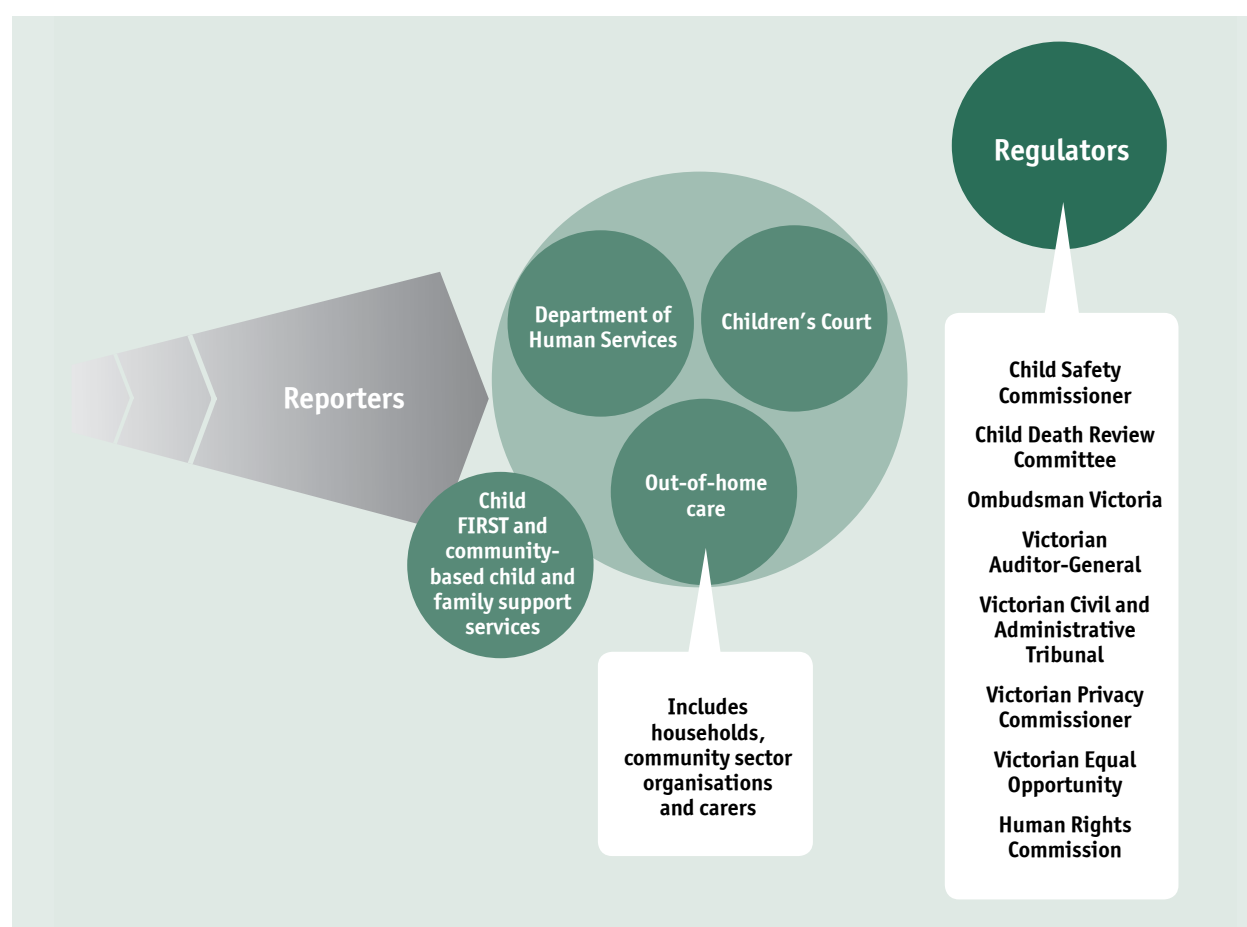
The above aggregate data masks significant differences for Victorian Aboriginal children, as the following data illustrates:

- 2,716 Aboriginal children were the subject of child protection reports, a rate of 178.1 per 1,000 Victorian Aboriginal children aged 0 to 17 years;
- 1,170 Aboriginal children were the subject of finalised investigations, an investigation rate of 76.7 per 1,000 Victorian Aboriginal children;

- 768 Aboriginal children were the subject of a substantiated case of child abuse or neglect, a substantiation rate of 50.4 per 1,000 Victorian children aged 0 to 17 years;
- 1,060 Aboriginal children were on care and protection orders at 30 June 2010, a rate of 69.2 per 1,000 Victorian children aged 0 to 17 years; and
- 1,251 Aboriginal children had at least one out-of-care placement during the year or rate of 82.0 per 1,000 Victorian Aboriginal children and at end-June 2011, and at end-June 2011 there were 877 Victorian Aboriginal children in out-of-home care, a rate of 57.3 per 1000 Victorian Aboriginal children aged 0 to 17 years. This later rate is more than 12 times the rate for Victoria's non-Aboriginal population (Source: Information provided by DHS initially for inclusion in the 2012 *Report on Government Services*).

Figure 3.1 depicts the main elements of the current statutory child protection system and the responsibilities and roles of the government sector, non-government sector and individuals in the delivery and oversight of these activities.

Figure 3.1 Victoria's statutory child protection system



Source: Inquiry analysis

In summary in 2010-2011:

- A range of Victorian individuals, family members and classes of professionals including mandated professionals such as police and teachers, lodged 55,718 reports of suspected harm, abuse and neglect with DHS. More than half (54 per cent) of reports came from mandated reporting groups; the remainder came from individuals such as family members and neighbours;
- Nearly 1,200 child protection practitioners located in the regional office network of DHS investigate, initiate interventions and undertake case management, oversight and referral activities;
- More than 40 CSOs funded by DHS provide and support out-of-home placements including residential care employing 1,200 staff;
- Around 5,000 Victorian households provide kinship care and foster care. In 2010, 1,574 households provided foster care and 2,275 households provided kinship care;
- More than 90 CSOs provide the intake and integrated family services in the 24 catchment areas of the Child FIRST initiative and 13 Aboriginal agencies that form part of this and other service responses; and
- DHS received budget allocations in 2011-2012 of \$171 million for statutory child protection services, \$362.3 million for specialist support and placement services and \$147.8 million for family and community services (which includes Child FIRST, early intervention programs for vulnerable families and at-risk children and also the more broadly focused family violence and sexual assault support services).

In addition, overall expenditure on the Children's Court (including both the Family Division and Criminal Division) exceeds \$8 million.

The above depiction and snapshot data is based on the conventional perspective that child protection aligns with the statutory child protection system. However, as outlined in Section 3.2, increasingly child protection is being viewed and placed within the vulnerable children and families and broader child health, wellbeing and development domains. More specifically, the Inquiry's Terms of Reference require consideration be given to prevention and early identification of, and intervention targeted at, children and families at risk including the role of adult, universal and primary services.

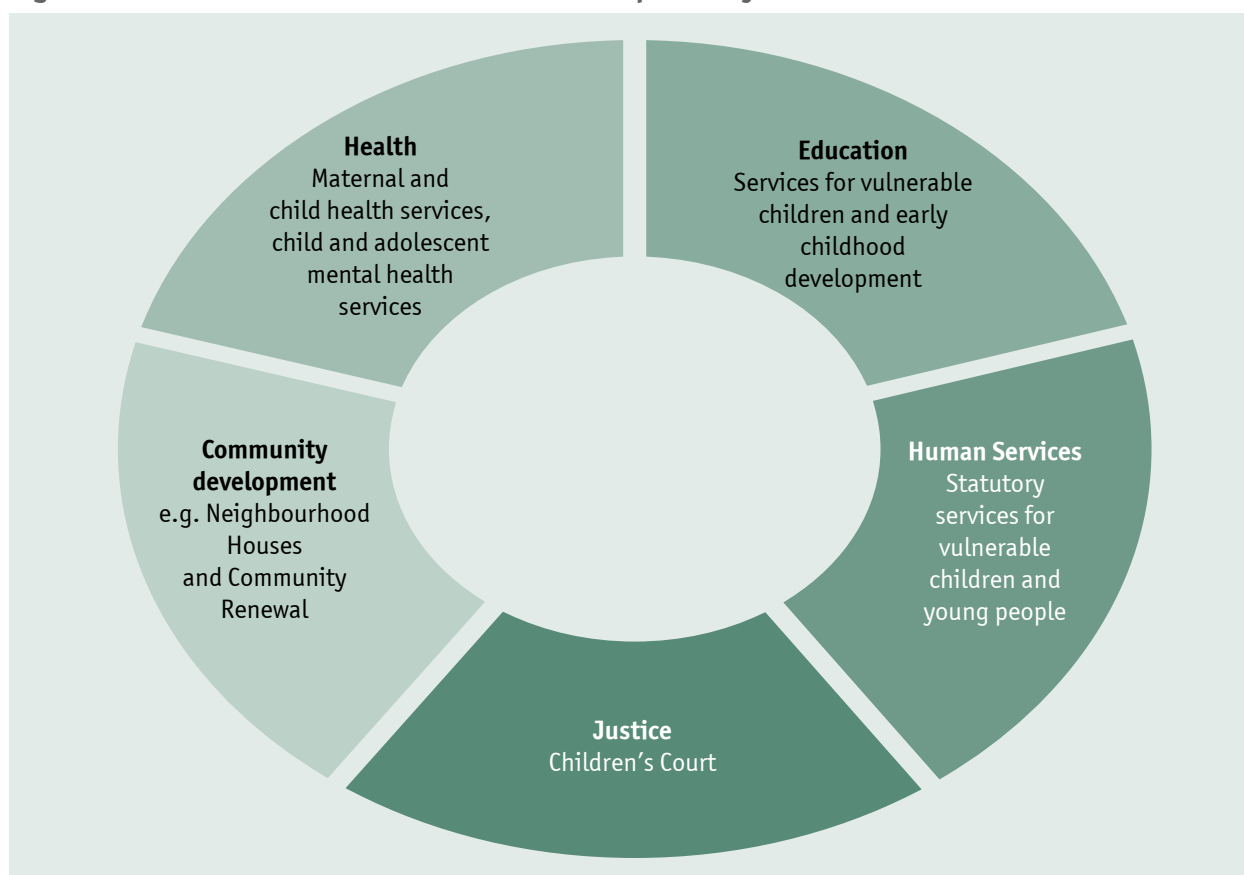
The adoption of these perspectives stems from: evidence that a multiplicity of parent/family, child, environmental and community factors are contributing or are associated with child abuse and neglect; the recurring nature of vulnerable children's interactions with the statutory child protection system; and evidence pointing to the limited impact of tertiary-level interventions for children who have been subjected to chronic or periodic child abuse and neglect.

This broader approach has led to a greater emphasis on prevention and early intervention and viewing the protection and care of vulnerable children through the lens of:

- Comprehensive primary or universal services offered to all families and children that provide support and education before problems arise;
- Secondary or selective interventions targeted at families in need to provide additional support or help to alleviate identified problems and prevent escalation; and
- The tertiary or statutory child protection service where abuse and neglect has occurred to help keep children safe and well (Holzer 2007).

Figure 3.2 depicts this broader view of the protection and care of Victoria's children.

Figure 3.2 The broader child welfare and development system



Source: Inquiry analysis

3.5 The preventative character of law

Laws enacted by parliaments generally operate prospectively only and are of general application. Decisions of the courts generally operate retrospectively, in that they decide legal rights and liabilities about conduct or events that have occurred. These decisions have a flow-on effect by the doctrine of precedent, by which decisions of higher courts bind lower courts and which requires that like cases are decided alike. As well as binding the person to whom the statute or court decision directly applies, the law has an educative role in society by articulating and reinforcing acceptable standards of conduct. Finally, the law has a preventative character in that by stating what acceptable conduct is and by providing sanctions for its breach the law seeks to prevent unacceptable conduct from occurring. Statutes do this by stating the sanction for future conduct; courts do this by imposing sanction for past conduct.

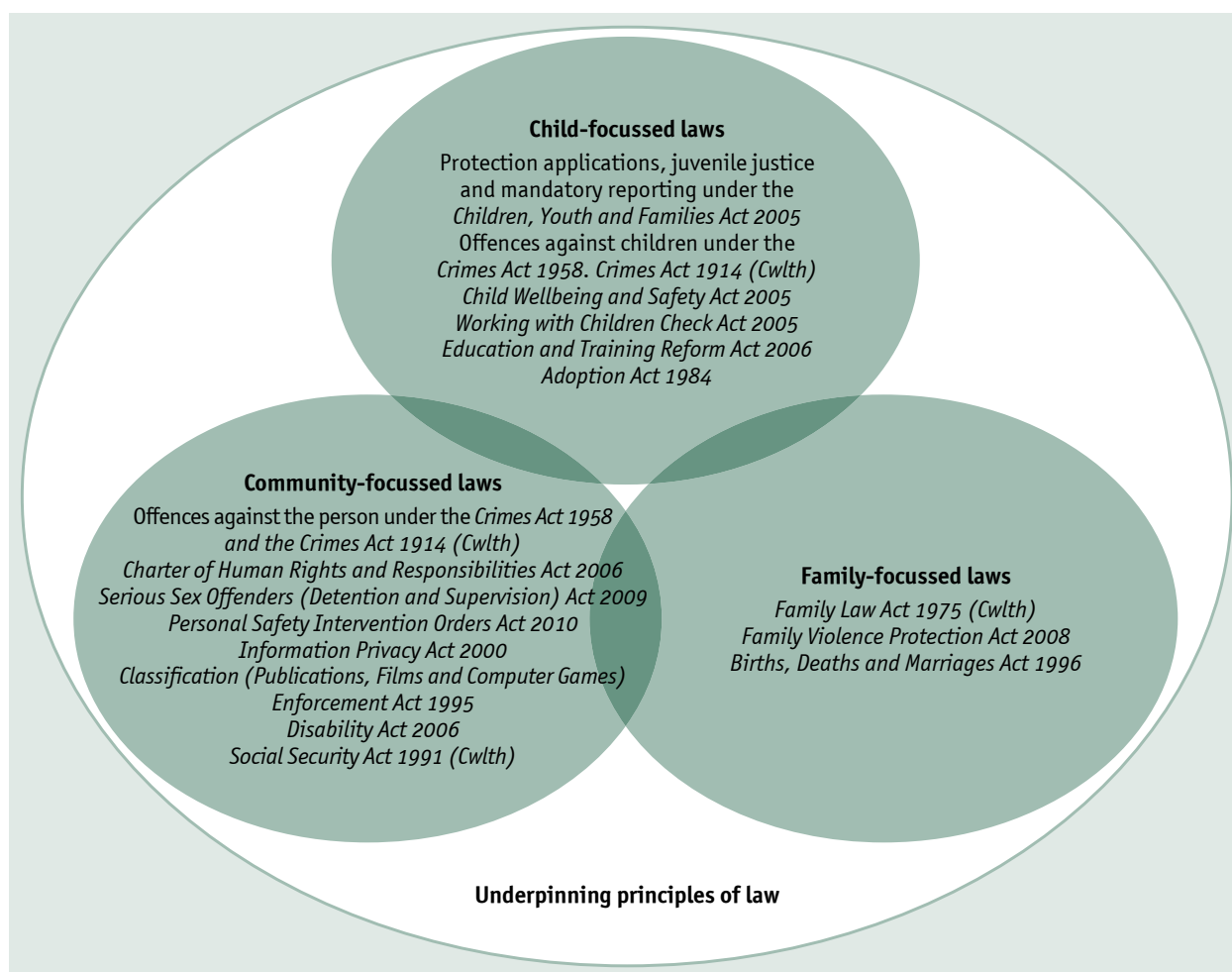
3.6 Legislation and the protection of children and young people in Victoria

The child protection legislative framework in Victoria forms part of a broader set of legislation. These laws relating to the protection of children and young people define and regulate a number of relationships between children, their families, and the community.

Figure 3.3 groups the various Victorian and Commonwealth laws relating to children into three overlapping categories: child-focused laws, family-focused laws, and community-focused laws. Each of the three categories contains a mixture of criminal laws and protective laws.

At any point in the life of a child or young person there is a range of state and Commonwealth laws that operate to guide and promote and protect the child's interests. These laws can be brought into play where the child's relationships with others, or their family circumstances, breakdown or undergo stress, or where anti-social behaviour is displayed. The law and its legal institutions should be aiming to provide support and direction to children and their families rather than adding further layers of complexity.

Figure 3.3 Victorian and Commonwealth laws relating to the protection of children



Source: Inquiry analysis

Part of the role of government, and of those responsible for applying and enforcing the law, is to ensure these laws interact as seamlessly as possible.

In Victoria, the laws relating to children and young people are a combination of Victorian and Commonwealth laws. This is because the Australian legal system divides the responsibility for making laws between the Commonwealth and state parliaments. For example while the Commonwealth has responsibility to make laws regarding marriage and parenting, it does not have responsibility to make laws regarding child protection. The Australian Constitution allows for some overlap between Commonwealth and state legislative powers, but if there is an inconsistency between the laws, the Commonwealth law will prevail to the extent of that inconsistency. This means that, when making laws, the state and Commonwealth governments and parliaments should consider whether the laws are best suited for enactment and enforcement at a federal or state level.

A list of the various Commonwealth and Victorian statutes that either directly relate to, or in some way concern, Victorian children and young people appears at Appendix 6.

In addition, Australia is a signatory to the United Nations Convention on the Rights of the Child (CRC). The CRC sets out a range of rights and principles that children are entitled to expect to be protected by participating governments. These rights and principles are, to varying degrees, reflected in a number of laws, such as the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Charter Act), the *Children Youth and Families Act 2005* (CYF Act) and the *Child Wellbeing and Safety Act 2005* (CWS Act).

The Charter Act articulates the human rights and responsibilities applicable to Victorians. Subject to certain limits, section 38(1) of the Charter Act requires public authorities (which, under section 4 of that Act, may include private entities such as community service providers working within the CYF Act) to act in accordance with the rights and obligations in the Charter Act. The Charter Act also influences the development, enactment and interpretation of legislation, and applies to all aspects of Victoria's statutory child protection system such as:

- The separation of children and families;
- Child protection legal proceedings;
- The cultural rights of children and young people in all aspects of family services, out-of-home care and statutory child protection including secure welfare;
- The safety and wellbeing of children and young people; and
- Non-discrimination and access to services, including universal and specialist services (Victorian Equal Opportunity and Human Rights Commission submission, pp. 8-10).

3.6.1 *Child-focused laws*

The history of statutory child protection legislation is set out earlier in this chapter. As mentioned, the two principal Acts governing the current approach are the CYF Act and the CWS Act. The CYF Act contains the framework and details of the child protection system. The CWS Act expresses the broad principles for the way the State acts in relation to children. All the Acts referred to below are Victorian Acts, unless otherwise stated.

Children, Youth and Families Act 2005

The CYF Act underpins the Victorian system of statutory child protection. The Act affects children, young people, families, caregivers, child protection workers, community service providers, magistrates, police, lawyers, and anyone else who is involved in protecting and caring for children and young people.

Who administers the Act?

Two ministers are responsible for administering the CYF Act: the Minister for Community Services and the Attorney-General. The CYF Act outlines the sorts of decisions the State can make in relation to the child, who can make them and how they should make them. It also establishes institutions like the Children's Court, the Youth Parole Board and the Youth Residential Board. It sets out the principles that the State, whether that is the DHS, the Children's Court, Victoria Police, or any of the other State institutions, must consider when making decisions about children and young people.

The CYF Act authorises the Secretary of DHS and members of the police force to intervene in the life of a child or young person (s. 181). In practice, interventions are carried out by a delegate of the Secretary, usually a child protection practitioner.

A key provision of the Act

One key provision of the CYF Act is section 162, which outlines the reasons a child will be considered to be in need of protection. These reasons are known as grounds. Grounds include circumstances in which the child has suffered, or is likely to suffer significant harm as a result of certain forms of injury, and their parents have not protected them from that harm. The forms of injury are physical injury, sexual abuse or emotional or psychological harm such that the child's emotional or intellectual development is or is likely to be damaged. These kinds of harm may be caused by a single event, or can build up over time from a series of events.

Under the Act, a child protection practitioner may investigate concerns about the wellbeing of a child or young person, and become actively involved in the child or young person's life. Chapter 9 sets out the five phases of possible DHS intervention in the life of a child, and describes the main activities that take place in each phase. A protection application may only be made in respect of a child or young person who has not reached the age of 17 (section 3 of the CYF Act). Existing orders will still be valid until the child reaches 18 years of age. This is considered further in Chapter 14.

Protective intervention as a court process

Depending on the circumstances, protective intervention may require the authority of an order of the Children's Court. DHS may make a number of applications to the court. The most frequent application is a 'protection application'. A protection application marks the start of a formal court case between the parties – that is, DHS and the parents of the child who DHS believes is in need of protection. In Victoria, children themselves are not parties to the protection application, but their best interests and, when they are mature enough, their views, are presented to the court by lawyers.

Parties are required to present evidence to support their case to the court, and the court decides which case is the most convincing. This is what is known as the 'adversarial process', and will be further discussed in Chapters 15.

Protection applications are made on a temporary ('interim') or long-term ('final order') basis. There are two ways of bringing a protection application to court:

- Application by notice - DHS holds protective concerns that stop short of a belief that the child is at risk of serious harm in their home environment. DHS makes an application, a court date is set, and the family attends court (in many cases with the child) on the date to answer to any of the concerns. The child remains in their current living arrangements; and
- Application by safe custody - DHS believes that there is an immediate risk of harm to the child such that it is necessary to immediately remove the child or young person from their home.

The protection application is heard as a civil matter. Among other things, this means that facts are proved on the 'balance of probabilities' rather than 'beyond reasonable doubt', other types of civil processes, such as Alternative or Appropriate Dispute Resolution (ADR) may be used by the parties, and penalties are not imposed on people.

Figure 3.4 illustrates the types of applications available, how they may be made, and the orders that may result. Orders are separated into 'primary' and 'secondary' applications. A primary application is the first application DHS brings in relation to a child. Because the court processes in relation to a protection application take time, and because a child's needs and circumstances may well change over the duration of the order, a number of other, secondary applications and orders are likely to be made during the course of a primary application. While Figure 3.4 is useful in mapping the legal process, vulnerable children within the protection system do not, of course, experience court processes in this tidy, segmented way.

The VLRC's 2010 report titled *Protection Applications in the Children's Court* provides a comprehensive description and analysis of the processes relating to applications to the Children's Court. Orders available under the current system, and proposals for reform, are further discussed in Chapter 15.

Mandatory reporting

Sections 182-189 of the CYF Act provide for a system of mandatory reporting that aims to protect vulnerable children by bringing to light incidents of physical and sexual abuse of children. This is achieved through reports by professionals who have greater levels of contact with children and young people, which would not otherwise have been discovered.

Mandatory reporting was introduced in Victoria in 1993. In its current form, mandatory reporting requires teachers, members of the police, medical practitioners, nurses and midwives to report any reasonable belief that a child is in need of protection because the child has suffered or is likely to suffer significant harm as a result of physical injury or sexual abuse. The CYF Act (and the *Children and Young Persons Act* preceding it) stipulated that certain other professions would become mandated reporters from a date that would be fixed by order published in the Government Gazette. In the 18 years that this scheme has been in force none of the other professions have been gazetted as mandated reporters. This aspect of the CYF Act is considered in more detail in Chapter 14.

Child Wellbeing and Safety Act 2005

The CWS Act sets out principles to guide the provision of government, government-funded and community services to children and their families. These principles are aspirational and do not create legal rights. Principles set out in the Act include:

- Society as a whole shares responsibility for promoting the safety and wellbeing of children;
- Parents are the primary nurturers of the child and government intervention should be limited to that necessary to secure the child's safety and wellbeing;
- Government must meet the needs of the child when the child's family is unable to provide adequate care and protection;
- Every child should be able to enrol in a kindergarten program at an early childhood education and care centre; and
- Service providers should protect the rights of children and families and to the greatest extent possible encourage their participation in any decision making that affects their lives.

The Secretary of DHS is also obliged to act cooperatively with other agencies, and to provide a quality service (section 3(a)-(b) of the CWS Act).

The CWS Act also creates three advisory, oversight and review bodies: the Office of the Child Safety Commissioner, the Victorian Children's Council, and the Children's Services Co-ordination Board.

The Child Safety Commissioner undertakes a number of functions to promote the objectives of the CWS Act, such as promoting child-safe and child-friendly practices in the community, monitoring the administration of the *Working with Children Act 2005* (WWC Act), providing oversight advice to the responsible minister on out-of-home care, and conducting child death inquiries and reporting on those inquiries to the minister.

The Victorian Children's Council provides advice on child related policies and services to both the Premier and the responsible minister. The Children's Services Co-ordination Board reports to the Minister for Children on their reviews into the outcomes of government actions in relation to children, particularly vulnerable children (section 15 CWS Act). The Inquiry examines these bodies in Chapters 20 and 21 of this Report.

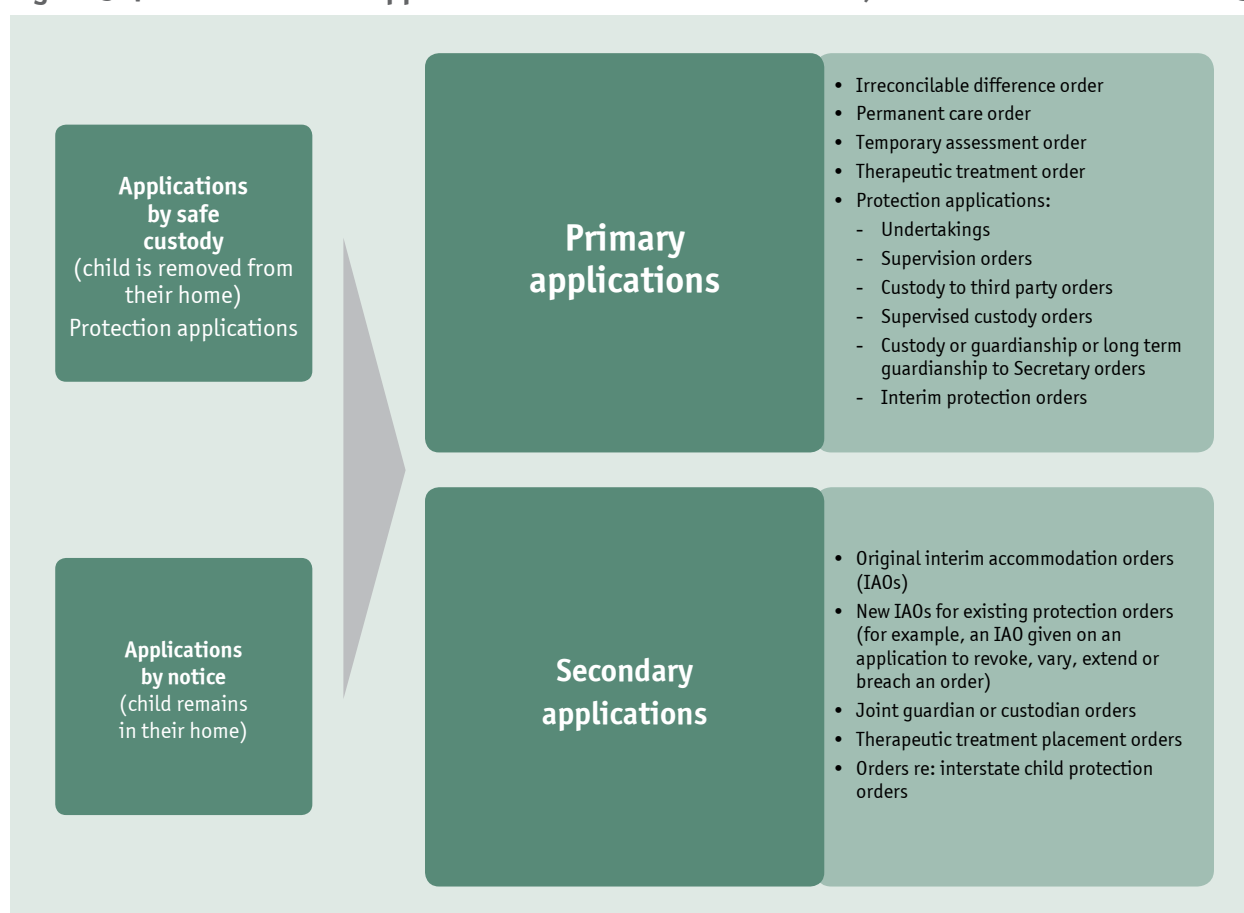
Working with Children Act 2005

The WWC Act regulates how the government determines who is suitable to work with or care for children and young people. People who work with children on a regular basis must apply for a Working with Children Check and employers, volunteer organisations and employment agencies must not engage anyone in child-related work without a current 'positive assessment notice' or Working with Children Check Card.

Section 9 of the Act defines child-related work to include volunteer work and practical training and lists various services, bodies and activities including clubs, associations or movements, and religious organisations.

The Victorian Department of Justice is responsible for conducting assessments and issuing a Working with Children Check Card. Section 39A of the WWC Act prohibits registered sex offenders from applying for an assessment. The Act creates various offences if a person works with children without a Working with Children Check Card. The application of this Act in the context of religious and volunteer organisations involving children is discussed further in Chapter 14.

Figure 3.4 Children's Court applications made under the *Children, Youth and Families Act 2005*



Source: Inquiry analysis

3.6.2 Family-focused laws

Family Violence Protection Act 2008

The *Family Violence Protection Act 2008* (FVP Act) aims to maximise the safety of children and adults who have experienced family violence. The Act provides for both family violence safety orders (orders), which are made by application in the Magistrates' or Children's Court, or family violence safety notices (notices), which are issued by the police. The Act also allows the police to exercise special holding and directions powers when they intend to apply for an order or issue a notice.

Both orders and notices provide that a family member must stop being physically, sexually or emotionally violent, and contain special conditions relating to such things as living arrangements. It is a criminal offence to breach an order or a notice (sections 123 and 37 of the FVP Act).

The Act has a wide definition of 'family member' and 'family violence' (for example a child experiences family violence if they witness family violence, which includes physical or emotional abuse of another family member, or injury to family pets). It contains a number of child-focused considerations for decision making.

Orders and notices have a relationship with orders under the CYF Act, and the *Family Law Act 1975* (Cwlth). For example, a member of the police should not apply for a notice if she or he suspects that a Family Law Act order or child protection order is in force that may be inconsistent with the proposed terms of the family violence safety notice (section 24(c) of the FVP Act). This Act is considered further in Chapter 14.

Family Law Act 1975

Children are particularly vulnerable at the time of the breakdown of a marriage or partnership. The Commonwealth Family Law Act, which establishes the system of family law in relation to married and de facto relationships, recognises this by:

- Providing for a system of dispute resolution in the Family Court of Australia, or the Federal Magistrates' Court where agreement as to a child's living arrangements cannot be reached by the child's parents; and
- Imposing the 'best interests of the child' as the most important consideration when making decisions (either in court, or when making parenting plans) about a child's living arrangements.

At times, matters heard in respect of the Family Law Act may involve child protection issues. The Family Law Act provides that child protection orders under the CYF Act prevail over any orders made under the Family Law Act so long as the child protection order is in force.

The Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) recently completed a joint report into how family violence legislation across Australia intersects with family law. The commissions' report also considered the interaction of these laws with child protection laws. The Commissions' comments and recommendations are considered further in Chapter 14.

The Commonwealth Parliament recently passed the *Family Law Legislation (Family Violence and Other Measures) Act 2011* to implement the joint commissions' recommendations, including prioritising the safety of children in parenting matters, and is considering the Commonwealth Commissioner for Children and Young People Bill 2010.

Adoption Act 1984

Where a parent has voluntarily decided that they are unable to care for their child (and in some limited cases where a court has decided that it is appropriate to dispense with parental consent), a child may be adopted by an appropriate person under the Adoption Act. Section 9 provides that the 'welfare and best interests' of the child is paramount in the administration of the Adoption Act.

Adoption reconfigures a number of legal relationships in a child's life: not only does it sever the legal relationship between a child and their birth parents, but it creates a new legal parental relationship, and new legal relationships between the child and the whole of the adoptive family.

Under the Adoption Act, appropriate adoptive parents are heterosexual couples who are either married, or have been in a de facto relationship for at least two years. Under the Act, a child and their birth parents can access limited information about each other from DHS (Part VI). The Act incorporates the principle of 'open adoption' (Part III, Division 3), whereby a child may continue to have contact with their natural parents, if all parties consent and the court so orders.

3.6.3 Community-focused laws

Disability Act 2006

The Disability Act sets out the framework for meeting the rights and needs of Victorians with a disability. The Act contains a number of principles that guide the way the State interacts with persons with a disability, including the planning, funding and provision of services, programs and initiatives.

The Disability Act applies to people of all ages but makes some references specifically to children. For example:

- Section 5(3)(l) of the Act requires disability service providers to have special regard for the needs of children with a disability and their families and caregivers; and
- Section 52(2) (d) requires the Secretary DHS (or her or his delegate) to where possible, strengthen and build capacity within families to support children with a disability when making a disability plan.

Chapter 9 examines the system response to children with a disability in Victoria.

Other relevant acts

The other key instruments completing the legal framework in Victoria for protecting children and young people from a community perspective are the *Personal Safety Intervention Orders Act 2010*, the *WWC Act*, *Sex Offenders Registration Act 2004*, and the *Serious Sex Offenders (Detention and Supervision) Act 2009*.

Personal Safety Intervention Orders Act 2010

The *Personal Safety Intervention Orders Act 2010* (Stalking Act) allows a court to make a 'personal safety intervention order' which aims to protect a person from someone who has threatened their safety. Orders have a list of conditions that tell the respondent what they cannot do, including stopping them from contacting or threatening the protected person, coming near the protected person or their home, and from damaging their property.

Sex Offenders Registration Act 2004

The *Sex Offenders Registration Act 2004* (SOR Act) allows courts to order that those convicted of certain sex offences (including sex offences against children) must be registered on the Sex Offenders Register for a period of time after their release from custody. Registration occurs by way of a court order made at the time of the sentencing.

The purpose of the legislation is to reduce the likelihood of the registered people reoffending and, in the event that they do reoffend, assist the police in the investigation and prosecution of offences. As such, under section 68 of the Act, after the completion of their sentence registered offenders must report annually to Victoria Police and keep the police informed of any changes to their whereabouts. Also, registered offenders are prohibited from working in 'child-related employment'.

A court must order the registration of adults who commit sexual offences against children, but has the discretion to make an order in the case of a young person (section 1 and sections 6 - 7 of the SOR Act). Offenders are added to the register for a period of time (eight years, 15 years, or life) depending on the age of the registered person, the type of offence, and the number of relevant offences that the offender has committed. Registered offenders who were children at the time of the offence must report for four years, or seven and a half years.

Victoria Police are required to report to DHS whenever a registered sex offender reports unsupervised contact with a child so that DHS can consider whether there is a risk to the child. In February 2011 the Victorian Ombudsman released a report into allegations that Victoria Police had, due to an administrative error, failed to inform DHS of more than 300 registered sex offenders who were living with, or had unsupervised contact with children.

The Ombudsman made a number of recommendations, including that:

- Victoria Police and DHS develop a governance model, protocol and a review mechanism for operating the Sex Offenders Register that promotes greater collaboration with agencies;
- Consider the expansion of multidisciplinary sexual assault investigation centres (discussed further in this Report in Chapter 14);
- Training for case managers be undertaken as a priority; and
- The VLRC review the 'legislative arrangements in place for the registration of sex offenders and the management of information provided under its reporting obligations' (Victorian Ombudsman 2011b, pp. 37-38).

The SOR Act and its implementation were reviewed in 2011 by the VLRC. According to the VLRC, on 1 June 2011, there were 2,659 sex offenders living in the community (VLRC 2011). Given the Ombudsman's comments in early 2011 and the VLRC report, the Inquiry does not propose to comment on the operation of the SOR Act.

Serious Sex Offenders (Detention and Supervision) Act 2009

The *Serious Sex Offenders (Detention and Supervision) Act 2009* (SSO Act) establishes a scheme for the further detention and/or supervision of some categories of sex offenders who, although they have completed their sentences, are thought to pose an unacceptable risk of committing further sexual offences. A number of other states in Australia have similar legislation. The purpose of the legislation is to protect the community (and especially children) from the risk of harm posed by those offenders (section 1(1) of the SSO Act). The Act also allows for the making of suppression orders in relation to identifying victims or offenders who are the subject of proceedings under the SSO Act. This is discussed further in Chapter 14.

3.7 The Criminal law

The purpose of criminal law is to protect society, maintain social order, define minimum standards of conduct, and provide sanctions for conduct that falls below those standards (ALRC & NSWLRC 2010, pp. 933-934). The criminal law in Victoria is set out in many different Acts, although in the context of child abuse, the key statute is the *Crimes Act 1958*. The Crimes Act contains a number of provisions that relate to the protection of children, and the protection of society as a whole.

3.7.1 Defining a child for the purpose of criminal law

Generally, the community considers that a child or young person is someone up to the age of 18. For the general purposes of the law, a person is an adult once they reach the age of 18 (section 3 of the *Age of Majority Act 1977*). There are many other legal milestones marking 'adulthood', such as the eligibility to vote and drive (section 18 of the *Electoral Act 2002* (Vic); section 93(1) (a) of the *Commonwealth Electoral Act 1918*; section 19 of the *Road Safety Act 1986*). However, Victorian criminal law does not provide a single definition of a 'child' or a 'young person'. This is because the law recognises that there should be different levels of responsibility flowing between the child and society depending on the child's maturity, circumstances, whether the child is a victim or offender, and the particular offence.

For example, in Victoria, the criminal responsibility of children is organised along the following lines:

- A child under the age of 10 cannot commit an offence (section 344 of the CYF Act);
- A child between the age of 10 and 14 years is capable of committing an offence, but their responsibility for the offence will depend on whether the prosecution can show that the child understood that their

alleged conduct was seriously wrong and could lead to punishment by a court (this is known as the *doli incapax* principle); and

- A person who is alleged to have committed a crime, and who was aged of 10-18 years (inclusive) at the time they were alleged to have committed the crime is considered to be a child (s. 3 of the CYF Act) for the purpose of criminal law.

Similarly, some offences provide higher penalties for offences committed against children of certain ages. For example the legal age of consent for sexual activity in Victoria is 16 years of age. If a child is under the age of 16, in most cases a child is unable to give consent to a sexual relationship and so the sexual penetration of a child under the age of 16 is an offence. Some exceptions set out in section 45(4) of the Crimes Act include:

- Where the alleged offender and the child are aged 10-16 and there is a two year or less age difference between them; and
- Where the child is over the age of 12 and the alleged offender proves to the court the alleged offender made a reasonable mistake as to the child's age being 16 years or older.

Penalties for the sexual penetration of a child under the age of 16 are higher where the child is under the age of 12, or where the offender is in a 'position of care, supervision or authority' over the child (section 45(2) of the Crimes Act). Section 48 of the Crimes Act also prohibits the sexual penetration of 16 and 17 year olds who may be under the power or care or authority of certain classes of people including teachers, foster parents, health professionals and ministers of religion with pastoral responsibility for the child.

3.7.2 Offences specifically relating to children

A range of Victorian and Commonwealth statutory laws apply to those areas in which our society views children to be vulnerable, particularly in relation to the protection of children from sexual abuse and exploitation. Some examples include:

- Indecent acts with or in the presence of a child under the age of 16, persistent sexual abuse of a child, and facilitating sexual offences against children (sections 47(1), 47A and 49A of the Crimes Act);
- Aggravated sexual servitude and aggravated deceptive recruiting for commercial sexual services (sections 60AC and 60AE of the Crimes Act) and various provisions of the *Sex Work Act 1994* relating to exploitation of children in sex work;

- Abduction of a child under the age of 16 and child stealing (sections 56 and 63 of the Crimes Act);
- Taking, or failing to take, action that resulted in harm (or could potentially cause harm) where a person has a duty of care over the child (section 493 of the CYF Act);
- Knowingly using an on-line service to publish or transmit material that portrays a minor engaged in sexual activity or depicted in an indecent sexual manner (*Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*), producing and possessing child pornography, and procuring a child for the purpose of child pornography (sections 68, 70 and 69 of the Crimes Act);
- Child homicide, infanticide and concealing the birth of a child (sections 5A, 6 and 67 of the Crimes Act);
- Female genital mutilation (section 32 of the Crimes Act); and
- A range of offences relating to the care of children under Chapter 6 of the CYF Act, such as failing to protect a child from harm, leaving a child unattended, and harbouring or concealing a child (sections 493-495 of the CYF Act). Further consideration will be given to this offence in Chapter 14.

The Commonwealth *Criminal Code Act 1995* also creates offences relating to the sexual abuse of children, including trafficking in children, commission of child sex offences outside Australia and offences for distribution of child pornography material outside Australia.

In addition, there are a range of offences that, although not specifically directed at protecting children, nonetheless perform that role. For example a person hitting a child may be prosecuted for assault under section 31 of the Crimes Act. This will be considered in relation to the prosecution of physical and sexual abuse of children in Chapter 14.

3.7.3 Offences committed by children and young people

The Inquiry's Terms of Reference did not include an examination of criminal acts by children or young people. This section is included for completeness in the overview of the legal framework relating to children and young people.

The Criminal Division of the Children's Court

Victoria has had a special criminal court capable of hearing charges against children and young people in one form or another since early last century (*Children's Court Act 1906*; the *Children's Court Act 1973*).

The Criminal Division of the Children's Court, currently established by sections 504 and 516 of the CYF Act, hears most offences committed by children in Victoria (section 516 of the CYF Act). As explained previously, for the purpose of criminal law, a child is a person aged 10 to 17 years at the time of committing the alleged offence. If a young person has turned 19 by the time their case is heard in the Children's Court, the case will be transferred to the Magistrates' Court.

The court may hear any offences committed by children except homicide, attempted murder, culpable driving causing death, and arson causing death. This means that some serious charges that would ordinarily be heard before a jury are not heard before a jury where the accused is a child or young person. A young accused may, however, elect to have their case heard by a judge and jury in the County or Supreme Courts. In certain exceptional circumstances a matter may be transferred from the Children's Court to an adult court (see, for example, section 516(5) of the CYF Act).

Sentencing principles relating to children and young people

Sentencing principles relating to children and young people recognise that the criminal justice system should treat young offenders differently from adults.

Generally, legislation that creates a criminal offence will also state a maximum penalty. Courts are not obliged to fix a penalty to the maximum. This is known as 'sentencing discretion'. In exercising that discretion, courts will consider sentencing principles, that reflect the purpose of criminal punishment that is, 'protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform' (*Veen v R (No 2)* (1988) 164 CLR 465 at 476). Section 362 of the CYF Act sets out sentencing principles for young people.

Under section 362 of the CYF Act, a court (generally the Children's Court) must consider, among other things, the desirability of allowing the child to live at home, the need to strengthen and preserve the relationship between the child and the child's family and the need to minimise the stigma to the child resulting from the court determination. These principles are well established, have their genesis in the 1984 Carney Committee report, and reflect an understanding that 'rehabilitation is usually said to be more important than general deterrence because punishment may in fact lead to further offending' and that imprisonment of a young person can have far reaching and damaging consequences for the child and for the community in the long term (*R v. RPJ* [2011] VSC 363).

When a person under the age of 18 is sentenced to a period of custody, they do not serve their sentence in a prison, but in youth justice centres, which are administered by the DHS rather than the Department of Justice. In some circumstances, young people aged 18 to 21 years may also be sentenced to serve their custodial sentence in a youth justice centre instead of an adult prison. This is known as the 'dual track' system. Generally, courts may set a non-parole or minimum period for sentences of two years or more (section 3(1) *Sentencing Act 1991*). However for children or young people detained in a youth justice centre the Youth Parole Board determines when a child is eligible for parole (section 458 CYF Act).

Consistent with the law's primarily rehabilitative approach to criminal offending by children, in some cases section 248 of the CYF Act allows the court to make a therapeutic treatment order in relation to a child over the age of 10 but under the age of 15, where the child has displayed sexually abusive behaviours and the order is necessary to ensure the child's access to and participation in therapy. This contemplates, but is not limited to, a situation where the child may be charged with a sexual offence. However, if the child successfully completes the program, the court must dismiss any criminal charges against the child (section 354(4) of the CYF Act). Statements made by the child in therapy are not admissible for the purpose of prosecution (section 251 of the CYF Act).

Criminal records, police records and children and young people

Victoria does not have laws that erase the criminal history of young people once they reach the age of 18 (often referred to as 'spent conviction schemes'). The continuing appearance of convictions on conviction and police records is largely governed by Victoria Police policy.

In Victoria a conviction for an offence committed by a young person under the age of 18 will not appear on a police record after five years have passed from the conviction. Where the young person is aged 18 or over at the time of their conviction, the usual '10 year rule' will apply (i.e. offences more than 10 years old from the court date are generally not disclosed on a police record). Exceptions to the 10 year rule include: where the sentence was for a period of more than 30 months; where there are other sentences within the 10 years; or where the conviction is for a serious offence of violence or a sex offence and the records check is for the purpose of employment with vulnerable people, including children (Victoria Police 2011).

3.8 Conclusion

This chapter has sought to provide an overview of Victoria's system for protecting vulnerable children and the broader legal framework covering the safety and wellbeing of Victorian children and young people.

In particular, the chapter has emphasised Victoria's child protection system is a product of historical trends and changes in this area of social policy as various governments have responded to the issues at hand since the settlement of Victoria. Society's and government's understanding of what constitutes child abuse and neglect has changed over time and so in turn has governments' responses through policy and legislation. Child protection in Victoria has evolved since the 19th century, often in line with other jurisdictions; however, from the outset in Victoria, CSOs have played a major role.

Child protection in Victoria has a broad scope covering government, the community services sector, the legal system and individual households. In 2010-2011, more than 55,000 reports of alleged children abuse were made to the child protection system, and the Victorian Government allocated more than \$600 million for direct child protection activities.

The laws governing Victoria's child protection system form part of a much broader set of Victorian and Commonwealth laws that affect the safety and wellbeing of children and young people. These laws aim to provide a system for allowing children to live in circumstances that are as safe, stable and as responsive to their needs as possible.

While Victoria enjoys a relatively stable system of civil and criminal laws that apply to children and young people, the overall legal framework comprising Commonwealth and state laws has developed into complex fabric of interrelating laws and legal institutions. This complex fabric can be attributed to the need to weave protective and corrective aims into legislation and also address the sometimes conflicting priorities and needs of children, their families and the broader community.