



**Victorian
Law Reform
Commission**

Review of Victoria's Child Protection Legislative Arrangements

Information Paper

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Victorian Law Reform Commission
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BACKGROUND

In December 2009, the Attorney-General asked the Victorian Law Reform Commission to review those aspects of Victoria's child protection system that concern Children's Court processes and provide the Government with a range of reform options that may minimise disputation and maintain a focus on the best interests of children.

The reference to the Commission followed the release of a report by the Victorian Ombudsman into the Department of Human Services' child protection program on 25 November 2009.

The Ombudsman suggested that there were 'fundamental questions regarding the design of the legal framework around the child protection system in Victoria' that required consideration.

One of the Ombudsman's key recommendations, which was accepted by the Attorney-General, was that the Commission be asked to examine 'alternative models for child protection legislative arrangements'.¹

The Commission has been asked to 'consider models that take a more administrative case management approach to child protection issues'. Our Terms of Reference are attached.

As part of its review, the Commission has been directed to consider the arrangements that exist in other Australian jurisdictions (including the Family Court) and in other countries, particularly England and Scotland. The Commission is also required to have regard to:

- the underlying aim of the system to protect children in Victoria from abuse and neglect, and the best interests principles in the *Children, Youth and Families Act 2005*
- the processes for applying for and reviewing orders in the Family Division of the Children's Court
- the previous reviews of Victoria's child protection system, including the report of the Government's Taskforce
- the Attorney-General's Justice Statements (in 2004 and 2008), particularly the focus on Appropriate Dispute Resolution and measures to reduce the adversarial nature of the justice system
- The *Charter of Human Rights and Responsibilities Act 2006*

¹ The Ombudsman's report, *Own motion investigation into the Department of Human Services Child Protection Program*, can be accessed at:
http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_the_Department_of_Human_Services_Child_Protection_Program.pdf

PROCESS

As the Commission is required to report to the Attorney-General by 30 June 2010 we are unable to follow our usual practice of publishing a comprehensive Consultation Paper. Instead we have released this Information Paper which identifies possible areas for reform and seeks responses to a number of questions.

Despite the short time-frame, we wish to consult as broadly as possible and encourage submissions from all Victorians with an interest in child protection legislative arrangements.

OPTIONS

We have identified four areas where reform may be possible. Identification of these areas does not represent any final thinking on the part of the Commission. No doubt, there are different ways of characterising the many components of our child protection system and different aspects of that system that may benefit from reform other than those identified in this paper.

We seek comment about the four areas identified by the Commission. For ease of discussion we describe them as options. We also encourage suggestions about other areas for reform which fall within our terms of reference.

The four options identified by the Commission are:

1. New processes that may assist the resolution of child protection matters by agreement rather than by adjudication.
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.
3. The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services.
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.

The questions accompanying each of the four options provide some explanation of the matters that may merit examination.

The first two options assume that the legal framework of the existing child protection system would remain in place. The major components of that legal framework are the Department of Human Services and the Children's Court of Victoria (Family Division).

Currently, the Secretary of the Department of Human Services has a very broad range of functions that include:

- assisting children and families where children may be at risk of or have suffered abuse or neglect
- working with community agencies and government to assist vulnerable children and families
- investigating whether a child is in need of protection
- commencing and conducting proceedings in the Children's Court if the Secretary is of the opinion that a child is in need of protection
- taking a child into safe custody and bringing that child before the Children's Court if the Secretary is of the opinion that emergency intervention is necessary
- organising and facilitating out of home care for children
- acting as the custodian or guardian of a child found to be in need of protection when there is no other more suitable person to undertake this role

The Family Division of the Children's Court has a range of functions that include:

- hearing and determining protection applications in relation to any person under the age of 17 years
- hearing applications for intervention orders where either party is under the age of 18 years.

The third and fourth options involve changes to the legal framework of the child protection system. In broad terms the third option involves the establishment of an independent statutory commissioner who would have some of the functions currently exercised by the Secretary of the Department of Human services and by the Children's Court. The fourth option involves changes to the composition and functions of the Family Division of the Children's Court that are centred upon the inclusion of people other than judicial officers in decision-making panels. This option could involve changes to the membership of the Family Division of the Children's Court, the transfer of the functions performed by the Family Division to a new division of the Victorian Civil and Administrative Tribunal (VCAT), or the creation of a new Protective Tribunal which has jurisdiction in relation to child protection and other matters where the state intervenes in the lives of people for their protection.

Some, or all, of the matters that fall within Options 1 and 2 could be adopted if there are changes to the existing framework.

We seek responses to the questions in this paper and any other submissions by *Thursday 1 April 2010*.

QUESTIONS

Option 1

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

- 1.1 Do you think that the current dispute resolution conference procedure in the Family Division of the Children's Court operates effectively?
- 1.2 How could the current dispute resolution procedure be improved?
- 1.3 What other ADR² processes could be used for child protection matters?
- 1.4 Are there some matters that are better suited to ADR than others, such as questions concerning conditions that should be attached to any final order?
- 1.5 When is ADR inappropriate for child protection matters? What protections need to be incorporated into the processes to protect vulnerable parties?
- 1.6 At what stage(s) should ADR processes be used in child protection matters?
- 1.7 Who should conduct ADR processes? What qualifications and standards of practice should ADR facilitators be held to?
- 1.8 Who should be present during ADR processes?
- 1.9 What role (if any) should lawyers play in ADR processes?
- 1.10 Where should ADR processes in child protection matters take place?
- 1.11 To what extent should ADR processes be confidential?

² ADR means appropriate or alternative dispute resolution. It is a generic term which is used to describe a broad range of processes, such as mediation and conciliation, where an impartial person assists the parties to resolve the issues between them by agreement rather than by adjudication.

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.

New grounds

- 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?
- 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?
- 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?
- 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'?
- 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?
- 2.6 If 'yes', what sanctions should apply if a contract is breached?
- 2.7 Should it be possible to have parental responsibility contracts or orders by consent at any stage of proceedings?

Specific court processes

- 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?
- 2.9 If not, what period of time should apply before Children's Court authorisation of this state intervention is required?
- 2.10 Should children be required to attend Court when a safe custody application first comes before the Court?
- 2.11 Should children be required to attend Court at later stages?

- 2.12 How should children be represented in proceedings before the Family Division of the Court?
- 2.13 Do directions hearings serve their intended function or are there better ways of identifying contested issues and managing cases?
- 2.14 To what extent (if any) should the Children’s Court adopt an administrative case management approach³ to child protection matters?
- 2.15 Should all (or some) of the provisions of Division 12A of Part VII of the *Family Law Act 1975* (Cth) which seek to encourage Less Adversarial Trials be adopted in the Children’s Court?

³ “Case management” refers to processes used by judicial officers to control the management of cases through a court and involves the court managing the number and timing of events necessary to move cases from commencement to final disposition.

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*?
- 3.2 If yes, should some of those functions be given to an independent statutory commissioner?
- 3.3 Could the commissioner have a role to play in any pre-court ADR mechanisms?
- 3.4 Could the commissioner be responsible for the carriage of proceedings before the Children's Court?
- 3.5 Could the commissioner have the 'first instance' capacity to authorise State intervention in 'safe custody' cases?
- 3.6 Could the commissioner be capable of appointment as the guardian or custodian of a child in need of protection if there is no other suitable person?
- 3.7 If the commissioner is appointed as the guardian or custodian of a child, could the commissioner have the authority to exercise some functions currently fulfilled by the Children's Court such as issues of access?
- 3.8 Should decisions of the commissioner be subject to merits review in the Children's Court?
- 3.9 How should the independence of any new statutory commissioner be secured?

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?
- 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?
- 4.3 What people other than judicial officers should comprise decision-making panels?
- 4.4 What qualifications, if any, should they have?
- 4.5 Upon what terms should any non-judicial members of the Family Division of the Children's Court be appointed?
- 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 people should those functions be retained by the Children's Court or should they be exercised by a tribunal?
- 4.7 If these functions are to be exercised by a tribunal should that tribunal be a division or specialist list of VCAT?
- 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?

Child Protection - Terms of Reference

To review Victoria's child protection legislative and administrative arrangements in relation to Children's Court processes, and to recommend options for procedural, administrative and legislative changes that may minimise disputation and maintain a focus on the best interests of children.

In reviewing the current Victoria arrangements, the Victorian Law Reform Commission should consider models that take a more administrative case management approach to child protection issues. In particular, the Commission should include consideration of the arrangements currently in place in other relevant Australian jurisdictions (Including the Family Court) and overseas, including England and Scotland.

In addition to consulting with Victoria's Children's Court and the Victorian Department of Human Services and Justice, the Victorian Law Reform Commission should consult with Victoria Legal Aid and other relevant stakeholders.

This reference is designed to provide the government with recommend options for Victoria's child protection legislative and administrative arrangements.

In conducting the review, the Victorian Law Reform Commission should have regards to:

- the underlying aim of the child protections system to protect children in Victoria from abuse and neglect, and the objectives of the best interests principles set out in the Children, Youth and Families Act 2005
- the processes associated with the application for an order and the review of interim and ongoing disposition orders before the Family Division of the Children's Court
- the previous reviews of Victoria's child protections system, particularly in relation to the models for the Children's Court, and the report of the Government Taskforce that will look at measures to immediately reduce court time and bring in less adversarial processes
- the themes and principles of the Attorney-General's Justice Statement (2004) and Justice Statement 2 (2008), particularly the focus on Appropriate Dispute Resolution and measures to reduce the adversarial nature of the justice system
- the rights enshrined in Victoria's Charter of Human Rights and Responsibilities Act 2006.

The Commission is to report by 30 June 2010.

Making a submission

What is a submission?

Submissions are your ideas and opinions about the law being reviewed. The commission asks for submissions as part of its consultation process.

Who can make a submission?

Anyone can make a submission. They can be made on behalf of individuals or organisations.

What is in a submission?

Submissions can be anything from a personal story about how a law has affected you, to a well-researched paper complete with footnotes and bibliography. When we publish a paper it will contain questions to guide your submission however you don't need to answer all questions, your answers don't need to be lengthy and you can provide us with information not covered by the questions.

How can I make a submission?

Submissions can be made via the online form on our website, email, post, fax, over the phone and face-to-face.

What if I need assistance?

If you require an interpreter, materials in accessible formats or help to make your submission please contact the commission.

When can I make a submission?

We invite submissions when we've published a Consultation, Options, Position or Information Paper but you can make a submission at any point before the submission deadline. Your submission may not be considered if it arrives after the deadline. Please speak to a researcher on the project before making a late submission.

What is a public submission?

Unless otherwise stated all submissions are considered public. 'Public' means they can be uploaded to the commission website, quoted in reports and kept at the commission for people to look at. Submissions uploaded to the website have contact details removed.

What is an anonymous submission?

Anonymous submissions can be uploaded to the commission website, quoted in reports and made available for people to look at but all names and identifying features will be removed.

What is a confidential submission?

Making your submission confidential means only commissioners and commission staff can look at it. It will not be quoted in reports, appear on our website or be made available to the public.

Do I need any material to complete my submission?

The Consultation, Options, Position or Information paper about the law under

review will assist you in making your submission. You can download it from our website or order it from the commission

What happens once I make a submission?

You will receive a letter acknowledging that your submission has been received and asking you to confirm who it is from and whether it is a public, anonymous or confidential submission. It will then be read by commissioners and commission staff to help them develop recommendations and write reports. If you have made a public submission it will be uploaded to the commission website.

What is the commission?

The commission was created by the Victorian Law Reform Act 2000 as a central agency for developing law reform in Victoria. It is an independent agency that facilitates community-wide consultation and advises parliament on how to improve and update Victorian law. It is committed to transparent and public law reform which is independent of the political process.

Where can I find out more information?

The commission website contains a range of information about current and completed projects. You are also encouraged to contact the commission with any queries.