Submission to 'Protecting Victoria's Vulnerable Children Inquiry':

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This submission relates broadly to Term of Reference 6 – Possible changes to the processes of the courts referencing the recent work of and options put forward by the Victorian Law Reform Commission.

This submission does not entail a detailed response to the specific and detailed policy options put forward by the Victorian Law Reform Commission in its 'Protection Applications in the Children's Court' Final Report June 2010, which of course my colleague Judge Paul Grant who carries judicial leadership for this area will do.

I have chosen to focus on the broad perspective of how the disciplines of law and welfare intersect and to outline some observations about the interface between the two professions regarding their respective contributions to the protection of vulnerable children.

The submission also addresses what I consider to be some threshold questions regarding how the respective parameters of responsibilities between the State authority charged with the obligation to protect children from harm and the Children's Court which determines whether a child is in need of protection might be re-drawn; together with some comments about processes which may enhance the functioning of the court in achieving its role in protecting vulnerable children.

I have a longstanding interest in the interface between welfare and the law and how this plays out in the protection of vulnerable children. My credentials – qualifications and experience – relevant to this submission are:

- I am a qualified social worker and legal practitioner
- Extensive experience in both the legal and social work professions
- As a social worker, I worked primarily in the areas of mental health, family support and child protection – as a child protection frontline practitioner, team leader /supervisor and manager
- During a 15 year career as a Barrister, I developed a broad legal practice which overtime specialized in Child Welfare Law, Family Law, Criminal Law and Administrative Law
- As a Barrister, I had extensive experience representing child protection interveners, providing separate representation for children, as well as representing parents in the Children's Court and other jurisdictions. I also represented foster carers and grandparents
- From 2003 to the time when I was appointed as a Victorian Magistrate, I worked as the Tasmanian Children's Commissioner, an independent statutory officer which had an advocacy role in relation to broad issues concerning children and an oversight function in relation to that state's child protection system and youth justice system
- In September 2006, I was appointed as a Magistrate and took up my current role as inaugural – and sole - Magistrate of the Neighbourhood Justice Centre which operates in the municipality of

the City of Yarra; this justice initiative was designed as a problem-solving court based on principles of therapeutic jurisprudence with the aim of being 'tough on crime and the underlying causes of crime' at the same time as hearing and determining the broad range of matters that come before a Magistrates Court and in VCAT (Residential Tenancies List, Small Claims and the Guardianship and Administration List).

In making the following observations, it is not my intention to infer criticism to particular groups concerning the problems with how the current institutional arrangements to protect children are working. I have worked with numerous child protection practitioners over the years that I practiced as a barrister and all were dedicated to their task and skillful. The child welfare jurisdiction has long been undervalued in the law and, likewise, the legal practitioners who work in this area are also committed and highly skilled. Family Law is often rightly described as a demanding and highly charged area whereas there is less recognition of the arguably more challenging area of child welfare law which deals with marginalized adults, vulnerable children and very difficult questions of state intervention into family autonomy.

Victoria's child protection system is obviously under severe strain as outlined in the Victorian Ombudsman's 'Own Motion investigation into the Department of Human Services Child Protection Program' report. The same problems are or have been experienced in other Australian states as well as internationally. A common issue that is being raised in a number of jurisdictions concerns the operations of Children's Courts and whether there are changes required. The matters that child protection brings to the Children's court are those considered at highest risk and therefore they are core to the work of protecting vulnerable children.

The problems outlined in the Ombudsman's report were subsequently further considered in the VLRC report which identified a range of possible technical reforms – 5 options for change were outlined, not presented as a single integrated scheme but as a menu of possible changes which could be adopted in part or as a whole. I do not address each of these options or the various ways the options could be combined in detail but, within the submission, I do make comment regarding the proposed overarching principles which the VLRC sets out to govern the overall approach in the determination of Protection Applications. In general, the thrust of the directions for reform is positive but, as with all reform processes, the 'devil is in the detail' of how each option is translated into practice and how the sum of the individual options would work together.

My proposition is that solutions to problems which have been identified are to be found in changed culture and changed processes.

Some relevant observations:

Despite differing underpinning values and skill sets…..

Understanding the differing nature of the professions of welfare and the law helps to understand the tensions that can be played out in setting where they come together such as in the delivery of child protection services. It is essential that there be a culture of mutual respect and trust between welfare professionals, judicial officers and legal practitioners in the settings in which they come together. The stereotype attributes of initially social workers, now more accurately described as welfare professionals given the broad qualification base, and lawyers paints them as polar opposites. However, increasingly in contemporary professional life responding to complex social problems, there is a need to be able to think and work across professional boundaries. Creating a coherent response to protecting vulnerable children requires the professions of welfare and the law to better understand the other as a foundation for building mutual respect regarding the role that each plays.

The law places high value on argument, individual rights and rationality in terms of the forensic examination of facts and opinions in order to resolve conflict and disputes. In contrast, the traditional focus of welfare was to help, to attend to needs through relationships which acknowledge feelings and subjectively defined realities rather than a rational pursuit of the facts. Whilst these stereotypes now overstate the differences because time has seen the welfare profession develop an interest in rights and social justice and the law develop an interest in communication and interpersonal skills, there remains some truth in this characterization of the two professional groupings.

…there is a need for mutual respect and trust

Child protection practitioners represent the community's interest in ensuring that children receive 'good enough' care. Their work involves being on the frontline of defining what constitutes 'good enough' care of children or parenting. Of course, the community should be able to expect that as a professional task this is undertaken competently and to high professional standards. However, on the other hand, it is extremely difficult for the community to fully appreciate what the work involves on a daily basis. Child protection practitioners routinely come into contact with some of the community's most disadvantaged who present with multiple social and personal problems but who are nonetheless affronted by any idea that they are not capable parents. The response to child protection is rarely one of welcome and acceptance of their role – it is most often characterized by different degrees of hostility, resistance, avoidance and at best a lack of frank disclosure about what is actually going on in their lives or acknowledgement of the impact of this on their children.

As a welfare based service, child protection practitioners are expected to reach out to engage with parents and offer assistance whist at the same time objectively assessing the care of the children. Statutory child protection encompasses both 'care and control'. The emotional demands of the work are considerable. The community generally values the difficult role of police whose job can place them in danger but there is less acknowledgement of the hostility that child protection practitioners can face, sometimes involving overt threats but often with this as a powerful undercurrent.

It is important that when the work of child protection staff takes them into the legal environment that they do not experience further hostility to their role and an environment of distrust about their

competence and diligence. I do not contend that this is the atmosphere that legal practitioners intend to convey but more that it is the result of a clash of professional cultures.

The need for a better understanding of the role of the court as independent arbiter

There is continuing basic confusion within child protection and among the broader service network about the role and status of the court. The lexicon of the law and welfare are very different. I have come across a prevailing sentiment that is often expressed along the lines of '…the court should work with us to protect children.' Of course, there is a broad common purpose but such sentiments portray what may be a deep misunderstanding about respective roles and responsibilities and the particular function that the court fulfills. Judicial officers are not part of the service network and are bemused at best or dismayed and insulted at worst at the portrayal that they are 'stakeholders' and 'but one of a number of stakeholders' in the service system. The role of the court is that of independent adjudicator with the responsibility to enact the law. A judicial officer is obligated to reach a legally correct outcome by impartially applying the law to facts. It is important that this role is well understood and respected.

The court should remain the decision making body

For serious child protection cases for which the state exercises its discretion to intervene and bring matters before the Children's Court, there are potentially 3 main competing interests – the parents, the child/ren and the state embodied in the child protection service. Two interests have rights which require protecting – the child/ren and the parents – and the third, the state, has an obligation to protect children. The involvement of the state in issues concerning the protection of children can result in parents' rights being limited or even potentially extinguished. Courts are the appropriate place for such rights and interests to be considered and determined. Welfare untempered by law and the protection of rights, which only courts can properly provide, leads to a different set of significant problems.

It should be remembered that Children's Courts were the original specialist jurisdiction and they were developed to ensure that the rights of parents did not always prevail over the rights of children when it was recognized that children could have separate rights which were not synonymous with those of their parents. In general, Children's Courts have been successful all around the world as a means of protecting children from abusive parents and recognizing their developmental immaturity and reduced culpability in the juvenile criminal division of the court. If the current situation is that parents rights are being asserted at the expenses of the protection of vulnerable children and contrary to their 'best interests' due to overly adversarial processes being adopted, this calls for changes in the processes of the court to better enable it to perform its role.

One of the issues of concern is the time that it can take to finalised child protection proceedings. Certainly it was already the case when I was practicing as a barrister now some 7 years ago that it was not infrequent for extensions of court orders to take so long that by the time an extension was finalized, there was only months before the whole process had to again commence. It is fundamentally antithetical to the welfare of children for proceedings regarding planning for their futures to take so long. It also means that child protection practitioners are involved in constant court activities with

families during which time it is virtually impossible to successfully engage with parents and address underlying problems because the outcome status of the case is continually pending final resolution.

Another issue of longstanding concern is the need to improve the securing of permanency for children who are unable to safely return to their parents. This needs to occur in timeframes that take account of the child's developmental needs relating to attachment and placement stability. Having processes that drive towards achieving permanency planning either through successful return to parents that has likely prospect of being sustained long term or by severing parental rights to enable permanent alternative placement should be undertaken through court processes given the profound issues relating to parents rights involved in such decision making. This is not an argument that parents' rights should not be extinguished but that, to the contrary, this should happen more often and more quickly but must occur through a court process of decision making.

Child protection practitioners often misconstrue their role as 'representing the best interests of the child' whose welfare they have bought before the court when, as representatives of the State or Executive, their role can only be to put the state's view of what constitutes the 'best interests' of the child. Confusion and distress result when the court is interpreted as not taking into account the 'best interests' of the child by not accepting, either partially or fully, the view being advanced by child protection.

The 'best interests' principle is not the magic pudding of solving problems related to the protection of vulnerable children. There will always be competing rights and interests and inherent tensions between competing principles. The 'best interests' principle just like similar provisions in previous legislative schema which gave expression to ultimate paramountcy to the child necessarily requires interpretation. The interpretation of 'best interests' as put by child protection in its role of representing the state is clearly not the only possible view of what this principle means in individual cases. The 'best interests' of the child in each particular proceedings can be the subject of differing views and opinions supported to a greater or lesser extent by the facts and this is exactly the area of contest which it is most appropriate for a court to determine.

The VLRC report contains a proposal regarding the establishment of an Office of the Children and Youth Advocate as an independent statutory body 'which would represent and promote the best interests of children at all stages of the child protection process.' The role of the proposed body of representing children seems akin to, although not termed, a Guardian Ad Litem function. There are various models of how children themselves can be represented in Children's Court proceedings, all with benefits and disadvantages which I do not propose to canvas. However, moving to a model of creating a new role which adopts a 'best interests' approach to the representation of children does not in any way remove the need for the judicial officer to deal with the competing rights and interests of involved parties. It cannot be assumed that in each proceedings, this proposed new role's view of the 'best interests' of the child will coincide with that of the state authority's view of what constitutes 'best interests'. I note that the VLRC report does not envisage that the proposed new approach would mean that children could not continue to be represented on their 'instructions model' which means that potentially both could occur in the same proceedings.

Court processes should illicit evidence through inquisitorial rather than adversarial processes

However, the view that the protective intervener has regarding the 'best interests' of the child is profoundly important for the court to illicit and seek to understand. It is inevitably the case that welfare professionals will, and do, struggle with presentation of evidence before the court because this is not their primary skill. The court should use processes which are conducive to understanding the important material that child protection and other welfare practitioners bring to proceedings. Inquisitorial rather than adversarial processes are more suited to the decision maker obtaining the best information. This would enable judicial officers to take a more active role in determining how cases are presented to the court. Overall this should reduce the time taken to determine individual matters as the judicial officer is more active in defining what information is relevant. Importantly, the adoption of inquisitorial processes would have the impact of changing the overall tone of proceedings. The experience of child protection practitioners in giving evidence is reported by them not to be positive. Whilst presentation in court might always be somewhat daunting for people not always in that environment, child protection practitioners should not experience presentation in a Children's Court as negative. In a well managed court environment in which the judicial officer both sets the tone of the court together with shaping what evidence is presented and how, the experience of giving testimony would change.

Significantly, given the current pressures within the Children's Court jurisdiction, a move to inquisitorial processes would increase the efficient use of the court's resources.

The balance between judicial and administrative decision making

Overtime different legislative schema have reframed the division between judicial and administrative decision making, increasingly reducing the discretionary powers of the state department responsible for the delivery of child protection services. In response to the problem of lack of planning for children in state care on open ended orders, which was termed 'welfare drift' along with a view that the operation of child protection should be prescribed in more detail in legislation, the 'Carney Review' introduced a greater tariff of court orders and annual review processes as part of the *Children and Young Persons Act 1989*. Child protection was left with the discretion to allow court orders lapse at their completion date but was required to seek extensions of orders through court applications.

This represented a major shift in decision making to the court and arguably altered the nature of child protection work which became much more consumed with court processes rather than working with families and collaborating with other services about service provision issues to vulnerable families and their children. Changes to extension provisions could be considered.

Of interest in relation to the appropriate balance between judicial and administrative decision making are changes that are currently under consideration in England and Wales after being recommended in the Family Justice Review Interim Report, March 2011. As a unitary system of government in contrast to Australia's federal system, England's Family Justice System combines the functions of public family law – what we know as child welfare law – and private family law – broadly equivalent to the Family Court of

Australia jurisdiction. In relation to public family law, this review refers to 'duplication' between the work of the state child protection authority and the courts in relation to the court's consideration of issues relating primarily to the detail of future administrative case planning in the event that of an Order being granted. 'Too much time is being spent trying to predict the child's future welfare needs through the examination of the detail of the care plan…Courts should focus on the fundamental question whether a care order is in the child's best interests.' In Victoria, there are legislative provisions that restrict the making of Protection Orders which include a mandatory requirement to obtain Disposition Reports (S 276 CY&F Act 2005) as well as draft case plans in relation to all recommendations for Custody to Secretary and Guardianship Orders (S 538 CY&F Act 2005).

Solutions are beyond child protection alone

My experience as magistrate at the Neighbourhood Justice Centre has confirmed to me the benefits that can be derived from having mechanisms and processes that can bring a wider array of services into problem solving. Families with which Child Protection is involved are increasingly characterized by the co-occurrence of family violence, mental health problems and substance use by parents. Complexity due to this co-morbidity is also apparent in other jurisdictions.

There is a question about whether the design of child protection fits this picture of growing complexity. Despite many incremental improvements, the basic design of child protection remains the same – the statutory child protection service carries responsibility for assessing possible abuse and neglect - whilst attempting to enlist the involvement of other services- and it is then responsible for managing children and families on court orders - although again its internal processes attempt to involve a range of other relevant services. The services most likely to be involved are those child welfare and care services that have historically been closely connected to child protection. Despite the best efforts of these services, they are not the services best equipped to deal with the nature of the family issues which underpin the risk and harm to the child/ren

Given the issues that are driving demand for child protection and which must be addressed in order to achieve the necessary changes in many families coming to the attention of child protection, it is timely to consider how responsibilities across services might be re-configured. There is a particular need to join up the efforts of child focused and adult focused services. This is a more complex issue than new legislative provisions relating to a broader array of services although this may be an option. It would require adult focused services that themselves are stretched with current service provision patterns to extend their boundaries of service delivery. Beyond issues of capacity to respond to increased demand for service, the reality seems to be that translating the rhetoric of 'joined up services' or 'working together' into practice remains a challenge. Notwithstanding the challenge that this seems to represent, there would be major dividends derived from identifying mechanisms and processes that successfully brought services together and extended this beyond traditional child welfare services.

I would be happy to discuss any aspect of this submission with Inquiry members if this would be of assistance to your considerations.

David Fanning