Submission to the Protecting Victoria's Vulnerable Children Inquiry

Empowering children and families to negotiate workable outcomes based on strengths and needs

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About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority with a mandate to provide to the community improved access to justice and legal remedies. We are the major provider of legal services to socially and economically disadvantaged Victorians.

VLA plays a vital role in helping Victoria's vulnerable children and their families to reach safe, workable and sustainable care arrangements, and has done so for over 30 years. We provide legal advice and assistance to parties and children in matters before State and Commonwealth Courts including disputes within the family about a child's care, contact with parents and extended family members and their financial support, those involving child protection authorities, and the use of family violence restraining orders. Our experience of many families and clients is that resolution of matters often involves movement between State and Commonwealth jurisdictions and, accordingly, our expertise in these areas means that we are well placed to contribute meaningfully to the Inquiry.

Our Family Law Program interacts with children, parents, counsellors, welfare workers, judicial officers and a range of related service providers to minimise the harm and risk to children from possible neglect and ongoing parental conflict. In 2009-2010, expenditure on the Family Law Program approximated $46.8 million, over a third of VLA's total expenditure, and included funding for 775 independent children's lawyers in the family law courts to represent a child's voice and provide independent advice on their best interests to judicial officers.

Our Child Protection program provides services that promote the interests of children and young people where the Department of Human Services (DHS) believe they are at risk, with an aim to assist children and their parents to reach safe, workable and sustainable care arrangements by their informed participation in decision-making. In 2009 – 2010, the program accounted for 10.5% of VLA's total operating expenditure. Implicit in this investment is a belief that the broader community interest is served by having children grow and develop in a safe, secure and conflict free environment.

VLA's Roundtable Dispute Management (RDM) provides low-income vulnerable Victorians with access to lawyer-assisted family dispute resolution services. Of the 810 appropriate dispute resolution (ADR) conferences held in 2009-2010, 87% resulted in settlement of either some or all issues. In purely economic terms, an independent study into the value of legal aid to the Commonwealth family law system demonstrated a saving of up to $2.25 for every dollar spent through earlier resolution of disputes and avoiding unnecessary litigation.[1] In a client survey conducted as part of an independent evaluation of family dispute resolution services in legal aid commissions, 64% of surveyed clients strongly agreed or agreed that RDM conferencing helped them understand the relevant issues.

[1] Price Waterhouse Coopers, 2009, Economic Value of Legal Aid: Analysis in relation to Commonwealth funded matters with a focus on family law, National Legal Aid. Retrieved from <http://www.nla.aust.net.au/res/File/Economic%20Value%20of%20Legal%20Aid%20-%20Final%20report%20-%206%20Nov%202009.pdf>

Promoting the interests of vulnerable children and young people

Victoria's child protection system is governed by *the Children, Youth and Families Act 2005* (Vic) (CYFA) which mandates State intervention on the grounds of a significant risk of harm to a child and requires that a child mature enough to give instructions be legally represented in Children's Court proceedings where a decision is sought about their removal or placement in protection, among others application types[2]. Many families who come in contact with the court experience one or more of the following factors: poverty, lack of education, inadequate housing, social isolation, intellectual disability or mental illness, family violence or drug and/or alcohol abuse.[3] The parties to child protection matters in the Children's Court include the DHS child protection worker who has worked with the family, the parents and/or other adults involved in the care of the child, and the child him or herself. In most circumstances, low-income parents and all children are represented pursuant to a grant of legal aid provided by VLA.

When statutory intervention occurs, most children can be engaged in a way that empowers them and their families to take ownership of the issues and any plan of action. Child protection is a specialist area requiring expert training and experience. Many decisions do not quickly admit an easy right or wrong answer and require a careful weighing up the facts and available options. Importantly, the safety and protection of vulnerable children requires a community response. Appropriate and adequate protection of the best interests of children can be achieved through properly resourced early intervention and family support services that meet the needs of children and families, and open and collaborative professional relationships within the child protection system.

In his report[4] released in 2009, the Victorian Ombudsman was critical of the overly adversarial nature of court proceedings in the child protection jurisdiction, which were said to lead to delays and stressful working conditions for child protection workers. The Ombudsman noted that the nature of the current system involves the presentation of two competing arguments to the Court, with the judicial officer then making a decision.

Judicial oversight of these matters, with judicial officers having access to all relevant evidence, properly tested, to discern the best interests of the child, is a necessary procedural safeguard. However, such a system should ensure that DHS child protection workers are able to highlight a family's strengths despite their need to prove their case that the child is in need of protection. It is through the implementation of less adversarial and ADR processes, where legal representation assists to represent children's and families' interests, that families will be empowered to negotiate workable outcomes based on strengths and needs.

A. Improved access to integrated early intervention and family services

VLA supports increased resourcing of earlier intervention with at-risk families. The best interests of vulnerable children are more likely to be met when there are services and supports available to families to address their needs before they find themselves in crisis situations.

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[2] *Children Youth and Families Act 2005 (Vic)* s 525

[3] Children's Court of Victoria, Submission No. 46 to Victorian Law Reform Commission, *Review of child protection applications in the Family Division of the Children's Court*, 9 April 2010, at p 10

[4] Own motion investigation into the Department of Human Services Child Protection Program

According to the Productivity Commission, in 2009-2010, $2.5 billion was spent on child protection and out of home care services across Australia. Sixty five percent of this was spent on out of home care services[5], demonstrating that a significant proportion of government resources are spent responding to children who have already suffered harm or are at serious risk of abuse or neglect after problems have developed. From our observations, as the major provider of legal assistance services to children and families in child protection cases, we consider that greater funding for services that target families at risk of protective intervention, and that aim to keep children with their families in supported environments, will ultimately lead to a decrease in the number of children who are placed in care.

ChildFirst, a community-based program, was established under the 2005 legislation. It was intended to be available to assist families where there were wellbeing concerns for children that needed more structured assistance than might be available in the general community. Unfortunately, while some of the ChildFirst agencies have been able to include a good level of casework within their programs, most have become a virtual triage centre for DHS, with more focus on crisis response than was ever intended. Funding more focussed at early intervention and support services, and better funding to enable ChildFirst to actually conduct the levels of case work that it was intended to perform, would lead to fewer families and children reaching crisis levels that require intervention by DHS.

Supporting families has clear benefits for children and parents as well as benefits to the wider community, including a decreased reliance on out of home care services, decreased public health expenditure later in life, and a lowered incidence of criminal offending[6].

These benefits are not immediate, and we consider that it is crucial to adequately fund early intervention health and welfare services to achieve the goal of reducing intergenerational family involvement with child protection services.

B. Appropriately trained professionals

The need for dedicated child protection workers within the community is self-evident, and VLA acknowledges the difficulty of the work that they perform in extremely challenging circumstances. To meet these challenges, workers must be appropriately trained in the needs of families and children, their obligations and legal requirements as representatives of the State, and the roles of other professionals working in the child protection system. They must also be guided well as they acquire this knowledge in practice, because one of the paradoxes of the current system is that in so many cases the children and families with greatest need receive a systemic response from those with the least experience.

[5] Bromfield L, Holzer P, Lamont A (2011) *The economic costs of child abuse and neglect*, National Child Protection Clearinghouse Resource Sheet, Australian Institute of Family Studies. Retrieved from <http://www.aifs.gov.au/nch/pubs/sheets/rs2/rs2.pdf>

[6] Wise S, Da Silva L, Webster E, Sanson A (2005) *The efficacy of early childhood interventions* (Research report No. 14.2005), Australian Institute of Family Studies; Chapter 6. Retrieved from <http://www.aifs.gov.au/institute/pubs/resreport14/main.html>

VLA commends DHS for recent improvements in the basic training of new child protection workers in its 'Beginning Practice' program. VLA is keen to assist and participate in the program to enhance new workers' understanding of the roles of legal representatives in the child protection system.

However VLA is mindful of the continuing issues faced by DHS with high worker turnover continuing the cycle of junior workers with limited experience working with our most vulnerable children and families in the field. There is little doubt that crushing workloads have a massive impact on protective workers' job satisfaction. Their ability to provide the level of service that clients need is seriously compromised by how many cases they are expected to undertake at any one time.

It has been suggested that part of the reason for protective workers' lack of job satisfaction has been the adversarial nature of the court process. VLA contends that at least part of this problem relates to insufficient training provided to protective workers, and misunderstandings of the role of legal representatives in the system.

VLA contends that all professionals working in the system have the same overriding goal or role: to help make children safe. Collaborative training of legal and non-legal professionals about their respective roles, including in the protective framework operated by DHS which guides the exercise of protective workers' discretion, will be crucial to be better outcomes.

Case study: Improving understanding of professional roles

For most of the past year, a VLA staff lawyer has been seconded to the DHS Child Protection Policy and Practice unit to work on ways to address mutual understanding of the roles of legal representatives and child protection professionals in the children protection system, including drafting a 'Legal representatives' Code of Conduct'. This code will apply to all legal representatives working at Melbourne Children's Court and Moorabbin Children's Court, including those representing DHS, parents, children and any other parties joined to the proceedings.

A memorandum of understanding between VLA and DHS is near completion and will apply at the outset to practice in metropolitan cases, with extension to rural areas following a preliminary evaluation.

Together, VLA and DHS, in conjunction with the Department of Justice, have arranged a two day, multi-disciplinary training intensive in June 2011. The training will bring together legal representatives (a mix of VLA, Community Legal Centre and private lawyers) and protective workers from metropolitan and rural areas. Not only will this training provide education in child development and protection issues for those involved, it will also give all participants a better understanding of each others' roles. It is not expected that this will change relationships and job satisfaction for participants overnight, but it is hoped that, together with ongoing multi-disciplinary training, it will lead to a cultural shift in the way the professionals within the child protection system deal with each other.

VLA supports targeted funding for joint training and relationship-building processes between protective workers and legal representatives to continue in a structured fashion into the future with an appropriate evaluation of its effectiveness.

One part of a lawyer's professional role is to assess whether a child is capable and willing to give instructions. This is a complex task. VLA acknowledges that a child's age is not the sole determinative factor and that such decisions should be assessed on their actual intellectual, cognitive and emotional capacity. The ability to make such an assessment requires careful specialised and intensive training in child development and the impact of trauma, whether a lawyer acts as a direct instructions or best interests representative. Accordingly, such training should be included within any Children's Law specialist accreditation program.

VLA is keen to maintain and improve quality standards of representation of children through continuous specialist training, including:

- supporting the continuation of multi-disciplinary training for lawyers and child protection workers.
- enhancing in-house training and professional support for all children's legal representatives employed by VLA.
- providing a program of continuing professional development available to both in-house legal representatives and CLC and private legal representatives working in the Children's Court.
- supporting the introduction of Law Institute of Victoria specialist accreditation for Children's legal representatives
- phasing in a system whereby grants of legal aid will only be made to children's legal representatives with appropriate specialist training.

Recommendation

VLA recommends:

(1) that DHS offer multidisciplinary training to legal and non-legal professionals in its risk assessment or protective framework that guides the exercise of protective workers' discretion, and

(2) consequential on (1) above, that a specialist training program be implemented that would require all legal representatives for children to be appropriately trained in child development, the impact of trauma and taking instructions from children.

C. Fair and effective pre-court processes

i. Voluntary agreements

Currently the child protection system utilises formal and informal appropriate dispute resolution (ADR) processes. Where no protection application has been filed with the court, no formal ADR process is used to reach an agreement regarding the protective concerns for a child, although some DHS offices do use an ADR-type model in their discussions with the family. A negotiated outcome resulting from non-court engagement with DHS is usually termed a 'voluntary agreement'.

VLA recognises that voluntary agreements have a valid and useful role in child protection by allowing families and DHS to reach agreements without the need for court proceedings. Voluntary

agreements are appropriately used when all parties are properly informed and advised about the options available to them and the consequences of signing such an agreement.

Currently VLA provides advice to a significant number of clients who have already signed voluntary agreements. These agreements may include terms that remove the child or exclude a family member from the home.

Case study: impact of entering into, but not understanding, an agreement

T was a young girl with an intellectual disability. T lived with her mother and younger siblings and had contact with B, her older teenage sibling, who lived out of the home because of unsubstantiated concerns that B had been sexually inappropriate with T. T's mother, Q, who was also intellectually disabled (and was illiterate), had previously entered into an undertaking that she would supervise B's access with T.

After the undertaking expired, DHS workers continued to work with the family on a voluntary basis. On what was to be their final visit they became concerned that B had been spending time in the home.

Two weeks after this visit, DHS workers attended the home with a voluntary agreement for Q to sign – including clauses not only excluding B from the family home, but containing an informal undertaking that B would have no contact at all with T and her younger siblings. Q later instructed her lawyer that she did not understand what she was signing at the time.

When DHS workers next attended the home, B was present. There were no new allegations of inappropriate conduct, but the workers were concerned that Q had not been acting protectively and apprehended T and her younger siblings who spent the night in out of home care.

T and her younger siblings had always been in their mother's care. T did not feel unsafe at home, nor did she feel uncomfortable or unsafe around B. She was confused and baffled by the DHS proceedings.

The Magistrate found there was not an unacceptable risk of harm to T and her younger siblings. An interim accommodation order was made for T to reside with Q. There were conditions that B (who had been joined as a party) reside with a family friend for 3 weeks. T's contact with B was to be supervised by Q or the family friend.

It is the policy of DHS that voluntary agreements last for a maximum of three months from the date of intake, by which date a protection application must be issued if DHS intend to maintain their involvement with the family.

This time limit, which has been set by DHS, has no statutory basis, but prevents voluntary agreements from continuing indefinitely without review. However, the policy has the negative consequence of requiring DHS to issue a protection application even where all parties may be in agreement about the continuing need for services and what those services should be.

Conversely, where a voluntary agreement contains severe conditions which are designed to address a perceived emergency, some measures may only be appropriate as temporary arrangements. Voluntary arrangements with overly severe or restrictive terms are unlikely to be sustainable, and the family may only come to the attention of DHS again when another emergency

occurs. This crisis response characteristic of the current system demonstrates the importance of both appropriate safeguarding and accountability mechanisms provided by legal representation and the court oversight process.

An inherent power imbalance permeates ADR in child protection matters, as individuals, parents and children, must negotiate with the state in an arena in which the state service, DHS, is an expert and has the power to institute proceedings to remove children as a sanction to compel agreement. Frequently these individuals are the most disadvantaged in the community, and the least able to understand the child protection system and the various options available in terms of services and legal outcomes. They may be unable to appreciate the ramifications of various decisions, and to advocate for themselves and their families. Children are not free of risk when entering State care, and considering the resource constraints in which it operates, it should not be assumed that DHS's proposals will always advance the child's best interests.

There is no provision for legal representatives to attend these pre-court ADR meetings with families. There is no current practice of DHS advising parents to seek legal advice. Many parents contact VLA, or seek legal assistance, only significantly after the voluntary agreement process has been completed, and usually when the agreement is close to or already has collapsed. By this time, further harm may have been caused to the child or family dynamic by an unnecessarily proscriptive intervention. Furthermore these parents may have been significantly prejudiced in their ability to negotiate on behalf of themselves and their children in any coming application. Parties who represent themselves frequently identify to VLA that they have felt intimidated or that they really did not have a choice in negotiations in 'voluntary agreements' with the state. Aboriginal organisations argue that Koori families are particularly vulnerable.[7] Parents from culturally and linguistically diverse backgrounds may have trouble understanding the nature of the child protection system, and some are keen to appear compliant out of fear of potential repercussions for disagreement.[8]

In such situations the agreement is 'voluntary' in name only.

It is important to note that the current framework for these agreements does not ensure that DHS is accountable for the fulfilment of any of its obligations under the agreement. Instead, only parents are held accountable, through DHS's power to institute proceedings, for failure to comply with provisions of the agreement.

The parents who find themselves engaged with DHS in the child protection process often include those with Intellectual disability, mental illness, and culturally and linguistic diverse backgrounds – or a combination of any or all of these factors. Without legal representation these parties are grossly disadvantaged.

[7] Aboriginal Family Violence Prevention and Legal Service, Submission No. 26 to Victorian Law Reform Commission, *Review of child protection applications in the Family Division of the Children's Court*, 1 April 2010.

[8] Springvale Monash Legal Service, Submission No. 32 to Victorian Law Reform Commission, Review of child protection applications in the Family Division of the Children's Court, 1 April 2010.

Children mature enough to give instructions, who would ordinarily receive legal representation as of right in any post-court ADR, are particularly disempowered here. DHS recognises the need for children's voices to be heard at this stage of DHS's involvement:

> *Providing children with a voice is a strong contributor to children and young people's stability, because they are more likely to respond and engage with services when they have had the opportunity to be involved in their design and implementation*[9].

Furthermore, 'voluntary agreements' where self represented participants accept settlements that do not reflect an appropriate intervention in the family's life – for example, the removal of a child or restrictions on access instead of commensurate provision of rehabilitative services to assist parents – weaken and do not enhance community access to justice.

Such settlements are often unsustainable and cause great harm to the children and families. 'Voluntary agreements' which disrupt the family unit for longer than is absolutely necessary to protect the child from harm in fact result in harm to the children, as their attachment to caregivers is disrupted, and instability affects their development.

Such settlements also place great strain on individual family members, often making it hard for the family to work together in the ways necessary to promote the best interests of children. Similarly these settlements can damage relations between family members and DHS or other services, who they can come to view as agents of interference and disruption rather than of assistance and support.

When such settlements resurface it is often at another crisis point brought on by the unsustainable long term nature of the voluntary agreement, which may have been appropriate only for a short term intervention. In this case many matters ultimately reach court that never would have needed to enter the legal system had more appropriate agreements been made in the beginning. In addition to the expense of the added court proceedings, problems may also have become ingrained or become so severe that the proceedings become significantly more intractable.

In these circumstances the protection and procedural safeguards afforded to children and parents by legal representation at ADR are in some senses even more important than in ADR in matters which are already before the court, because the safeguards of the court's best interests decision-making system are absent. The system would be improved through the use of pre-court lawyer-assisted ADR, and, particularly in circumstances where legal advice has not been obtained, the registration of voluntary agreements in the Children's Court.

a. Lawyer-assisted pre-court appropriate dispute resolution

Families who do not receive legal advice and do not having an understanding about the merits of the agreements and their legal ramifications cannot be said to have entered those agreements voluntarily. VLA notes that this occurs frequently, and often the families' first contact with a legal representative is when a protection application has been issued as a result of a breach of the voluntary agreement. It is our experience that in many of these situations, family members have

[9] Victorian Department of Human Services & Victorian Department of Education and Early Childhood Development & Victoria. Dept. of Planning and Community Development (2007). *The state of Victoria's children report every child every chance* Department of Human Services, Melbourne, p 61.

either inadvertently breached the voluntary agreement, or not understood the gravity of the breach because they have not been properly advised.

Case study: impact of vulnerability at voluntary agreement stage

K was a woman who spent most of her pregnancy at a gambling venue, and was there when she went into labour. K was reluctant to leave the venue to go to hospital to give birth as encouraged by the ambulance officers, but managed to get there in time to deliver her baby, L.

After the birth of L, K stayed in the hospital for a week (partially social admission). Although she developed good attachment with L, she did not have accommodation, and at the end of the week she signed a voluntary agreement for her baby to go into foster care until the Department was satisfied that she could provide a safe environment for L.

K spoke almost no English, and later instructed that she was not aware that she could have had legal advice or that she could have refused to sign the voluntary agreement.

On the first night out of hospital, with L in care, K went to the gambling venue and then arranged to be self-banned. Of her own volition, K worked on finding accommodation and supports, with minimal assistance from DHS to place her on waiting lists. She attended all offered access visits with L which totalled three hours per week.

When the matter first came to court by notice 3 months later, L was still in care. DHS had written an adverse report about K's lack of engagement. DHS recommended an interim protection order to consider reunification, but with a reduction to two hours per week access.

With legal representation K was linked in with community supports who were able to verify within a few weeks that not only was K no longer gambling – and was engaging extremely positively with a community gambling counsellor – but that she had arranged good accommodation and all the basic requirements for L to be placed in her care.

DHS initially opposed an application for L to go home with her mother, but they eventually agreed. After several weeks at home it was clear that K was attending to and caring for L in an appropriate and safe way.

The case was eventually resolved at the directions hearing. The protection application was not proven. K gave an undertaking to continue to accept community counselling and L remained safely with her parent.

Legal representation at the stage of voluntary agreement could have made a dramatic and timely difference to the conduct of this case.

Early legal advice would ensure that families are fully informed about the nature of the voluntary agreement, and this in turn may result in fewer protection applications due to fewer breaches of agreements. An agreement negotiated with appropriate legal advice is more likely to be realistic, workable and sustainable and be less open to challenge or appeal should the matter need to go to Court. Such outcomes protect and promote children's interests in a manner that is cost effective and that promotes rehabilitative services at an early stage. This is far preferable to significant intrusive intervention by the state when crisis point has already been reached.

The New Zealand model of family group conferencing was considered favourably by the Victorian Law Reform Commission (VLRC), particularly in relation to:

- the independence of the convenor
- a formal pre-court ADR process
- family time alone in the middle section of the family group conference to allow reflection and joint decision making.

VLA considers that pre-court ADR should be facilitated and convened either by the court or by independent mediation services. All pre-court ADR should follow the Children's Court New Model Conference (NMC) model. This is because the NMC model is lawyer-assisted, emphasises preparation by the parties, and the exchange of information between parties prior to the conference, ensuring that all parties are aware of any issues in dispute before the conference begins. In these circumstances, the family can receive legal advice based on a clear understanding of DHS protective concerns, thus leading to more realistic and fairer discussions.

Under the New Zealand system, there is no provision for automatic legal representation of the parties although parties may have legal representation if the convenor permits it. VLA's discussions with legal practitioners in New Zealand have highlighted that, with the benefit of legal representation, parents were more willing to engage, and could engage properly, in the process because they were able to evaluate and could rely on the advice they were receiving from the other parties, and had confidence in their own assertions. When they made claims that were exaggerated or unrealistic, their representative would be available to reality-check their proposals. Not only was there increased generation of alternatives by the parents, but the alternatives were more realistic and better thought through. This led to better quality engagement by the parents and better proposals being put forward by and accepted by the parents.

The Children's Court submission to the VLRC in 2010 argued that legal representation of parties is critical to the conduct of good practice ADR during the course of a protection application and strongly endorsed the provision of legal representation in pre-court ADR.[10]

VLA accepts that the conduct of the parties in the child protection system can and should be made less adversarial. However, VLA contends that the negative consequences of the adversarial nature of the system might be ameliorated if the parties understood each other's roles better, and felt confident in exchanging information about their case. This includes:

- DHS providing timely information about its threshold protective concerns and proposals to make the child safe, and
- clients, and their legal representatives, identifying and making clear to DHS the strengths of the family and their clients' own proposals.

While some have argued that legal representation makes parents and children less likely to agree to interventions once they have been made aware of all their options, that argument is not borne out in our experience. Similarly, in our experience, arguments that legal representatives overbear the views of family members are not borne out in practice. The role of the lawyer in ADR is not to

[10] Children's Court of Victoria, Submission No. 46 to Victorian Law Reform Commission, *Review of child protection applications in the Family Division of the Children's Court*, 9 April 2010, at pp 40 and 47.

act in an adversarial manner as it might be in the well of the court. In an ADR setting, the lawyer's role is to advise the party they are assisting as to their options, the likely consequences of the choices they are considering, and to assist them to make their own choices. This serves to enhance the parties' access to justice and promote a better engagement with the system that is designed to help children and families.

Legal representation in ADR conferences assists:

- at the start of the ADR process by explaining the system and its operation, including services and court processes
- by generating options for the parties, given their individual circumstances during the ADR
- by managing client expectations, by providing a 'reality check', and weighing suggested outcomes against the likely result should the matter be taken to court.

Recommendations

VLA recommends that negotiations to achieve voluntary agreements should be conducted by way of a structured ADR process, along the lines of a NMC.

VLA recommends that agencies include legal representatives in ADR conferences, or refer parties for legal advice prior to signing voluntary agreements, especially where the terms of the agreement will result in significant intervention with the family such as the removal of a child from their usual carer, or excluding a family member from the family home.

VLA supports the expanded use of family group conferences (or a similar pre-court conference), especially in cases where:

- there has been a voluntary agreement for three months, in which circumstances DHS would ordinarily be considering a protection application by notice, or
- a voluntary agreement is being considered by DHS, where entering into the agreement is likely to have a significant impact on the family, including situations where a child is to be removed, or a family member excluded from the family home or access supervised.

b. Registration of voluntary agreements arising out of pre-court ADR

VLA considers that voluntary agreements should be registered with the court with a basic statement of agreed facts settled as part of the ADR process, particularly in circumstances where legal advice has not been available to the family.

It is our experience that many contested matters in the Children's Court arise out of cases that have come to court simply because of the expiry of three months' voluntary involvement and not because of any immediate protective concerns. The reason most of these cases are contested is not because the family is opposed to continuing involvement, but because once proceedings are issued, DHS is obliged to prove one of the grounds for intervention set out in the CYFA. Therefore, the contest relates to the issue of whether or not the parents have 'failed to protect' their child from harm, rather than whether and what DHS involvement or assistance is appropriate for the family in order to make the children safe.

If these cases are able to be dealt with through pre-court ADR then registration of any resulting agreement, without any need for a formal protection application, could assist with:

- confirming to the parties that the agreement is to be taken seriously and will have consequences, on all sides, where undertakings to do things or provide supports are not adhered to.
- providing continuity of case knowledge in the event that the matter comes to court for substantive proceedings.
- providing better data about overall system performance.

In the event that a party no longer wished to abide by the registered agreement, DHS could issue a Protection application. The court would then have access to the statement of agreed facts and the registered agreement itself on the court file.

Recommendation

VLA recommends that a system to enable the registration of voluntary agreements with the court be established.

ii. Case Planning

Case planning is a practice that occurs throughout DHS involvement with a family, and is also required by legislation to take place 6 weeks after the making of a protection order and 6 weeks prior to the expiry of an order. This occurs internally within DHS and theoretically, case plans should be developed at meetings between protective workers, families and relevant professionals.

Case plan decisions set out what is expected of families, what services should be arranged to assist the family, and what disposition DHS seeks when a protection application has been lodged.

The current legislative arrangements for reviewing case plan decisions involve, initially, an internal review of the decision by a Unit Manager at the request of a child or parent. If this does not resolve a dispute about the case plan, parents and child then have the right to seek a review of the case plan decision by VCAT. This may occur concurrently with any protection proceedings in the Children's Court.

VLA submits that the separation of case plan decisions and protective order proceedings between the court and a tribunal is undesirable. VLA supports legislative changes to allow case planning reviews to be heard by the Children's Court.

The benefit of the Children's Court having jurisdiction is that the Children's Court is a specialist court with unique knowledge of child protection, which VCAT generally does not have, as there are comparatively very few case plan reviews sought at VCAT.

Moreover, allowing case plan reviews to be dealt with by the Children's Court allows proper judicial oversight of this decision-making. Since case planning is an integral part of decisions made by DHS in the protection application proceedings, any issues with case planning should logically be managed alongside the court proceedings.

As case planning also includes cultural plans for Koori families, and stability plans, decisions in these kinds of case planning have a direct connection to the placement of children who are to be or who have been removed from a parent. These types of case planning decisions are also required for long term orders, such as Long Term Guardianship Orders or Permanent Care Orders.

Recommendation

VLA recommends that the appropriate legislative changes be made to give jurisdiction to the Children's Court to conduct case plan appeals.

D. After a protection application has been filed with the court

i. Giving children a voice in decision-making processes

The CYFA aims to encourage the participation of children, young people and their families in the decision-making processes that affect their lives[11].

The right of children to have their voices heard in legal proceedings that affect their lives empowers them, gives them a sense of self-worth, and promotes the idea that they, the subject of proceedings, are important participants in the process. This right is enshrined in the United Nations Convention on the Rights of the Child[12] and in most Australian child protection legislation. Without proper representation of some kind, a child is merely a silent witness to proceedings which centre on his or her welfare and which may have a significant effect on how his or her life progresses.

At the same time, it is important to recognise that the term "children and young people" covers a wide range of age groups and stages of development. The cognitive capacity and emotional needs of a two-year-old are vastly different from those of a sixteen-year-old for instance. The CYFA recognises this and states clearly that the more mature a child is, the greater weight the court should place on his or her wishes or views about the outcome of proceedings [13].

It is also important to recognise that some children, for a variety of reasons, may not wish to be placed in a position where they are forced to express any views on such profound issues. In those situations, children should not be compelled to do so, but this does not mean that their interests should not be represented separately from those of the parents or DHS.

Under the CYFA, all children mature enough to instruct must be represented. If they do not have representation, the court must adjourn for them to obtain representation.[14] The CYFA allows three exceptions to this:

- the court may proceed if a matter is adjourned for them to get representation and they do not[15]

[11] Victoria, Parliamentary Debates, Legislative Assembly, 6 October 2005, 1368 (Sheryl Garbutt, Minister for Community Services)

[12] United Nations Convention on the Rights of the Child, opened from signature on 20 November 1989, (entered into force on 20 September 1990), art 12.

[13] *Children Youth and Families Act 2005 (Vic)* s 10

[14] *Children Youth and Families Act 2005 (Vic) ss 542(2), 525(1)*

[15] *Children Youth and Families Act 2005 (Vic) s 542(3)*

- some secondary applications (to extend, vary and revoke various distinct orders) do not require representation.[16]

- with the leave of the court a person who is not a legal representative and is not a parent may represent the child.[17]

Where a child in the opinion of the Court is not mature enough to give instructions, in 'exceptional circumstances', pursuant to s 524(4) of the CYFA, the court must adjourn proceedings to allow for the appointment of a best interests legal representative. What constitutes 'exceptional circumstances' is not defined.

Decisions in the Family Court, in particular *Re K* [18], which sets out certain criteria the court might take into account when appointing an independent children's lawyer (ICL), provide limited assistance because virtually all the cases coming before the Children's Court would satisfy the *Re K* criteria. We note that there may be circumstances where an ICL is appointed to represent the interests of a child in the family law system while the same child's circumstances may not be assessed as 'exceptional' enough for them to have independent legal representation under the best interests model in the State child protection system.

We also note that the CYFA does not have any provision or power for the court to actually *appoint* a representative for a child, only to adjourn proceedings until such a representative is appointed. Contrast the provisions of the *Family Law Act 1975* (Cth) [19], which gives the Family Law Courts specific power to order the appointment of an ICL, whose role is to gather all relevant information about the child's interests and ensure that that information is put before the court in proper evidentiary form. Moreover, the legislation requires that the child's views be put before the court where the child is capable of and willing to express those views.[20]. VLA's experience of representing children's best interests in the Family Law Courts, where the legislation clearly states the role and responsibilities of the ICL[21], and provides for varying weight to be placed on the child's views depending on their maturity,[22] is that children's views are very much at the forefront of the proceedings without placing on those children the burden of having to make actual decisions about their future that they may not be emotionally prepared to make.

In its submission to the VLRC in 2010, the Children's Court indicated that, since the provision came into operation in 2007, orders for best interests representatives had been made in only 33 cases[23]. In the year since then VLA is not aware of any significant change in the rate of appointments.

[16] *Children Youth and Families Act 2005 (Vic) ss 525(1), 255(1)(a) and (b), 267*

[17] *Children Youth and Families Act 2005 (Vic) s 542(8)*

[18] (1994) FLC 92

[19] *Family Law Act 1975 (Cth) s 68L*

[20] *Family Law Act 1975 (Cth) s 68LA(5)(b)*

[21] *Family Law Act 1975 (Cth) s 68LA*

[22] *Family Law Act 1975 (Cth) s 60CC(3)(a)*

[23] Children's Court of Victoria, Submission No. 46 to Victorian Law Reform Commission, Review of child protection applications in the Family Division of the Children's Court, 9 April 2010, at p 61

Were the court to have power under the CYFA to appoint an ICL, many more children's voices, (whether literally, or figuratively in the case of infant children) could be heard in the court through their legal representatives.

Recommendation

VLA submits that s. 524(4) of the CYFA should be amended to provide legislative clarity as to the meaning of 'exceptional circumstances', and that the definition be framed in a way that would facilitate the appointment of an ICL, acting on a best interests model. VLA considers that the child protection system in Victoria would benefit from greater involvement of appropriately tasked lawyers to act for children.

There is no test at law for gauging a child's capacity to instruct. In practice the court is guided by the determination of the legal representative who has interviewed the child. Legal representatives make a determination of a child's capacity to instruct based on an assessment of each individual child on a case by case basis, which in turn is theoretically based on 1999 guidelines[24] for child representatives, that have been endorsed by the President of the Children's Court.

The starting assumption made by the court and practitioners, based on verbal advice provided by the Children's Court Clinic in the early 1990s, is that a child of seven, plus or minus one year, should be considered potentially capable of instructing a legal representative and should therefore be assessed as being able to do so. In practice, no real such assessment is made, and all children of seven years and over are represented using the direct instructions model, while children under the age of seven are rarely independently represented at all.[25]

When providing wishes and views to a legal representative, whether those views are provided via direct instructions or to a best interests representative, a child must be confident that this person will do everything possible to explain their point of view to the other parties and to the court. Developing this relationship of trust is crucial as it empowers children who often feel marginalised by the process. Research[26] indicates that marginalisation of children can cause great and lasting harm, but that agreed outcomes that take full account of the children's views and wishes are more likely to be stable and sustainable.

Case study: having a voice in proceedings

J, a young boy, was brought to court after he had called the police seeking assistance. His parents were divorced, he lived with his mother and spent time with his father, but his parents were constantly arguing about how much time he should spend with each parent.

[24] contained in Akenson, Louise. & Buchanan, Lynn. 1999 *Guidelines for lawyers acting for children and young people in the Children's Court / Louise Akenson ; edited by Lynn Buchanan* Victoria Law Foundation, [Melbourne].

[25] VLA acknowledges that DHS acts in the best interests of the child in the overall welfare sense, but contends that once proceedings are issued, DHS's major commitment in the legal sense is to prove its case. This can be seen as leading to a conflict of interest between the need to prove a legal case, and acting in the child's best interests and thus, in that sense, DHS might be seen as not an "independent" representative.

[26] See Australian Law Reform Commission, *Seen and Heard: priority for children in the legal process*, Report No. 84 (1997).

J had asked to spend the night in foster care after telling the police and a bail justice that he didn't want to return home until his parents could stop fighting. At court he was very clearly instructing in the same way.

J reported that he was suffering from extremely severe medical condition which he claimed his doctors had told him was caused by the stress he was suffering at home. He stated that he wanted his parents to stop fighting so that he could get better.

DHS assessed that J had a good home and that other than the parents' relatively low level arguments, they were good parents. DHS recommended that J return home.

J was unmoved by the DHS position and clearly instructed that he wanted to remain in care until his parents sorted things out.

After J's instructions had been put to the court, the Magistrate asked the legal representatives to strongly recommend to their clients (parents and DHS) that agreement be reached about a short placement out of home with conditions about mediation and counselling. All parties agreed.

After a few days the foster carer could not care for the extent of J's physical condition and all parties agreed that he should be hospitalised. By the end of the hospitalisation the parents had accepted supports that helped them to recognise their role in their son's illness and the need to prioritise his care.

J returned home after his hospitalisation, and after a short additional testing time the situation had improved so that DHS were able to withdraw, with J's happy agreement.

ii. Active case management

The VLRC Protection Applications in the Children's Court Final Report (VLRC Report) made recommendations in favour of active case management, by which cases are allocated to a single judicial officer at commencement of proceedings, in the Children's Court[27] This system would benefit the court and parties by enabling clear management and oversight of the direction of each case, referrals to ADR where appropriate, and greater consistency for the duration of the proceedings.

VLA notes that a form of active case management has been adopted by the DHS Court Advocacy Unit, which has resulted in more effective of the negotiations between parties.

Recommendation

VLA supports the adoption of active case management in the Children's Court and sufficient allocation of resources to achieve this.

Case management would begin from the time a protection application is lodged with the court and, in VLA's submission, should continue through to any post-order case planning litigation, and subsequent variation, revocation, breach or extension applications.

[27] Page 309

Should the increase of resources not be available, VLA recommends that priority for active case management should be given to cases where a child has been removed or a family member excluded from the home.

iii. Addressing needs through specialist lists

Together with case management, the VLRC Report also recommends the streaming of cases into specialist lists. There are different options for doing this. Cases can be streamed by the nature of the protective concerns, such as drug abuse, family violence, sexual abuse, or it could be streamed on the basis of a party's identity, such as developing a Koori list. It is important to note that families who are the subject of protection applications generally have more than one type of protective issue and there would be too great a degree of overlap in most cases to allocate into specialist lists.

Recommendation

VLA supports the establishment of a specialist sexual abuse cases list in the Children's Court.

There are specific issues in this type of case that warrant a high degree of care in the case management, including that:

- there are implications for evidence given in the Family Division of the Children's Court in potential consequent criminal charges and criminal proceedings
- there is often a reliance on disclosures made by children, which gives rise to particular rules of evidence, and
- particular care must be taken to properly case manage these proceedings so that there is minimal damage caused to family relationships which may be in the best interests of the child to preserve.

The advantage of such a specialist list would be that it allows judicial officers to provide case management and give direction to the proceedings with greater knowledge of the issues in each protection application they hear. Both the Magellan List in the Family Court and the specialist sexual offences list in the criminal division of the Children's Court provide good examples of how specialist case management and case streaming can be successfully used. In the criminal division, the sexual offences list enables the allocated magistrate to deal with cases with common procedural and evidentiary issues.

Recommendation

VLA supports the implementation of a specialist Koori list in the Family Division across the Melbourne and Moorabbin Courts and across regional Victoria.

The Koori Court in the criminal division of the Children's Court provides a model for implementation. The Koori Court deals with young offenders by addressing the offending and rehabilitation in culturally appropriate ways. VLA submits this has an important place in the criminal justice system, in light of the over-representation of indigenous persons in the criminal justice system.

Similarly, there is an over-representation of indigenous persons in the child protection system and as there are specific legislative requirements for case planning and making judicial decisions.

iv. Appropriate dispute resolution processes at court

After a protection application has been filed with the court there are several formal kinds of ADR process which are available to the parties.

Dispute Resolution Conferences (DRCs) and NMCs are the most common. When parties cannot agree on issues, but it is agreed that there is some room for discussion, matters are regularly adjourned for a DRC.

NMCs were introduced in 2010 as a new model of DRCs as a pilot program in two metropolitan DHS regions. Due to training and other issues, the new model is being gradually rolled out – at first applying only to matters out of the Footscray office, but now also including Preston. The NMC format is the result of collaboration between the Children's Court, DHS and VLA.

Occasionally used for more complex matters, there are also Judicial Resolution Conferences (JRCs), in which a magistrate will engage with parties and the legal representatives in a formal mediation process. The aim is to narrow the issues in dispute and reach resolution where possible.

In DRCs, parties are represented by their legal representative. They provide instructions to the legal representative who advocates and negotiates on their behalf. There are no specific preparation requirements, or requirements for the exchange of information among the parties prior to a DRC, and if the matter does not settle, it is simply adjourned to the next court event.

In contrast, at NMCs the parties negotiate directly with each other, with the legal representatives present to provide advice as required. They assist parties to understand the various options available, and by providing advice on the likely view of a court should the matter be taken to contest.

An important difference between a DRC and an NMC lies in the pre-conference requirements for preparation by the lawyers and the candid exchange of information among the parties. This information, filed with the court and served upon all other parties, includes the actual protective concerns held by DHS and its proposals for settling the proceedings, and the family's views on its own strengths and its proposals for settlement. The parties are therefore much better prepared to negotiate realistic outcomes based on full knowledge of each other's proposals and views, thus leading to much more informed negotiations and better outcomes for the children. After the NMC, the parties return immediately to the court, either for orders (in cases where a resolution has been agreed) or directions for further hearings to be made, providing a direct nexus between the NMC and the court process.

Ninety-seven per cent of primary protection applications filed at the children's court do not reach final contest. This means that they have settled either through a formal ADR process or simply by the negotiation of the parties at court mention dates.

ADR is used to refer to a formal mediation conference, rather than matters negotiated at mention. Statistics for DRCs indicate that approximately 75% do not go to a contest, either settling directly or being adjourned to a further DRC or mention, which is usually indicative that the parties have found

common ground, progress has been made and there is no need for a contested outcome. In these circumstances, an eventual negotiated outcome is likely.

Although there are no direct statistics in relation to Victoria, research in other jurisdictions suggests that mediated outcomes are more sustainable and cause less harm to the intra family dynamic or the relationship of the family members with the child protection service, than contested outcomes.

v. The benefit of successful ADR processes

In VLA's view, based on our experience of successful ADR processes, the key benefit of such processes is the preservation of the relationship between family members and DHS or other services. The continuation of these relationships allows further collaboration between families and DHS and leads to a higher likelihood of non-court outcomes and truly voluntary improvement in family conditions. If matters do not thus proceed to court, all members of the family, and especially the children, are spared the court process which can be very stressful and adversely affect family relationships.

A negotiated or mediated settlement results in less pressure on the public purse than a contested outcome. Since the vast majority of persons party to child protection proceedings fall in lower economic brackets, or are children, nearly all qualify for legally aided representation. Avoiding a contested outcome thus saves the cost to the state of the legal representation of the family members, of DHS, including all the extra preparation work that protection workers must put in to a contest, and the considerable court costs. In addition, negotiated outcomes are usually more quickly reached than a contested decision and therefore more promptly deal with the protective concerns raised.

Some proponents of the ADR process also talk of greater 'ownership' by the family members of the decisions reached and greater 'control' over the outcomes. It is important in the experience of VLA not to overstate this point however. There is an inherent power imbalance in all negotiations conducted between individuals and the state in the child protection system, as they occur in the shadow either of the court process or under threat of a potential removal of a child. While an ADR process often allows more direct participation of the parties in the negotiation, control of the outcome may not be increased by a mediation process, especially if legal representation is absent. Whilst direct participation in the negotiation and the reaching of a decision can lead to family members accepting the outcome as their own choice in some circumstances, it should not be assumed of mediations conducted with the threat of court proceedings or removal of a child in the background.

vi. Negotiated Outcomes through new model conferences

The Children's Court implemented the NMC process in 2010 following a recommendation made by the Premier's Child Protection Taskforce. VLA has implemented new fees to allow and encourage legal practitioners to properly prepare for NMCs by taking further instructions and exchanging all relevant information. The NMC process encourages a strengths-based approach to assessing the best interests of the child by allowing the family to express its views about its own strengths as an explicit part of the process. In addition, DHS is required to state its views on the family's strengths as well as its protective concerns

Case study: empowering parties through a strength-based approach

J was the mother of K, a young child who had been on a Custody to Secretary order for the previous twelve months. Under that order J had been having access with a reunification case plan.

DHS had applied to extend the custody order but wanted access to be reduced because they were proposing a permanent care case plan. J opposed the permanency planning.

The matter was referred to an NMC which was attended not only by J and her lawyer and DHS worker, but also by a representative from K's foster care agency.

The involvement of the foster care agency in the process proved to be very positive as they had first-hand knowledge of J's relationship with K and were able to inform the conference of the strengths of that relationship. This led to DHS being willing to discuss alternative approaches to the case to give a reunification plan another chance.

The matter was adjourned for a further NMC, with a clear plan as to what was to occur in the interim, in the hope that the case would be able to be resolved at the next conference.

At the time of writing, the court has held 71 NMCs at VLA's RDM facility. As at early April, the NMC process has resulted in a higher proportion of matters settling with a final order or an interim protection order and a lower proportion of matter proceeding to contest, compared to pre-NMC figures provided by the Court in its submission to the VLRC[28].

There is significant potential for NMCs to bring cost effective, principled resolution to child protection disputes that protect and promote the best interests of children and provide the necessary safeguards to children and parents, so that intervention by the state is limited to what is necessary, and so that services that assist in rehabilitating families are preferred to measures which remove children or exclude parents for any longer than is absolutely necessary.

A regular problem in DRCs, that is gradually being ameliorated in NMCs, is the absence of an authoritative DHS decision maker in the ADR session. The protective worker attending the DRC might only be authorised to make decisions that conform with the preconceived plan for the child and family. Without authority to make a decision beyond these bounds there is no room for real exploration of options and alternatives, and therefore no real negotiation.

The planned rollout of NMCs to all metropolitan cases – and eventually to all regional cases – has been delayed by the lack of facilities. Alternative facilities need to be located at the earliest opportunity to make the innovative NMC process available to all metropolitan and regional areas.

In addition, dispute resolution processes should be consistent across Victoria. They should not be compromised as is sometimes the practice with DRCs in rural areas where they are often conducted by a court coordinator in their office, sometimes in very time limited circumstances with minimal impact. VLA asserts that the advantages of the NMC process should be available to all Children's Court litigants regardless of where they live, and that the rollout of the new system, properly resourced, should be expedited.

[28] Children's Court of Victoria, Submission No. 46 to Victorian Law Reform Commission, Review of child protection applications in the Family Division of the Children's Court, 9 April 2010, at p 35 (together with additional information provided by Sue Higgs, Manager, Conferences, and Russell Hastings, Operations Manager, Children's Court of Victoria).

Recommendations

VLA recommends that:

- legal representation should be provided for all children who are mature enough to provide instructions and who wish to do so. Children who are not mature enough to provide direct instructions, but whose interests are deemed to require separate representation, should have an independent children's lawyer appointed to represent those interests.
- the protective worker attending the ADR conference should have authority to make all appropriate decisions or, failing that, an authorised DHS decision maker should attend at all ADR conferences.

E. After a court makes a protection order

i. Case planning appeals

Under the current legislation the Children's Court can make conditions on most protection orders other than guardianship orders. These conditions can be very detailed and set out the way in which DHS should conduct its case plan.

However, the case planning process, required to take place after the court has made a protection order involving DHS, is totally under the control of DHS.

If a party does not agree with the case plan, which typically occurs in relation to Custody to Secretary or Guardianship to Secretary orders, they must first seek an internal review within DHS (for which there are no formal procedures or time frames). If they do not agree with the outcome of the review then they can appeal to VCAT – a tribunal with no training and little if any experience in child protection matters.

Case study: protracted appeal processes

G is a sole parent with a mild intellectual disability. DHS apprehended her baby, H, who suffered from a medical condition so needed special care, soon after birth. After a submissions contest – and with the support of the baby's paediatrician – H was placed with G.

During the baby's first year, H was apprehended on several occasions even though H had made good progress after numerous operations. After a period of time, following a self-notification by G, H was placed in care and eventually on a custody to Secretary order with access to take place three times per week.

DHS tried to reduce this access on several occasions, including when the matter returned to court after another 12 months for extension of the custody order, but the court continued to order the same level of access.

After the extension, DHS changed the case plan from reunification to permanent care. This was opposed by the mother and subjected to internal review then appeal to VCAT.

The appeal process took almost 18 months with different members presiding over each step, none of whom had any experience with child protection and needed to be assisted with basic information about Children's Court orders.

By the time the appeal was finally listed for hearing in VCAT, so much time had elapsed that another application to extend the custody order had been lodged. The hearing of that application, in the court with specialist expertise in relation to child protection, had to be deferred for several months until the VCAT matter was finalised.

At the final hearing at VCAT, H was returned to G's care. It was expected that this would lead to the Children's Court extension application resolving quickly, but DHS continued to seek an extension to the custody order even though a supervision order to the mother was now the more appropriate disposition.

It is appropriate for any 'review' of a case plan decision to be dealt with through ADR, conducted in exactly the same way as that proposed for pre-court ADR. In the event that the matter is not resolved through ADR, any 'appeal' should be dealt with in the jurisdiction where the order was originally made, that is in the Children's Court, which has the specialist knowledge to apply the 'best interests' principles.

This would ensure that there was a more consistent and streamlined approach, especially in a court with active case management, where the hearing could be before an officer who was already aware of the central issues in the particular case. This would lead to a speedy resolution of issues and would promote the best interests of the child.

Recommendation

VLA submits that post-order case plan 'reviews' and 'appeals' should involve an ADR process similar to the pre-court ADR process referred to earlier in this submission. They should be conducted independently, and the hearing of any continuing issues should be before the originating jurisdiction, in this case the Children's Court, rather than VCAT.

Summary of recommendations

VLA recommends:

(1) that DHS offer multidisciplinary training to legal and non-legal professionals in its risk assessment or protective framework that guides the exercise of protective workers' discretion.

(2) consequential on (1) above, that a specialist training program be implemented that would require all legal representatives for children to be appropriately trained in child development, the impact of trauma and taking instructions from children.

(3) that negotiations to achieve voluntary agreements should be conducted by way of a structured ADR process, along the lines of a NMC.

(4) that agencies include legal representatives in ADR conferences, or refer parties for legal advice prior to signing voluntary agreements, especially where the terms of the agreement will result in significant intervention with the family such as the removal of a child from their usual carer, or excluding a family member from the family home.

(5) the expanded use of family group conferences (or a similar pre-court conference), especially in cases where:

- there has been a voluntary agreement for three months, in which circumstances DHS would ordinarily be considering a protection application by notice, or
- a voluntary agreement is being considered by DHS, where entering into the agreement is likely to have a significant impact on the family, including situations where a child is to be removed, or a family member excluded from the family home or access supervised.

(6) that a system to enable the registration of voluntary agreements with the court be established.

(7) that legal representation should be provided for all children who are mature enough to provide instructions and who wish to do so. Children who are not mature enough to provide direct instructions, but whose interests are deemed to require separate representation, should have an ICL appointed to represent those interests.

(8) that s. 524(4) of the CYFA be amended to provide legislative clarity as to the meaning of 'exceptional circumstances', and that the definition be framed in a way that would facilitate the appointment of an ICL, acting on a best interests model.

(9) the adoption of active case management in the Children's Court and sufficient allocation of resources to achieve this.

(10) the establishment of a specialist sexual abuse cases list in the Children's Court.

(11) the implementation of a specialist Koori list in the Family Division across the Melbourne and Moorabbin Courts and across regional Victoria.

(12) that the protective worker attending the ADR conference should have authority to make all appropriate decisions or, failing that, an authorised DHS decision maker should attend at all ADR conferences.

(13) that the appropriate legislative changes be made to give jurisdiction to the Children's Court to conduct case plan appeals.

(14) that post-order case plan 'reviews' and 'appeals' should involve an ADR process similar to the pre-court ADR process referred to earlier in this submission. They should be conducted independently, and the hearing of any continuing issues should be before the originating jurisdiction, in this case the Children's Court, rather than VCAT.