

Part 5: The law and the courts

Chapter 14:

Strengthening the law protecting children and young people

Chapter 14: Strengthening the law protecting children and young people

Key points

- Abused children are not adequately protected as they should be by the law. The crimes of child physical abuse and child sexual abuse should be recognised in the *Children, Youth and Families Act 2005*, and processed, as the crimes they are.
- Child abuse is a 'hidden crime', in that it is under-reported and under-prosecuted.
- There should be a stronger legislative link between the child protection and criminal justice responses to child physical and sexual abuse and serious neglect. Forensic child protection and Victoria Police investigators should be continuously trained in interviewing and evidence gathering, particularly when seeking evidence from a child or young person.
- The available data in Victoria does not provide a clear picture of the factors that influence the progress of each stage of the criminal justice process. This impedes the reporting and prosecution of child physical and sexual abuse and neglect.
- The mandatory reporting scheme is an important part of the legal framework protecting children from abuse. It is important that all mandated groups in the *Children, Youth and Families Act 2005* are progressively gazetted to report abuse, that they are appropriately trained, and that the system is adequately resourced to ensure it can cope with an increase in reports. Mandatory reporting should continue to be evaluated, preferably at both the national and state levels. There should also be ongoing monitoring of the *Working with Children Act 2005* to ensure organisations are complying with the legislation.
- State prescribed criminal reporting provisions, such as a reporting duty for ministers of religion and members of religious organisations, can overcome private and institutional hurdles to the reporting of child abuse.
- A formal investigation by government into how to best address criminal abuse of children in Victoria by religious personnel is justified and is in the public interest. Any such investigation should possess the necessary powers to compel the attendance of witnesses and the production of documentary and electronic evidence.
- Caution should be exercised in relation to the enactment of any new 'failure to protect' offence in relation to family members, particularly in situations of family violence. Consideration should be given to the better application and enforcement of section 493 in the *Children, Youth and Families Act 2005*.
- Children and young people aged under 18 should be capable of being the subject of a protection application under the *Children, Youth and Families Act 2005*.
- There is room to improve the interaction between the Commonwealth family law system, the State child protection system and State family violence laws including the way in which agencies and services interact with each other.
- Filicide is a most grievous crime and particularly so when committed as an act of spousal punishment or spousal revenge. The Inquiry considers that the appropriate sentencing standard for filicide committed with the intention of punishing the child's other parent or of denying that parent contact with the child or for spousal revenge is life imprisonment with no minimum term. There is a need to study the various cases across Australia to discern the factors likely to lead to acts of filicide and the early warning signs that can alert the relevant professionals who interact with parents and caregivers.

14.1 Introduction

Children have a right to be protected by the State from harm. This protection is not limited to child protection law, but extends to the criminal and broader civil law.

This chapter addresses the Terms of Reference relating to the interaction and the appropriate roles of departments and agencies, the courts and services providers in the delivery of services to children. In particular, the chapter considers submissions relating to the principles, objectives and aims of key pieces of legislation, perceived gaps in the protections offered by the State, and the nature of child sexual and physical abuse as a crime. Issues relating to the Children's Court and court processes in child protection proceedings are addressed separately in Chapter 15. This chapter also addresses, in part, the Terms of Reference relating to the processes of the courts referencing the reform options put forward by the Victorian Law Reform Commission (VLRC) in its *Protection Applications In The Children's Court: Final Report 19* (the VLRC Report).

Reporting and prosecution of child abuse in the criminal justice process is considered in the first part of this chapter, and is followed by a discussion concerning proposals for discrete areas of reform to the *Children, Youth and Families Act 2005* (CYF Act) including jurisdictional reform. The chapter also reviews the operation of mandatory reporting laws within the statutory protection system and the *Working with Children Act 2005* (WWC Act) and considers a potential criminal reporting duty. The latter part of the chapter considers the intersection of family law, family violence law and child protection, and the operation of suppression orders under the *Serious Sex Offenders (Detention and Supervision) Act 2009*, as well as the introduction of a new offence for the abuse of children through the electronic media, and sentencing standards for the killing of children by parents.

14.2 Child abuse is a crime

The Inquiry received submissions from organisations that argued that child physical and sexual abuse is not treated as a crime in practice (Australian Childhood Foundation (ACF), pp. 3-4; Goddard et al. *Child Abuse Prevention Research Australia*, p. 7).

The Inquiry considers that there should be no ambivalence. Wherever there is child physical or sexual abuse there is crime. However, while there has been a significant increase in reporting rates for child abuse over the past 20 years, the same cannot be said for the prosecution and conviction rates for the physical and sexual assault of children and young people.

This is not a problem that is unique to Victoria: prosecution and conviction rates for the physical and sexual assault of children across Australia are low compared with the rates for other offences. Studies show that, although sex offences against children have a higher conviction rate than those against adults, smaller proportions of incidents involving children resulted in the commencement of proceedings (Richards 2009, p. 2).

The issues that may hinder the prosecution of child abuse are now well known and, in the case of child sexual abuse, well documented. They include: low reporting rates; difficulties in obtaining evidence where the complainant is often the only witness and may be too young to communicate the abuse; variable quality of forensic interviewing; complainant or witness reluctance to give evidence regarding a perpetrator; the perception that a child's uncorroborated evidence is seen as unreliable; and traumatic court processes that may discourage complainants from pursuing criminal matters (Cossins 2006a).

A number of valuable reforms have been made to strengthen the criminal justice response to the low prosecution and conviction rates for child abuse, particularly for sexual assault offences. Reforms have largely aimed at addressing the difficulties encountered by children in court processes due to their age (Cossins 2006b). However, as prevention of child abuse is an aim of the criminal law, reform options should deal with the investigation and prosecution processes and outcomes. The following sections therefore examine the investigation and prosecution of child abuse crimes.

14.2.1 From child protection to the courts: the processes

The reporting process for child abuse as a matter for the Department of Human Services (DHS) is described in Chapters 3 and 9. Broadly speaking, under the current arrangements for all reports of concerns in relation to young people:

- Child FIRST receives wellbeing reports, and refers those to DHS if necessary;
- DHS receives protective intervention reports, and refers to police where reports involve allegations of sexual abuse, physical abuse and/or serious neglect; and
- Police receive reports of suspected offences from the general public, and reports of suspected offences from DHS. Where reports are not received by DHS, police notify DHS.

DHS child protection practitioners are required to notify Victoria Police of all reports of sexual and physical abuse and serious neglect of a child or young person (Victoria Police and DHS 1998). It should also be noted that Victoria Police may also receive reports of physical or sexual assault of children independently of DHS. In this case, Victoria Police notifies DHS of its suspicion that a child is in need of protection.

Currently, reports relating to child physical or sexual assault go to either Victoria Police Sexual Offences & Child Abuse Units (SOCAUs) or Sexual Offence and Child Abuse Investigation Teams (SOCITs). Police officers in SOCAUs take statements, complete reports, and may interview alleged offenders in conjunction with the Criminal Investigation Unit. SOCITs, which will replace SOCAUs as of February 2012, will undertake investigations. There are also two operational multidisciplinary centres (MDCs) in Victoria that operate as co-located services for SOCIT teams, Centres Against Sexual Assault (CASA) counsellors and advocates, DHS and medical examination facilities. The Inquiry notes that MDCs are a key Department of Justice (DOJ) initiative to address particular needs of sexual assault victims and victims of child abuse. The MDC model is referred to in Chapter 9 of this Report.

After an investigation into a matter, a Detective Senior Sergeant (in the case of physical abuse), or a specialist Detective Senior Sergeant (in the case of sexual assault) is responsible for authorising a brief on the case to be referred to the Director of Public Prosecutions (DPP) and Office of Public Prosecutions (OPP) for prosecution.

The DPP and OPP do not prosecute all referred matters. In deciding which matters to prosecute (the 'prosecutorial discretion'), the DPP applies guidelines that require the DPP to consider the interests of the victim, the suspected offender and the wider community, as well as the more general considerations of justice and fairness, and whether the prosecution can be conducted in an 'effective and efficient manner'.

14.2.2 The flow of information between the Department of Human Services and Victoria Police in relation to child abuse allegations

An effective response to child protection requires the interactive operation of both child protection and criminal intervention (Sedlak et al. 2006, pp. 657-658). It is therefore essential that DHS and Victoria Police have a coordinated and transparent response to physical and sexual abuse and serious neglect.

In the recent *Family Violence – A National Legal Response* report (Commissions' Report) into family violence law across Australia, the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) recommended that state and territory law enforcement, child protection and other relevant agencies should, where necessary, develop protocols that provide for consultation about law enforcement responses when allegations of abuse or neglect of a child for whom the police have care and protection concerns are being investigated by the police (ALRC & NSWLRC 2010, recommendation 20-2). The Inquiry notes that Victoria has an established protocol.

The *Protecting Children Protocol* between DHS and Victoria Police governs the roles of both agencies relating to allegations of sexual and physical abuse and serious neglect of children. DHS is the lead agency with responsibility for the care and protection of children under the CYF Act but must report all allegations and situations of suspected child physical and sexual abuse, as well as serious neglect, to police (Victoria Police & DHS 1998, p. 5). Police practice is also influenced by the *Code of Practice for the Investigation of Family Violence* (Victoria Police 2010).

The protocol notes that, in the interests of eliciting evidence of a standard appropriate to the prosecution of a criminal matter, it is 'crucial that police are involved at the earliest stage of notification of sexual abuse, physical abuse and serious neglect' (Victoria Police & DHS 1998, p. 9). The Inquiry understands that a review of the *Protecting Children Protocol* is being conducted. Given that the protocol predates the CYF Act by seven years, and does not reflect new practice at SOCITs and at MDCs and intake processes, the Inquiry draws attention to this review and considers its completion and subsequent updating, a priority.

Matter for attention 9

The Inquiry draws attention to the completion of the review of the *Protecting Children Protocol* between Victoria Police and the Department of Human Services, incorporating updated practices such as the rollout of the Sexual Offence and Child Abuse Investigation Teams and multidisciplinary centres. The completion of the review, and the subsequent updating of the protocol, is a priority.

At present, data limitations do not allow for an accurate measurement of whether the current *Protecting Children Protocol* is being rigorously applied. Police do not collect data on the source of their reports and so it is not possible to identify the proportion of recorded parent-child alleged offences for 2010-11 reported by DHS. The Inquiry has therefore considered data for 2010-11 on the flow of reports to DHS, from DHS to police and police data on the number of recorded alleged offences against victims aged 0 to 17 to gain an approximate understanding of the application of the Protocol. There are significant limitations on the use of this data. For example: a lack of comparability between police and DHS data due to recording practices; a filtering of reports which appear to police to lack sufficient evidence to warrant recording as a complaint and investigation; operational issues such as resources and competing police priorities; and past police practice and experience.

As the Inquiry noted in Chapter 3, 41,459 children aged under 17 were the subject of one or more reports to DHS in 2010-11. In 2010-11 DHS made 12,836 reports to Victoria Police of suspected physical and sexual abuse (8,732 involving reports of suspected physical abuse and 4,104 reports of suspected sexual abuse). These reports are not reflected in Victoria Police data on the number of recorded victims aged 0 to 17 of alleged physical and sexual assaults and other crimes against the person that occurred within the family context.

According to Victoria Police data, in 2010-11, there were 7,277 reported alleged offences of homicide, rape, sexual assault and physical assault against victims aged 0 to 17 in Victoria. Of these, 2,358 were alleged to have occurred within a parent-child or other family relationship and 1,738 family violence notices were issued in relation to total reported alleged offences.

The data, although limited, shows a gap in the number of reports made by DHS to police and the number of alleged child abuse crimes recorded and investigated by police either across the board, in relation to children and parents, or children and other family members. However, without further research it is not possible to accurately state the true extent of, or reasons for, this gap. Recommendation 40 addresses this issue.

14.2.3 Investigations and interviewing

Frequently, children are the only witness in relation to the abuse they suffer. The investigative or 'forensic' interviewing of alleged victims of abuse is therefore an essential part of the effective investigation, substantiation and prosecution of child abuse.

Where police receive a report of a suspected crime, they must undertake an investigation. There is no discrete data on investigations as, theoretically, the report and investigation figures should be the same. Therefore, the stage at which the investigation reaches may indicate the degree to which child abuse is treated as a crime by the police once they have received a report.

In interviewing children in relation to allegations of abuse, DHS and Victoria Police aim to: assess the safety of children's living arrangements; establish the credibility of allegations; record evidence; and evaluate the viability of prosecution or litigation. The forensic interviewing of victims is particularly difficult in the case of child complainants and, in the case of infants, impossible. Further, as noted by Associate Professor Snow at the Inquiry's Bendigo Public Sitting, in ideal circumstances, oral language skills emerge and develop in the context of a stable and warm family life. Children who suffer abuse have had experiences that fall well short of this ideal, and their language skills suffer as a consequence (Associate Professor Snow, Bendigo Public Sitting).

Local and international literature on appropriate interviewing techniques for children supports forensic interviewing protocols that aim for a comprehensive and, as far as possible, free narrative account of the circumstances surrounding the allegations of abuse, with little specific prompting from the interviewer (Lamb & Brown 2006; Powell & Snow submission, p. 3). Traditional conversational interviewing techniques may be suitable for testing information about which the interviewer has independent reliable evidence but unsuitable where the allegations are unsupported by physical or other evidence as may be the case in suspected child abuse. Interviewing techniques that are not appropriately modified and nuanced may miss information, or elicit information that may end as a composite of the interviewers' assumptions (Lamb & Brown 2006, p. 216). This becomes a problem when evidence is tested in court and, as is explored further in section 14.2.5, in the consideration of the evidence as warranting prosecution.

Time spent with children and young people during the process of assessing risk and gathering information is vital to the outcome of child protection and criminal investigations. Child protection practitioners, whose interviews frequently inform police investigations, receive little training on investigative interviewing, other than a course on interviewing skills. However, not all workers complete this course (Ms Perry submission, p. 2; Mr Perversi submission, p. 3).

The interviewing of children can be improved with specialist training. One submission received by the Inquiry noted that an effective training program for child protection practitioners should incorporate the following elements:

- The establishment of key principles or beliefs that underpin effective interviewing;
- The adoption of an interview framework that maximises narrative detail;
- Clear instruction in relation to the application of the interview framework;
- Effective ongoing practice;
- Expert feedback; and
- Regular evaluation of interviewer performance (Powell & Snow submission, p. 4).

Victoria Police interviewers are also informed by internal guidelines such as the *Crime Investigative Guidelines: Child Abuse*, and the *Crime Investigative Guidelines: Sexual Crimes*.

The Inquiry notes that, over the past 18 months, Victoria Police has established innovative interviewing technique training for SOCIT units. The 'whole story technique' of interviewing attempts to accommodate children's level of learning and development. It is aimed at eliciting information from victims and offenders beyond the specifics of an offence. Interviewees are asked open-ended questions that seek to establish broader contextual information that may be relevant to the events, such as the relationship between the alleged victim and offender, and situational factors, rather than directing children to specific incidents. A child may need to tell the story more than once so that interviewers can isolate various events and test the child's recollections.

The Inquiry was informed that the technique has not been extensively tested in court.

In the securing of evidentiary admissibility, the relevance of the whole story technique is the element of children's compliance. The method helps elicit why children comply with approaches by criminally-minded adults. It does so by eliciting the relationship between the child and the adult, in particular the child's dependence, malleability and vulnerability. It articulates the psychological power imbalance. It explains the child's vulnerability to manipulation, which is the method of the criminally minded adult.

A critical question is the interface between the whole story technique and the rules of admissibility of evidence. The rules of admissibility of evidence focus upon the nexus between the evidence sought to be elicited and the crime charged. The prosecution must demonstrate that nexus – that the evidence sought to be elicited is relevant and proximate to the proof of the crime charged. Otherwise the evidence is deemed not probative, or more prejudicial than probative. The key to admissibility of evidence obtained using the whole story technique is to demonstrate its psychological relevance and probativeness. Not only do sexual crimes against children begin in the mind of the offender, they are enabled by the mind of the child – by the child's vulnerability and compliance. For the method to achieve proper admissibility as evidence, the prosecution needs to be able to articulate the relevant psychological pathway of the child, and to link that pathway to the knowledge and intent of the offender. The evidence needs to be seen through the prism of psychology, not only overt acts. The Inquiry considers that attention should be given to the training of investigators in this method and of prosecutors in its presentation.

The Inquiry is advised that the success of the technique is yet to be properly evaluated, as its effect on reporting and prosecution rates is not likely to be established for another five to 10 years. Nevertheless, the Inquiry notes that the whole story technique is consistent with local and international literature on appropriate interviewing techniques for children who are alleged to have been abused. However, the Inquiry also notes that specialist training, whatever the model, should be ongoing if it is to be effective (Lamb et al. 2007, p. 1,209). Compulsory, ongoing training is necessary to increase interviewer competence (Associate Professor Snow, Bendigo Public Sitting). Ongoing training of Victoria Police interviewers is likely to increase opportunities for substantiation and prosecution of child abuse. Following the rollout of SOCITs it will be important to continue interviewing training and professional development.

The Inquiry also received submissions on the impact of child protection interviewing practice on potential criminal investigations.

In view of the crossover between child protection investigations and criminal investigations in allegations of child abuse, and in light of the Inquiry's recommendations relating to MDCs in Chapter 9, there is likely to be benefit in incorporating forensic interviewing training of the type offered to Victoria Police investigators into training modules for DHS child protection practitioners. This training would increase interviewer competence and assist in creating collaborative efforts.

Finding 9

The Inquiry considers there is likely to be benefit in extending forensic interviewing training of the type delivered to Victoria Police Sexual Offences and Child Abuse Investigation Team interviewers to Department of Human Services child protection practitioners and to provide prosecutors with relevant study in it.

14.2.4 Brief authorisation process

Victoria Police does not refer all allegations of abuse to the DPP. Generally speaking, Victoria Police makes that decision based on the evidence available, usually records of interview with the alleged victim and offender, and any corroborative evidence. Authorising police officers may also consider the opinions of investigators. This is what is known as the 'brief authorisation process'. The brief authorisation process is the system's first bridge between an allegation of child abuse and prosecution for abuse in the courts.

Following recommendations made by the VLRC in the *Sexual Offences: Final Report* published in 2004, Victoria Police made a number of changes to the investigative and brief authorisation process for child abuse allegations. In particular, the SOCIT and MDC models for child abuse investigation were developed and run as a pilot scheme in two locations. Initially, the pilot scheme only investigated alleged penetrative offences against adults and children. The old model SOCAUs continued to investigate allegations of indecent assaults against adults and children, and physical abuse of children.

A recent evaluation published by Deakin University and funded by Victoria Police considered the relative quality and detail of the brief authorisation documents, the length of investigations and complainant engagement for matters that were not authorised for prosecution from the piloted SOCITs and the old model SOCAUs over an 18 month period. The study, consistent with the scope of the SOCIT pilot, was limited to penetrative sexual offences, and considered 59 reports in relation to child complainants and 48 adult complainants.

Although no significant difference in the duration of investigations between the sites was found in the study, there was a difference in the quality and detail in investigation documentation. Complainant engagement levels, which were assessed on the basis of whether, how and when complainants had elected to state their disinclination to proceed with criminal charges by filling in a 'No Further Police Action' form, were similar at all sites. The study also considered that victims tended to engage in the process for a longer period of time at SOCITs than SOCAUs, and that longer engagement may suggest a positive difference in victim satisfaction with police responses to allegations (Powell & Murfett 2009).

The Inquiry was informed that as of February 2012, SOCITs will be operational across Victoria and will investigate both child physical and sexual abuse and serious neglect. The Inquiry considers that the quality of investigation and the brief authorisation process for child abuse should continue to be monitored. The Inquiry notes that without consistent monitoring and development it could be easy for police decision making to be over-reliant on an individual interviewer's perceptions of victim credibility, and to give insufficient consideration of the quality and process of interviewing on the information gathered from witnesses (Powell et al. 2010; Powell & Murfett 2009, p. 9). The danger in a lack of individual and systematic attention to the risk that interviewers may be employing inadequate interviewing practice is that allegations that could have been prosecuted are not.

The Inquiry notes that the specialisation of investigation of sexual and physical abuse is likely to increase not only the quality of evidence obtained from children and young people, but increase the level of scrutiny applied to interviewing techniques in the brief authorisation process.

As noted above, the brief authorisation process is conducted by a specialist Senior Sergeant in the case of child sexual assault, but a generalist Senior Sergeant in the case of physical assault. The specialisation of the brief authorisation process provides for a higher level of scrutiny and accountability in the referrals from Victoria Police to the DPP. As many of the issues with the collection of evidence in relation to sexual abuse are replicated in relation to physical abuse, this is an anomalous situation and should be rectified.

Recommendation 39

Victoria Police should change the brief authorisation process for allegations of child physical assault so that authorisation is conducted by a specialist senior officer.

14.2.5 Prosecution

The prosecution of child abuse in appropriate cases is an important part of Victoria's system for protecting children. As discussed in Chapter 3, the prosecution of offences, along with the punishment for those offences, provides important recognition to the victim of his or her hurt and suffering, acts as a deterrent, and provides legitimacy to the laws that are there to protect the community. It may also enable effective treatment and rehabilitation of the offender to occur and thus reduce the risk of reoffending. However, most fundamentally, the prosecution of the offences of child physical abuse and child sexual abuse should occur because the subject conduct, if proved, is criminal.

The Inquiry was advised that the OPP's principal source of data about the cases the OPP prosecute is the case management system Prosecution Recording and Information System (PRISM). The OPP does not collect data on the age of victims in matters prosecuted by the OPP in PRISM, except where the age of the victim is an element of the offence title, for example, 'indecent act with a child under 16'. This means that there is scant data on the prosecution of alleged physical and sexual abuse and serious neglect of children. The OPP advises that PRISM is capable of capturing data on the age of victims but that it is not current practice to do so.

As a result, it is not possible to say how frequently and to what end child abuse matters are prosecuted. The Inquiry considers that the collection of data would be a useful component of work undertaken by DOJ in implementing Recommendation 40.

Finding 10

The Inquiry finds that there are critical gaps in data in relation to the prosecution of suspected child physical and sexual abuse in the criminal justice system. While suspected child physical abuse is under-reported, under-investigated and under-prosecuted, the Inquiry considers that a full understanding of the reasons behind this require further investigation.

The Inquiry notes that the OPP is currently part way through a two-year project to implement a new practice management system that will replace PRISM. Part of the project is the specification of data fields and business rules around the collection of information. The new system will be developed and tested throughout 2012 and is expected to be commissioned for production use in the first half of 2013. The OPP advises that, for reporting capabilities and record keeping, the project team is recommending that victim details be recorded in the new system, at a minimum the victim's name, address, gender and date of birth. The Inquiry welcomes this change in reporting practice and considers that the data will contribute to a better understanding of the reasons for a lack of prosecution of suspected child physical and sexual abuse.

14.2.6 Convictions

The conviction and sentencing of a person for criminal child abuse or neglect is the final stage in the criminal justice process. A study of the numbers of and factors in convictions for child abuse and neglect in Victorian courts fell outside the scope of the Inquiry. The Inquiry notes that literature on child sexual abuse shows low rates of prosecutions and convictions as against victimisation studies of unreported crime, as well as recorded crime (e.g. Fitzgerald 2006) although, as noted previously, of all prosecuted sexual offences, child sexual offences have a higher conviction rate than adult sex offences (Richards 2009, p. 2).

The Sentencing Advisory Council (SAC) analyses and releases data on sentencing practice in the Victorian higher courts. Although the SAC presents data on assault and related offences, there is no data dealing discretely with the physical assault of children. The available SAC data for specific offences against children are summarised at Appendix 11.

The low conviction rates for child sexual abuse has generated considerable interest from the community, academics and policy makers in improving the criminal justice response to child abuse. Much of the research and literature and many of the reforms have been focused on improving the system response to child sexual abuse, often as a subset of sexual offences more generally. In relation to child sexual abuse there have been particular advances in reducing the traumatising of child complainants during the trial process (Cossins 2006b, p. 319), as well as evidentiary reforms, such as the giving of recorded and closed-circuit television testimony, and the bringing of opinion evidence to counter jury misconceptions about children's ability to give truthful evidence and how children react to sexual abuse (ALRC & NSWLRC 2010, chapter 27).

The Inquiry considers, however, that there is a lack of data and research on both child physical and sexual abuse, and common problems in the criminal justice approach to both.

14.2.7 Data collection

As noted in the Commissions' Report, it is difficult to accurately measure rates of attrition in the criminal justice process for allegations of sexual assault, partly due to under-reporting, the different data collection approaches of various agencies, and the limitations of current methods of data collection and evaluation (ALRC & NSWLRC 2010, chapter 26). The Inquiry considers this is equally true for physical abuse and severe neglect of children.

The Inquiry notes that the development of a multidisciplinary approach to the investigation of child abuse and neglect presents many opportunities

for developing collaborative approaches and system responses to child abuse and neglect, including the collection of data on criminal reporting and investigation.

Recommendation 40

The Department of Justice should lead the development of a new body of data in relation to criminal investigation of allegations of child physical and sexual abuse, and in particular the flow of reports from the Department of Human Services to Victoria Police. Victoria Police, the Office of Public Prosecutions, the Department of Human Services and the courts should work with the Department of Justice to identify areas where data collection practices could be improved.

14.2.8 Recognition of the crime of child abuse as a crime in the Children, Youth and Families Act 2005

Under section 83 of the CYF Act, the Secretary of DHS is required to report allegations regarding the physical or sexual abuse of a child in out-of-home care to Victoria Police. The provision appears in the context of the regulation of out-of-home care providers, and the processes that should be adhered to following the making of an allegation of abuse against a foster carer or an out-of-home care service.

The Inquiry received a submission from the Australian Childhood Foundation (ACF) that proposed this duty be extended to all allegations of physical or sexual abuse, whether in out-of-home care or not (p. 7). The Inquiry considers that an amendment of this nature is not desirable within the context of section 83 of the CYF Act. This particular section has a specific purpose, that is, to ensure that an independent investigation is facilitated in the case of allegations of abuse in out-of-home care.

However, the Inquiry considers it is of importance to signify the relevance and the priority of the criminal law in the criteria guiding decisions made under the CYF Act. In the best interests principles section (section 10) of the Act, the criterion 'the need to protect the child from harm' is stated as a required criterion (section 10(2)), but the category of criminal harm is not specified. In the relevant provision (section 10(3)) the category of criminal harm is entirely absent. Accordingly the Inquiry recommends that section 10(3) of the CYF Act be amended to signify the relevance and the priority of the criminal law in the criteria guiding decisions under the Act. The amendment is best placed in section 10(3) rather than in section 10(2) because the element of criminality is not always present in harm.

Recommendation 41

The best interests principles set out in section 10 of the *Children, Youth and Families Act 2005* should be amended to include, as section 10(3) (a), 'the need to protect the child from the crimes of physical abuse and sexual abuse'.

14.3 Proposals for discrete areas of reform to the *Children, Youth and Families Act 2005*

The Inquiry received a number of written and verbal submissions proposing amendments to various aspects of the CYF Act. The VLRC also proposed a number of amendments to the CYF Act.

Apart from the court-related amendments (considered in the following chapter), the proposals for reform fell into four main categories:

- The objectives and principles of the CYF Act;
- Evidentiary issues, including the grounds for, and standards of proof in, protection applications;
- The jurisdiction of the Family Division of the Children's Court; and
- Language in the CYF Act and in child protection practice.

14.3.1 *Proposals for reform to the objectives and principles of the Children, Youth and Families Act 2005*

While the Inquiry heard support for the current principles and objectives of the CYF Act and the *Child Wellbeing and Safety Act 2005* (CWS Act) (Bethany Community Support and Glastonbury Child & Family Services submission, p. 20), the Inquiry also heard calls for a re-evaluation of the objectives and principles.

Principles

In a joint submission to the Inquiry, Anglicare Victoria, Berry Street, MacKillop Family Services, The Salvation Army, Victorian Aboriginal Child Care Agency and the Centre for Excellence in Child and Family Welfare (Joint CSO submission) proposed that the principles of the CYF Act be reviewed to establish the State's intentions for children and young people within the statutory system, and establish 'the parameters within which services for those children and young people will be delivered' (p. 25).

The Joint CSO submission argued that a clarification would be best achieved by incorporating the principles from the CWS Act into the CYF Act (pp. 25-27). The ACF also made a similar proposal (ACF submission, pp. 3-4).

The CWS Act was introduced in order to provide a framework for a cohesive service system to provide appropriate responses to the changing needs of families, within a common set of goals and values (Parliament of Victoria, Legislative Assembly 2005a, p. 1,365). The common goals and values are set out as principles in the CWS Act. They are of general application and go to the development of policy as well as the development, design and provision of services to children and families, including those provided under the CYF Act. The CWS Act and the CYF Act should be read together. As such, the Inquiry considers that it would be a duplication to include the CWS Act principles in the CYF Act.

Objectives

Children and young people in care require a range of services to build on their wellbeing and resilience, such as early childhood services, education services and health services. Concerned that children and young people are missing out on these services, the Joint CSO submission also proposed that legislative responsibility for providing them be reviewed. The submission suggested that the objectives of the CYF Act be amended to acknowledge the roles and responsibilities of early childhood services, education and health services, including mental health and alcohol and drug services, for the protection and care of vulnerable children and young people (Joint CSO submission, p. 29).

The Inquiry notes that the issue raised by this submission should be considered as a matter of encouraging service providers to take responsibility for broader outcomes for children (e.g. the education of children in care), and secondly, for their responsibility to the children of adult clients when delivering services to those clients. The Inquiry considers that vulnerable children and young people could benefit from a clearer enunciation of various agencies' responsibilities to children in the provision of services. The Inquiry further considers that any specification of service provider and agency responsibilities to children and young people would be of greater utility if set out in the relevant Act (e.g. the *Disability Act 2006* (Vic) and the *Mental Health Act 1986* (Vic)).

Recommendation 42

The following Acts should be amended to ensure that service providers assisting adults also have a clear responsibility to the children of their clients:

- *Disability Act 2006*;
- *Education and Training Reform Act 2006*;
- *Health Services Act 1988*;
- *Housing Act 1983*;
- *Mental Health Act 1986*; and
- *Severe Substance Dependence Treatment Act 2010*.

14.3.2 Evidentiary issues: proposals for reform to the grounds for, and standard of proof in, making protection applications

'No fault' ground for intervention in the *Children, Youth and Families Act 2005*

In its 2010 report the VLRC expressed concerns that the current grounds for making a protection application, particularly sections 162(1)(c) - (f) of the CYF Act, that refer to situations in which a parent 'has not protected' or is 'unlikely' to protect a child from harm, implied the existence of parental fault. The VLRC noted that there may be a number of situations in which a parent was or is willing, but was or is unable to protect their child from harm and that a finding under section 162(1)(c) - (f) unduly stigmatises these parents. The VLRC further considered that fault-finding and the need to identify a grounds in cases where the need to protect is agreed is likely to 'increase disputation between the parties' (VLRC 2010, pp. 333-335).

The VLRC considered the introduction of a ground similar to that in section 52 of the *Children (Scotland) Act 1995* whereby a child could be considered to be at risk of harm on the basis that they were 'uncontrollable' (VLRC 2010, pp. 334, 338). The VLRC rejected this amendment on the basis that it would be inconsistent with the harms, rather than needs, focus of the CYF Act, and blur a sensible distinction between the criminal law and child protection law (VLRC 2010, p. 334). The Inquiry agrees with this conclusion.

Addressing these concerns under Option 2 detailed in its Report, the VLRC proposed that:

- Sections 162(1)(c) - (f) be amended to reflect situations where a parent is willing, but for some reason is unable, to protect the child from harm;
- A court be able to make a protection order in respect of a child on the basis that the child's behaviour is or is potentially harmful to himself or herself; and

- In situations where the parties agree that a child is in need of protection and it is in the child's best interests to do so, a court may make an order without specifying a specific ground (VLRC 2010, p. 339).

Other than those submissions that provided the Inquiry with a copy of submissions sent to the VLRC report on Option 2, no new material was presented to the Inquiry in submissions or consultations relating to the introduction of a no-fault ground.

Regarding the wording of section 162(1)(c) - (f), the Inquiry considers that, while there may be a perception that parents whose children are the subject of a protection application are at fault, the Inquiry does not consider that this perception is caused by the wording of the legislation.

As explained in Chapter 3 of this Report, a child will be considered to be 'in need of protection' if the Secretary of DHS can establish one of the grounds set out in section 162 of the CYF Act. 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, and are unlikely to protect, the child from that harm. Sections 162(1)(c) - (f) of the CYF Act do not imply fault. The sections simply set out the grounds for a finding of fact based on the harm that a child has experienced or is at risk of experiencing. Whether a parent did not (or will be unlikely to) protect their child either due to unwillingness or inability is irrelevant under the provisions. Likewise, the provisions do not require the Court to make a finding as to who has caused the harm. It is sufficient that the Court finds that the harm has occurred.

The VLRC's consideration of the no-fault ground raises the issue of at-risk adolescents and children with a disability, or special and complex needs, where the only protective concern is the child's parents' inability to provide the level of care required for that child or young person. The VLRC noted that protection applications are sometimes made in respect of a child so as to secure out-of-home care or other services for that child (VLRC 2010, pp. 335-336). This is indicative of a serious gap in service delivery, but the Inquiry notes that prioritising service delivery should not be the function of protection applications. If children are missing out on services provided under other Acts (e.g. under the *Disability Act 2006*) this should be addressed in prioritising services to children and young people under those Acts. The Inquiry expects that the implementation of Recommendation 42 will address this issue.

Standard of proof for findings of fact under the *Children, Youth and Families Act 2005*

Option 2 of the VLRC report also advocates the amendment of the CYF Act to clarify the application (or the perception of the application) of the standard of proof in Family Division matters, especially those matters involving allegations of sexual abuse.

As explained in the VLRC report, in protection applications involving allegations of past sexual abuse, the Court must decide the facts, including whether the abuse occurred. This is decided on the balance of probabilities test. This test is informed by the qualification as set in *Briginshaw v. Briginshaw* (1938) 60 CLR 336 and section 140 of the *Evidence Act 2008*. The qualification requires the Court, in determining facts that are of themselves serious allegations, to take into account the nature of the subject matter of the proceeding and the gravity of the facts alleged (VLRC 2010, pp. 340-341).

Submissions were made to the Inquiry that in matters involving allegations of sexual abuse, the Court is applying a higher standard of proof than the balance of probabilities (ACF, pp. 5-6; Humphreys & Campbell (b), pp. 3-4; Inquiry consultation with DHS). A higher standard of proof makes it more difficult to prove that a child is in need of protection. The Inquiry also heard that this perception is affecting DHS willingness to bring a protection application based solely on sexual abuse (submissions from ACF, pp. 5-6; Humphreys & Campbell (b), pp. 3-4; Inquiry consultation with DHS).

The Court submitted that this view is inaccurate (Children's Court submission no. 2, p. 41). In support of this, the Court noted that the determination rate of sexual abuse remains largely unchanged (Children's Court submission no. 2, p. 42).

In relation to protection applications involving allegations of a future risk of sexual abuse, the Children's Court considers whether there is 'a real possibility, a possibility that cannot be sensibly ignored having regard to the nature and gravity of the feared harm' that the allegations are true (VLRC 2010, p. 341, citing *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563). The VLRC argued, and the Inquiry agrees, that this further test adds unnecessary complexity to the determination of facts.

The Inquiry has considered the VLRC's proposed amendment to the CYF Act carefully. Allegations of sexual abuse carry potentially serious implications for the person against whom the allegations are made. Nonetheless, the proceeding is about determining the future risk of harm to the child based on alleged past facts. It is concerning that child protection services might have developed a practice to bring applications on alternative grounds, as submitted by the ACF and other stakeholders.

The Inquiry therefore considers there is a sound reason for amending the legislation to clarify the standard of proof required. The Inquiry relevantly notes that any judgment by the Court that a child was in need of protection on the grounds of sexual abuse, cannot be adduced as proof of sexual abuse in any subsequent criminal trial brought against the alleged abuser (*Hollington v. Hewthorn* [1943] 1 K.B. 587).

In the interests of a clear approach to the proof of facts of past and risk of future abuse, the Inquiry endorses the VLRC's recommendation to amend the CYF Act to state that the standard of proof required in Family Division matters is the balance of probabilities, and not any higher standard. The Inquiry considers that this will assist in righting any perception of improper application of the correct standard, as well as providing clear guidance to decision-makers. The Inquiry refers to Recommendation 43.

14.3.3 Proposals for jurisdictional reform

Age limit in protection applications under the *Children, Youth and Families Act 2005*

Under a long standing apparent anomaly in the CYF Act, the jurisdiction of the Court to make protection applications in respect of children and young people is limited to those children and young people under the age of 17 (section 3 of the CYF Act). The VLRC proposed to amend this to those children and young people under the age of 18 (VLRC 2010, pp. 344-346).

The Inquiry considers that the current jurisdiction of the Family Division in relation to children under the age of 17 is inconsistent with the Court's Criminal Division jurisdiction, its jurisdiction under the *Family Violence Protection Act 2008*, the *Personal Safety Intervention Orders Act 2010* and the *Guardianship and Administration Act 1986*. It is also inconsistent with the *Age of Majority Act 1977*, the generally accepted definition of a 'child', international obligations under the *Convention on the Rights of the Child* (United Nations), and the jurisdiction of children's courts in other Australian jurisdictions. The Inquiry refers to Recommendation 43.

Two more reforms were proposed by the VLRC in relation to the jurisdiction of the Family Division. These were to allow the Children's Court to make a protective order allocating guardianship and/or custody to one parent to the exclusion of the other and to also extend the jurisdiction of the Court to make orders under the *Family Violence Protection Act 2008* where an adult is the affected family member on family violence application but children are not covered by the application. This is considered in more detail in section 14.6.2.

14.3.4 Amendments relating to emotional abuse grounds and bringing evidence relating to cumulative harm

As noted in Chapter 9, ‘cumulative harm’ is a child protection term that reflects an understanding that chronic child maltreatment or recurrent incidents of maltreatment over a prolonged period of time causes children to experience harm. Neglect and persistent emotional or psychological harm delay development and pose long-term difficulties with social functioning, relationships and educational progress, and can lead to serious impairment of health. In extreme cases, neglect can also result in death (Lazenbatt 2010, p. 3). Child neglect may go unreported or unsubstantiated until the cumulative effects of neglect have developed into a chronic and severe state (Berry Street submission, p. 1).

One of the significant changes in the CYF Act was the introduction of the notion of ‘cumulative harm’. Section 162(2) of the CYF Act recognises that harm is not always caused by a single event but may result from an accumulation of acts, omissions and circumstances. Where a protection application is brought on the basis of physical injury, sexual abuse, emotional abuse or neglect (s. 162(1)(c) - (f) CYF Act), applicants may bring evidence of cumulative harm to prove any of the grounds set out in section 162(1)(c) - (f).

The Inquiry considered three distinct matters in relation to cumulative harm:

- Suitability of referrals to Child FIRST (see Chapter 9);
- The impact of workload in statutory child protection services (see Chapters 9 and 16); and
- The use of cumulative harm in protection orders made by the Children’s Court.

Cumulative harm and protection orders

Chapter 9 lists the reasons suggested to the Inquiry for the perceived failure of the system to protect children from cumulative harm caused by child abuse. The issue was also considered by the Victorian Ombudsman in his 2009 report (Victorian Ombudsman 2009, p. 11).

Submissions argued that there is a perception that both DHS and the Court have failed to address issues of long-term child neglect and cumulative harm, leaving family services with inappropriate and unworkable responsibility for many such cases (CatholicCare, pp. 18-19; Grandparent Group, pp. 8-9; Humphreys & Campbell (b), p. 4). Others pointed to a perceived tendency of risk assessment models towards event-based rather than cumulative harm (Moonee Valley City Council, pp. 1-2).

The Inquiry notes that the Children’s Court is of the view that cumulative harm is a concept well understood and applied by the Court (Children’s Court submission no. 2, p. 23). Child protection practitioners reported that workers understand the concept only too well but that they feel that the Court gives insufficient weight to cumulative harm evidence (Inquiry consultation with DHS).

The Office of the Child Safety Commissioner (OCSC) conveyed anecdotal evidence to the Inquiry that there is an apparent reluctance among some child protection practitioners to pursue cumulative harm in child protection cases because they believe this evidence will not be accepted by courts. The OCSC proposed that further research should be undertaken to determine if such reluctance does exist and if it does how it can best be addressed (OCSC submission, p. 7). Such a project would require a qualitative analysis of child protection practitioner experience.

Matter for attention 10

The Inquiry draws attention to the need for further research into the way in which the concept of cumulative harm is understood and applied by child protection practitioners when bringing protection applications to the Children’s Court.

14.3.5 Terminology in the Children, Youth and Families Act 2005 and child protection practice

The Inquiry notes that the words ‘apprehends’ or ‘apprehension’ are still used today in reference to children who are the subject of protection applications although not used in the CYF Act (for example see the DHS *Guide to Court Practice for Child Protection Practitioners 2007*, p. 34 and in the research materials published by the Children’s Court on its website). Further the use of ‘warrants’ specified in sections 240-241 of the CYF Act with respect to action taken by protective interveners for a child in need of protection reflects a historical approach in this state between vulnerable children and criminal behaviour.

The Inquiry supports the VLRC’s observations in relation to the outdated language of the CYF Act to describe protection processes (VLRC 2010, pp. 204, 209). The Inquiry considers the term ‘emergency removal’ should be used in lieu of ‘safe custody’ and the term ‘warrant’ should be replaced by ‘emergency removal order’. No vulnerable child in need of protection should be ‘apprehended’. The use of that term has no place in a system designed to meet the needs of children.

The Inquiry also considers there is scope for the language of the CYF Act to be more consistent with the Commonwealth *Family Law Act 1975* when describing relationships and circumstances between children and their parents or other people. For example, sections 283, 284 and 287 of the CYF Act use the term 'access' in relation to the level of contact between a child who is in the custody of a person other than the parent, and the parent or another person. The Inquiry recommends that words such as 'access' should be replaced with 'contact' consistent with the terminology used in the Family Law Act.

Recommendation 43

The *Children, Youth and Families Act 2005* should be amended to address the following issues:

- Section 215(1)(c) that requires the Family Division of the Children's Court to consider evidence on the 'balance of probabilities' should be amended to expressly override the considerations in section 140(2) of the *Evidence Act 2008* and to disapply the *Briginshaw* qualification that requires a court to take into account the nature of the subject matter of the proceeding and the gravity of the facts alleged;
- The definition of 'child' in section 3 should be amended to make it possible for protection applications in respect of any child under the age of 18 years; and
- Out dated terms in the *Children, Youth and Families Act 2005* associating child protection with criminal law should be modernised and consideration should also be given to using terms consistent with the *Family Law Act 1975*. This includes: substituting the term 'emergency removal order' for 'warrants'; the term 'protection application by emergency removal' for 'protection application by safe custody'; and the word 'contact' for 'access' when describing contact between a child and a parent or other person significant in the child's life.

14.4 Mandatory reporting

It is now more than 20 years since the tragic death of Daniel Valerio at the hands of his mother's de-facto partner in 1990. Daniel was seen by 21 professionals in the lead up to his death including doctors, nurses, a teacher and police, and yet no one acted to remove Daniel from his circumstances or to apprehend the perpetrator prior to Daniel's death. In response to Daniel's case, and following government reviews into other child deaths as a result of abuse, the then Minister for Community Services announced that the Victorian Government would amend the *Children and Young Persons Act 1989* (the CYP Act) to introduce a mandatory reporting scheme but noting it would require a phased introduction to enable adequate training of the mandated professionals to occur (Parliament of Victoria, Legislative Assembly 1993a, p. 47).

The CYP Act was amended in 1993 to introduce mandatory reporting for professional groups that were identified as the groups with the most significant contact with children and the most likely to become aware of child abuse (Parliament of Victoria, Legislative Assembly 1993b, p. 1,006). They were required to report where they formed a reasonable belief that a child was in need of protection due to physical injury or sexual abuse.

The *Children, Youth and Families Act 2005* provides that the mandated reporter must report where he or she forms the belief on reasonable grounds that a child is in need of protection on the ground that the child has suffered, or is likely to suffer, significant harm as a result of physical injury or sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from that harm (ss. 184 and 162 CYF Act). Both the belief and the reasonable grounds for the belief must be reported.

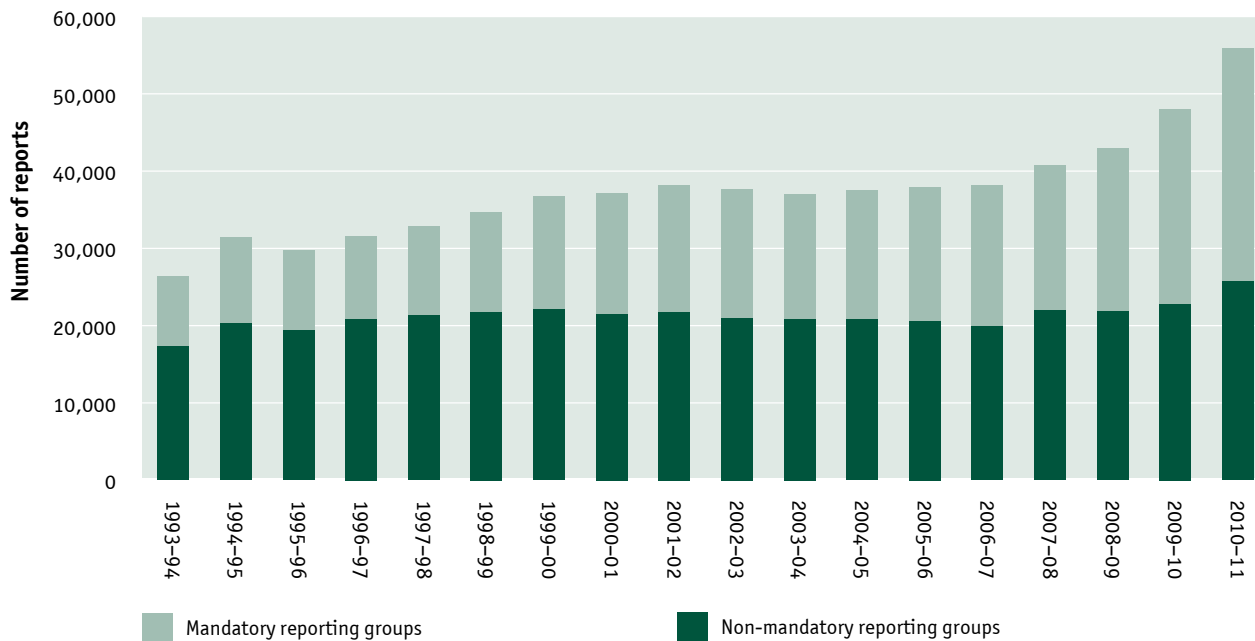
Reports from mandated reporters now comprise a significant proportion of reports of protective concerns made to DHS. As demonstrated in Figure 14.1, there has been a gradual increase in the proportion of reports from mandated reporters over the past decade (from 42 per cent of all reports in 2000-01 to 54 per cent in 2010-11).

14.4.1 Mandatory reporting: a system for protecting children from abuse where the family is unwilling or unable to provide protection

The mandatory reporting scheme was introduced in 1993 to 'uncover hidden but serious abuse and to underline the criminal nature of sexual abuse and severe physical abuse.' In introducing the Bill, the Victorian Government noted that children have a right to be protected from crime committed against them by 'family members or others from whom the family is unwilling or unable to provide protection' (Minister for Community Services, in Parliament of Victoria, Legislative Assembly 1993b, p. 1,005).

The reporting scheme as introduced in 1993 has been continued in substantively the same form through sections 182 and 184 of the CYF Act. The grounds for mandatory reporting are significant harm as a result of physical injury or sexual abuse. Mandated reporters may also voluntarily report protective concerns on other grounds, such as emotional and psychological harm, under section 183 of the CYF Act. Reports are made to the Secretary of DHS and mandated reporters are afforded protection from liability.

Figure 14.1 Child protection reports from mandated and non-mandated groups, Victoria, 1993-94 to 2010-11



Source: Information provided by DHS

Mandated reporters

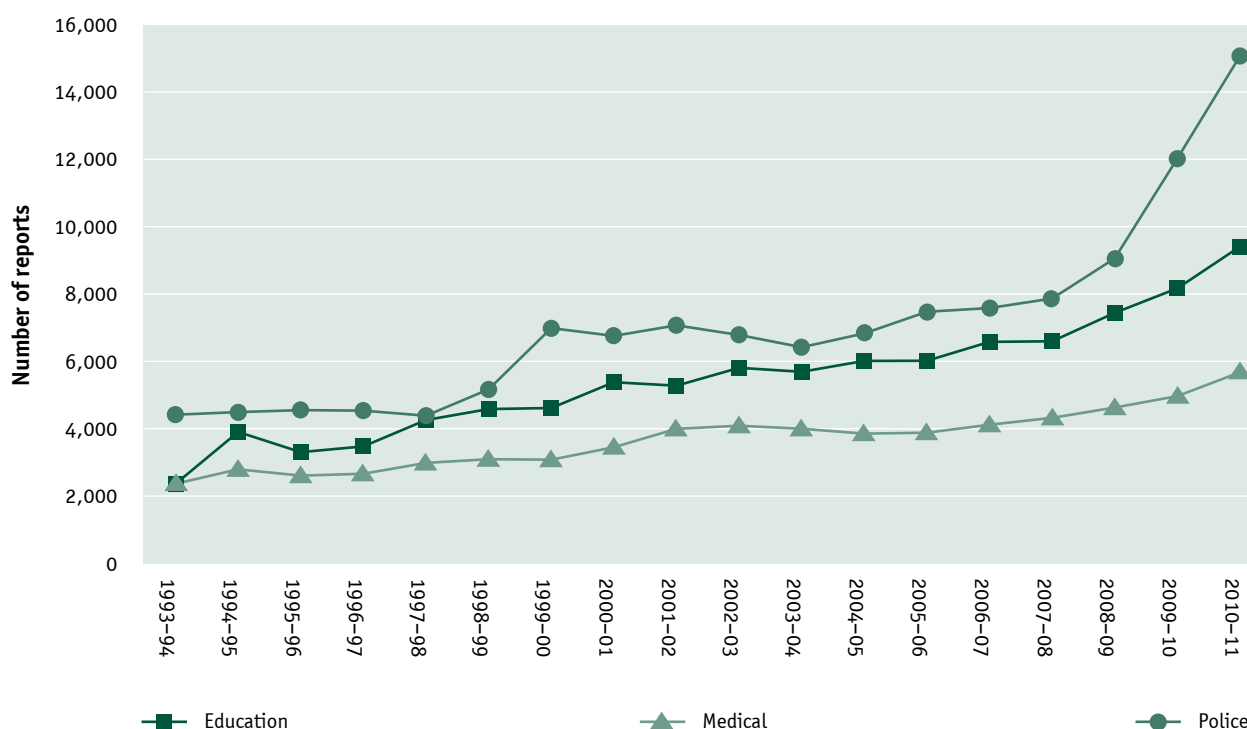
The CYF Act (and the CYP Act before it) outlines a scheme of mandatory reports from: members of the police; medical practitioners; psychologists; nurses; teachers; school principals; owners, operators and professional employees of children's service centres; appropriately qualified youth, social or welfare workers; youth and child care workers working for the then Department of Health and Community Services; probation officers; and youth parole officers. Midwives were added as a category of reporter in 2010.

The phased introduction of the mandatory provisions meant that only certain categories of reporters were actually mandated reporters at the commencement of the scheme. Those in the remaining categories were to 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. At the time of this Inquiry, the statutory scheme mandates only teachers, members of the police, medical practitioners, nurses and midwives. Figure 14.2 shows the number of reports (including for matters other than suspected child physical and sexual assault) received by category of mandated reporters since the introduction of the scheme.

Prior to the commencement of the Victorian mandatory reporting scheme on 4 November 1993, Mr Justice Fogarty noted that the significance of mandatory reporting scheme as a formalisation of moral and social responsibility to report protective concerns should not be considered in isolation, exaggerated or over-emphasised (Fogarty 1993, pp. 114-115).

Mr Justice Fogarty observed that it was an essential part of the government's responsibility to ensure the costs of implementation were met noting that it would be 'tragic if the reform was jeopardised by the lack of modest, but essential funding' and 'there is little point in setting up a system which encourages increased notifications if the overall system is unable to cope with that increase' (Fogarty 1993, p. 133). An increase in the number of children brought into the system is not meaningful if those children are not adequately supported. Furthermore, 'it then becomes doubtful whether the children had been advantaged by being involved in the process at all or whether they suffered additional abuse by the system set up to protect them' (Fogarty 1993, p. 134).

Figure 14.2 Child protection reports from mandated reporting groups, Victoria, 1993-94 to 2010-11



Source: Information provided by DHS

14.4.2 Mandatory reporting in Australia

Every Australian jurisdiction has a statutory mandatory reporting scheme. The schemes vary in terms of the types of abuse or neglect that are subject to reports, the categories of people who are mandated to report suspicions of abuse or neglect, and the legal tests for when a report should be made. For example:

- In the Northern Territory any person with reasonable grounds is mandated to report abuse and neglect (broadest coverage);
- In the Australian Capital Territory statutory officers such as the Public Advocate and the Official Visitor are obliged to report physical and sexual abuse; and
- In South Australia the reporting provisions extend to members of non-government organisations that provide sporting or recreational services for children and to ministers of religion (unique to South Australia).

The Inquiry notes there are no categories of mandated reporters in Victoria that are unique to this jurisdiction. In relation to the grounds of abuse or neglect that are the subject of mandatory reports, these vary in each jurisdiction and in some cases are linked to the type of reporting group. The Victorian and ACT schemes have the narrowest grounds on which reports are made – physical injury and sexual abuse – while the Northern Territory and New South Wales schemes have the broadest coverage thresholds including exposure to family violence. A summary of Australian mandatory reporting schemes appears in Appendix 12.

Under section 67ZA of the Commonwealth *Family Law Act 1975*, Family Court judges and court staff, federal magistrates and staff, and independent children's lawyers, family dispute resolution practitioners and family counsellors who have reasonable grounds for suspecting a child has been abused must report their suspicion to the relevant child protection authority.

To date, there has been no comprehensive cross-jurisdictional study of the performance of mandatory reporting schemes in Australian jurisdictions. Despite attempts by academics to gauge the performance of mandatory reporting schemes in various Australian jurisdictions including whether it has led to over-reporting, these have proven difficult due a lack of qualitative and quantitative data, varying statutory definitions and categories of abuse and neglect, changes to recording and disposition practices over time, and different data reporting practices (Mathews, in Freeman 2011 in press, pp. 14-15).

The Inquiry anticipates that short of a national statutory child protection scheme, there will not be uniformity in the area of mandatory reporting. While an in-depth analysis of the differences in the various schemes is beyond this Inquiry's mandate, it considers that jurisdictions should review this area of law with a view to achieving greater consistency across mandated reporting groups and the grounds on which reports should be made. This becomes more apparent when any meaningful attempt is made to evaluate the effectiveness of mandatory reporting, as a means of uncovering hidden incidents of abuse, as is discussed in section 14.4.1. The Inquiry considers that the Victorian Government should raise a review of mandatory reporting laws at the appropriate national ministerial forum. Recommendation 46 addresses this issue.

14.4.3 Submissions on mandatory reporting

Given the mandatory reporting scheme has only partially been implemented in Victoria and the diversity of schemes across Australia, the Inquiry sought to gauge community views on the performance of the current system. The questions asked by the Inquiry in its *Guide to Making Submissions* at the start of the consultation process were:

- What has been the impact of the Victorian system of mandatory reporting on the statutory child protection services?
- Have there been any unintended consequences from the introduction of the Victorian approach to mandatory reporting and, if so, how might these unintended consequences be effectively addressed?

Understandably, these questions evoked a range of responses to the Inquiry:

- There was opposition to mandatory reporting on the basis that mandatory reporters were not sufficiently skilled (Ms L, Geelong Public Sitting; Family Life submission, p. 18);
- Other submissions expressed significant concerns with the system's ability to cope with the scheme. It was submitted that there are insufficient resources to follow up on reports, and that the system should, but does not train or support reporters, with the result that the quality of reports are variable (submissions by Australian Nursing Federation (ANF) (Victorian Branch), pp. 36-37; Centre For Excellence in Child and Family Welfare, p. 53; Community and Public Sector Union (CPSU), p. 21; Dr Gall, pp. 9-10; Royal Children's Hospital (RCH), p. 8; Victorian Forensic Paediatric Medical Service (VFPMS), pp. 13-14);

- Some submissions, without expressly advocating the repeal of the scheme, queried its policy currency in the context of Victoria's various family support services networks and the Child FIRST referral pathway that seek to encourage vulnerable families to engage with services rather than fear being reported to authorities (Ms Burchell, p. 14; Connections UnitingCare, p. 5; GordonCare, pp. 1-2; UnitingCare Gippsland, pp. 20-21; Upper Murray Family Care, p. 5);
- Some submissions sought full implementation of the current range of mandated groups (ACF, p. 5; Goddard et al. p. 9); and
- Others were of the view that mandated groups should be extended to cover clergy (Melbourne Victim's Collective, Melbourne Public Sitting).

Some of the suggestions arising from these submissions were:

- Providing greater capacity for and support to DHS Child Protection to investigate mandated reports including matching any extension to, or full implementation of, the legislative scheme with adequate staff resources (CPSU, pp. 21-22);
- A need for DHS to provide feedback on the outcomes of its investigation progress to the mandated reporter and to maintain engagement with the mandated reporter to ensure everyone knows what is happening with the child or young person (Dr Gall, p. 10; VFPMs, p. 14);
- Extending the role of Child FIRST as a practical intake point for notifications, to determine and refer reports of physical or sexual abuse to DHS particularly if a mandated reporter does not want to engage with DHS (Ms Burchell, pp. 8-9); and
- Providing greater training and education to mandated workforce groups about their statutory obligations (ANF (Victorian Branch), p. 37; RCH, p. 4; UnitingCare Gippsland, p. 20-21).

Given the range of views expressed, the Inquiry's focus fell on three policy questions:

- Is there a policy basis for retaining a mandatory reporting system in Victoria?
- How effective is the current mandatory reporting system?
- Should section 182 of the CYF Act, which sets out the professions eligible to be mandatory reporters, be fully implemented?

14.4.4 Need for mandatory reporting

While the Inquiry has, through its consultation process, heard the debate as to whether mandatory reporting laws should be retained, fully implemented or repealed, it has not heard many voices in favour of expanding the scope of those laws.

Many have argued for the paring back of mandatory reporting laws as the emphasis should be on early detection, prevention or diversion, which requires resources to be invested in helping vulnerable families avoid reaching situations where a child's safety is at risk (Melton 2005, p. 14) rather than overburdening an already stretched child protection system. Others studies have argued that there is no evidence that these schemes have worked other than to increase notifications (Harries & Clare 2002, pp. 48-49).

Reports may also be made in respect of concerns that are not required under the legislation. For example, reporters may have a lack of understanding of the legislation, how the legislation applies in the circumstances, or of the signs of various forms of harm. Segmented surveys have been attempted of specific reporting groups in some jurisdictions.

In 2009 a cross-jurisdictional survey was attempted of teachers reporting suspected child abuse in New South Wales, Queensland and Western Australia. That study concluded that there were significant gaps in teachers' knowledge of their duties to report suspected child sexual abuse partly due to inconsistency of policies and practices with the legislative duty or due to their understanding of when abuse occurred (Mathews et al. 2009, pp. 809-810).

A survey of nurses across Queensland found that while there was high likelihood of nurses recognising abuse and neglect and reporting such cases, the reporting practice varied and was influenced by negative attitudes such as not having faith in child protection services, perceiving a number of organisational barriers to reporting and not believing a report would benefit the child or the family (Mathews et.al. 2010, p. 153).

However, there are countervailing policy arguments as to why these laws should be retained. These include that mandatory reporting laws do not allow society to ignore wrongs committed by adults against children, that mandatory reporting laws are based on an 'experiential approach' to children's rights that when entrenched into positive law will produce a less unjust society, and that these laws directly acknowledge and protect a child's right to safety (Mathews & Bross 2008, pp. 513-514).

The Inquiry has also considered this debate in the context of a child's needs which, as was discussed in Chapter 6, is informed by a child's rights-based approach including the right of a child to be protected from abuse and harm of all kinds. As has been put to the Inquiry, the mandatory reporting provisions are one of the few reminders of the traditional child's rights approach in the CYF Act in the context of that Act's strong child welfare focus (Inquiry consultation with ACF).

The reason mandatory reporting remains required is that, unless specified professionals like doctors are required to report suspicions of maltreatment, severe cases of abuse that are inflicted in private on young children are less likely to come to the attention of helping agencies (Mathews submission, p. 2). As noted by the then Minister for Community Services when introducing the scheme in 1993, the primary policy basis for mandatory reporting is to use professionals who have significant contact with children and are most likely to be able to detect abuse to bring such to the attention of authorities. While there may be a range of systems and responses available to support children and young people who are the victims of abuse and to deal with the perpetrators of the abuse, the laws are designed to ensure that child physical and sexual abuse is, as much as is possible, not one of society's hidden problems.

The Inquiry notes that the most recent interstate review of mandatory reporting laws by the Special Commission of Inquiry into Child Protection Services in NSW 2008 (the Wood Inquiry) concluded the requirement to report should remain as it also had the useful effect of overcoming privacy and ethical concerns by compelling the timely sharing of information where risk existed. Further, abolition of the scheme could weaken opportunities for interagency collaboration essential for an effective child protection system (Special Commission of Inquiry into Child Protection Services in NSW 2008, pp. 181-182). The Inquiry agrees with this analysis.

14.4.5 The effectiveness of the current Victorian scheme

The Centre for Excellence in Child and Family Welfare submitted that, although mandatory reporting is deeply entrenched in the Victorian response to vulnerable children and young people, the dilemmas of an under-resourced and poorly distributed system of prevention services remain (Centre for Excellence in Child and Family Welfare, p. 53).

The most problematic aspect in attempting to evaluate the performance of the mandatory reporting scheme, and readily acknowledged by academics, is the lack of empirical data (Mathews & Freeman 2011 in press, pp. 14-15).

Prior to the commencement of the mandatory reporting scheme Mr Justice Fogarty noted that the introduction of mandatory reporting to Victoria presented 'a once only opportunity' to evaluate mandatory reporting from the beginning (Fogarty 1993, p. 136). To date, no such evaluation has taken place.

DHS provided data to the Inquiry that shows total mandatory and non-mandatory reports that resulted in the proportion of substantiations. Table 14.1 summarises the data in relation to reports from 2010-11.

It should be noted that, although mandatory reporters are obliged to report on the grounds of requisite belief physical and sexual abuse, they can and do report on other grounds. Similarly, it should be noted that the 'reports substantiated' figure may or may not relate to the primary report made (that is, substantiation may be on any of the grounds in section 162 of the CYF Act).

The data shows a higher substantiation rate for mandated reports than for non-mandated reports. This suggests that mandatory reporters, especially those reporters in the medical group, are more reliable reporters than those in the general community.

Table 14.1 Substantiations of child abuse and neglect, by reporter group, Victoria, 2010-11

| Reporter category | Reports | Reports substantiated |
|--|---------------|-----------------------|
| Mandated reporters | | |
| Education | 9,407 | 14% |
| Medical | 5,676 | 20% |
| Police | 15,066 | 15% |
| Total mandated reporters | 30,149 | 16% |
| DHS workers | | |
| DHS worker | 1,682 | 36% |
| Non-mandated reporters other than DHS workers | | |
| Agency* | 6,280 | 17% |
| Courts and legal | 675 | 8% |
| Family | 14,468 | 8% |
| Anonymous/unknown | 2,165 | 6% |
| Other | 460 | 15% |
| Total non-mandated reporters | 24,048 | 10% |

Source: Information provided by DHS

* Includes Child FIRST, community service organisations and government agencies

Grounds and threshold for reporting

The Wood Inquiry found that the 'risk of harm' threshold that triggers the obligation to make a mandatory report was too low and led to a significant gap between the reports made by mandatory reporters and those which warranted statutory intervention.

Apart from the overwhelming of a system with unnecessary reports, the Wood Inquiry observed that lower thresholds for reporting can precipitously trigger a statutory intervention in a child and child's family life that is, in and of itself, a serious matter (Special Commission of Inquiry into Child Protection Services in NSW 2008, pp.183–185). The Wood Inquiry therefore recommended that the threshold be raised to 'significant harm' (as operates in Victoria) (Special Commission of Inquiry into Child Protection Services in NSW 2008, p. 197).

As noted previously, the Victorian mandatory reporting provisions only relate to the grounds of physical and sexual abuse. The Inquiry considers that these grounds should not be expanded. In addition to the difficulties inherent in training professionals in identifying the other grounds of child abuse such as emotional harm and neglect, the Inquiry notes that the child protection system has limited resources for receiving, assessing and responding to those reports. Well-founded suspicions of abuse can become lost in an overwhelmed system. An appropriate system response is to improve the quality of reports and intake systems, and providing adequate resources to receiving and responding to those reports. Aspects of the system response and proposals for reform are considered in Chapter 9.

The Inquiry also considered the observations of various stakeholders raised in submissions. There were no comments expressly endorsing the current mandatory reporting scheme in Victoria. Most comments from the submissions outlined earlier in this section were primarily directed at issues such as the effectiveness of training and education of mandated reporters, the lack of a communication or feedback process between DHS and the reporter once a report had been provided, and government needing to ensure that DHS (particularly its after hours service) and Child FIRST were adequately resourced to properly refer and investigate reports.

A lack of comprehensive data in the effectiveness of mandatory reporting notwithstanding, mandatory reporting is a key legal response to hidden abuse of children. As a legal response, it enforces the right of a child to be protected from future acts of abuse. Accordingly, Victoria's mandatory reporting system should remain as a key component of the statutory child protection framework.

Finding 11

The Inquiry finds that the current mandatory reporting scheme for physical and sexual abuse should be retained in Victoria, and that the current grounds for reporting are appropriate.

14.4.6 Full implementation of section 182 of the Children, Youth and Families Act 2005

As the Inquiry has noted previously, the mandatory reporting scheme has been in place for 18 years but only some groups covered by section 182 have been mandated to report. The Inquiry assumes that this is largely due to concerns that, if all professions were mandated, that a spike in reporting numbers would overwhelm the system.

However, the Inquiry notes that all these reporting categories were chosen for their particular expertise in and window into the lives of children. The Inquiry is of the view that one way in which the current law can be strengthened to protect children is for the Victorian Government to gazette the remaining groups listed under section 182. Categories of reporters should be progressively gazetted to prevent unmanageable spikes in reports.

The expansion of reporters will create particular challenges in implementation both in a global sense and in each category of reporters. Child care workers who are listed under section 182(1)(f) of the CYF Act in particular, will provide a large increase in the pool of mandated reporters. While child care workers have frequent contact with infants and young children, signs of physical and sexual abuse in infants and young children are difficult to detect and are often only accurately assessed by paediatricians.

Child care workers are unlikely to receive targeted training on mandatory reporting in the course of their qualifications, as qualifications are attained through courses of shorter duration than many other mandated professionals, with less ongoing training required. Clear and specific guidelines in what constitutes a serious concern may assist child care workers in their duty as mandatory reporters.

The Inquiry notes that section 182(1)(f) of the CYF Act has not been amended since its enactment. However, there have been a number of amendments to the *Children's Services Act 1996* in the intervening period reflecting a greater degree of regulation over, and professionalisation of, the provision of children's services in Victoria. For example, when mandatory reporting was first introduced, only managers and supervisors of children's services had a post-secondary qualification. Under the current Children's Services Act, all child care workers must have a post-secondary qualification.

Further, the scope of children's services covered by the Children's Services Act has broadened since the enactment of the mandatory reporting provisions. If section 182(1)(f) were to be gazetted in its current form, the category of child care workers covered by the CYF Act and under section 3 of the Children's Services Act would be any child care worker employed by any child-minding facility for four or more children aged under 13 years. This would include not only child care centres, but also smaller child-minding facilities such as those attached to shopping centres and gymnasiums and family day care.

The Inquiry considers that in order to maintain the original policy focus of the mandatory reporting provision, amendments will be required to both the CYF Act and the Children's Services Act to ensure that the types of child-care professionals that should be the subject of the reporting requirement are licensed proprietors of, and qualified employees who are managers or supervisors of, a children's service facility that is a long day care centre.

Appropriate funding will be required to enable DHS or the new intake service recommended in Chapter 9 to manage the expected increase in reports and to provide appropriate training to the newly mandated groups. DHS should also ensure there is appropriate dialogue between mandated reporters and the appropriate child protection practitioner on what action DHS has taken once a mandated report is received.

Recommendation 44

The Victorian Government should progressively gazette those professions listed in sections 182(1)(f) - (k) of the *Children, Youth and Families Act 2005* that are not yet mandated, beginning with child care workers. In gazetting these groups, amendments will be required to the *Children, Youth and Families Act 2005* and to the *Children's Services Act 1996* to ensure that only licensed proprietors of, and qualified employees who are managers or supervisors of, a children's service facility that is a long daycare centre, are the subject of the reporting duty.

Recommendation 45

The Department of Human Services should develop and implement a training program and an evaluation strategy for mandatory reporting to enable a body of data to be established for future reference. This should be developed and implemented in consultation with the representative bodies or associations for each mandated occupational group.

Recommendation 46

The Victorian Government should obtain the agreement of all jurisdictions, through the Council of Australian Governments or the Community and Disability Services Ministers' Conference, to undertake a national evaluation of mandatory reporting schemes with a view to identifying opportunities to harmonise the various statutory regimes.

14.4.7 *Mandatory reporting of protective concerns for personnel in religious organisations working with children*

At its Public Sitting of 28 June 2011, the Inquiry heard from the Melbourne Victims' Collective about reporting practices and the response by the Catholic Church to past cases of child abuse. In particular, the submission called for the extension of the mandatory reporting obligations to cover clergy (Melbourne Victim's Collective, Melbourne Public Sitting). Following the publication of that submission on the Inquiry's website, four submissions were received from the Catholic Church that addressed those comments made by the Melbourne Victims' Collective (Catholic Archdiocese of Melbourne; Catholic Bishops of Victoria; O'Callaghan QC submission no. 1; O'Callaghan QC submission no. 2).

Although these submissions were made to the Inquiry in relation to complaints of abuse within the Catholic Church, the Inquiry, consistently with its Terms of Reference, did not receive submissions on, or investigate individual cases of, child abuse within any individual organisation. Neither does the Inquiry intend to critique specific compensation processes, the amounts of compensation awarded to victims of abuse from private organisations or the civil liability of such organisations. Rather, within its Terms of Reference, the Inquiry considered the following systemic issues:

- Whether the requirement of mandatory reporting of suspected child abuse should be extended in relation to religious personnel and if so, with what limitations;
- Whether the requirements of the Victorian *Working with Children Act 2005* should be extended in relation to religious personnel and if so, with what limitations; and
- Whether in churches or religious entities in Victoria there are processes, procedures, doctrines or practices which operate to preclude, deflect or discourage the reporting of child abuse by members of religious organisations to secular authorities.

This section deals with the question of whether mandatory reporting should be extended to religious personnel, which for the purposes of the following discussion the Inquiry refers to as 'ministers of religion' noting that this term encompasses clergy from all religious faiths and denominations. Section 14.5 considers the second and third issues relating to the WWC Act and the reporting of child abuse to secular authorities.

Under the CYF Act mandatory reports are made by designated professional groups in relation to the suspected physical or sexual abuse of children by parents or caregivers. This is because mandatory reporting is a function of the statutory child protection system rather than the criminal law. Generally, once DHS ascertains that the parents or caregivers are willing and able to protect the child from the alleged abuse by someone other than the parent or caregiver, the matter ceases to be a protective concern and is a criminal concern to be investigated by the police.

Religious personnel are currently not mandated reporters under the CYF Act. In section 14.4.2 the Inquiry noted that the South Australian mandatory reporting provisions extend to members of non-government organisations that provide sporting or recreational services for children and to ministers of religion and members of religious or spiritual organisations. There is little available research or commentary on the implementation and effect of this reporting requirement and there is no equivalent provision in other Australian jurisdictions.

The South Australian reporting requirement was introduced in 2005 following the Layton Report on the South Australian child protection system. That report stated:

All church personnel including the clergy, with the exception of confessionals, are proposed for inclusion as mandated notifiers. This position is strongly supported by a number of major churches in light of the disclosures of abuse that have been made within Australia and overseas and the view that the public interest and the relationship of the church personnel to children and the wider community warrants this (Layton 2003, section 10.11).

Section 11(2) of the South Australian *Children's Protection Act 1993* places a reporting obligation on 'a minister of religion' and on 'a person who is an employee of, or volunteer in, an organisation formed for religious or spiritual purposes'. Section 11(4) exempts a priest or other minister of religion from divulging information communicated in the course of a confession. The report is from the mandated reporter to statutory child protection services. There is no direct obligation under the Act to report the abuse to the police.

As noted above, the Inquiry received written submissions from the Catholic Bishops of Victoria, Mr Peter O'Callaghan QC, the Independent Commissioner for the Catholic Archdiocese of Melbourne, and the Salesians of Don Bosco on whether or not mandatory reporting should be extended to cover religious personnel. While the Salesians of Don Bosco supported extending mandatory reporting on the basis that many of their members were already included, for example, teachers (Salesians of Don Bosco submission, p. 1), there was opposition to the concept by the Catholic Bishops of Victoria. The Catholic Bishops opposed extending mandatory reporting to religious personnel on the grounds that:

- It would have an unintended consequence of discouraging offender disclosures;
- It would place an impossible obligation on priests to violate the confessional;
- It would further burden a system that is already struggling to cope with increased reports and ineffective or inefficient responses from statutory child protection services to reports would dissuade notifiers from reporting (Catholic Bishops of Victoria submission, pp. 3-5).

The submissions from the Catholic Church also stated that the majority of clergy sexual abuse cases within the Melbourne Archdiocese relate to abuse committed decades ago. They stated that in nearly all cases the subject of complaints took place before the Archdiocese implemented its current procedures and processes to provide internal safeguards for the reporting of abuse and so the cases of abuse dealt with by the Catholic Church were ostensibly reports about an adult rather than a child (Catholic Bishops of Victoria submission, p. 5; O'Callaghan submission no. 1 p. 10-11).

The Inquiry agrees that mandatory reporting should be contemporaneous with reports of suspected physical or sexual abuse of children and young people and not of historical events where the child is now an adult.

Extending the mandatory reporting duty in section 182 of the CYF Act in line with the South Australian legislation may promote the objectives of the mandatory reporting scheme by including ministers of religion and the employees or volunteers of such organisations who, as part of their organisational duties, have frequent contact with children and young people. The consideration is that as a result of their frequent contact they may be more likely to suspect signs of child abuse than other members of the community.

However, the Inquiry considers that extending the mandatory reporting duty in this way could inappropriately extend the reach of section 182 of the CYF Act. Section 182 currently applies to identified professional groups that have training in and would be expected to have frequent contact with children and young people. Not all ministers of religion will have frequent contact with young people. Extending mandatory reporting to all ministers of religion would extend the reporting categories beyond that initially contemplated by the CYP and CYF Acts.

It is accepted that there will be a number of people who are employees and volunteers of religious organisations who already, by virtue of their profession, belong to mandated groups including those yet to be gazetted, for example, teachers (who may also be ministers of religion). The key focus for any policy reform is to ensure that mandatory reporting facilitates the reporting of suspected abuse by people best able to recognise signs of suspected child abuse. The Inquiry does not advocate a general extension that could lead to a significant spike in reports with few resulting substantiations. This may be the likely result if a reporting duty similar to the South Australian legislation was introduced into the CYF Act.

Across Victoria, religious communities have a great diversity in:

- Religious faiths and practices;
- Professional expertise of ministers of religion; and
- Experience that ministers of religion may have with children and young people.

Given this diversity, the Inquiry is also concerned that even if the reporting duty were to be solely confined to ministers of religion, the imposition of such a duty would not achieve the desired objective of facilitating an effective systemic statewide practice of identifying and reporting suspected cases of child physical and sexual abuse by religious personnel.

The Inquiry is reluctant, without broader input from other faiths, to make a recommendation extending mandatory reporting to religious personnel. In that context, the Inquiry believes Recommendation 44 to fully implement the current mandated groups in section 182 of the CYF Act would be a more effective response than if the reporting duty were to be further extended to cover all religious personnel.

Finding 12 relates to the provisions in the CYF Act that require a mandated reporter who forms a reasonable belief that a child has suffered, or is likely to suffer, physical or sexual abuse and whose parents have not protected, or are unlikely to protect, the child from that harm, to report the matter to the Secretary of DHS. The Inquiry considered whether it was appropriate to institute a legal requirement under the mandatory reporting provisions of the CYF Act for religious personnel to report suspected child physical and sexual assault occurring in religious organisations. The Inquiry decided extending this provision under the CYF Act would not achieve the desired aim of ensuring an appropriate investigation of suspected child physical and sexual assault by religious personnel in religious organisations. The Inquiry considered the *Crimes Act 1958* is the appropriate legislative mechanism to achieve the aim ensuring an appropriate investigation of suspected child physical and sexual assault by religious personnel in religious organisations. Section 14.5 and recommendation 48 address this matter.

Finding 12

The Inquiry considers that in the absence of:

- research into: the diversity of religious faiths and practices; the number of ordained or appointed ministers; and expertise and capacity of ministers of religion to report suspected cases of child physical and sexual abuse; and
- input from all religious and spiritual faiths across Victoria,

any proposal to extend the mandatory reporting duty under the *Children, Youth and Families Act 2005* to ministers of religion may not achieve the desired aim of facilitating an effective systemic statewide practice of reporting accurate protective concerns to the Department of Human Services.

14.5 Protecting children from abuse within religious organisations

The community is all too aware of the numerous cases of child abuse that have occurred within religious organisations or associations and the severe trauma caused by sustained and unreported episodes of abuse inflicted by ministers of religion and other trusted religious leaders. Churches and religious organisations have traditionally included the provision of many child-related services and activities. Public commentary on past incidents of child abuse within such organisations and the perceived inadequacies with organisational responses is frequent and often damning.

Section 14.4.7 has dealt with the issue of whether the mandatory reporting requirements of the CYF Act should be extended to religious personnel. The two further matters that the Inquiry has considered in the specific context of whether the current legal framework adequately protects vulnerable children within or who are in contact with religious organisations are:

- The application of the WWC Act to religious personnel; and
- Whether reports alleging child abuse are dealt with internally by religious organisations as opposed to being reported to the secular authorities.

14.5.1 Application of the Working with Children Act 2005 to religious personnel

Chapter 3 sets out a brief summary of the WWC Act. The Act provides for a system of checks to prevent people who are not suitable from working with children. The check is necessary for roles that involve regular contact with children. The check, which also applies to voluntary positions, looks for certain criminal offences and findings by certain professional disciplinary bodies such as the Victorian Institute of Teaching. DOJ publishes relevant statistics on its website. The department issued 820,982 assessment notices, 824 negative notices, and 1074 interim negative notices under the Act from April 2006 to September 2011 (DOJ 2011).

It is an offence under sections 33 and 35 the Act to work or volunteer in a role that involves regular contact with children without first obtaining an assessment notice (that is, a clear Working with Children Check), or to employ such a person without a check. At the Morwell Public Sitting, the Inquiry heard a submission that alleged there was a failure by Victoria Police to prosecute breaches under sections 33 and 35 of the WWC Act and confusion as to which agency had the responsibility to investigate and enforce breaches of the WWC Act with respect to a particular religious organisation (Mr Unthank, Morwell Public Sitting).

It is not appropriate for the Inquiry to comment on specific organisations and their compliance with the Act. The Inquiry notes that the WWC Act was gradually implemented and has only been fully operational since 1 July 2011. As noted in Chapter 3, the WWC Act extends to work done in connection with various services, bodies and activities including religious organisations. The Inquiry has heard on this point from the Catholic Church that in relation to that organisation, there is a blanket policy that all religious personnel and persons over the age of 18 associated with parish or school work require a check under the WWC Act (Catholic Bishops of Victoria submission, p. 5).

A review of the WWC Act was conducted in 2009, and a number of amendments were made to the Act in 2010 to improve the operation of the Act. The Inquiry makes no comment on the specific matter raised in the Public Sitting. The Inquiry considers that it is too soon within the full implementation of the Act to provide any meaningful comment on the level of compliance by religious organisations with the Act and on the investigation and enforcement processes in relation to possible offences committed under sections 33 and 35 of the Act.

The Act is an important element of the legal framework in place to protect vulnerable children. It is appropriate for there to be not only an effective response to any complaints of potential offences committed under the Act, which is the responsibility of Victoria Police, but also for there to be proactive administration of the Act by DOJ. In that regard, any future review of the operation of the Act would benefit with the recording and reporting of data in relation to investigations and prosecutions under the Act as well as the number of active audits undertaken by DOJ of religious and other organisations that involve working with children, on their level of compliance with the requirements of the Act.

As noted above, DOJ records data relating to the application and issue of Working With Children Checks and publishes these on its website. The recording and reporting of data on the number of investigations and prosecutions for breaches of the WWC Act is not recorded.

Finding 13

The *Working with Children Act 2005* clearly applies to persons in religious organisations who work or volunteer with children and young people. The collection and publication of data on the number of investigations and prosecutions for breaches of the *Working with Children Act 2005* could be a valuable indicator of the effectiveness of this Act as part of the legal framework protecting vulnerable children.

14.5.2 Internal processes, practices or doctrines that operate to preclude or discourage reporting of criminal abuse to authorities

A submission was made to the Inquiry that religious organisations and communities directly and indirectly pressure victims not to disclose abuse to the police (Ms Last, Melbourne Victims' Collective, Melbourne Public Sitting). The Inquiry did not investigate whether there are systemic practices in religious organisations in Victoria that operate to preclude or discourage the reporting of suspected child abuse to State authorities. With the exception of the Catholic Church, the Inquiry did not receive submissions from religious bodies, or from secular, volunteer or community organisations. The Inquiry did not specifically invite such submissions.

The Inquiry has considered more general research conducted by the Australian Institute of Family Studies (AIFS) into child abuse within large organisations (including out-of-home care). That research looked to identify factors that may contribute to children's vulnerability to abuse within large organisations, and strategies that could increase child safety within organisations (Beyer et al. 2005; Irenyi et al. 2006).

The research found that pre-employment screening for criminal histories for perpetrator risk factors such as substance abuse and violence, and clearly stated and enforced policies around bullying, violence and substance use in the workplace, can contribute to a safer organisational environment for children (Irenyi et al. 2006, p. 9). Similarly, a good organisational approach to risk management of child abuse would incorporate an understanding of:

- Patterns of child abuse perpetrator behaviour so that they may be identified;
- How theological beliefs and church structures that engender and maintain patriarchal views can operate to undermine the ability of a victim to speak up, and to expect that appropriate criminal action can take place;
- How the 'reverencing of church leaders' can lead to a reluctance of victims to speak up; and
- The role of civil authorities in prosecuting abuse (Irenyi et al. 2006, pp. 11, 15).

In relation to the handling of complaints of sexual abuse by churches, the AIFS study notes that, whatever the mandatory reporting obligations of religious personnel, religious organisations have a responsibility to encourage victims to report criminal behaviour to the police. This sends a clear message to a victim that she or he is not responsible for the activity and will be supported by the religious organisation, and removes the need for the religious organisation to act as investigator of the allegations, a role that is properly reserved for the police (Irenyi et al. 2006, p. 14).

The Catholic Archdiocese of Melbourne submitted that victims of abuse are encouraged to report their complaints to police, and that the church has implemented a number of initiatives to respond to allegations, such as the 'Melbourne Response' and the 'Integrity in Ministry' code of conduct (Catholic Archdiocese of Melbourne submission, pp. 3-4).

The Inquiry did not consider whether similar practices, policies or protocols operate in other religious denominations or faiths in Victoria. Accordingly, the Inquiry is unable to make any finding on whether there are current practices across religious organisations in Victoria that operate to divert claims of abuse from State authorities. This is a significant task that is beyond the capacity of this Inquiry to investigate within its reporting timeframe.

The Independent Commissioner appointed in 1996 by the Catholic Archbishop of Melbourne to inquire into and report on allegations of sexual abuse by priests, religious and laypersons within the Archdiocese, Mr O'Callaghan QC, in a submission to the Inquiry set out the terms of his appointment. They include that immediately upon a complaint of sexual or other abuse which may constitute criminal conduct, the Commissioner shall inform the complainant that he or she has an unfettered and continuing right to make that complaint to the police, and the Commissioner shall appropriately encourage the exercise of that right. Mr O'Callaghan informed the Inquiry that this is what he does and has done, without exception. A further term of appointment is that, except where the complainant expressly states that the complainant will divulge the relevant facts only upon the Commissioner giving his assurance not to disclose that evidence, the Commissioner himself may report the conduct which may constitute sexual abuse to the police (O'Callaghan QC submission no. 2, part 2).

The Inquiry, in accordance with its Terms of Reference, did not review individual organisations nor does it make recommendations in relation to them.

A number of significant issues relevant to the Inquiry's Terms of Reference, that is, systemic matters relating to protecting vulnerable children, arise from the Inquiry's consideration of this matter. First, whether or not private processes are conducted faithfully according to their own criteria, and the Inquiry makes no finding adverse to the Melbourne Response in this respect nor can it do so, the fundamental issue is that the processing of crimes against children should be the subject of state process. The Melbourne Response is a private initiative. Its processes and procedures are not public. Second, if children come before it, there is no public scrutiny of its processes including whether the scrupulous care exercised by the criminal courts to ensure victims are not confronted personally by their abusers in the hearing, is or is not followed. Third, there is no public knowledge whether the consent given by children to the process is informed consent as contemplated by the law.

Further, the Melbourne Response has processed a large number of matters. Mr O'Callaghan has publicly stated that he has found more than 300 cases of clerical sexual abuse established. It is not established how many of that substantial number concerned children and how many cases Mr O'Callaghan has reported to police. These are important questions for this Inquiry and are discussed in section 14.5.3.

The Inquiry notes that there is no longer a general common law duty to report crime to the police. Section 326 of the *Crimes Act 1958* only creates an offence where a person, knowing of the commission of a serious indictable offence and has information that might procure a prosecution or conviction, accepts any benefit for not disclosing that information. Mr O'Callaghan submitted to the Inquiry that the imposition of an obligation to refer a crime to the police would therefore be a 'draconian' measure and that:

- It is the victim's right to complain to the police and to have a say as to whether or not a complaint should be made;
- Many of the cases are in relation to past or historical incidents of abuse where the complainant is now an adult; and
- The sanctity of the confessional in a religious context and its current recognition under the law must be respected (O'Callaghan QC submission no. 2, part 1).

The Inquiry considers that, in the long term, the potential discomfort or distress to an individual victim caused by the mandatory reporting of the alleged abuse will be outweighed by the public interest in triggering a criminal justice response that holds the perpetrator publicly responsible and aims at deterring potential abusers from using the cover of large organisations and positions of authority or influence over children to commit abuse. The public criminal process would also have a significant public educative effect. However, the Inquiry is mindful of the right of an adult who was previously abused as a child to be able to choose whether or not they wish to lodge a complaint of criminal abuse. Accordingly, the Inquiry proposes the following reform.

A new statutory duty to report suspected acts of physical and sexual abuse of children and young people who are under the age of 18 by ministers of religion or members of religious and spiritual organisations should be created. The suspicion should be formed on reasonable grounds. The report should be directed to the police. The reporting provision should be crafted so that the duty operates prospectively. That is, the requirement to report should only cover reasonably suspected instances of physical and sexual abuse of a person who is under the age of 18 at the time a minister of religion or member of a religious or spiritual organisation forms the suspicion of such abuse.

Further, a statutory exemption to the reporting duty should be provided in relation to information received during a religious confession. In Victoria, information revealed during religious confessions is considered privileged when admitting evidence before courts. Section 127 of the *Evidence Act 2008* states:

- (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.
- (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.

Accordingly, the treatment of such information should be consistent with the current treatment of information made to a minister of religion in the course of a religious confession under the *Evidence Act 2008*.

The Inquiry considers that the Victorian Government should also impose an appropriate penalty for a failure to report suspected abuse. Consideration should be given to section 326 of the *Crimes Act 1958* and section 493 of the *CYF Act* (being a maximum of 12 months imprisonment) and/or a suitable fine. Consistently with its view that criminal acts should be recognised as such, the Inquiry considers the *Crimes Act 1958* the appropriate legislation for this reporting duty.

Recommendation 47

The *Crimes Act 1958* (Vic) should be amended to create a separate reporting duty where there is a reasonable suspicion a child or young person who is under 18 is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation. The duty should extend to:

- A minister of religion; and
- A person who holds an office within, is employed by, is a member of, or a volunteer of a religious or spiritual organisation that provides services to, or has regular contact with, children and young people.

An exemption for information received during the rite of confession should be made.

A failure to report should attract a suitable penalty having regard to section 326 of the *Crimes Act 1958* and section 493 of the *Children, Youth and Families Act 2005*.

14.5.3 Investigation into criminal abuse of children in Victoria by religious personnel

Finally, the Inquiry considered the matter of a need for a formal investigation into criminal abuse of children by religious personnel. There has been considerable media attention given to this question in Victoria, principally but not exclusively in relation to the Catholic Church. Such an investigation itself is beyond the scope of this Inquiry, and, in any event, to be effective would need the power to compel the elicitation of witness evidence and of documentary and electronic evidence, powers this Inquiry does not possess. However, the Inquiry has considered how the current processes within some religious organisations operate to conceal, intentionally or otherwise, criminal acts of child physical and sexual assault.

The Inquiry considers that a formal investigation into the current processes by which religious organisations in Victoria respond to criminal abuse of children by religious personnel is justified and is in the public interest for the following reasons. The investigation and prosecution of crimes is properly a matter for the State. Any private system of investigation and compensation which has the tendency, whether intended or unintended, to divert victims from recourse to the State, and to prevent abusers from being held responsible and punished by the State, is a system that should come under clear public scrutiny and consideration. In particular the private processing of matters involving children should come under clear public scrutiny. A private system of investigation and compensation, no matter how faithfully conducted, by definition cannot fulfil the responsibility of the State to investigate and prosecute crime. Crime is a public, not a private, matter. The substantial number of established complaints of clerical sexual abuse found by Mr O'Callaghan (many of which are likely to relate to offences committed against children), reveal a profound harm and any private process that attempts to address that harm that should be publicly assessed.

Further, the Inquiry considers that the often advanced argument that such a formal investigation would be merely 'historical' and would bring distress to adults who years ago were victims, is not persuasive. There is a strong public interest in the ascertainment of whether past abuses have been institutionally hidden, whether religious organisations have been active or complicit in that suppression, and in revealing what processes and procedures were employed. This is not a mere historical artefact. It can, and should, lead to present remedy of any deficiencies in the processes of investigation and to future prevention. Further, people who once were abused would be accorded proper acknowledgement and respect by being able to discuss and disclose their concerns about any deficient private processes. The Inquiry considers that is a most significant rehabilitative matter. Finally, it should not be forgotten that although the abuse may have occurred in years long past, the suffering of victims continues to this day, often most grievously. Such a formal investigation into the processes followed in this regard by religious organisations should not be confined to the Catholic Church. The Inquiry's consideration of relevant matters arising from the Melbourne Repose was occasioned by a submission made in relation to the Melbourne Response. However, the issues stated above are of general application, and of general public concern.

The Inquiry has confined itself to matters of principle as stated above. Such an investigation into the processes followed by religious organisations should possess the power to compel elicitation of witness evidence and of documentary and electronic evidence, powers this Inquiry did not possess.

Recommendation 48

A formal investigation should be conducted into the processes by which religious organisations respond to the criminal abuse of children by religious personnel within their organisations. Such an investigation should possess the powers to compel the elicitation of witness evidence and of documentary and electronic evidence.

14.6 Interaction of the Commonwealth family law system, child protection and family violence laws

14.6.1 *Families in conflict: separation, divorce and family violence*

Children are particularly vulnerable when parents are undergoing a separation or divorce. In some instances separation can engender violence, or threats or insulting behaviour between parties, although it is understood views differ about when such behaviour constitutes 'violence' (Parkinson et al. 2011, pp. 1-32). In addition, surveys of children indicate that witnessing separation or post-separation arguments leaves children frightened and vulnerable and where violence is present, they need more protection and support from sources outside their parents (Bagshaw et al. 2011, pp. 58-59). Chapter 3 provided a brief outline of the various Acts that play a role in this area including the Commonwealth *Family Law Act 1975*, the Victorian *Family Violence Protection Act 2008* and the CYF Act.

The interaction of the Commonwealth family law system, the Victorian statutory child protection system and Victoria's family violence laws raises particular complexity for vulnerable children and families. When a child (or an adult) suffers from, or is exposed to family violence the first priority is to ensure their safety and the second priority is to ensure that the secondary and tertiary systems equipped to support victims and prevent further recurrences are in place and are well coordinated.

The law and its legal institutions must be as simple and as accessible as possible to children and young people. Furthermore, the legal framework should set rules relating to the role of the State when the State must assume the role of a child or young person's parent, and should create and organise sub-systems for identifying and addressing situations where those parental obligations have not been met, and enable the various sub-systems to work as cohesively as possible.

It is acknowledged that these aims are not readily achieved when laws are organised in a federal framework of Commonwealth and state laws and the complex social problems faced by vulnerable families transcend those jurisdictional boundaries. However, the problems raised by the current interaction of family law, child protection and family violence laws are illustrated by a case study raised with the Inquiry by Domestic Violence Victoria (see box).

If this case example were expanded to encompass the scenario where the parents were also in the middle of divorce proceedings and seeking parental access and custody orders in the Family Court, there would be potentially four decision makers with respect to that one family. The central concern is that the child or young person's best interests, particularly their safety and wellbeing, are at the forefront of the decision making process of each institution, agency and service that play a role in the family law system and in promoting family safety.

A family violence case study

A mother and father both raised allegations of family violence against each other.

The father applied for interim intervention order against the mother in a regional sitting of the Children's Court, with the children listed on the order.

The mother applied for and was granted an interim intervention order against the father in a Magistrates' Court in Melbourne, with the children listed on the order.

DHS filed a separate protection application in relation to the children in the Melbourne Children's Court.

All the matters were scheduled to be heard separately, in separate courts within four days. Without the intervention of the family violence service who coordinated the adjournment of the two intervention orders to the Melbourne Children's Court for all matters to be considered by one magistrate, all courts would have ruled independently and quite possibly with contradictory rulings (Domestic Violence Victoria submission, p. 18).

14.6.2 Key themes and current responses

There are two key themes that arise from the interaction of the family violence, child protection and family laws and systems:

- The administration and, where relevant, the enforcement of the various laws by relevant statutory agencies, family support services and the courts are currently not as effectively coordinated (particularly in communication, referrals and resource sharing) as they could be; and
- The laws (and the policy underlining the laws) intended to protect vulnerable family members in each case, principally the Family Violence Protection Act, the CYF Act and the Commonwealth Family Law Act are not operating seamlessly to meet the needs of vulnerable children.

Law enforcement and service responses

The Inquiry heard that the statutory child protection system does not recognise the significant risks experienced by children in the context of separation and divorce and the intersection of family violence across family law and child protection jurisdictions. Submissions argued that this has resulted in a lack of direction and training to promote responsiveness of Child Protection teams and workers (Family Life, p. 22). Concerns were expressed about the tendency for various services to operate in silos and not engage if they believe a matter is being dealt with by another jurisdiction. An example of this is the lack of sharing of facilities or resources (such as a child contact centre or family relationship centre) between the Commonwealth family law system and State child protection and family violence support services (Mr Rumbold, Upper Murray Family Care, Wodonga Public Sitting; Mallee Family Care submission, p. 22).

Measures suggested to address these issues were co-located agencies and services in the family violence and child protection context (Inquiry meeting with Domestic Violence Victoria; Ms Bunston, RCH, Ballarat Public Sitting), and the development and implementation of common risk assessment protocols and resources to enhance communication and planning for victims of family violence across schools, family violence services, family support services, health services and law enforcement services (Inquiry meeting with Darebin Family Violence Response Unit, Victoria Police; Inquiry meeting with Domestic Violence Resource Centre Victoria; Ms Maggs & Ms Trainor, Centre for Non Violence, Bendigo Public Sitting; Ms Howard, Peninsula Health, Melbourne Public Sitting; Ms Hendron, Grampians Community Health, Horsham Public Sitting).

The Inquiry, however, notes and supports the important work that has been started by Victoria Police in promoting a targeted and specialist response to victims of family violence under its *Strategy to Reduce Violence Against Women and Children 2009–2014*. The Inquiry met with members of the Victoria Police Violence Against Women Strategy Group and Darebin Family Violence Response Unit. The Inquiry considers that dedicated police family violence response units provide a greater opportunity for: more specialist and sensitive responses to incidents of family violence by police; better coordinated responses between police, DHS, family violence and other support services; and the ability for police to take a more direct role in the life of vulnerable families experiencing family violence. The expansion of family violence response services to vulnerable sections of the Victorian community can ultimately only serve to improve the safety of vulnerable children.

Matter for attention 11

The Inquiry notes the substantial benefits that have arisen for vulnerable children and families that are exposed to family violence through the use of specialist Victoria Police Family Violence Response Units. This model warrants further consideration by government as a way of more effectively reducing the harm to children exposed to family violence.

Law reform review

The 2010 report by the ALRC and the NSWLRC conducted a comprehensive review into the interaction of family laws, family violence laws and state child protection laws. The Inquiry does not propose to revisit the detailed discussion and analysis in that report. However, Part E of the Commissions' Report set out a number of key recommendations relevant to the child protection system (ALRC & NSWLRC 2010, pp. 31–33).

One of the recommendations in the Commissions' Report was that federal, state and territory governments should ensure the immediate and regular review of protocols between family courts, children's courts and child protection agencies for the exchange of information to avoid duplication in the hearing of cases, and that a decision is made as early as possible about the appropriate court (ALRC & NSWLRC 2010, recommendation 19-5). The Inquiry endorses this recommendation.

In July 2011 the Standing Council on Law and Justice, formerly the Standing Committee of Attorneys-General, agreed to develop a national response to the Commissions' Report on family violence. The Inquiry was informed that, at the time of this report, a ministerial working group has been convened to develop that response.

Orders allocating parental responsibility

The Inquiry notes that the VLRC has also commented on the intersection between child protection laws, family law and family violence laws. In particular the VLRC proposed two reforms. The first is that the range of protective orders under the CYF Act be expanded to enable the Court, where it finds that a child is in need of protection, also to make an order granting the guardianship or custody of a child to one parent where in the best interests of a child. This proposal is based on a similar 'Order allocating parental responsibility' available under section 79 of the New South Wales *Children and Young Person's (Care and Protection) Act 1998*. The rationale for this proposal, as put forward by the Family Law Council in 2002, was to allow the child to remain with family as far as possible and to strengthen the one-court approach to both family law and child protection matters and mitigate against the need for children to move in between courts (VLRC 2010, pp. 349-350). The Children's Court has indicated its support for the proposed reform and that it should be expanded to include third parties (Children's Court submission no. 1, p. 51).

The Inquiry notes that orders of the Family Court go to the longer term interests of the child. By contrast, orders of the Children's Court are frequently relatively short term. The Inquiry does not consider that the jurisdiction for making parenting orders is comparable with the jurisdiction of the Children's Court.

The VLRC also proposed that section 146 of the Family Violence Protection Act should be extended to permit the Court to exercise jurisdiction under that Act when a child who is the subject of a child protection application is a child of 'the affected family member' or 'the protected person' (VLRC 2010, p. 352, recommendation 2.24). This would occur in circumstances where the application for the family violence protection order for an affected adult family member did not list any children on the application but the court is concerned that children might also be affected by the family violence. Under this proposal, the Children's Court may on its own motion include the children on the family violence protection order. The Children's Court has indicated its support for this recommendation (Children's Court submission no. 1, p. 51). The Inquiry supports the VLRC's proposal.

Recommendation 49

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

14.7 The Victorian Government's proposed 'failure to protect' laws

14.7.1 Victorian Government policy

On 23 November 2010 the Victorian Government announced as part of its pre-election commitments that it would be legislating to effectively mandate adults who are caregivers or are living in the same household as a child who is abused to either intervene to protect the child, remove the child from the abusive environment or report the abuse to the relevant authorities or face substantive penalties to be determined (Clark 2010).

The Victorian Government conducted a consultation process on the proposal reflected in a paper *Discussion Paper – 'Failure to Protect Laws'* (DOJ Discussion Paper) released by DOJ and a consultation conference with interested stakeholders. The proposal, in summary, will create two offences for adults who failed to take action in the following circumstances:

- Where the adult knows or believes that a child who they have custody or care of, or live in the same household as, is suffering sexual abuse or abuse that may result in serious injury or death; and
- Where the child living in the same household as the adult dies due to child abuse and that adult was aware of the abuse and its seriousness (DOJ 2011, p.1).

According to DOJ, the proposed offence would serve two purposes. First, to reinforce the responsibility of adults who are living with or care for a child to protect that child from harm. Second, in circumstances where it was not clear which parent was responsible for the abuse, the laws would allow the conviction of either or both parents under the proposed failure to protect laws (DOJ 2011b, p.1).

14.7.2 'Failure to protect' in the context of family violence

The Inquiry has concerns about the proposal. Children who are abused are often also exposed to family violence. Non-abusive parents may themselves be the victims of family violence, and may be unable to be act protectively towards their children. There is no recent data on the co-occurrence of child protection substantiations and family violence incidents. However, a number of submissions to DOJ during its consultation process suggested family violence is a factor in over half of substantiated child protection cases in Victoria (Women's Health Association of Victoria 2011, p. 3; Women's Legal Service Victoria (WLSV) et al. 2011, p. 9). This is based on data contained in *An Integrated Strategy for Child Protection and Placement Services* published by DHS in 2002.

As noted by the Victorian Equal Opportunity and Human Rights Commission, the proposed laws may be inconsistent with recent reforms concerning family violence (Victorian Equal Opportunity and Human Rights Commission (VEOHRC) 2011, p. 7). In particular, reforms addressing offender accountability may be waylaid by placing responsibility for abusive behaviour on a non-abusive parent. The Inquiry is also concerned that efforts in recent years to acknowledge that, for victims, putting an end to family violence is not as simple as 'walking away' could be undermined by laws that criminalise non-protective behaviour by vulnerable parents.

The Inquiry also notes that section 493 of the CYF Act already provides that it is an offence for a person who has a duty of care in respect of a child to intentionally fail to take action that does, or is likely to, result in harm to the child. Victoria Police advised the Inquiry that, between 1 July 2000 and 30 June 2010, there were 15 recorded alleged offences in relation to section 493 of the CYF Act and its predecessor under section 216 of the CYP Act.

It is important that the government consider, before introducing legislation, the reasons why section 493 of the CYF Act has rarely been enforced. A potential reason for the lack of prosecutions under section 493 of the CYF Act is that it includes an element of intention, so that a person is only charged with failing to protect a child if they have intentionally failed to take action to prevent the abuse. Intention can be difficult to prove, particularly in the context of child abuse and family violence. However, if intention is not an element of the offence, there is a risk that individuals who are themselves the victims of abuse or violence will be unfairly penalised. This is more so in vulnerable families where other factors may also contribute to the victim's circumstances such as mental health concerns, own life or childhood trauma, or drug and alcohol addiction. A general failure to protect offence, without an element of intention but with a significant jail sentence attached would, in the Inquiry's view, be disproportionate to the stated aims of the legislation.

'Failure to protect' regimes currently exist in jurisdictions such as the United Kingdom (UK), South Australia and New Zealand. The offences in these jurisdictions do not require intention on the part of the person who failed to take protective action. The failure to protect laws in other jurisdictions are summarised at Appendix 13.

One of the policy aims of the proposal is to overcome non-cooperation by the parents or primary caregivers or the provision of conflicting accounts to police. It was brought to the Inquiry's attention that a recent evaluation of the UK scheme found 'there is very little evidence of the new powers being used to frustrate collusive attempts to escape justice, and much more evidence of its application in circumstances where responsibility for homicide itself is not at issue' (Drakeford & Butler 2010, p. 1,430; Humphreys submission (a), pp. 18-19).

Another concern is that the introduction of these offences might have a dampening effect on help-seeking behaviour and the reporting of abuse. For instance, the reporting or referrals to child protection services in both the UK (in 2004-05) and in South Australia (2005-06) appear to have declined following the introduction of these offences in the two jurisdictions (VEOHRC 2011, pp. 3-4; WLSV et al. 2011, pp. 6-8). The Inquiry is unable to comment on whether the introduction of the offences in those jurisdictions was the sole cause for a decline in reporting in the relevant years.

The Inquiry notes that submissions to DOJ suggested that should the Victorian Government wish to proceed with the creation of this new offence, some form of legal recognition be provided to members of the household affected by family violence. Some recommended that this be done through the creation of a defence or special evidentiary grounds where the accused is a victim of family violence (Centre for Excellence in Child and Family Welfare 2011b, p. 8; Victoria Legal Aid 2011, p. 9; WLSV et al. 2011, p. 21) while other submissions to DOJ recommended that the prosecution be required to establish beyond reasonable doubt that the person accused of failing to protect was not under any duress to stay silent (Children's Protection Society 2011, p. 6; WLSV et al. 2011, p. 21). The Inquiry considers that, given the grave implications such an offence would have for victims of family violence, who are not intentionally complicit in the commission of the abuse, the prosecution should be required to prove as an element of the offence, and beyond reasonable doubt, the accused was not the subject of, or exposed to, relevant family violence.

The Inquiry also considers that careful consideration should be given to the flow-on effects for children or young people if one, or both, parents or caregivers are imprisoned as a result of one being prosecuted for perpetrating the abuse and the other for failing to protect the child.

Matter for attention 12

In considering whether a new 'failure to protect' law should be enacted, it is necessary that the current operation of section 493 of the *Children, Youth and Families Act 2005* be reviewed and consideration given to whether this section is sufficient to meet the policy objectives that the proposed new offence is being designed to address.

If a new 'failure to protect' law is enacted, it should provide that the prosecution is required to prove, as an element of the offence and beyond reasonable doubt, that the accused was not the subject of, or exposed to, relevant family violence.

14.8 Serious sex offenders and vulnerable children

14.8.1 Sex offenders, supervision and suppression orders

The *Serious Sex Offenders Monitoring Act 2005* (2005 Act) was introduced to address concerns that serious sex offenders were being released after the completion of their sentences and that the public was being exposed to a risk that sex offenders would reoffend. The 2005 Act built on the *Sex Offender Registration Act 2004* (SOR Act) to allow the State to closely monitor and regulate the living arrangements and behaviour of offenders after they had finished their sentences and were returned to the community. The 2005 Act was justified on the basis that sex offending, particularly that which involves child victims, is difficult to uncover and to prosecute, and has devastating and life-long consequences (Parliament of Victoria, Legislative Assembly 2005c, p. 9).

14.8.2 The supervision of serious sex offenders

The *Serious Sex Offenders (Detention and Supervision) Act 2009* (SSO Act) repealed the 2005 Act and provided for a new scheme of supervision and indefinite detention. Existing orders under the 2005 Act were maintained under the SSO Act. Some differences between the 2005 Act and the SSO Act are that the SSO Act applies to both child and adult sex offenders, and that proceedings under the SSO Act are civil in nature, rather than criminal as under the 2005 Act (section 79 SSO Act and section 26 of the 2005 Act).

Although all child sex offenders are eligible for an order under the SSO Act, not all child sex offenders will be subject to the Act. It will depend on whether the offender is thought to pose an 'unacceptable risk of offending'. The Adult Parole Board, established by the *Corrections Act 1986*, conducts a risk assessment of offenders before their release. The board then makes a recommendation to the Secretary of DOJ as to whether the offender poses an unacceptable risk of reoffending and whether an application should therefore be made for supervision or detention. Even where an offender is returned to the community, a condition of this may be that the offender is housed in a unit supervised by Corrections Victoria. Regardless of whether an order is made, child sex offenders will be registered under the SOR Act.

The purposes of the SSO Act 2009 are set out in section 1 of the Act. That section provides that the 'main purpose' of the Act is to enhance the protection of the community, and 'the secondary purpose' of the Act is to facilitate the treatment and rehabilitation of offenders.

14.8.3 Suppression orders

Suppression orders under supervision and detention laws

Part 13 Division 1 (ss. 182-186) of the SSO Act, entitled 'Suppression of publication', makes provision in relation to suppression orders. Section 182 provides that a person must not publish or cause to be published:

- (a) any evidence given in a proceeding before a court under this Act; or
- (b) the content of any report or other document put before the court in the proceeding; or
- (c) any information that is submitted to the court that might enable a person (other than the offender) who has attended or given evidence in the proceeding to be identified; or
- (d) any information that might enable a victim of a relevant offence committed by the offender to be identified

unless the court authorises publication under section 183. Section 183 provides that the court, if satisfied that exceptional circumstances exist, may make an order authorising publication. Section 184(1) provides that:

In any proceedings before a court under this Act, the court, if satisfied that it is in the public interest to do so, may order that any information that might enable an offender or his or her whereabouts to be identified must not be published except in the manner and to the extent (if any) specified in the order.

Section 184(2) provides that an order 'may be made on the application of the offender or on the court's own initiative'. Notably, and in contrast to section 42(2) of the 2005 Act, the Secretary of DOJ has no locus to apply for a suppression order. Section 185 provides that, in deciding whether or not to grant a suppression order, the court must have regard to:

- (a) whether the publication would endanger the safety of any person;
- (b) the interests of any victims of the offender;
- (c) whether the publication would enhance or compromise the purposes of this Act.

Section 186 provides monetary and custodial penalties for breach of a court order under the Division.

No submissions to the Inquiry were made on the justification for and prevalence of suppression orders issued under supervision and detention laws. Nevertheless, the Inquiry has considered this matter as an element of the overall system for protecting vulnerable children.

The constitutional validity of suppression orders for offenders under section 42 of the 2005 Act was recently authoritatively determined in *Hogan v. Hinch* (2010) 275 ALR 408 (Hogan v. Hinch). That provision was substantially similar, but not identical, to the provision in the SSO Act. The case arose from charges laid against radio broadcaster Derryn Hinch relating to breaches of suppression orders made under section 42 of the 2005 Act for publishing information that could identify supervised sex offenders. Mr Hinch challenged the provisions of the 2005 Act on the grounds that the suppression orders were contrary to the principles of open justice and of freedom of political communication implied in the Constitution. The issues were removed to the High Court pursuant to section 40(1) of the *Judiciary Act 1903* (Cwlth). The High Court found that section 42 of the 2005 Act was not constitutionally invalid.

The Court found that, although the 2005 Act limited the principle of open justice and the implied constitutional principle of freedom of political communication, these principles are not absolute. The limits the Act placed on the principles were reasonable, and open to Parliament

In his judgment Chief Justice French noted that the power to issue suppression orders in relation to supervision matters is particular to an order under that Act. Details of the original offence proceedings are not suppressed, unless by publishing the information it would reasonably lead to the identification of the person as prohibited by the order. His Honour also noted that the orders are reviewable. In a joint judgment, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. found that section 42 did not impermissibly breach the principles of open courts or of freedom of political communication. Their Honours in particular accepted the submission of the Queensland Attorney-General that the regime established under the Act might be frustrated by the identification of the offender (at [75]).

The Inquiry has considered whether as a matter of policy, the retention of the current discretionary power of a court to issue a suppression order in section 184 of the SSO Act is in the best interests of vulnerable children and young people, and whether it reflects an appropriate balance between the principle of open justice and the need to preserve judicial discretion. Prior to addressing this issue it is appropriate to consider current practice by courts on the issuing of suppression orders under the SSO Act.

The data on suppression orders under the *Serious Sex Offenders (Detention and Supervision) Act 2009*

Contemporary media reports suggest that courts are increasingly issuing suppression orders in relation to sex offences. The question arising is whether the scheme has an indirect effect of shielding the identification of some sex offenders in a way that does not shield other types of offenders. An examination of the number of applications to orders suggests that suppression orders are not made by the courts as a matter of course.

The Supreme Court has data relating to suppressions orders generally issued by that court. However, the Inquiry was unable to determine how many orders were issued under the 2005 Act. The County Court began reporting on suppression orders from commencement of the SSO Act on 1 January 2010. The County Court informed the Inquiry that, in 2010, there were 28 applications for suppression orders in relation to proceedings under that Act, and 25 of those applications were granted. From 1 January to 11 October 2011 there were 75 applications for suppression orders and 17 of these were granted.

It is clear that, although the number of suppression order applications has almost trebled since 2010, the number of suppression orders actually issued has not. The Inquiry is of the view that it is too early in the history of section 184 of the SSO Act to make a finding on whether the issue of suppression orders in relation to sex offenders is increasing. If, contrary to the Inquiry's majority recommendation below, sections 182-186 SSO Act are not repealed, the Inquiry considers the number of suppression orders issued in relation to the SSO Act should continue to be monitored.

Suppression orders more generally

Suppression orders are available under sections 18 and 19 of the *Supreme Court Act 1986* and sections 80 and 80AA of the *County Court Act 1958* and the common law. Under these sections, a suppression order is available in criminal and civil proceedings if, in the Court's opinion, it is necessary to do so in order not to:

- (a) endanger the national or international security of Australia; or
- (b) prejudice the administration of justice; or
- (c) endanger the physical safety of any person; or
- (d) offend public decency or morality; or

- (e) cause undue distress or embarrassment to the complainant in a proceeding that relates, wholly or partly, to a charge for a sexual offence within the meaning of the Criminal Procedure Act 2009; or
- (f) cause undue distress or embarrassment to a witness under examination in a proceeding that relates, wholly or partly, to a charge for a sexual offence.

In contrast to the above sections, which lay down the test of necessity, the test in section 184 of the SSO Act is a test of 'public interest'. That is a wide and malleable test. It is not restricted to specific events or considerations, as in the Inquiry's majority view it should be. A provision impinging upon open justice should be limited to specific events and considerations, not cloaked in generality.

Reforms to suppression orders proposed by the Standing Council of Law and Justice

The Inquiry notes that, in May 2010, the then Standing Committee of Attorneys General (SCAG) endorsed the Draft SCAG Model Bill for Court and Suppression and Non-publication Orders Bill 2010 (SCAG Model Bill), which are a set of model provisions in relation to the issuing of suppression orders.

Under the SCAG Model Bill, the court must take into account 'that a primary objective of the administration of justice is to safeguard the public interest in open justice' (clause 6 of the SCAG Model Bill). The provisions also set out a number of grounds on which a suppression or non-publication order may be made, including that 'the order is necessary to protect the safety of any person' and that it is 'otherwise necessary in the public interest for the order to be made and that the public interest significantly outweighs the public interest in open justice' (clauses 8(1)(c),(e) of the SCAG Model Bill).

DOJ advised the Inquiry that reform on suppression orders is proceeding but that the reform is in the early stages of development, and it is not yet possible to say how closely the reforms will mirror the form of the model legislation.

Relevant considerations

There are a number of considerations supporting the existence of the power to make suppression orders provided by Part 13 Division 1 (ss. 182-186) of the SSO Act. First, the offender has concluded the sentence and yet is subject to ongoing restrictions including of residence, and the burden of publicity is a further and oppressive factor upon persons who have served their sentences, sometimes extremely so. Second, rehabilitation is always important and publicity, particularly as to residence, can impede orderly rehabilitation. Third, publicity can impede arrangements for rehabilitation made by the Adult Parole Board and impose administrative burdens, sometimes substantial, upon an already overstretched administrative system, a system that rightly is designed to treat offenders fairly and enhance rehabilitation. However, to this important matter, in contrast with the 2005 Act the SSO Act gives no locus to DOJ to apply for a suppression order prohibiting publication of an offender's identity or whereabouts (section 184(2)). Finally, the spectre of vigilantism is anathema to a decent society and should be prevented, not enabled.

On the other hand, there are powerful considerations militating against the existence of sections 182-186. First, there is a fundamental value in open courts. Courts being open 'keep the judge, while trying, under trial' to use the famous words of Jeremy Bentham (Bentham 1843). It keeps the administration of justice under public scrutiny. It keeps the administration of government under public scrutiny. These are deep-seated modern democratic values, and they should be affirmed and maintained. Suppression orders undermine, rather than enhance, public confidence in the courts. Second, parents and families have a right to know if a serious sex offender is residing among them. Third, the community has a right to be informed about the functioning of the system in relation to serious sex offenders. Fourth, as a group, paedophiles who are serious sex offenders are the most recidivist of all major categories of offenders. Fifth, the methodology of the paedophile is secrecy and the law should not itself provide a veil of secrecy to paedophiles. Finally, the risk of vigilantism can be guarded against by specific provision, such as section 85L of the Community Protection (Offender Reporting) Amendment Bill (No. 2) 2011 of Western Australia, that proscribes conduct intended or likely to create animosity towards or harassment of an identified offender.

In a majority decision, the Inquiry, having weighed the competing considerations set out above, has reached the conclusion that Part 13 Division 1 of the SSO Act (being sections 182-186) cannot be supported as policy and should be repealed. Repeal would enhance the protection of vulnerable children and would affirm the principle of open courts.

The Inquiry is conscious that courts, from the High Court to the Magistrates' Court, have applied the predecessor to sections 182-186 (section 42 of the 2005 Act (Vic)) that involved different procedures most of which differences for present purposes are immaterial) and have acted pursuant to it. The High Court ruled that the (precedent) legislation was not constitutionally invalid. The Magistrate, in July 2011, sentenced Mr Hinch pursuant to it. The decision of the High Court is authoritative, and the Magistrate acted faithfully in accordance with the existing legislation. The Inquiry makes no suggestion that the decisions of the courts were wrong. Rather, it is the legislation that is wrong, and the Inquiry by majority considers it should be repealed. Protection for victims and witnesses currently provided for in section 182(1) of the SSO Act can be secured pursuant to other existing legislation, including sections 18 and 19 of *Supreme Court Act 1986*, sections 80 and 80AA of the *County Court Act 1958* and the common law.

Recommendation 50 (By majority)

Sections 182-186 of the *Serious Sex Offenders (Detention and Supervision) Act 2009*, which provides for the making of suppression orders, should be repealed.

Recommendation 50 is the recommendation of the Chair and one Panel member. The other Panel member's view is as follows.

The minority view did not support repealing sections 182-186 of the SSO Act. This view weighed the competing considerations differently. First, it gave salience to the potential to protect children through the rehabilitation of offenders being facilitated by suppression orders. Second, it recognised the importance of judicial discretion in selectively determining the circumstances of individual cases. In this respect it is noted that, in the past year, less than a quarter of applications to the County Court for suppression orders under these sections of the Act were granted.

14.9 Abuse of children through electronic media

The term 'electronic abuse' describes unlawful sexual behaviour involving children using computers or mobile phones. Sexual offences against children that are facilitated by the internet fall into two main categories:

- Using the internet to target and 'groom' children for the purposes of sexual abuse; and
- Producing and downloading indecent illegal images of children from the internet and distributing them (Davidson & Gottschalk 2011, p. 26).

The Australian Institute of Criminology notes that 'opportunities for child sexual offenders and other financially motivated criminals to sexually exploit children' are increasing with the advances in information and communications technologies (Choo 2009, p. 1). Like all physical and sexual abuse, the offences generally involve adult perpetrators and child victims, although may involve child perpetrators. The constitutional division of powers, as well as the ease of distribution of images through the telephone and internet, means that electronic abuse is legislated and prosecuted by the states and territories as well as by the Commonwealth.

Examples of electronic abuse are 'online grooming' and 'sexting'. Online grooming refers to the behavior of an adult who, using the internet, contacts a child under 16 for the purpose of sexual abuse. The relationship may continue online or in person (Virtual Global Taskforce 2011) and may be prosecuted under sections 474.26 and 474.27 of the *Criminal Code Act 1995* (Cwlth) in some instances. Victoria is the only Australian jurisdiction without online grooming laws.

'Sexting' is a term used to describe the sending of sexually explicit text messages or images via a mobile telephone or the internet. Where the images are of a child, the law views sexting as the production, distribution and possession of child pornography. Sexting may be prosecuted under the child pornography provisions of Division 1, Subdivision 13 of the *Crimes Act 1958* (Victoria) or Part 10.6 of the *Criminal Code Act 1995* (Cwlth).

The Inquiry notes that, prompted by concerns that minors engaging in sexting are charged under state child pornography laws and consequently registered on the Sex Offender Register, the Victorian Parliamentary Law Reform Committee recently received a reference to conduct an Inquiry into sexting. The Terms of Reference are to consider: the incidence, prevalence and nature of sexting in Victoria; the extent and effectiveness of existing awareness and education about the social and legal effect and ramifications of sexting; and the appropriateness and adequacy of existing laws, especially criminal offences and the application of the sex offenders register (Law Reform Committee 2011).

Recommendation 51

The Victorian Government should, consistent with other Australian jurisdictions, enact an internet grooming offence.

14.10 Child homicide and filicide

14.10.1 Child homicide

In 2008 amendments to the Crimes Act recognised child homicide as an offence that is separate from other homicides. Under section 5A of the Crimes Act, child homicide is the killing of a child under the age of 6 years, where the circumstances are such that it would be considered manslaughter. The introduction followed a number of homicide convictions where the child victim was killed in the context of ongoing physical abuse, and where there was public outcry over the sentences, which were considered not to reflect the gravity of the offence (for example, *R v. McMaster* [2007] VSC133; *DPP v. David Scott Arney* [2007] VSCA 126).

Although the maximum penalty for child homicide is equal to that for manslaughter (20 years), the offence was introduced in an effort to encourage courts to increase the sentences that were being imposed for the killing of young children (Parliament of Victoria, Legislative Assembly 2007, p. 4,412). The government hoped that a discrete child homicide provision would allow, over time, a distance to be formed between the sentencing considerations applied in manslaughter and child homicide cases (Parliament of Victoria, Legislative Assembly 2007, p. 4,414). It is not yet possible to assess whether the provisions are having the desired effect.

14.10.2 Sentencing for filicide

Filicide is the killing of a child by the child's parent or de facto parent. Filicide is a category of murder. Tragically, in Victoria over the past 10 years, there have been a number of instances of this crime. A most disturbing fact is that within the category of filicide, there has been a number of instances of the crime performed with the intention of punishing the other parent of the child (in most instances the mother), whether to cause that parent long-suffering anguish, or to deny that parent their right of care of the child, or for spousal revenge, or for like intention. Further, the killings have been by parents who have had the full benefit of legal recourse, have been granted proper access, and have not been denied parental rights. The deliberate and intentional killing of a child by one parent to punish the other parent is in the worst category of murder.

Under section 3 of the *Crimes Act 1958*, the penalty for murder is imprisonment for life or for a fixed term of imprisonment. If the sentence imposed is life imprisonment, a minimum term of imprisonment before eligibility for parole is nearly always fixed. It is rightly an exceptional course to refuse to fix a minimum term. The Inquiry considers that filicide with the intention of punishing the other parent should be an exception to this normal standard.

The Inquiry considers that the normal sentence for the intentional and deliberate killing of a child by one parent to punish another parent should be life imprisonment with no minimum term. The offence is:

- In the worst category of murder;
- The killing of a vulnerable child;
- The most profound breach of trust;
- Executed to punish an innocent parent; and
- Normally contemplated or premeditated.

Turning to relevant sentencing principles, the Inquiry considers it is of limited relevance that the killer is otherwise of good character. The normal reductionist principle of reformation, so often of high importance in sentencing, is here of marginal relevance. The principle of special deterrence – that is, deterring the offender from further crime – is relevant. The principles of denunciation and of punishment have high relevance. The principle of general deterrence – that is, deterring others from like conduct – has the highest relevance of all. The offence of filicide starts in the mind of the offender. It develops over time. It is that psychological pathway to which the principle of general deterrence especially is applicable.

The present judicial standard for sentencing in this category of murder is life imprisonment with a lengthy minimum term before eligibility for parole. It is very much an exception that the sentence is life imprisonment with no minimum term. With every respect, the Inquiry considers that with this crime the converse standard should be the position. That is, the sentencing standard for this crime should be life imprisonment with no minimum term, and the exception should be life imprisonment with a lengthy minimum term. Such a judicial standard, in the Inquiry's considered view, would properly mark the character of this offence, and would do what the sentencing court, within proper principle, can do to protect vulnerable children.

In reaching its view, the Inquiry has had regard to the applicable principles as to head sentence and minimum term stated by the High Court in *Bugmy v. The Queen* (1990) 169 CLR 525 and the authorities there referred to. The Inquiry also has had regard to section 11(1) of the Sentencing Act 1991, which relevantly provides:

[T]he court must, as part of the sentence, fix a period during which the offender is not eligible for parole unless it considers that the nature of the offence or the past history of the offender makes the fixing of such a period inappropriate.

The Inquiry considers that ‘the nature of the offence’ of intentional and deliberate killing of a child by a parent in order to punish the other parent is a crime that should attract the exception provided for in section 11(1).

The Inquiry does not recommend amendment to section 3 of the *Crimes Act 1958* for this crime, because the Inquiry supports judicial discretion in sentencing. Judicial experience demonstrates that there can be genuine exceptions to sound general rules, and room should be retained for the genuine exception. However, the Inquiry considers that the present judicial standard of sentencing for this most egregious category of murder should attain a higher level.

The above observations do not apply to persons found to be suffering relevant mental impairment at the time of the offence, because they would not be guilty of the offence of murder.

Unlike other sections in this Report, the Inquiry here makes no formal recommendation. It makes no recommendation to government to amend the relevant legislation, for the reasons stated above. It makes no recommendation to the judiciary, because it would be inappropriate to do so. Rather, the Inquiry expresses its considered view in the hope that it contributes to community understanding of the true nature of this crime, and to community expectation of the proper sentencing standard for it.

Greater attention needs to be given to the potential to prevent filicide of this nature. By analysing a number of such cases, nationally and over a period of time, it may be possible to identify common factors and early warning signs that family law practitioners, medical practitioners and others might use to identify risks and help to prevent such tragedies. The Inquiry recommends that such a study be undertaken by an appropriate body, such as the Australian Institute of Criminology.

In doing so, the Inquiry also considers that such a study can draw on current research being undertaken by organisations such as the Domestic Violence Resource Centre of Victoria.

14.11 Conclusion

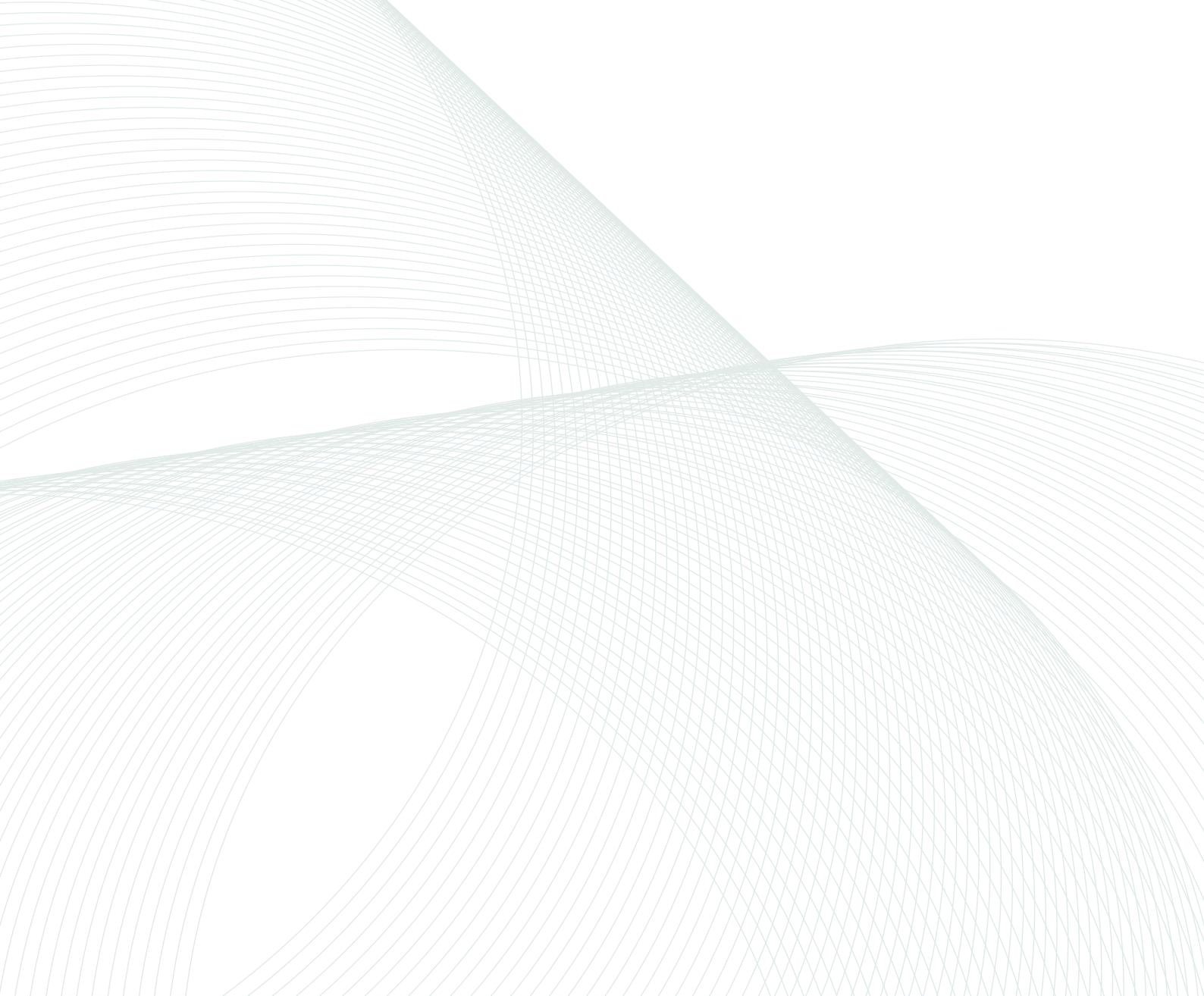
Aspects of the legal framework designed to protect children are operating as intended. However, the Inquiry considers that the legal response to protecting children can and should be strengthened. A number of opportunities exist for the Victorian Government to do so.

Victoria’s vulnerable children and young people have a right not only to protection, but also therapeutic intervention for both their own needs and the needs of their family members. Legislation that allows for the provision of services to children and their families should be amended to reflect that the best interest of children should be a consideration in the delivery of those services.

It should be made clear in legislation that the law intends to protect children from child abuse through the application of civil and criminal law. To ensure that this is reflected in consistent and robust responses, reporting should be supported and, in some cases, obliged. A legislative recognition of child abuse as a crime should be supported through better collection of use of data on the flow of reports, investigations, prosecutions and convictions for allegations of child abuse. It is also critical that the investigation of criminal allegations of child abuse continue to be improved.

Recommendation 52

A national study should be undertaken to improve current knowledge and understanding of the causes of filicide and the behavioural signs preceding filicide. Such a study could be undertaken by a research body such as the Australian Institute of Criminology.



Part 5: The law and the courts

Chapter 15:

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

Chapter 15: Realigning court processes to meet the needs of children and young people

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.

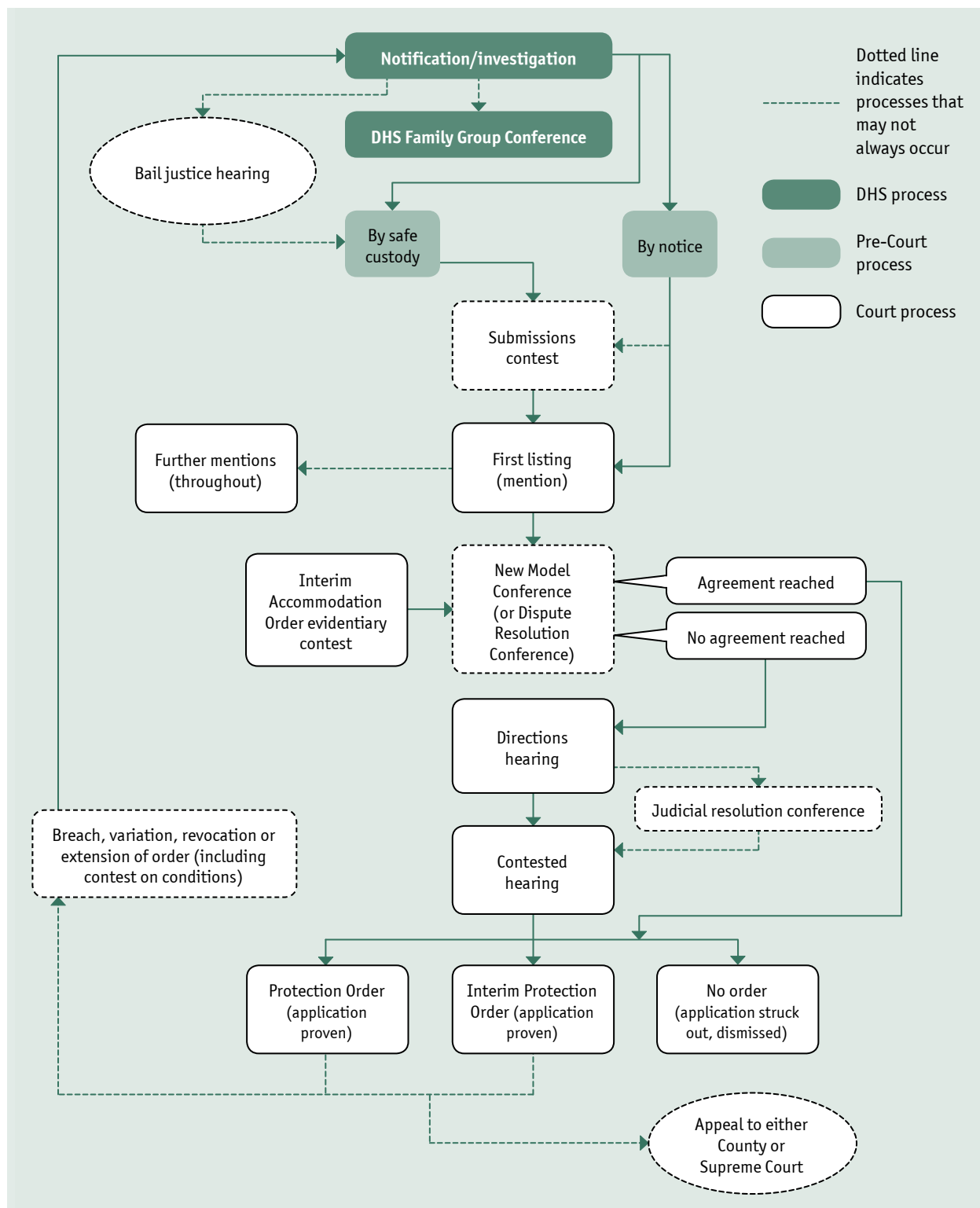
The Children's Court is more than a place where orders are made. It is a forum in which a child's voice can be heard, and where parents and DHS come to state their cases. The Court is also a physical environment in which legal and child protection professionals, magistrates, and children and their families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

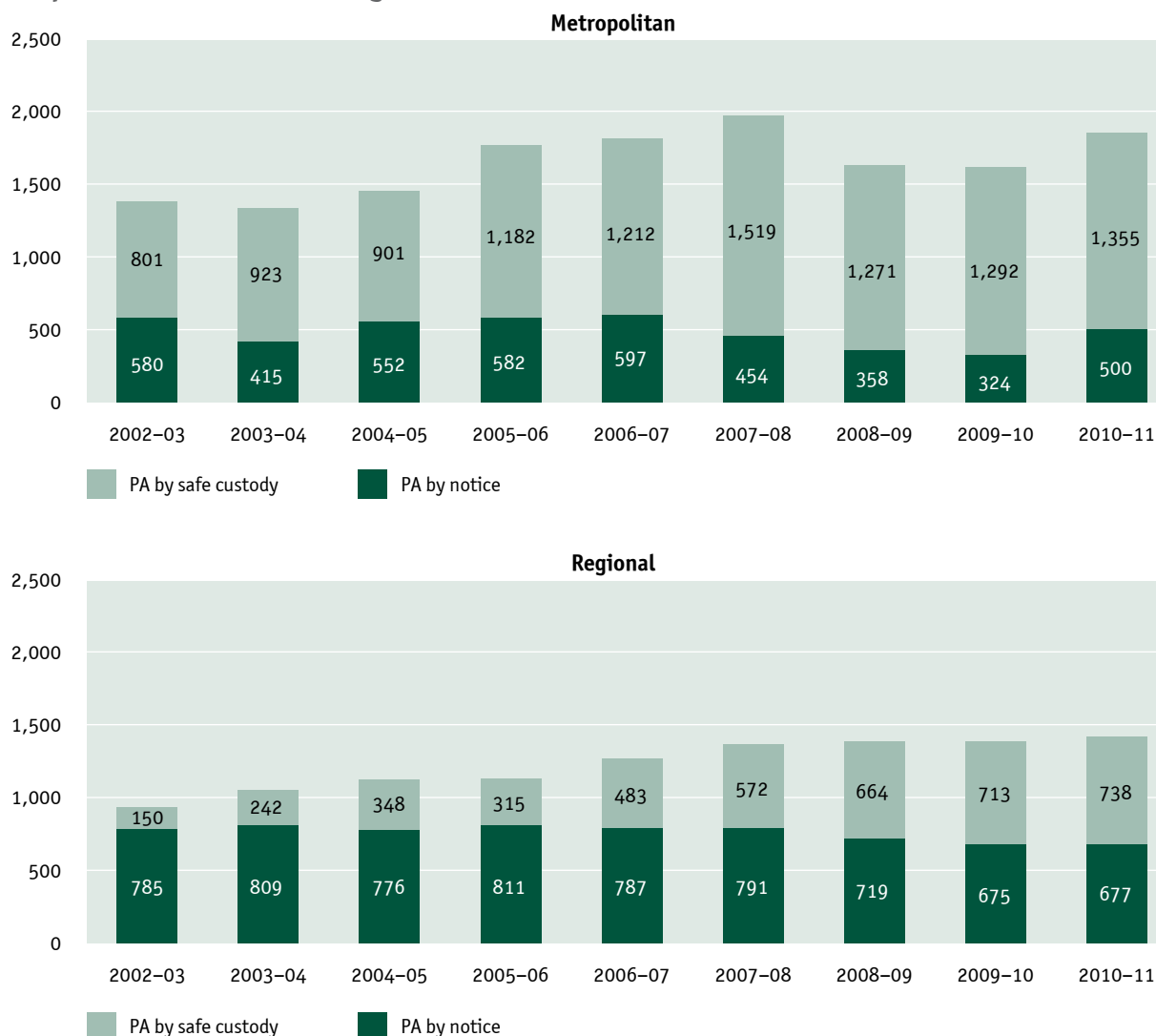
The Children's Court should establish specialist Sexual Abuse and Koori lists in the Family Division. The court should be resourced to create and implement these lists as a matter of priority. To ensure these lists are suitable for implementation across the state, a pilot could be run in the Melbourne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

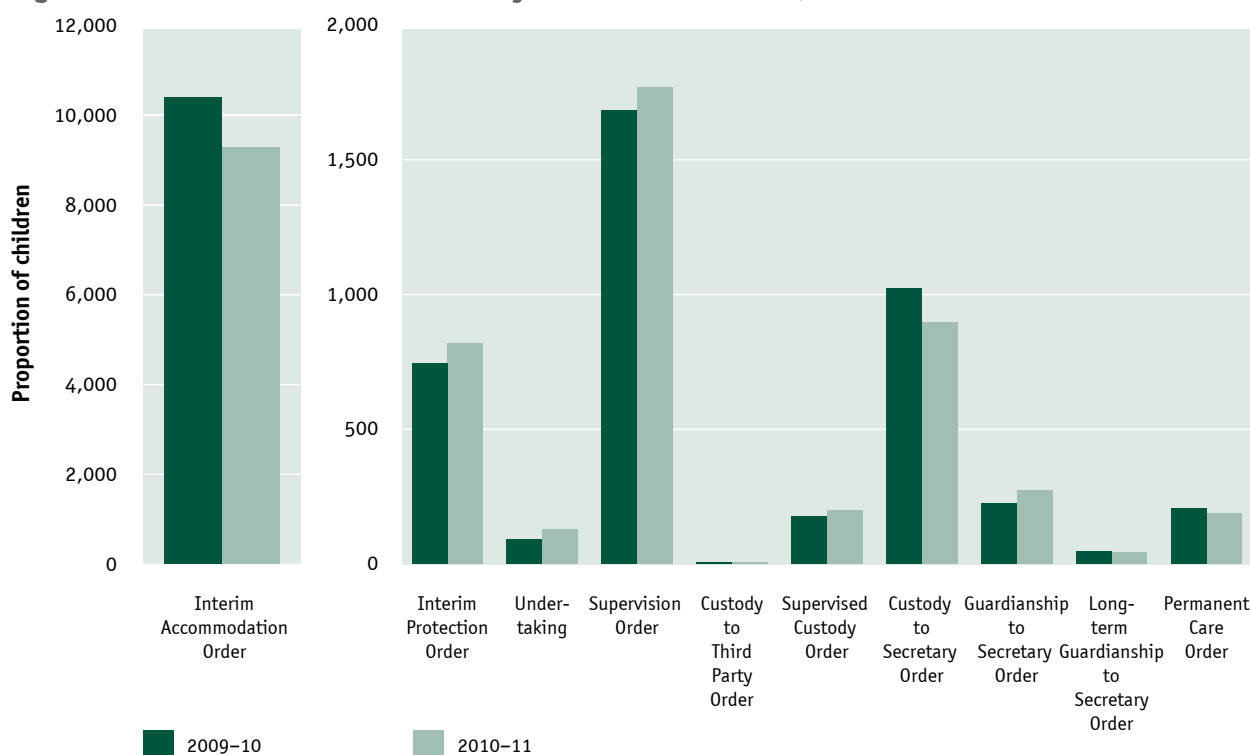
Further, the system of statutory orders should allow sufficient flexibility for DHS and the parties to best meet the needs of children. The current range of orders and the conditions that may be attached to these can lead to protracted negotiations or disputes that do not serve the interests of children 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 | <ul style="list-style-type: none"> • 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 | <ul style="list-style-type: none"> • 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). <p>The Children's Court is empowered to make ancillary orders to complement these primary orders.</p> |
| Queensland | <ul style="list-style-type: none"> • Temporary Assessment Orders • Court Assessment Orders • A generic category of Child Protection Orders with different specified functions such as: <ul style="list-style-type: none"> – 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 | <ul style="list-style-type: none"> • 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*

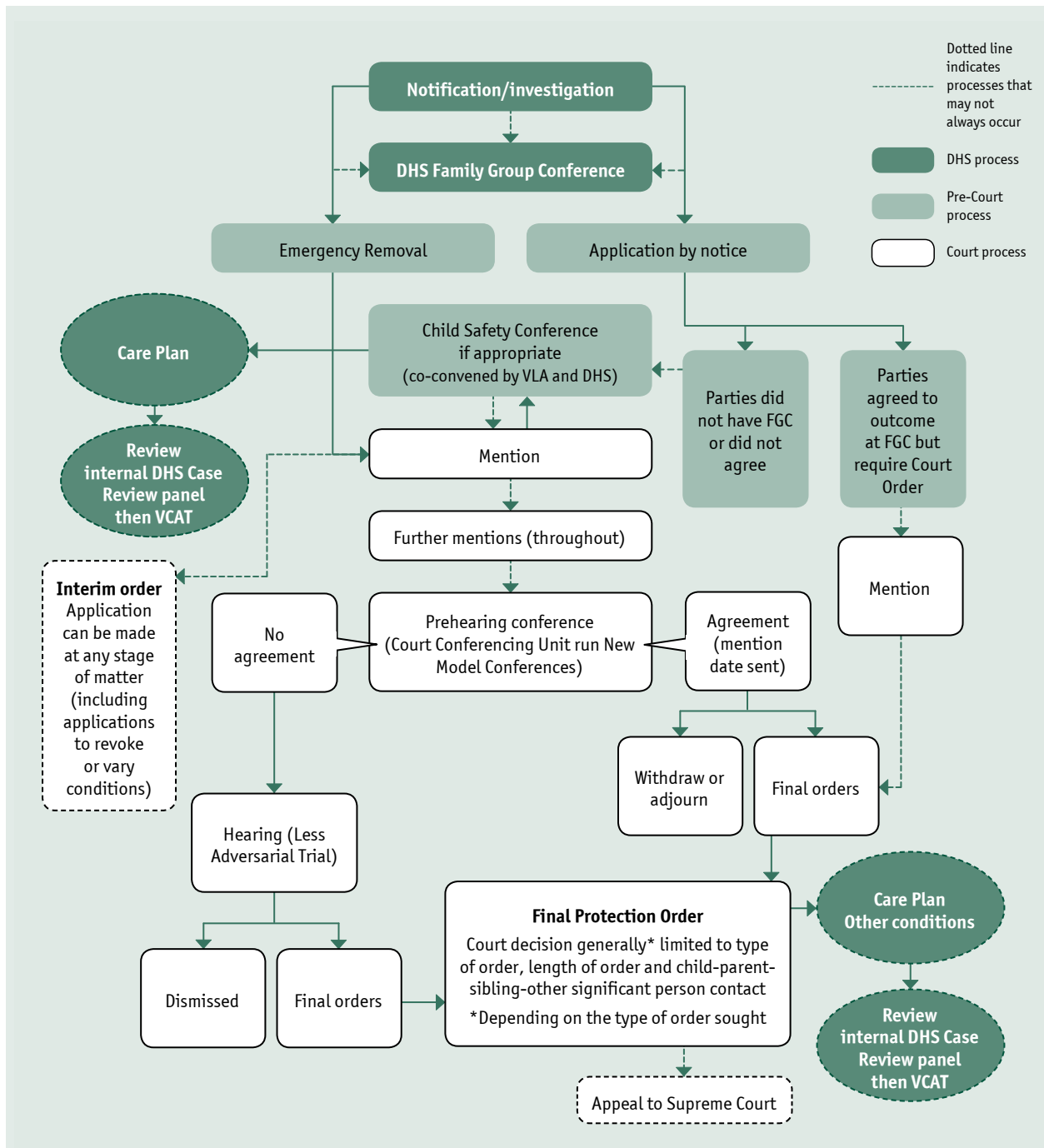
The Inquiry has recommended a reduction in the range of statutory orders and a redefinition of the Children's Court's role. The Inquiry has also recommended an increased emphasis on earlier conferencing to minimise, where possible, the need for parties to go to court to resolve their disputes. In section 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.