

Submission

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

April 2010

Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Arrangements

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Acknowledgements

This submission has been prepared for the Federation of Community Legal Centres (Vic) by the Federation's Child Protection Working Group in consultation with its Human Rights Working Group and other member community legal centres.

The Child Protection Working Group comprises representatives from the following community legal centres:

Aboriginal Family Violence Prevention and Legal Service
Central Highlands Community Legal Centre
Fitzroy Legal Service
Gippsland Community Legal Service
Loddon Campaspe Community Legal Centre
Mental Health Legal Centre
Murray Mallee Community Legal Service
Springvale Monash Legal Service
Villamanta Disability Rights Legal Service
West Heidelberg Community Legal Service
Western Suburbs Legal Service
Youthlaw

In addition the following community legal centres were consulted as part of this submission:

Victorian Aboriginal Legal Service
National Children's and Youth Law Centre

The Federation also wishes to acknowledge the substantial research report prepared by the Disability Discrimination Legal Service in 2002, *Pride and Prejudice, A Snapshot of Parents with Disabilities Experience of the Child Protection System in Victoria*. This submission has not sought to address the issues affecting parents with disabilities but instead refers the Victoria Law Reform Commission to this report.

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About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty one 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 met-

ropolitan 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 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 responds to many of the questions raised in the Victorian Law Reform Commission's (VLRC) Information Paper, *Review of Victoria's Child Protection Legislative Arrangements*. We have also provided some additional comments outside of the scope of Information Paper's questions.

This submission is intended to supplement the issues and feedback provided to the VLRC in the Federation's Preliminary Issues Paper, January 2010 and the consultation held on 10 March 2010 with members of the Federation's Child Protection Working Group.

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.

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.

Timeframe and terms of reference

The Federation acknowledges that the terms of reference and timeframe for this review are matters outside of VLRC's control. Nevertheless, the Federation has significant concerns that the breadth of the terms of reference and the seriousness of the issues being considered are not reflected in time allowed for this review. This is particularly apparent when this review is compared with the time and resources provided to the review that led to the *Children, Youth and Families Act 2005* (Vic).

We are particularly concerned that the consultation period and process are not sufficient to enable families, children and young people affected by the child protection legislation to participate meaningfully. We are also concerned that in the absence of a detailed discussion paper exploring and analysing different options, our responses are not able to provide a detailed reflection of our views on particular options nor are we able to hear and reflect upon the views of others in this debate. This is particularly relevant to options 3 and 4 that contemplate significant reform. We would strongly support VLRC recommendations that the Victorian Government allow further time for discussion and consultation.

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].

Response to the Information Paper

Option 1

New processes that may assist the resolution of child protection matters by agreement rather than by adjudication.

General comments on alternative dispute resolution (ADR) in child protection

Community members who seek community legal centre assistance with child protection issues tend to be parents and family members of children who have come into contact with the child protection system. Many young people also seek advice on child protection issues from the specialist youth legal service, Youthlaw.

Our 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.

Many 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 caseplanning processes following a court order. Our assistance leads to increased involvement of families in caseplanning 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.

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;
- realistic expectations about capacity to provide day-to-day supports is provided; and
- basic principles of procedural fairness are adhered to.

As incremental changes have not resulted in any meaningful improvements in this regard, we are open to the possibility of more formal ADR processes being implemented where appropriate safeguards are guaranteed and where this will achieve the necessary cultural change.

1.1 Do you think that the current dispute resolution conference procedure in the Family Division of the Children’s Court operates effectively?

The current dispute resolution conference functions effectively as a pre-contest forum for clarifying and narrowing the issues in dispute in litigation and thereby reducing the length of contested hearings. It is a necessary and useful step in the court process.

However, the dispute resolution conference is too late in the process to provide a meaningful opportunity for parties to work collaboratively to develop a best interests plan for a particular child.

1.2 How could the current dispute resolution procedure be improved?

Our experience is that in some areas, particularly outside of metropolitan areas, the quality of mediators/facilitators is unsatisfactory. Improved and consistent access to quality mediators/facilitators would improve the current dispute resolution procedure.

1.3 What other ADR processes could be used for child protection matters?

See also discussion under question 1.5.

Family group conferencing

The Federation notes and supports the following comments and concerns outlined in the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission’s 1997 report *Seen and heard: priority for children in the legal process*:

“17.48 Family group conferences and prehearing conferences hold a good deal of promise for the resolution of disputes about the care and protection of children. They attempt to ensure that the family, and in some cases the extended family or other community members, can participate in reaching a co-operative solution to their problems.

17.49 On the other hand, there are concerns with processes that pressure vulnerable families into negotiation with social workers who are privy to all the family concerns and failings and that may result in limited contact between or even separation of parents and children. Submissions to the Inquiry also expressed concern that the vulnerability of some family members within violent and abusive families may mean that dynamics in conferences could hamper appropriate resolutions. There is a ‘...potential [in conferencing schemes] to mask the inequality of the parties by a veneer of participation’. Appropriate training of conference convenors and an ability of family members to access legal advice before conferences may address some of these issues.

17.50 The Inquiry is concerned about the appropriate level of children’s involvement in these conferences. Where the conference convenor is unable to protect the child or is unaware of negative family dynamics, participation by the child could constitute further abuse of the child. It may involve the child in discussions with an allegedly abusive parent or with family members who may intimidate or blame the child for ‘disrupting’ the family. In some family group conferences in New Zealand the entire family spent their time haranguing the child or subjecting the child to intimidation. On the other hand, it is important that children are able to participate or at the very least that their wishes or best interests are made clear when conference participants are making decisions about children’s residence, contact with parents or

family members and services needed. Children consistently told the Inquiry that they should be able to participate in decision making processes when the decisions to be made directly concerned them. The current levels of children's participation in these conferences is unknown.

17.51 Recommendation 82 proposed that a representative be appointed for a child as early as possible in the process of a care and protection intervention. Legal advice should be provided to a child before the child decides whether or not to participate in a conference. The legal representative should attend the conference to represent the child's interests if the child is too young to participate or wishes the representative to participate on his or her behalf or to assist a child who wishes the additional support during these processes.

17.52 Another concern is that, in the promotion of a solution acceptable to the family and professionals involved, the best interests of the child may become of secondary importance. The commitment in conferences is to negotiation and settlement by agreement, a commitment that may subsume concerns about the welfare of the child. Most jurisdictions require that the best interests of the child be promoted in court proceedings. Conferencing models should also incorporate this principle.

17.53 Finally, the initial assessment of whether a child is at risk should not be the subject of negotiation or compromise at these conferences. Pre-application or pre-hearing conferences are not an appropriate investigation tool nor should they be a forum in which the family or family services department attempts to prove or disprove the allegations. Conferencing procedures are appropriate only to decide upon a plan for the protection and care of children found to be at risk following an investigation and for whom court orders will be sought if the conference fails to reach an acceptable solution.

17.54 [Conferencing models should] take into account the particular perspectives and needs of Indigenous children and families and those from non-English speaking backgrounds and ensure that people with disabilities are not effectively excluded from the process.”⁴

The Federation supports the relevant recommendation that:

“The procedures associated with conferencing schemes should be set down in legislation, based on the evaluation proposed in recommendation 169. The legislation dealing with procedures for conferencing models in care and protection jurisdictions should require that

- in family group and pre-hearing conferences the best interests of the child should be the paramount consideration
- family members and children have access to independent legal advice before participating in any conference
- children who are too young to participate or who wish to have additional support during the conference should be represented by a lawyer or advocate of their choice in these conferences
- convenors of family or pre-hearing conferences should have knowledge of and training in care and protection law, family dynamics and child development issues, so that they are aware of power imbalances between the participants at the conferences and are able to work to overcome these imbalances to arrive at a resolution in the best interests of the child.”⁵

We note the more recent research undertaken by the National Child Protection Clearinghouse, *Family Group conferencing in Australia 15 years on*.⁶ The Federation supports entrenching family group conferences into Victoria's child protection system where they seek to apply the principles and practices that will empower nuclear families and their immediate communities, such as extended family and friends, to be involved in making decisions about their children; and

⁴ Australian Law Reform Commission, Human Rights and Equal Opportunity Commission, Report No.84, *Seen and heard: priority for children in the legal process*, 1997, Chapter 17

⁵ Ibid, Recommendation 170, page 442.

⁶ Harris, N, *Family Group conferencing in Australia 15 years on*, Australian Institute of Family Studies, Issues Paper No. 27, 2008. <http://www.aifs.gov.au/nch/pubs/issues/issues27/issues27.html>

mobilise informal and formal support services for families. It is of concern that the implementation of family group conferencing in other jurisdictions around Australia does not accord with these principles or the original intent of the model that was pioneered by and adopted from New Zealand.

In addition to the features noted above, the Federation supports a conferencing model that includes the following:

- the provision of private time for families during the course of the conference to enable families to make decisions;
- facilitators who are adequately trained and be independent of DHS;
- vetting of matters unsuitable for ADR should be conducted by an independent body (not DHS);
- participation by family members and children should be voluntary;
- participation by DHS should be compulsory;
- all parents, children, young people and other family members who are or could be primary care-givers should be provided with access to independent legal advice before participating in a conference and should be able to be represented by an advocate or lawyer of their choice in the conference;
- agreements made within conferences should not be dependent upon subsequent ratification by DHS;
- a process for ensuring that agreements are consistent with best interest principles. This may involve court endorsement of agreements in particular in cases where children are to be placed in out-of-home care;
- a process for ensuring that agreements that are made at conferences including agreements made by DHS to provide resources or support services are complied with; and
- adequate resourcing to establish and maintain the integrity of the agreed model.

As discussed in the recent consultation held with the VLRC, our member centres Aboriginal Family Violence and Prevention Legal Service and the Victorian Aboriginal Legal Service, who work exclusively with Aboriginal families, have only been involved in a limited number of cases that have involved an Aboriginal Family Decision Making Conference, despite applications being made to the Children's Court for this to occur. There have been cases where the court has refused to order one where it has been specifically requested.

1.5 When is ADR appropriate for child protection matters? What protections need to be incorporated into the processes to protect vulnerable parties?

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 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 be able to be represented in an ADR process by a lawyer or advocate of their choice;
- Mediators should be independent of DHS and all of the parties. Co-mediation could be used where appropriate;
- 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 complaints⁷;
- Measures should be undertaken to assist mediators working with people who have language and literacy issues⁸; and
- Cross-cultural training should be provided to help mediators manage cultural differences between parties⁹.

1.6 At what stage(s) should ADR processes be used in child protection matters?

If the conditions stated above are met, ADR could be conducted prior to DHS initiating proceedings in the Children’s Court. DHS should be required to explore these ADR options before proceeding to initiate a protection application. Once an application to the Court is made, there may be a role for a subsequent pre-hearing ADR process.

1.7 Who should conduct ADR processes? What qualifications and standards of practice should ADR facilitators be held to?

Any ADR process should be managed completely independent of DHS. Mediators should be adequately trained to ensure understanding of the vulnerability of clients in this jurisdiction. Protocols and processes should be developed to ensure standardised practice throughout Victoria.

1.8 Who should be present during ADR processes?

DHS staff with the appropriate decision-making authority must attend. Children and their advocate should be invited to attend, depending on their age and capacity. In many cases children are not kept informed of what is happening for their families and having them involved in aspects of the case could minimise their anxiety.

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 family members, teachers, welfare workers as in the South Australian model.

Where required, interpreters should be present during all stages of the process.

1.9 What role (if any) should lawyers play in ADR processes?

Disadvantaged and marginalised families including Aboriginal families, parents with disabilities including mental illness, parents with drug and alcohol issues, refugee and migrant families, families with low education levels and from low socio-economic status and children and young people, are overrepresented in the child protection system. Accordingly, to address some of the impacts of this disadvantage upon meaningful participation in ADR processes, there is greater

⁷ See recommendation 14 of the Victorian Parliament Law Reform Committee *Inquiry into Alternative Dispute Resolution and Restorative Justice Final Report* (May 2009).

⁸ Ibid, recommendation 15

⁹ Ibid, recommendation 24.

need for independent legal advice at an early stage as well as the availability of a 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.¹⁰ 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.

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.¹¹ In this sense, there is a risk that commonly held stereotypical attitudes may affect the mediator’s response to parties’ behaviour.¹²

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.

¹⁰ See the discussion of the judge’s duty to assist self-represented litigants in *Tomasevic v Travaglini* (2007) 17 VR 100.

¹¹ 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.

¹² See Field and Crowe, *ibid*, 115.

For example, in our experience:

- DHS often fails to afford professional courtesy to lawyers;
- DHS often fails to comply with deadlines and court processes;
- DHS case workers often ignore written requests from the client's lawyers to provide information to lawyers and provide the information directly to the client;
- DHS speaks directly with the client and does not invite, or in some cases will not permit, lawyers to be present at meetings with the client;
- DHS discourages clients from inviting their lawyers to meetings;
- there are often significant problems with timely access to documents before a relevant court date; and
- DHS reports are often prepared without legal assistance and lack evidential rigour.

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.

1.10 Where should ADR processes in child protection matters take place?

Should ADR be appropriate, it 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.

1.11 To what extent should ADR processes be confidential?

Information obtained during ADR should not be able to be used in subsequent proceedings.

Option 2

New grounds upon which State intervention in the care of a child may be authorised and reform of the procedures followed by the Children’s Court when deciding whether to provide this authorisation.

2.1 Are the existing grounds for finding that ‘a child is in need of protection’ in s 162 of the Children, Youth and Families Act 2005 adequate?

In our view the existing grounds are adequate - proof of fault is not causing issues. Proposals to expand the existing grounds for state intervention and involve more families in tertiary services are inconsistent with the national policy approach shifting towards a public health model.

2.2 Should there be additional grounds for finding that ‘a child is in need of protection’ which do not involve proof of fault on the part of a child’s parent or other primary carer?

There should not be additional grounds.

2.3 Should there be a new set of grounds for earlier state intervention in the life of a child where removal of a child is not necessary but where some state supervision or assistance is appropriate?

The state does not require statutory powers to provide assistance to a family. The problems which child protection systems are seeking to solve through legislative intervention will not be solved until significant resources are spent on improving the social, economic and cultural rights of the disadvantaged members in our society. This includes housing, education, health care and access to employment. This also includes addressing the undersupply of community-based supports to provide prevention and early intervention programs and practical solutions to assist parents with parenting (assistance with transport to appointments, finding child-care for other children whilst attending appointments etc). Clearer pathways into appropriate support services also need to be established.

Whilst Child FIRST was intended to provide early intervention and prevention support, our experience is that Child FIRST has worked primarily in crisis interventions, playing the role of a contracted child protection worker and resulting in more families becoming involved at the tertiary level. There are insufficient services to meet the demand for basic family supports.

In our view, this problem is clearly articulated in the recent Allen Consulting Group report *Inverting the Pyramid, Enhancing systems for protecting children* which noted:

“A clear finding from the consultations was that referral processes do not reflect a continuum of care in the public health model that ‘steps up’ from primary to secondary to tertiary strategies (if required).

Stakeholders reported that the most common pathway for vulnerable families was either:

- receiving only universal supports (e.g. the child may be attending school) and then being reported to the tertiary system
- receiving no supports (i.e. not accessing universal services) and then being reported to the tertiary system (this is commonly the case for the most vulnerable families).

The needs of many of these families could be met by a more appropriate response at a lower level of intervention, and as such many reports of alleged child abuse and neglect (around 80 per cent) are unsubstantiated. A large proportion of these are referred to secondary services (Bromfield and Holzer 2008). The impact of these pathways is that in some jurisdictions the primary way for families to access support services is through the tertiary system.”¹³

¹³ Allen Consulting Group, *Inverting the Pyramid, Enhancing systems for protecting children*, Australian Research Alliance for Children and Youth, 2008, page 54.

http://www.aracy.org.au/publicationDocuments/REP_Inverting_the_Pyramid_Enhancing_Systems_for_Protecting_Children_2009.pdf

2.4 Could such a basis for state intervention, authorised by the court, be that ‘a child is in need of assistance’ or ‘at risk of harm’?

As set out above, the state does not require expanded statutory powers to provide assistance to a family.

2.5 Should it be possible for there to be formal parental responsibility contracts, approved by the Court, in circumstances where the parties agree that a child is in need of assistance?

It is difficult to comment on this proposal without a better understanding of the purpose of formal parental responsibility contracts and the types of matters that can form part of a contract, and information on how these contracts would differ from the current range of court orders.

In general, if some form of parental responsibility contracts are to be introduced, there must be appropriate safeguards in place including that:

- contracts must be in the best interests of the child.
- 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 before agreeing to a contract; and
- all parents, children, young people and other family members must be able to be involved in the development of the contract.

Under the current system, a parent can agree to place a child in out-of-home care without court oversight and without accessing legal advice. We have significant concerns about the lack of safeguards around this, which increase the likelihood of outcomes which undermine parents and children’s rights.

We do not support the title “formal parental responsibility” contract as it suggests that only parents have responsibilities. DHS also has responsibilities to provide support services and must be held accountable when implementing its commitments.

2.7 Should it be possible to have parental responsibility contracts or orders by consent at any stage of proceedings?

Yes, but only if family members make the agreement fully informed of the likely consequences of their agreement.

2.8 Should the present time requirement that protection applications commenced by taking the child into safe custody be brought to Court (or before a bail justice) within 24 hours be retained?

Yes. The time requirement should not be extended beyond 24 hours.

2.10 Should children be required to attend Court when a safe custody application first comes before the Court?

This depends on the age and capacity of the children to understand the process. Many young people want and need to understand what is happening to them and their families.

2.11 Should children be required to attend Court at later stages?

As above, this depends on the age and capacity of the children and whether they want to be involved once they have been properly advised of their rights and the processes.

2.12 How should children be represented in proceedings before the Family Division of the Court?

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 age at which the assessment of capacity is made.

The Federation supports the separate representation of children who have not yet reached capacity applying a best interests model. This is particularly important given the departmental restructuring in Victoria that has led to child protection being placed outside of the Department of Education and Early Childhood Development and divorced from early childhood development expertise.

2.13 Do directions hearings serve their intended function or are there better ways of identifying contested issues and managing cases?

Directions hearings can serve their intended purpose if all parties have been adequately advised and are properly prepared, and if the necessary documentation has been made available in adequate time to enable lawyers and their clients to prepare.

2.14 To what extent (if any) should the Children's Court adopt an administrative case management approach to child protection matters?

In general, we support judges taking an active and managerial approach to child protection matters and support the same magistrate or judge managing a case from first listing, on an individual case management model.

Option 3

The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services.

3.1 Does the Secretary of the Department of Human Services have too many functions under the Children, Youth and Families Act 2005?

The current system, which sees DHS performing the role of investigator, prosecutor, case manager, contract manager, custodian and guardian, is problematic. The problems result from insufficient resources to meet demand and inherent conflicts of interest between the multiple roles. The problems are compounded by the lack of meaningful independent oversight of DHS, aside from the role that the Children's Court plays.

In our view, there must be greater scope under the *Children, Youth and Families Act 2005* (Vic) to hold DHS accountable for failures to provide appropriate support to families or to work in accordance with the principles outlined in the Act. On an individual level this could be achieved by expanding the jurisdiction of the Children's Court to conduct a full caseplan review at the request of DHS, a child, young person or family member. The review would focus on ensuring that the child's best interests are paramount in the formulation of case plans and on providing objectivity and accountability in the formulation and implementation of appropriate case plans. On a systemic level increased accountability of DHS and improved compliance with best practice service standards could be achieved by the establishment of an independent statutory commission for children and young people.

3.2 If yes, should some of those functions be given to an independent statutory commissioner?

The Federation strongly supports the establishment of an independent statutory commission with responsibility for protecting and promoting the rights of all children and young people at a state level. This office should have a broad overview of the issues affecting children and young people in government, non-government and commercial sectors. However, we do not see the commission having a role in individual cases (see our further comments on this below).

Our preferred model for an independent commission is the model proposed by the Youth Affairs Council of Victoria (YACVic) in its 2001 paper *Are you Listening to us?* This paper presented a tailor-made Victorian model for a Victorian Children and Young People's Commission which was embedded in a rights framework as articulated by the CROC. The proposal was supported by a coalition of 45 organisations/individuals, including YACVic, the Law Institute of Victoria, Youthlaw, Defence for Children International - Australia, the Victorian Council of Social Service and the Children's Welfare Association of Victoria.

The proposed model was underpinned by six fundamental principles:

- independence;
- statutory powers;
- focus on children and young people up to the age of 18;
- adequate resources;
- broad perspective; and
- accessibility.

The Commissioner's general proposed functions were to:

- promote the interests, rights and welfare of children and young people;
- promote public awareness of the rights of children and young people;
- promote the participation of children and young people in relevant decision making forums;
- and

- promote, commission, undertake and publish research on matters relating to the rights of children and young people.

In terms of monitoring, the Commissioner's proposed powers were to:

- review laws, policies and practices relating to the rights of children and young people with a view to assessing the adequacy and effectiveness of such laws, policies and practices;
- develop and promote best practice models and protocols for the provision of services for children and young people, and for dealing with child abuse complaints;
- monitor and assess the policies and practices of government funded agencies and relevant laws relevant to children and young people;
- monitor programs and initiatives for compliance with the CROC;
- initiate and conduct inquiries into and make recommendations to Parliament and any body or person, on any matter, including any enactment or law or any practice or procedure, relating to the welfare of children and young people;
- provide information, referral and assistance to complainants (but not handle individual complaints); and
- apply for standing before the court in special selected cases involving the rights of children and young people.

Transferring the function of conducting proceedings from DHS

In addition to the establishment of a Victorian Children and Young People's Commission, the Federation also 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.

Option 4

Changing the nature of the body which decides whether there should be state intervention in the care of a child so that it includes non-judicial as well as judicial members.

4.1 Is the function of deciding whether ‘a child is in need of protection’ an exercise of judicial power?

Yes

4.2 Is it desirable to change the composition of the Family Division of the Children’s Court to include people other than judicial officers in decision-making panels?

In general, we do not think it is desirable to include people other than judicial officers in decision-making panels. An exception would be where the Koori community supports, and is involved the establishment of, an appropriate model for the involvement of community members in decision-making about Aboriginal children.

It is desirable for relevant professionals, advocates and community leaders to assist judicial officers in their decision-making. The Children’s Court Clinic currently plays this role. This also occurs in Magistrates Court Victoria through programs such as the Court Integrated Services Program, Drug Court and the Family Violence Division.

The Federation notes the recent innovations in Florida, USA in establishing infant/toddler court teams whereby a judge oversees a team of child welfare and health professionals, child advocates and community leaders providing services to the family, children and young people. This innovation has resulted in ‘system reforms, increased sharing of resources across agencies and collaborative strategies... A key element of this model is a monthly review meeting of all the individuals and organisations providing court-mandated services in order to review the progress of the case’.¹⁴ Such a model could address one of the current deficiencies in the system whereby, in the absence of detailed court orders and judicial oversight of caseplanning, DHS is not regularly held to account for assisting families to access relevant support services.

4.6 If some or all of the functions currently performed by the Family Division of the Children’s Court are to be performed by panels of peoples should those functions be retained by the Children’s Court or should they be exercised by a tribunal?

The Children’s Court should retain the current functions of the Family Division. We do not support the establishment of a new tribunal or of a new specialist list at VCAT to perform any of the functions currently in the jurisdiction of the Children’s Court. On the contrary, we would like to see the jurisdiction of the Children’s Court expanded to cover the caseplanning appeals that are currently within the jurisdiction of VCAT. Decisions on child welfare should not be relegated to an administrative body; they should be made by a court not a tribunal. In this way, procedural fairness and rules of evidence can be upheld.

4.8 If these functions are to be exercised by a tribunal should a new Protective Tribunal be established to deal with a range of matters where the state intervenes in the lives of people for their protection?

We do not believe that it is appropriate to comment on this proposal in the context of this review of child protection laws, particularly given the short time frame for the review and the lack of detail around the proposal for a new Protective Tribunal.

¹⁴ Jordan B, Sketchley R, *A stitch in time saves nine, Preventing and Responding to the abuse and neglect of infants*, Australian Institute of Family Studies, *Issues*, No.30, 2009 <http://www.aifs.gov.au/nch/pubs/issues/issues30/issues30.pdf>