Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

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Protecting Victoria's Vulnerable Children Inquiry

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Acknowledgements

This submission has been prepared by the Federation of Community Legal Centres (Vic) Child Protection Working Group and has drawn on input from a range of community legal centres including:
Aboriginal Family Violence Prevention and Legal Service
Fitzroy Legal Service
Springvale Monash Legal Service
Youthlaw
Victorian Aboriginal Legal Service

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About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty community legal centres across Victoria. A full list of our members is available at www.communitylaw.org.au.

The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Executive Summary

Community legal centres across Victoria provide advice, advocacy assistance and in some cases court-based representation to families, children and young people involved in different stages in the child protection system. Community legal centres' experiences of the child protection system vary depending on whether they are based in metropolitan Melbourne or rural and regional Victoria, and vary depending on the particular region they are located in. Despite these differences, community legal centres strongly agree that there are many problems and deficiencies in the current child protection system.

This submission draws upon community legal centres' experiences of the child protection system through their client work. It also draws upon the work of the Federation and member community legal centres in responding to the Victoria Law Reform Commission (VLRC) Review of Victoria's Child Protection Legislative Arrangements.

In broad terms, the Federation supports reforms to Victoria's child protection system that are consistent with the following:

- a rights-based approach to child protection, consistent with the principles articulated in the Convention on the Rights of the Child, including adherence to best interest principles (Article 3), the importance of family (Article 9), the importance of cultural links (Article 20(3)), the importance of the views of the child being taken into account (Article 12) and the need to protect children from harm and abuse (Article 19);
- an emphasis on the best interests of the child as the paramount consideration in decision-making;
- increased resources provided for prevention and early intervention services and strengthening the shift towards a public health model, within the existing legislative framework;[1]
- specific strategies developed and implemented as a matter of urgency to reduce the overrepresentation of Aboriginal children, children of parents with disabilities and children from refugee and migrant backgrounds in the child protection system;
- reunification with family to be a priority across the child protection system with adequate resourcing and training for professionals to support this;
- accountability of the Department of Human Services (DHS) to the Children's Court for decisions, caseplan responsibilities, the provision of services and quality standards;
- legislative enactment in the *Children, Youth and Families Act 2005* (Vic) of the direct instruction model for the legal representation of children and young people from the age of capacity;
- the establishment of a Victorian Children and Young People's Commission, independent of government, to ensure that the rights and wellbeing of children and young people are protected and promoted;
- DHS retaining ultimate legislative responsibility for the protection of children and young people in Victoria; and
- quality service standards being determined and monitored by an independent body external to DHS.

This submission focuses on item 6 of the terms of reference concerning possible changes to court processes and responds specifically to the VLRC's proposals.

1 Directing resources towards child abuse prevention, as opposed to responding once abuse has occurred, creates the potential for the greatest social and economic returns on investment; Blakester, A, *Practical child abuse and neglect prevention: A community responsibility and professional partnership*, Child Abuse Prevention Newsletter, 14(2), Australian Institute of Family Studies, National Child Protection Clearinghouse, page 4.

Victoria's child protection system – a human rights based approach

It is critical that Victoria's child protection system is consistent with the rights protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') and other relevant human rights in international treaties. Any recommendations made by the VLRC to reform the child protection system should be compatible with the relevant Charter rights.

International human rights treaties

Australia is a party to a number of key international human rights treaties which provides for specific rights relating to the protection of children and families. These treaties include:

- International Covenant on Civil and Political Rights ('ICCPR');
- International Covenant on Economic, Social and Cultural Rights ('ICESCR'); and
- Convention on the Rights of the Child ('CROC').

In ratifying these treaties, Australia has made commitments relating to the care and protection of children. In particular, the CROC recognises that fundamental human rights must be protected and promoted in particular ways that relevant and appropriate for children.

Relevance of the Victorian Charter

The Charter enshrines the protection and promotion of a number of fundamental human rights into Victoria's domestic law. The Charter is largely modelled on the civil and political rights contained in the ICCPR. As a result, much guidance can be obtained from the standards and obligations required under the ICCPR when considering the content and application of the Charter.

The following rights enshrined in the Charter are particularly relevant to this review.

Protection of families and children

Particularly relevant to this review are the protections afforded to families and children. Section 17(1) of the Charter provides that families are the fundamental group unit of society and are entitled to be protected by society and the State.

Section 17(1) is modelled on article 23 of the ICCPR and recognises that one of the principal ways in which the family is to be protected is through the promotion of family unity. The Human Rights Committee has emphasised that protection of families requires the development of necessary protections by social institutions.[2] Accordingly, human rights principles and standards relevant to the protection of families and children must be central to the current review undertaken by the VLRC.

Section 17(2) provides that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

Section 17(2) of the Charter is modelled on article 24(1) of the ICCPR. Particular guidance on the nature of the protection to be afforded to children that is in their best interests must also be taken from the CROC. The CROC is based on four general principles, being:

- the primary consideration of the child's best interests;
- the right to non-discrimination;
- the right to life and development; and

[2] UN Human Rights Committee, *General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses* (1990), [2].

- the right of all children to be heard.

Of specific relevance to particular aspects of this review is article 12 of CROC, which addresses the legal status of children and their right to be heard and taken seriously. Article 12 recognises that children, on the one hand, lack the full autonomy of adults, but on the other hand are subjects of rights.

Right to a fair hearing
The right to a fair hearing in section 24 of the Charter is also particularly relevant to proceedings relating to the care and protection of children. The right to a fair hearing is an essential aspect of the judicial process and is indispensable to ensure the protection of other human rights.

The concept of a fair hearing contains many elements and the standards against which a 'hearing' is to be assessed in terms of fairness are interconnected. Many of the elements of a fair hearing relate not just to the conduct of the hearing itself, but also relate to notions of procedural fairness and the ability of an individual to access the justice system. The administration of justice must "effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice".[3]

Cultural rights
Division 4 of the *Children, Youth and Families Act 2005* (Vic) provides additional decision-making principles for Aboriginal children. In this respect, the protection of cultural rights, contained in section 19 of the Charter, may also be relevant. Section 19(1) provides that a person:

> "with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language."

Section 19(2) provides that:

> "Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community-
> (a) to enjoy their identity and culture;
> (b) to maintain and use their language;
> (c) to maintain their kinship ties; and
> (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Considerations relating to the protection of culture, religious practice and language must therefore also be incorporated into decision-making processes regarding the care and protection of Aboriginal children.

Obligations on 'Public Authorities'
Section 38 of the Charter provides that "public authorities" must act compatibly with and give proper consideration to the human rights contained in the Charter. Accordingly, relevant public authorities, such as DHS, have direct legal obligations to give proper regard to the Charter rights outlined above and discussed throughout this submission.

[3] Human Rights Committee, *General Comment No 32*, CCPR/C/GC/32/CRP.1Rev.2 (2006), [2].

Community legal centres, alternative dispute resolution and child protection

The role of community legal centres in supporting clients with child protection issues
Community legal centres typically assist parents and family members of children who have come into contact with the child protection system. However, many young people also seek advice on child protection issues from the specialist youth legal service, Youthlaw. Indigenous clients are assisted by the Aboriginal Family Violence Prevention & Legal Service and the Victorian Aboriginal Legal Service. We refer this inquiry to their submissions.

35 out of 50 Victorian community legal centres record their activities on a common database, the Community Legal Services Information System (CLSIS). CLSIS shows that over the 18 months to 31 December 2010, community legal centres provided 460 legal information and referral activities, 302 legal advice activities and opened 89 cases, relating to child protection issues. These figures do not include the activities of the two specialist Indigenous services, Aboriginal Family Violence Prevention & Legal Service and the Victorian Aboriginal Legal Service which record their activities on a separate database.

Community legal centre clients are among the most vulnerable members of the community. They may be experiencing homelessness or inappropriate housing, poverty, mental illness or substance abuse. They may have been involved in the child protection system for years.

Community legal centres provide pre-court advice and advocacy to our clients. Our advice and assistance in writing a letter, making phone calls, and making successful referrals to appropriate support services has enabled families to resolve matters with DHS at an early stage of a child protection investigation and avoid lengthy litigation. Centres also provide advice and advocacy in case planning processes following a court order. Our assistance leads to increased involvement of families in case planning and decision making which increases the likelihood that a caseplan will be implemented successfully. In our view, there are significant improvements that can be made to processes to assist with this type of early resolution of matters.

The services provided by community legal centres in child protection matters are not comprehensive: the network of community legal centres does not cover all of Victoria nor will all families engage with a service at an early stage. Many community legal centres also lack the expertise or resources to provide this service. Increased resources and training and professional development support would increase community legal centre capacity in this area.

Community legal centre experience of child protection
In our experience, DHS does not demonstrate a commitment to involving families in decision-making and empowering parents to be involved – on the contrary there is a lack of collaborative planning and decision-making throughout the process. Taking a simplistic view of the current system, families go from being investigated to being prosecuted and then being told to change – there is little attempt at meaningful resolution of issues along the way.

For example, clients relate stories to us that they are the ones that often contact DHS themselves, seeking help, but once in the system, it is difficult for them to understand what is happening and their power to make decisions for their child/ren is seriously affected. The support services they initially asked for are often not available.

Unfortunately, a common but not universal experience is that a “draft” case plan is presented at a caseplan meeting with little opportunity provided to comment and amend the plan.

In our view significant cultural and process changes are needed to create a culture of collaborative decision-making and dispute resolution in the best interests of children. Changes to the system must occur to ensure that:

- respect is shown to all parties and their views;
- adequate and timely information is provided to enable parties to consider their response and evaluate their options;
- relevant deadlines for provision of information are complied with;
- realistic expectations about capacity to provide day-to-day supports is provided; and
- basic principles of procedural fairness are adhered to.

In this regard, we welcome recent initiatives by Victoria Legal Aid and DHS to:

- improve training for child protection workers;
- conduct joint multi-disciplinary training of lawyers (from Victoria Legal Aid, community legal centres and the private profession) and child protection workers; and
- develop a code of conduct.

We also support efforts to introduce a Law Institute of Victoria specialist accreditation for child protection matters as well as exploring a system under which grants of legal aid are made only to private lawyers with this accreditation.

Finally, we welcome investments in the Victorian State Budget for 2011/12 to employ additional child protection workers aimed at reducing the pressure on frontline workers.

Safeguards are needed for ADR to work fairly and effectively in child protection matter

ADR can be beneficial in many circumstances. However the Federation has significant concerns about the applicability of ADR to child protection matters given the nature of the dispute and the inherent unequal bargaining position of the family.

As outlined above, community legal centre clients in child protection matters are extremely vulnerable. The power imbalance between the parties is significant. In other areas of law where ADR has been significantly expanded, such as family law, power imbalances exist and safeguards are necessary (eg: where there is family violence). In child protection matters, the need for safeguards is arguably greater given that one of the parties to the matter is the state and the others are likely to be among the most vulnerable members of the community.

The principles and framework for ADR need to be clearly articulated and there must be a significant shift in DHS decision-making culture to enable ADR processes to be successful in child protection matters.

Protections for vulnerable parties in child protection ADR should include:

- Judicial oversight where the matter involves the removal of a child from a family and placement in state-sanctioned care;
- Participation in ADR by family members and children should be voluntary;
- All parents, children, young people and other family members who are or could be primary care-givers must be provided with access to independent legal advice at an early stage in proceedings and before agreeing to participate in ADR processes or signing “voluntary” agreements;
- Parties should able to be represented in an ADR process by a lawyer or advocate of their choice;
- Provision of private time for families during the course of the conference to enable families to make decisions;

- Mediators should be adequately trained and should be independent of DHS. Co-mediation could be used where appropriate;
- Vetting of matters unsuitable for ADR should be conducted by an independent body (not DHS);
- Support should be provided for people with limited English language or literacy skills, including access to interpreters, translated materials, information on DVD and assistance with writing complaints[4];
- Measures should be undertaken to assist mediators working with people who have language and literacy issues[5]; and
- Cross-cultural training should be provided to help mediators manage cultural differences between parties[6].

The ADR process should be convened by a body other than DHS and should be held close to where the family lives and in an independent location. It should not be in DHS offices or in the offices of services associated with DHS. The DHS worker attending the ADR process must have authority to make all appropriate decisions.

The role of lawyers in child protection ADR

If the Victorian child protection system is to have a greater focus on ADR, families and children must have access to:

- independent legal advice at an early stage; and
- legal representation during mediation processes.

We are acutely aware of the problems experienced by families who do not or cannot access legal advice at an early stage of a child protection matter. This is most obvious in working with families that have signed so-called "voluntary child-care agreements". Our experience is that many families do not properly understand what they are agreeing to, are unaware that they do not have to agree, do not understand the available options and have agreed to orders that are far more intrusive than what a court would have ordered when applying best interest principles. For example, clients have advised community legal centres that they signed "voluntary" agreements on the assumption that if they agree with DHS at this stage, they will be seen to be compliant and this will help them in getting the services they need to support themselves and their families and be able to keep the family together. Some clients have reported signing agreements to have their children removed on the basis that their compliance will assist in reunification.

Signing these agreements can have detrimental effects upon prospects for successful resolution at a later stage of court proceedings. The circumstances of these agreements also raise broader access to justice issues.

In general terms legal representation is often more important in ADR than in a court hearing given that the procedural safeguards of the court room are absent from ADR. In a court hearing, the judge will ordinarily assist a self-represented litigant to some extent.[7] In mediation, by contrast, the mediator must remain 'neutral' and cannot provide assistance to the same degree. ADR proceedings are not recorded, making it difficult to assess the fairness of the process retrospectively. Without proper safeguards, there is a risk that self-represented parties may accept settlements that do not reflect their true legal entitlements. Access to justice is weakened, not enhanced, by settlements of this nature.

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[4] See recommendation 14 of the Victorian Parliament Law Reform Committee *Inquiry into Alternative Dispute Resolution and Restorative Justice Final Report* (May 2009).

[5] Ibid, recommendation 15

[6] Ibid, recommendation 24.

[7] See the discussion of the judge's duty to assist self-represented litigants in *Tomasevic v Travaglini* (2007) 17 VR 100.

Legal assistance also helps to correct the power imbalances that characterise most disputes. Without legal representation, the vulnerable party may succumb to pressure to accept an unfair settlement. We acknowledge that mediators try to correct power imbalances and to ensure that vulnerable parties can participate on an equal footing. However their efforts will not always guarantee fairness to the weaker party.

Despite ubiquitous references to mediators' neutrality, mediators can never be completely neutral. They inevitably 'bring with them their social class, ethnic heritage, and professional and political ideologies.' A mediator's assessment of the parties' claims may have a significant bearing on the outcome of a mediation.[8] In this sense, there is a risk that commonly held stereotypical attitudes may affect the mediator's response to parties' behaviour.[9]

In our experience, DHS does not always recognise, welcome or value the involvement of lawyers in child protection processes, instead viewing their presence as an obstacle to agreement by the parties. There is a lack of understanding of the benefits that families can derive from:

- being provided with legal advice and information about their legal rights, the legal process and the consequences of particular decisions; and
- having the capacity to meaningfully express their views about affecting them.

As set out above, we are encouraged by efforts to conduct multi-disciplinary training of lawyers (from Victoria Legal Aid, community legal centres and the private profession) and child protection workers. Training of this nature has the potential to improve shared professional understanding and consequently improve the integrity and effectiveness of child protection decision making processes.

In this regard, it is worth examining a similar initiative in the related field of family dispute resolution. As part of the '*Building Better Partnerships between Family Relationship Centres (FRCs) and Legal Assistance Services' Pilot* Program, Women's Legal Service Victoria (WLSV) was funded by the Attorney General's Department to provide training to staff members of Family Relationship Centres (FRs) and community legal centres. The training program was designed, amongst other things, to increase inter-professional understanding between Family Dispute Resolution Practitioners (FDRPs) working in FRCs and community legal centre and legal aid commission lawyers so as to provide quality legally-assisted family dispute resolution to FRC clients. The training has been delivered successfully in Victoria and Tasmania throughout April and June 2010.

An important aim of the inter-professional training was transformation; it sought to change the way FDRPs and lawyers view each other's roles and responsibilities. One participant commented, "On reflection it struck me that the session was like shuttle mediation between FDRPs and lawyers – trying to shift each party from their entrenched positions to one of optimism on their future relationship so as to focus on the best interests of the clients (and their children)… to open up communication between the parties." Overall the evaluation feedback indicates that the training program was well targeted and relevant to each participant's role. Participants were asked to rate the training as: very relevant, relevant, mostly relevant, rarely relevant or not relevant. 98 % of participants responded that the training was either relevant or very relevant.

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[8] Richard Hofrichter, 'Neighbourhood justice and the social control problems of American capitalism: a perspective' in Richard L. Abel (ed), *The politics of informal justice vol 1: the American experience* (1982) 207-248, 241-42; Rachael Field and Jonathan Crowe, 'The construction of rationality in Australian family dispute resolution: a feminist analysis' (2007) 27 *Feminist Law Journal* 97, 113. See also Martha Shaffer, 'Divorce mediation: a feminist perspective' (1988) 46 *University of Toronto Faculty Law Review* 162, 185.

[9] See Field and Crowe, ibid, 115.

Item 6 – changes to court processes referencing the VLRC's proposals

Outlined below is an overview of the Federation's response to the VLRC's proposals outlined in its Final Report "Protection Applications in the Children's Court".

Option 1 – A New System

Proposal	Federation response and comments
1.1 A graduated range of supported, structured and child-centred agreement-making processes should be the principal means of determining the outcome of child protection matters.	The Federation supports the increased use of ADR in child protection matters, including the use of family group conferences, provided appropriate safeguards are put in place. The appropriate safeguards are discussed above at page 8-11.
1.2 The convenors of family decision-making processes should have appropriate qualifications and training.	The Federation supports this proposal.
1.3 The parties involved in family decision making processes should have access to appropriate legal assistance.	The Federation supports this proposal. As set out above, legal assistance is a critical safeguard which helps to ensure ADR is carried out fairly and effectively. Where a child is present in a family decision making process, we strongly agree with the VLRC that a representative for the child should also be present. However, unlike the VLRC, we believe that parties should be entitled as of right to be represented in family group conferences by a lawyer or advocate of their choice, as opposed to representation being at the discretion of the convenor of the family group conference.
1.4 The professionals who participate in family decision making processes should have appropriate qualifications and training that fosters inter-professional collaboration.	The Federation supports this proposal.
1.5 Family group conferences should become the primary decision making forum in Victoria's child protection system.	The Federation generally supports this proposal. DHS staff with the appropriate decision-making authority must attend the ADR process. Children and their advocate should be invited to attend, depending on their age and capacity. Family members, advocates and relevant persons should be invited to attend provided they have received advice about the process and likely outcomes. This could include extended to

	family members, teachers, welfare workers as in the South Australian model.
1.6 A family group conference should be conducted prior to filing a protection application unless there are exceptional circumstances that warrant a departure from this general rule.	The Federation supports this proposal subject to the comments above. Further, it is critical that where a family group conference is not appropriate, due to the subject matter or the circumstances of the participants or the choice of the family not to participate, there is an ability to promptly have the matter adjudicated by the Court.
1.7 Where an interim care order is made following emergency intervention the Court should order a family group conference at the earliest possible opportunity unless there are exceptional circumstances that warrant a departure from this general rule.	The Federation supports this proposal subject to the comments at 1.6 above.
1.8 A family group conference should be conducted before certain secondary applications are filed in the Court unless there are exceptional circumstances that warrant a departure from this general rule.	The Federation supports this proposal subject to the comments at 1.6 above.
1.9 A family group conference should be: a) convened by an independent person b) conducted in an appropriate location c) conducted in accordance with practice standards; d) conducted in a manner that allows a child or young person to participate if they wish to so and/or have their views taken into account, having regard to their maturity and understanding; e) confidential, except as provided in (f) or where any person engages in unlawful conduct during a conference; f) capable of producing an agreement that may become: i) a consent order in the Court; or ii) an agreement or 'care plan' that can be taken into account in any subsequent court proceedings, family group conference or other decision-making process.	The Federation supports this proposal. In particular, we emphasise the need for meaningful participation by the child or young person if they wish to do so (either directly or through their representative). We also support that the conference is confidential, subject to the narrow exception of unlawful activity that may take place in the conference itself.

1.10 The Court should direct that a conciliation conference, a judicial resolution conference or another family group conference (whichever is most appropriate) take place at the earliest possible opportunity after an application is filed unless there are exceptional circumstances that warrant a departure from this general rule.	The Federation supports this proposal subject to the comments at 1.6 above.
1.11 A conciliation conference should be: a) convened by an independent person b) conducted in an appropriate location c) conducted in accordance with practice standards; d) conducted in a manner that allows a child or young person to participate if they wish to so and/or have their views taken into account, having regard to their maturity and understanding; e) confidential, except as provided in (f) or where any person engages in unlawful conduct during a conference; f) capable of producing an agreement that may become a consent order in the Court.	The Federation supports this proposal. In particular, we emphasise the need for meaningful participation by the child or young person if they wish to do so (either directly or through their representative). We also support that the conference is confidential, subject to the narrow exception of unlawful activity that may take place in the conference itself.
1.11 A judicial resolution conference should be: a) convened by a judicial officer who will not determine the application if the matter is not resolved at the conference b) conducted in an appropriate location c) conducted in accordance with practice standards; d) conducted in a manner that allows a child or young person to participate if they wish to so and/or have their views taken into account, having regard to their maturity and understanding; e) confidential, except as provided in (f) or where any person engages in unlawful conduct during a conference; f) capable of producing an agreement that may become a consent order in the Court.	The Federation supports this proposal. In particular, we emphasise the need for meaningful participation by the child or young person if they wish to do so (either directly or through their representative). We also support that the conference is confidential, subject to the narrow exception of unlawful activity that may take place in the conference itself.
1.13 All new family decision making processes should be independently evaluated and regularly reviewed	The Federation supports this proposal.

Option 2 – A New System

Proposal 2.1: All protection applications should commence by notice.	The Federation supports this proposal.
Proposal 2.2: A family group conference should be conducted prior to filing a protection application unless there are exceptional circumstances that warrant a departure from this general rule.	The Federation supports this proposal subject to the comments at 1.6 above.
Proposal 2.3: An application by a protective intervener (including an application for any interim orders) should contain: a) a precise summary of the ground(s) upon which it is made b) a precise summary of the information upon which the application is based c) the orders sought.	The Federation supports this proposal.
Proposal 2.4: The Court should be permitted to make interim accommodation orders on the application of a party at any time after a protection application has been filed and before it has been finalised. The duration of an interim accommodation order should not be limited to 21 days, except where a child is placed in secure welfare, but should be for a limited period necessary to enable the next court-ordered process to occur.	The Federation is concerned that the removal of this time limit has the potential to reduce the scrutiny of the court over interim accommodation arrangements. Orders which result in the interim removal of a child from their family pending the determination of a court case which may take many months, should not be made lightly. On balance however, we are not opposed to the removal of the 21 day time limit provided that the court properly monitors interim accommodation arrangements and proceedings in the court are resolved in a timely manner. If this change is made, it is critical that there is appropriate monitoring and evaluation of this change and public reporting on the outcome of the evaluation so that the impact of the change can be assessed.
Proposal 2.5: The Court should direct that a conciliation conference, a judicial resolution conference, or another family group conference (whichever is most appropriate) take place at the earliest possible opportunity after an application is filed unless there are exceptional circumstances that warrant a departure from this general rule.	The Federation supports this proposal subject to the comments at 1.6 above.
Proposal 2.6: If an application is not resolved by agreement, it should be set down for hearing. Any parties who oppose the application and/or the orders sought by the protective intervener should be required to file a document in which they identify that opposition and their grounds for doing so.	The Federation supports this proposal.

Proposal 2.7: A protective intervener may apply to a judicial officer at any time for an emergency removal order when the protective intervener believes on reasonable grounds that: a) a child is at risk of significant harm, and b) the risk is of such magnitude that an order is necessary to protect the child, and c) a safety notice or intervention order (or variation of existing order) would not be sufficient to protect the child from that risk.	The Federation supports this proposal.
Proposal 2.8: A judicial officer may make an emergency removal order on the application of a protective intervener in the absence of interested parties. If a judicial officer makes an emergency removal order the judicial officer: a) must authorise a nominated person(s) to remove the child from his or her parents and keep that child at a nominated place, and b) must order that the matter be returnable for further determination at a time no later than 72 hours after the time at which the Court believes that its order will be executed, and c) may make any order the Court thinks fit in order to protect the child from the risk of harm.	Currently, where a safe custody removal occurs, there must be a court hearing within 24 hours. In some ways, this proposal would extend the current 24 hour limit to up to 72 hours, although there is a judicial safeguard involved in granting the emergency removal order. On balance, the Federation is not opposed to this proposal provided that the changes proposed by the VLRC are effective in drastically reducing the number of protection applications commenced by safe custody removal. If this change is made, it is critical that there is appropriate monitoring and evaluation of this change and public reporting on the outcome of the evaluation so that the impact of the change can be assessed.
Proposal 2.9: The Court may make an interim care order for a period not exceeding 14 days on the return of an emergency removal order or on application for an interim care order following an 'immediate risk removal', if satisfied that there is unacceptable risk of harm to the child. An interim care order may include: a) an order about where and with whom a child must live b) an order requiring a parent, guardian or carer to accept supervision by the Secretary c) any other order the Court thinks fit in order to protect the child from the risk of harm.	The Federation supports this proposal.
Proposal 2.10: A protective intervener should be permitted to remove a child from his or her parents without parental consent or judicial authorisation only when the protective intervener believes on reasonable grounds that: a) a child is at immediate risk of significant harm, and	The Federation supports this proposal.

b) there is insufficient time to apply to the Court for an emergency removal order, and c) a safety notice or intervention order (or variation of existing order) would not be sufficient to protect the child from that risk.	
Proposal 2.11: After involuntary removal of a child from his or her parents, a protective intervener must apply to the Court within one working day for an interim care order unless the child has been returned to the care of a parent or guardian and the Court must seek to determine the application on the day it is made unless there are exceptional circumstances.	The Federation supports this proposal.
Proposal 2.12: Prior to the conclusion of an interim care order, the Court may make a short-term assessment order if satisfied that the child remains at unacceptable risk of harm. A short-term assessment order, which may not exceed six weeks, may include: a) an order about where and with whom a child must live b) an order requiring a parent, guardian or carer to accept supervision by the Secretary c) any other order the Court thinks fit in order to protect the child from the risk of harm.	The Federation supports this proposal.
Proposal 2.13: The Court should be given a range of powers that encourage and permit it to control the conduct of proceedings by taking an inquisitorial and problem-oriented approach.	The Federation supports this proposal.
Proposal 2.14: The Court should have powers that are similar to those given to the Family Court and the Federal Magistrates Court in Division 12A of Part VII of the *Family Law Act 1975 (Cth).*	The Federation supports this proposal.
Proposal 2.15: Every child who is the subject of a protection application should be a party to the proceedings.	The Federation supports this proposal.
Proposal 2.16: Every child who is a party to a protection application should be legally represented in a manner that takes account of the level of maturity and understanding of that particular child. Two distinct models of representation—'best interests' and 'instructions'—should be available. The two roles and the circumstances of appointment for one or the other (or in rare cases both) should be	The Federation strongly supports the direct instruction model for the legal representation of children and young people from the age at which they have capacity to instruct a lawyer (which is currently around but not fixed at seven years of age). We do not support the best interests model for the legal representation of children who have capacity nor do we believe that there is any reason to increase the

clearly defined by guidelines. Children represented on an instructions model should: a) have capacity to instruct a legal practitioner, and b) indicate a desire to participate in proceedings by instructing a legal practitioner, and c) indicate an unwillingness to be represented on a 'best interests' basis.	age at which the assessment of capacity is made. Accordingly, we believe that the "default" position for a child with capacity should be the direct instruction model, however they may choose to be represented on a 'best interests' basis. The Federation supports the separate representation of children who have not yet reached capacity applying a best interests model.
Proposal 2.17: Section 522(1)(c) of the *Children, Youth and Families Act 2005* (Vic) should be amended to ensure that a child is given the opportunity to participate directly in proceedings if the child expresses a wish to do so, having regard to his or her maturity and understanding.	The Federation supports this proposal.
Proposal 2.18: There should be additional new 'no fault' grounds for finding that a child is in need of protection: a) It should be possible for the Court to find that a child is in need of protection if it is satisfied that the child is behaving in a manner that is likely to cause significant harm to the physical or emotional wellbeing of the child and the child's parents are unable to prevent the harmful behaviour. b) Section 162(1)(c), (d), (e) and (f) of the *Children, Youth and Families Act 2005* (Vic) should be amended by including reference to the fact that the child's parents are 'unable' to protect the child from the relevant harm or provide the relevant care.	The Federation generally supports this proposal, provided that there is appropriate monitoring and evaluation of this change and public reporting on the outcome of the evaluation so that the impact of the change can be assessed.
Proposal 2.19: If there is no agreement about the particular ground for determining that a child is in need of protection, but there is agreement between the child's parents and the Secretary that it is in the best interests of the child to be placed on a protection order to address concerns about significant harm to the child as contemplated by section 162(1)(c), (d), (e) or (f) of the *Children, Youth and Families Act 2005* (Vic), the Court may make a finding that a child is in need of protection and may make any of the orders open to it under Part 4.9 of the *Children, Youth and Families Act 2005* (Vic) as agreed by the child's parents and the Secretary if: a) any views and wishes of the child have been taken into account, and b) a child who is represented on instructions does not oppose a finding that he or	The Federation agrees with the proposal.

she is in need of protection or any of the orders sought, and c) the Court is satisfied that it is in the best interests of the child to make the orders sought.	
Proposal 2.20: Section 215(1)(c) of the *Children Youth and Families Act 2005* (Vic) should be amended to make it clear that whenever the Court is required to be satisfied as to the existence of a fact or any other matter in Family Division proceedings, that the level of satisfaction is the civil standard of the balance of probabilities and not any higher standard.	The Federation supports this proposal.
Proposal 2.21: Section 333 of the *Children, Youth and Families Act 2005* (Vic) should be amended to permit a child or a child's parent to apply to the Court for review of a decision in a case plan or any other decision made by the Secretary concerning the child.	The Federation supports this proposal.
Proposal 2.22: The definition of 'child' in section 3 of the *Children, Youth and Families Act 2005* (Vic) should be amended so that it is possible to make a protection application for any child under the age of 18 years.	The Federation supports this proposal.
Proposal 2.23: If the Court finds that a child is in need of protection it should be permitted to make an order granting guardianship and/or custody of the child to one parent of the child to the exclusion of another parent when satisfied that this order is necessary to meet the needs of the child.	The Federation is unable to comment in detail on this proposal. The Federation supports efforts to improve the harmonisation and interaction between child protection, family law and family violence law.
Proposal 2.24: Section 146 of the *Family Violence Protection Act 2008* (Vic) should be amended 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'.	The Federation is unable to comment in detail on this proposal. The Federation supports efforts to improve the harmonisation and interaction between child protection, family law and family violence law.

Option 3 – Office of the Children and Youth Advocate

Proposal 3.1: A statutory commissioner should be established to head the Office of the Children and Youth Advocate (OCYA).	The Federation generally supports this proposal. See our further comments below.
Proposal 3.2: The Commissioner should have the following functions and powers: a) To convene family group conferences and assist the parties to reach an agreement that is in the best interests of the child or young person.	In general, the Federation supports this proposal. In particular, the Federation strongly supports the provision of representation for all children and young people involved in all child protection matters (including family group conferences

b) To act as the representative of the child or young person in child protection matters and to appear on behalf of the child or young person in all proceedings before the Court. c) When acting as a best interests representative for a child: i) to assist the Children's Court to act in an inquisitorial and problem-oriented manner by gathering evidence, including expert reports ii) to assist decision making at family group conferences and family decision-making processes in the Children's Court by gathering evidence, including expert reports.	occurring prior to court proceedings). If the OCYA is not established, the family group conferences could be convened by Victoria Legal Aid in a similar manner to their Roundtable Dispute Management program, or by the Court.
Proposal 3.3: In performing the above functions, OCYA should assist and encourage the parties to reach an agreement that is in the best interests of the child or young person whenever possible.	The Federation supports this proposal.
Proposal 3.4: OCYA should have a sufficient number and range of professionally qualified staff including lawyers, social workers, psychologists and other appropriate professionals to fulfil these functions in relation to every child protection matter.	The Federation supports this proposal.
Proposal 3.5: The Commissioner should: a) be appointed by the Governor in Council b) hold office for a period of 7 years c) be otherwise appointed and hold office on terms similar to those that apply to the Public Advocate d) be required to report to Parliament on an annual basis about its activities and its financial operations.	The Federation supports this proposal.
Proposal 3.6: The Attorney-General should be the Minister responsible for the Commissioner.	The Federation supports this proposal.

Option 4 – Representing the Department of Human Services

Proposal 4.1: The Victorian Government Solicitor should be primarily responsible for conducting proceedings on behalf of protective interveners in Victoria.	The Federation supports transferring the function of commencing and conducting Children's Court proceedings from DHS to another body. In our experience, DHS workers or managers make the decision to commence proceedings without having provided DHS lawyers with the evidence upon which this decision is based or

	without heeding the advice of the lawyers as to the merits of the case. The body should either be the Victorian Government Solicitor or a new body similar to the Office of Public Prosecutions model.
Proposal 4.2: The Victorian Government Solicitor should prepare, in conjunction with the protective interveners, and after consulting the Managing Director of Victoria Legal Aid and the President of the Children's Court, model litigant guidelines which are specifically designed for protection applications in the Children's Court.	The Federation supports this proposal.
Proposal 4.3: In preparing these guidelines, regard should be had to the following: a) the model litigant guidelines prepared by the State of Victoria b) relevant guidelines prepared by the Office of Public Prosecutions and the Director of Public Prosecutions c) relevant rules of the Victorian Bar Association and the Law Institute of Victoria.	The Federation supports this proposal.
Proposal 4.4: The model litigant guidelines should be evaluated and reviewed after they have been in operation for three years.	The Federation supports this proposal.

Option 5 – Broadening the Role of the Office of the Child Safety Commissioner

Proposal 5.1 The Child Safety Commissioner should have the following additional functions: a) to oversee and review the child protection system b) to investigate and report to the Minister about the operation of the Children, Youth and Families Act 2005 (Vic) c) to advocate for children across government and throughout the community d) to liaise with the Aboriginal community in order to ensure that the Commissioner is able to effectively advocate for Aboriginal children e) to promote awareness of children's and young people's rights f) to report to Parliament on an annual basis and when reporting to the Minister about the operation of the Children, Youth and Families Act 2005 (Vic) g) to consult children about the performance of the Commissioner's functions.	The Federation supports the expansion of the Child Safety Commissioner's functions as outlined in this proposal but would like to see the functions expanded further so that the office is reformed into an independent commission in accordance with the model outlined in the Youth Affairs Council of Victoria's paper *Are you listening to us? The case for a Victorian Children and Young People's Commission*. We welcome the Victorian Government's pre-election commitment to establish an Independent Children and Young Person's Commission in Victoria and hope that the Government adopts the Youth Affairs Council's model. This Commission could incorporate the functions currently performed by the Child Safety Commissioner.

Proposal 5.2: The Child Safety Commissioner should: a) be appointed by the Governor in Council b) hold office for a period not exceeding five years c) be otherwise appointed and hold office on terms similar to those that apply to the Public Advocate d) be required to report to Parliament on an annual basis about the Commissioner's activities and financial operations.	The Federation supports strengthening the independence of the Child Safety Commissioner as outlined in this proposal.
Proposal 5.3: The Attorney-General should be the Minister responsible for the Child Safety Commissioner.	The Federation supports this proposal.