CHILDREN'S COURT OF VICTORIA

SUPPLEMENTARY SUBMISSION

to the

PROTECTING VICTORIA'S

VULNERABLE CHILDREN INQUIRY

6 SEPTEMBER 2011

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ABBREVIATIONS

ADR	Alternative Dispute Resolution (aka Appropriate Dispute Resolution)
BCG	Boston Consulting Group
BERC	Business Expenditure Review Committee
CPLO	Child Protection Litigation Office - formerly Court Advocacy Unit (CAU)
CYFA	Children Youth and Families Act 2005 (Vic)
DHS	Department of Human Services
DOJ	Department of Justice
DRC	Dispute Resolution Conference
GIC	Governor in Council
IAO	Interim Accommodation Order
IPO	Interim Protection Order
NMC	New Model Conference
VCAT	Victorian Civil and Administrative Tribunal
VLA	Victorian Legal Aid
VLRC	Victorian Law Reform Commission
WCJC	William Cooper Justice Centre

EXECUTIVE SUMMARY

The Panel of Inquiry has invited the Children's Court to make supplementary submissions on some of the themes that have emerged during the course of its investigation.

The inquiry considered material relevant to the Children's Court that included:

- the Victorian Law Reform Commission's (VLRC) 2010 Report, the Ombudsman 2009 Report and the Premier's Taskforce 2010 Report;
- written and verbal submissions from a number of community service organisations, professional groups and individuals; and
- matters raised in consultation with the Inquiry's Reference Group and consultation with Department of Human Services (DHS) Child Protection staff.

The court provides the following summary of its supplementary submission:

A court of law

The Children's Court is a court of law and conducts its hearings in an open and public manner. The court provides reasons for its decisions and is accountable for its decision-making through the appeal process. The court does not support replacing the current court structure with a panel/tribunal system. Recent reviews of child protection systems in other jurisdictions have also rejected such change.

An effective and efficient state-wide court

The Children's Court delivers an effective and efficient service to the Victorian community and engages with a wide range of agencies, organisations and groups regarding its work. The court is implementing the recommendations of the Child Protection Proceedings Taskforce and is actively involved in developing Alternative Dispute Resolution (ADR) processes and specialist lists. Developing some of these initiatives will require the provision of appropriate resources. In particular, the court requires the appointment of additional judicial officers, registry staff and administrative staff. The court is currently under-resourced.

Children's Court proceedings

The current use by the Department of Human Services (DHS) of the apprehension process contributes to family members adopting an 'adversarial stance' at the commencement of proceedings. A focus on intervening in a crisis undermines an approach based on the concept of 'cumulative harm'. Cumulative harm is a concept that the court fully understands and applies in appropriate cases.

Contested hearings and court culture

The court exists in an adversarial system that requires the parties to present relevant admissible evidence. Within the constraints of the current legislation, the court has led measures to improve ADR and develop problem-solving approaches. The court acknowledges that the experience for workers appearing in court can be difficult. However, the court is committed to implementing measures to assist in addressing these issues including implementing best practice ADR, developing specialist lists, moving some matters out of the Melbourne court, participating in collaborative training and encouraging measures designed to improve collaborative practice.

Responses to other themes and issues such as reducing the range of orders, children as a party, a court of record, specialist lists, sex abuse cases and high frequency child contact

The court submits that the current system of child protection adjudication should not be fragmented and that its New Model Conference (NMC) process is a good model for enhancing child centred agreements. The court submits that the current range of orders is appropriate and reducing the range will limit the options available to the court and result in more contested hearings. The court agrees with the principle that a child should not be required to attend court unless the child has capacity to understand the proceedings and wishes to attend. The court is developing two specialist lists – a Koori Family Division list and a Family Division sex abuse list. Resources would be needed to implement these proposals.

Children's Court Clinic

The clinic provides expert evidence to the Children's Court that assists in its deliberations. In many cases, the report provided by the clinic is the only independent expert evidence provided to the court. It appears that some people have been critical of the court for simply 'rubber-stamping' clinic recommendations. Recent research shows that such anecdotal assertions are unfounded. It has also been suggested that the evidence of a clinician cannot be tested in court. Such a suggestion is incorrect.

SECTION ONE

A Court of Law

Courts are valued in a democratic community as the third arm of government. Courts are independent of the executive and the legislature and offer open and accountable decision-making in a society governed by the rule of law. A court guarantees all parties the right to be heard and is not subject to the influence of any party no matter how powerful. As one former Chief Justice has noted, "the law restrains and civilizes power".[1] He continued -

> *"When the jurisdiction of a court is invoked, and the court becomes the instrument of a constraint upon power, the role of the court will often be resented by those whose power is curbed. This is why judges must be, and must be seen to be, independent of people and institutions whose power may be challenged before them. The principle that we are ruled by laws and not by people means that all personal and institutional power is limited".*[2]

In its child protection jurisdiction, the Family Division of the Children's Court of Victoria has the statutory power to hear a range of applications and to make a variety of orders upon finding that a child is in need of protection. The legislative provisions of the *Children, Youth and Families Act* 2005 (CYFA) govern the operation of the court.

The court exists in an adversarial system that requires the parties to present relevant and admissible evidence. This includes the ability to call expert evidence. The court does not have an investigative arm like the Coroners Court, nor does it have the power to collect evidence or conduct an investigation independent of the parties involved in the case.

The court has argued for many years for amendments to the legislation to allow for a more inquisitorial or less adversarial approach in child protection cases[3]. In its recent submission to the VLRC, the court proposed legislative amendments modelled on the Family Court's 'less adversarial trial' model.[4] The court also supports facilitated conferencing as a process to assist parties to reach agreement. The court has a long-standing commitment to ADR and, in more recent times, has developed a new model for conferencing that was endorsed by the Child Protection Proceedings Taskforce.[5] The court is now implementing the new model process in Melbourne and would like to expand this model throughout Victoria. Additional resources would be required to support this expansion. The court also supports the development of specialist lists. It is already working on the development of a Koori Family Division list and a specialist list for sex abuse cases in the Family Division. The matters raised in this paragraph are discussed later in this submission.

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[1] "The Rule of Law and the Constitution" , The Hon. Murray Gleeson AC, ABC Books, 2000 at p. 1.
[2] Ibid p. 2.
[3] See the discussion at p. 29 of the court's submission to the VLRC.
[4] See submission to VLRC at pp. 75-83 and Appendix 7 and Appendix 8 at pp. 119-124.
[5] Membership of which included the Secretary of the Department of Justice, Secretary of the Department of Human Services, the President of the Children's Court, the Child Safety Commissioner and the Managing Director of VLA.

Court decision-making

The judicial members of the court engage in judicial decision-making with respect to those applications that come before them. The court hearing is conducted in an open and public manner although there are limitations on the way proceedings can be reported. Proceedings are recorded and parties are able to apply to the court for a copy of the recording upon payment of a fee.

The court provides reasons for its decisions and in the overwhelming majority of final contests provides detailed written reasons. The court is accountable for every decision it makes through the appeal process. As with all courts, "*the reasons for decision are tested and, if wrong, corrected in the appellate courts, not the court of public opinion*".[6]

The relevant legislation that governs the operation of the court provides for a comprehensive system of appeals and reviews of Children's Court decisions. This comprehensive appeal process is available to any party aggrieved by a decision of the court and includes a right of appeal to the Supreme Court from the court's decision to make, or refusal to make, an interim accommodation order (IAO).

In the financial year 2007-2008, the Family Division of the Children's Court made 13,499 orders.[7] Only 12 cases were subject to appeal or review.[8] Two cases involved the complete over-turning of the court's orders and a third case involved a partial over-turning. There were only three cases out of 13,499, where the court's decision was altered by a superior court. Notwithstanding the low number of appeals, there have always been (and most likely still are) some people within the child protection sector who oppose judicial oversight of child protection decision-making.

In his 1993 review of child protection, Justice Fogarty said this:

> *"A significant reason for the existence of the Children's Court is that it stands independent of the Department, the children and the parents and represents the community in the determination of these extremely difficult and delicate issues which are likely to have a profound, perhaps permanent, effect on the lives of the young children involved. Consequently, it is necessary for the court to be independent and to be seen to be independent, especially from the Department, which is a party in every proceeding before it. It must have the confidence of the parents who come before it and the confidence of the community that it will act in an independent way in accordance with the legislation.*
>
> *At times, I was left with the impression in discussion with some officers of the Department, that they would really like to regard the court as a natural extension of the Department and that they are uncomfortable with its independence. Whilst that view was not articulated in a direct way, it is important that even at a subconscious level that attitude be recognised and rejected. I felt at times, both at a high level within the Department and from speaking with some workers, that there was a view that because*

[6] See Chief Justice Warren in *The Age* newspaper at page 15 on 23/9/2010.
[7] This figure excludes orders extending interim accommodation orders and orders under family violence or stalking legislation.
[8] The court has endeavoured to obtain updated information on appeals. However, the registries of the Supreme Court and the County Court advise that they are unable to provide such statistics.

> *a notification of abuse had been investigated by the Department and because it had reached a conclusion as to what order should be made, there was something obstructive about a process by which those opinions and views were independently assessed and at times rejected."* [9]

There are some critics of the court who have come very close to suggesting that the whole system be re-designed because it is too hard for DHS, the party initiating applications in the court. One writer has said of that argument -

> *"We urge caution about a review of the Children's Court in a context where the issue of concern is the stress and trauma this process causes for Child Protection staff. There are many fundamental reasons why a court process is necessary to ensure the protection of vulnerable children and their families – fairness and the rule of law should not be sacrificed lightly for a risk management approach that puts expediency ahead of thoroughness."*[10]

The court accepts that many child protection workers find contested court cases extremely difficult. In the court's experience, the difficulty for child protection workers is due to a number of factors including inexperience, a lack of rigorous training and a lack of support for the task of collecting and presenting evidence, huge workloads and a lack of time to prepare for court. The unhappiness of their court experience is explained by problems within Child Protection's work environment.[11]

In the court's view, proper supervision and support, reduced workloads, allowable preparation time and training in general forensic legal matters would assist in resolving the stress of legal proceedings on child protection workers. The court would be willing to be involved in such training.

The Scottish model

Some submissions to the panel suggested changing the system of adjudication in child protection but provided little detail about how this could work in the Victorian context. Certainly, there was no attempt to grapple with the relevant term of reference of this inquiry and no attempt to deal with the options presented by the VLRC. Indeed, the VLRC report is dismissed in one submission as suffering "from the vice of being a review of the law by lawyers".[12]

The VLRC provided cogent reasons for rejecting a panel model or tribunal system in Victoria[13]. The reasons included acknowledging the constitutional complexities of change identified by the court in its submission. It is reasonable to suggest that those proposing to change a court based system that has served the Victorian community well for many years, would have developed their position in a sophisticated way, would have tried to present evidence to support it and would have tried to engage with the reasoning of the VLRC.

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[9] "Protective Services for Children in Victoria" (1993), pp. 142-143.
[10] Rebecca Boreham, "The chance to be heard", *The Age*, 21/12/09 at p. 17.
[11] For a fuller discussion see the court's submission to the VLRC at pp. 28-29.
[12] See submission to Protecting Victoria's Vulnerable Children Inquiry – Anglicare Victoria, Berry Street, MacKillop Family Services, The Salvation Army, Victorian Aboriginal Child Care Agency and the Centre for Excellence in Child and Family Welfare at p. 52.
[13] See pp. 206-212 of the VLRC report.

The court provided a detailed response to the VLRC on the issue of courts, panels or tribunals. A copy of that part of the court's submission is attached to this document as Appendix 1.

In addition to the matters that were presented to the VLRC the court makes a number of additional points. First, a number of recent reviews of child protection systems in other jurisdictions have looked at panels or tribunals (instead of courts) and rejected them. The Layton review in South Australia, the Wood review in New South Wales and the very recent Family Justice Review in England all investigated other decision making models and determined that they were not appropriate.

For example, the Wood report quoted from a Department of Community Services (DoCS) submission highlighting some of the problems with the Scottish model and continued –

> "*The Inquiry does not however favour a model that includes lay, volunteer panels who often lack the rigour and experience in decision making that is necessary in such a sensitive and complex area*."[14]

The English review noted that the Scottish model "*offers children less sense of permanence*"; has "*issues around consistency of decision making;*" and that introducing such a model would be "*disruptive and would not offer sufficient advantage over our current court led process*".[15]

Second, panels "do not appear to significantly reduce the number of cases subject to adversarial processes, as some 80% of cases end up moving to the Sheriff Court for establishment". [16]

Third, it has been said of the Scottish system that the existence of a number of different decision-making arenas for child protection was "cumbersome" with the Children's Hearing System effectively adding "an additional layer to the child protection system when compared with the system in England and Wales".[17]

Finally, the court submits that it is instructive to look at the outcomes produced by the Scottish system. The court has reproduced a table from the Australian Institute of Family Studies (AIFS) submission to the VLRC. The table presents comparative child protection data from 2007/08 for Victoria, Australia and various other western countries.[18] It shows that, compared to Victoria (and Australia and most other

[14]See Wood report at p.489.
[15] See Family Justice Review Interim Report at pp. 115 and 116.
[16] See p.5 of the "Discussion Paper on Alternatives for Hearings and Making Decisions in Child Protection Matters, DoCS, February 2008 (also p. 28).
[17] Safeguarding and Protecting Children and Young People by Anne Stafford and Sharon Vincent, Dunedin Academic Press Limited, 2008 at p.56.
[18] Briory Horsfall et al, 'The AIFS Submission to the VLRC Review of Victoria's Child Protection Legislative Arrangements (April 2010).

jurisdictions), Scotland has a very high number of children on care orders and a very high number of children in out of home care.[19] The court accepts that this does not necessarily mean the Scottish system is "worse" than the Victorian system. It all depends on "how harmful or helpful it may be to be in care in that system".[20] Nonetheless, in comparing one approach to another the outcomes produced are worth considering.

Table 1: Child protection statistics, rate per 1,000 children (0-17 years), comparing Victoria, Australian average and international populations

Nation	Annual notifications/ reported/ referred cases	Annual total substantiated/ registered cases	Children in notifications /referrals	Children in substantiations/ on child protection register/ plan	Children on care orders/ looked after/ in care of authorities	Children in OOHC/ looked after (not with parents)
Victoria	35.1	5.2	27.6	5.0	5.0	4.3
Australia	67.2	10.8	41.0	6.5	7.0	4.5
United States	43.0	6.3	77.8	n.a	n.a	6.7
England	49.0	3.1	n.a	2.7	5.4	5.0
Scotland[21]	11.8	2.7	n.a	2.3	14.0	8.0
Wales	68.1	4.6	n.a	3.6	7.3	6.4
Northern Ireland	7.1	3.5	n.a	4.8	5.6	4.2
Canada[22]	n.a	21.7	n.a	n.a	9.2	9.0
New Zealand	82.5	19.0	n.a	n.a	n.a	4.2

[19] The calculations for "Children on care orders" and "Children in OOHC" for Scotland are based on the "Statistics Publication Notice: Children Looked After Statistics 2007-2008", a copy of which is attached to this submission as Appendix 2A. A copy of working sheets for the calculations made on this issue for the AIFS paper are attached as Appendix 2B. The court has also attached a graph prepared by the Scottish Government on "Children looked after per 1,000 of 0-18 population by type of placement, March 1987-2008" as Appendix 2C. For completeness, the legal definitions are attached as Appendix 2D.

[20] Quoted to the President of the Children's Court by Professor Dorothy Scott.

[21] See Appendices 2A, 2B, 2C and 2D.

[22] Trocmé et al., 2005. (includes Quebec). Children in care and out-of-home care from Federal/Provincial Working Group on Child and Family Services Information (2005). Child and Family Services Statistical Report 1998-1999 to 2000-2001. Excludes Quebec and Nunavut. The total numbers in care and out-of-home care calculated using provincial/territory estimates and exclude Quebec and Nunavut. There are no national level comparable data for child protection or out-of-home care in Canada. Therefore, this figure is an estimate only for purposes of discussion.

In Summary

- ❖ The Children's Court is a court of law and exists in an adversarial system that requires all parties to present relevant admissible evidence.
- ❖ Criticisms of court decision-making are not supported by appeals by DHS.
- ❖ The court opposes adopting a panel or tribunal system in Victoria. Various recent reviews conducted in other jurisdictions have rejected the suggestion that a court based model should be replaced by a panel or tribunal system.

SECTION TWO

An Effective and Efficient State-wide Court that Engages with the Community

The court submits that it provides an effective and efficient service for the children of Victoria including those in need of protection and child offenders, categories that often overlap. The Children's Court provides a responsive service in both the Melbourne metropolitan area and throughout rural and regional Victoria. The court is able to offer a preliminary hearing to any child apprehended by Child Protection (as allegedly being in need of protection) and to all other parties within 24 hours of the child's apprehension.[23] In conjunction with the Magistrates' Court After-hours Service, it also provides DHS with the ability to seek safe custody warrants for children believed to be in need of protection throughout the whole state 24 hours a day, 365 days a year.

In 2009/10, the court resolved 46.8% of primary applications (or 1,301 cases) within three months of the first hearing and 77.8% of cases within six months of the first hearing. In analysing these figures, it is important to note that the court made 795 Interim Protection Orders (IPOs). These orders require the court to adjourn the proceedings for three months before they can be finalised. The court will also present material later in this submission indicating that the major part of the court's workload involves the determination of secondary applications (close to 7,000 applications). Between 75%-80% of these applications are resolved within three mentions.

The court acknowledges that in the small percentage of cases that proceed to contest, there is an unacceptable delay between the date of a dispute resolution conference and a final contest date. In 2002-03, it was nine weeks. By the end of July 2011, it was 18 weeks. The court has introduced strategies to reduce this delay, including new ADR processes that are discussed later in this submission. One obvious way to address this issue would be to appoint more judicial officers. The court has initiated a budget bid for 2012-13 in which it seeks funding for that purpose.

Children's Court engagement

One submission to the panel has suggested that the court has been slow to engage with DHS (and more broadly), to bring about a 'better' system. The court welcomes the opportunity to refute that assertion. Later in this submission, the court will highlight how it established the working group to develop a model of 'best practice' ADR and how the Child Protection Proceedings Taskforce (the taskforce) adopted the recommendations of that working group. The working group is continuing to meet and oversee the NMC process. The court will also highlight the multi-disciplinary work on the development in the Family Division of specialist koori and sex abuse lists.

[23] The CYFA provides that unless an apprehended child is brought before the court within 24 hours after the child was taken into safe custody, he or she must be brought before a bail justice as soon as possible within that period of 24 hours for the hearing of an application for an interim accommodation order. See sections 242(2) & 242(3).

This section of the court's submission, will focus on the work of the court in implementing the taskforce recommendations, the work of the court in the community, including interagency cooperation and the research projects undertaken in the court during the past five years. Finally, the court will make some general comments on its resource needs.

Implementing taskforce recommendations

The court is progressing the Child Protection Proceedings Taskforce recommendations in accordance with the implementation plan and phased funding. The following sections provide a brief overview regarding the status of those recommendations:

a) *New Model Conferences* - The Implementation and Evaluation Plan provided in August 2010 set out implementation milestones for New Model Conferences in the Children's Court. The phase one rollout was implemented within the set timeframe. Phase two rollout involved the relocation of the Conference Unit by January 2011. This has not occurred because the William Cooper Justice Centre (WCJC) has been unavailable for occupation. Conferences are currently conducted at the Victoria Legal Aid (VLA) Roundtable Dispute Management office or at the Children's Court, pending the completion of building works at WCJC. There is currently no capacity to list more conferences while accommodation is restricted. The court anticipates that the Conference Unit will be relocated by early 2012. There is a full discussion of NMCs later in this submission.

b) *Dispute resolution conferences in the regions* - Regional courts continue to operate under the 'old' model of dispute resolution conferencing – conducted by registrars in addition to their normal duties. There is no funding for the introduction of NMCs outside the metropolitan area. In 2009-10, regional courts conducted 38% of all dispute resolution conferences. Persons appointed as convenors after January 2011 must meet performance indicators developed by the court and included in the schedule to the Order in Council. This year, the Children's Court will fund accredited LEADR training for 21 country registrars to assist them in the conduct of conferencing in their regions.

c) *Legislative amendments* - 'Convenors' are responsible for undertaking all dispute resolution conferences (DRCs) within Part 4.7 of the Act. Under section 227 of the CYFA, all DRC convenors (including any court registrar undertaking convenor duties) are required to be appointed by the Governor in Council (GIC) on the advice of the Attorney-General. The GIC appointment process presents a significant challenge to efficient court administration. Considerable delay and inconvenience is occasioned in the drafting of the relevant orders, briefs and documents necessary for GIC appointments when appointing new convenors, or extending the GIC appointment terms. The court has recommended to government an amendment to the legislation that removes this requirement and allows convenors to be appointed by the President of the court. It is anticipated that this amendment will be included in a Justice Miscellaneous Bill.

d) *Decentralisation of the Family Division* - The court has tentatively secured a two-year booking of two courtrooms at the WCJC. The court hopes to relocate

Family Division cases from the DHS Eastern Region to that venue in 2012. The court is working with the Magistrates' Court in planning for future court facilities to meet the growing demand in the Casey and Wyndham areas. The Children's Court is determined to build capacity to conduct Family Division sittings in venues outside the Central Business District (CBD).

e) *Improving preparation for court* - Various forms and processes have been introduced at Melbourne Children's Court and at the Moorabbin Justice Centre, which have improved preparation by the parties and supported early information exchange.

f) *Facilitating children's participation without the need for them to attend court* - A Child Participation and Representation Working Group has been formed by the ADR Working Group. The Working Group has strong representation from DHS. The Principle Practitioner within DHS (Robyn Miller) is a member of the group.

g) *A more collaborative approach between court users* - The court has been consulted by DHS and VLA during the development of a Code of Conduct.

h) *Improving the physical environment of the court* - The court cannot reduce the physical burden on the Melbourne Children's Court until the WCJC is operational. Once the relocation of part of the court's caseload is finalised, the court can use allocated funds to make minor improvements to the Melbourne building. The court is involved in the Legal Services Master Plan that is concerned with the infrastructure and capacity of suburban court venues.

i) *Improving legal and administrative processes to reduce time in court* - Legislative reform that saw the repeal of the 21-day limit for certain types of IAOs and the abolition of suitable person undertakings has improved process within the court and, one assumes, has reduced file handling within the Child Protection Litigation Office (CPLO). In addition, an electronic diary for court listings has been implemented at Melbourne to assist in reducing delays.

Engaging with the community

Judicial officers of the Children's Court regularly engage with groups of tertiary students studying Social Work, Community Services Work, Children's Services and Maternal and Child Health. Some of these students may gain employment working in child protection and associated areas of the welfare sector. Magistrates also regularly talk to groups from community organisations including foster carers.

The court maintains a website that is available to anyone who is interested in its work. The website includes comprehensive Research Materials, published papers, de-identified decisions on cases that involve points of principle and general information about the court. The website also has a virtual court site that includes videos, virtual tours, information on court processes and tips for going to court. The court is also part of a Courts Portfolio Community Engagement Working Group, whose efforts this year include developing a strategy for community engagement.

A collaborative approach to professional development

On a monthly basis, a magistrate facilitates an information session with a group of new child protection workers at Melbourne Children's Court. This session forms part of the DHS 'Beginning Practice' training program for new workers. Victorian Aboriginal Child Care Agency (VACCA) workers often attend these sessions. The court also has a strong relationship with DHS Child Protection and Youth Justice Professional Development Unit.

In addition, the court regularly invites guests to speak on various aspects of child protection. Over the past 12 months, guests have included Muriel Bamblett and Suzanne Cleary (VACCA), Ric Pawsey (Take Two), Dr Bruce Perry (American psychiatrist and expert on child trauma), Dr Marion Brandon (University of East Anglia) on child deaths and serious injury through child abuse and neglect, Karen Mapleston (DHS) on family coaching, and representatives from the Northern Territory on indigenous family group conferencing. The court also recently spent a day at the Queen Elizabeth Centre talking with staff about the work of QEC and the work of the court.

The Training Board

In 2010, a board of senior management staff from the court, DHS, Department of Justice (DOJ) and VLA was established to examine ways of delivering training and professional development to agencies and lawyers working in the Family Division of the Children's Court. On 16 and 17 June 2011, the Training Board was responsible for the inaugural Child Protection Legal Conference. The conference was a significant achievement in delivering cross-disciplinary professional development.

The Secretary of the Department of Justice and the Secretary of the Department of Human Services opened the conference. The program opened with a panel discussion and workshop on 'A day in the life of...' in an effort to aid all system participants to gain a better understanding of each other's roles. The experience of children, the role of legal representatives and the concept of working collaboratively were also examined.

The board has considered the views of child protection workers, set out in the *Child Protection Workforce: a Case for Change* report, and feedback gathered from participants at the Child Protection Legal Conference. The main themes identified for prioritisation include:

- facilitating future Child Protection Legal Conferences (for all court participants);
- arranging quarterly workshops/practice forums for court staff, VLA, CPLO lawyers and child protection workers on particular topics (e.g. interviewing children, ADR negotiation, child development and trauma); and
- improving training for child protection workers in evidence gathering, report preparation and court appearances.

It is anticipated that the board will continue to make recommendations to DOJ to inform its annual expenditure on multi-disciplinary training. In addition to facilitating these events, each agency represented on the board is committed to exchanging information, to ensure that those working in other parts of the system have access to training and expertise.

Multi-disciplinary training

With the introduction of NMCs in August 2010, the court participated in extensive joint training sessions for groups of practitioners including:

- DHS child protection practitioners;
- VLA lawyers;
- private legal practitioners;
- DHS CPLO lawyers; and
- barristers.

The training was conducted at the conference centre at VLA and covered topics such as the background to the changes, the guidelines for NMCs and the expectations regarding the roles and behaviour of participants. The training sessions provided an opportunity for practitioners to improve their understanding of other people's roles within the process and to observe a mock NMC.

In addition, the court was involved in four training sessions held for child protection practitioners from the Preston office prior to the rollout of NMCs in the North and West Metropolitan Region. Additional training sessions will be scheduled prior to the rollout of the NMC process in the Eastern and Southern Metropolitan Regions.

Court delivered training/professional development

The President and magistrates regularly address conferences, seminars and public forums in relation to the work of the Children's Court. Some of these include:

- facilitating court skills workshops in all metropolitan and regional offices of DHS to improve understanding of the court process;
- conducting regular lectures at Monash University and Leo Cussen Institute;
- presenting on NMCs to the Australasian Statutory Child Protection Learning and Development Group;
- attending agencies such as the Queen Elizabeth Centre to present information about the work of the Children's Court; and
- involvement in bail justice training.

Inter-agency collaboration

The ADR Working Group was established in December 2008. This working group has ongoing meetings every six to eight weeks involving the court, VLA, Child Protection, CPLO, private solicitors and the Victorian Bar. The Koori Family Division Working Group has representation from Aboriginal agencies, DOJ, DHS and the court. The Sex Abuse Working Group also has broad representation and will be discussed more fully later in this submission.

The State Manager

The creation in 2010 of the State Manager role in the Children's Court has enabled the court to engage with stakeholders at the highest management level. The State Manager liaises regularly with DHS, the CPLO and VLA to identify trends, issues and opportunities that may affect the Children's Court state-wide operations. The State Manager also assists in establishing consistency in the regions, supportive relationships in those areas, and organising court user forums at venues outside of Melbourne.

Research projects

The Children's Court regularly hosts researchers with an interest in the work of the court. Researchers, often completing PhD studies, are required to seek the approval of the President for the research project. They are also required to seek approval from the DOJ Human Research Ethics Committee and to sign a deed of confidentiality with the court. Many researchers will spend a day or days per week at the court over a period of months extracting data from court files and from the court's computerised case management system. The following research projects have been conducted at the court during the last five years:

Year	Research Project
2011	Dr Jess Dart, Clear Horizon Consulting Pty Ltd. Project entitled "Monitoring and Evaluation of New Model Conferences in the Children's Court".
2011	Dr Stuart Thomas, School of Psychology & Psychiatry, Monash University. Project entitled "The Changing Face of Youth Violence" (Children's Court Clinic data).
2011	Ms Briony Horsfall, Swinburne University of Technology. Project entitled "Children's Voices in Decisions About Their Best Interests: The Children's Court Context"
2011	Ms Aino Suomi, University of Melbourne. Project entitled "A Comparison of Clinicians' Recommendations and Magistrates' Court Orders for Protection Matters Referred to the court Clinic by Magistrates of the Children's Court of Victoria".
2011	Associate Professor Jeanette Lawrence, University of Melbourne. Project entitled "Analysis of the court's Processing of Secondary Protection Applications for Young Children Returned to the Melbourne Children's Court After Final Orders".
2010	Ms Greta Clarke, Victorian Aboriginal Legal Service Co-operative Ltd. Project entitled "Female Koori Youth and Diversionary Mechanisms: A Way Forward".
2010	Sentencing Advisory Council Project entitled "Ten Years of Sentencing in the Children's Court of Victoria".
2010	Ms Lillian De Bortoli, Monash University. Project entitled "Establishing and Comparing the Validity of the Structured Decision Making (SDM) and the Child Protection Risk Assessment (ChiPRA) Instruments Used to Assess Risk in Child Protection Practice."
2008 – 2010	Mr Max Travers Project entitled "The Sentencing of Children: Professional Work and Perspectives".
2008 – 2010	Associate Professor Rosemary Sheehan, Monash University and Professor Allan Borowski, La Trobe University Project entitled "Challenges, Possibilities and Future Directions: A National Assessment of Australia's Children's Courts".
2008 – 2009	Professor Allan Borowski, La Trobe University. Project entitled "Evaluation of the Children's Koori Court".
2007	Dr Teresa Flower & Dr Rosemary Purcell, Monash University Project entitled: A Study of Adolescent Stalkers: Clinical and Offence Characteristics".
2006	Dr Liam Tjia, Monash University. Project entitled "The Evidence Given by Expert Medical Witnesses in the Children's Court of Victoria Regarding Inflicted Injury and Future Research".
2006	Dr Rosemary Sheehan, Monash University and Magistrate Greg Levine. Project entitled "Parents as Prisoners: Maintaining the Parent/Child Relationship"

The resource needs of the court

In 2007, Boston Consulting Group (BCG) recommended to the former government that the Children's Court be funded (over three years) for four additional magistrates, a judicial registrar, 10 registry staff, one staff member to support the judicial registrar, a research officer, a pre-hearing conference coordinator and an assistant registry manager.

Over time, four additional magistrates were appointed, based at Melbourne. Two of them were appointed as acting magistrates. Generally, when a magistrate is appointed, there is related funding for 2.5 registrars. However, this did not occur for the Children's Court because two of the appointments were acting magistrates - even though they were (and are) working full-time. Apart from funding five registry staff no other positions were funded. This has placed considerable pressure on the court's Melbourne registry.

The staffing structure of the Children's Court does not contain any positions for research, project development, business analysis, or support for the judiciary and senior management. The court needs funding support to build capacity in these areas, to progress initiatives and business improvement.

The court has estimated that it immediately needs funding for a Chief Executive Officer and an Executive Assistant (Grade 3) to the President, a Research Officer (Grade 4) and a Project Manager (Grade 5). The court has provided this information to DOJ. The court is developing a Budget and Expenditure Review Committee (BERC) bid that seeks funding for three magistrates, nine registry staff, and the administrative positions mentioned above. A Research and Policy Officer position was recently advertised, but the court will fund this position internally.

The Children's Court budget allocation only funds operations at the Melbourne Children's Court and there is no designated position or definitive resource allocation for the jurisdiction's operations outside the CBD. The 2010-11 budget outcomes for the court were less than 1% in deficit. The Children's Court Clinic (funded from the Children's Court budget) continues to be under-funded (39% deficit in 2010-11).

In Summary

- The Children's Court provides an effective and efficient service for the children of Victoria. It is able to conduct preliminary hearings for any child apprehended by DHS within 24 hours of the child's apprehension or on the next court sitting day.
- The Children's Court engages with DHS, community groups and other organisations on the work of the court. The court also participates in a training board delivering joint training and professional development.
- The court is currently progressing the recommendations of the Child Protection Proceedings Taskforce.
- The court participates in working groups on ADR, Koori Family Division cases and sex abuse cases.
- The court is under-resourced and will need funding assistance if it is to reduce delay, better support country courts, expand the NMC model throughout the state and conduct specialist lists.

SECTION THREE

Children's Court Proceedings

How matters come before the court

It is important to know how the court becomes involved in child protection matters. The Family Division of the Children's Court becomes involved in the life of a child when DHS decides to invoke the court's jurisdiction. It may do this by issuing a notice for a future hearing or alternatively, by apprehending a child and seeking immediate orders from the court in relation to the child's placement.[24]

On a proceeding initiated by notice, the placement of the child remains unaffected, at least until the first mention date of the case and generally throughout the life of the case. On an apprehension, the court will either approve interim orders where all parties have negotiated an appropriate resolution, or alternatively determine where the child is placed (for example, with the parents, a suitable person or in out of home care) pending the determination of the application. The court determines these matters by way of 'submissions' rather than by the calling of witnesses and the cross-examination of witnesses. This process (which has been endorsed by the Supreme Court) acknowledges the difficulties inherent in the daily management of urgent applications. Any party aggrieved by a decision of the court, can appeal to the Supreme Court for an immediate and urgent hearing on the placement issue. Alternatively, a party can book the matter in with the court for an 'evidence based contest'.

Interim placement of children is by way of an IAO. These orders provide for temporary placement of a child with a parent, a suitable person, in out of home care, in secure welfare, with a declared parent and baby unit or in a hospital. The court may impose any conditions it considers to be in the best interests of the child. Determining interim placement is a significant part of the court's workload. In 2009-10, for example, the court made 5,494 IAOs although it is fair to say that a significant number of these were uncontested.

In making decisions about placement of children, 'the best interests of the child must always be paramount'[25]. When determining best interests the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered. Section 10(3) of the Act lists 18 further matters for the court to consider in determining what decision or action is in the best interests of the child.[26] The paramountcy principle has recently been the subject of extensive judicial analysis in *DOHS v Sanding.*[27]

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[24] The court also hears secondary applications. These are applications to extend, vary, revoke or breach existing orders.

[25] s.10 of the CYFA.

[26] The CYFA also details additional decision-making principles for Aboriginal children. In making a decision or taking an action in relation to an Aboriginal child, DHS must consider the principles in s.12. If it is determined that it is in the best interests of the child to be placed in out of home care, DHS must, in making the placement have regard to the advice of an Aboriginal agency, the criteria in s.13(2) of the Act and the principles in s.14 of the Act. The principles in s.13-14 are also relevant to the court's decision-making.

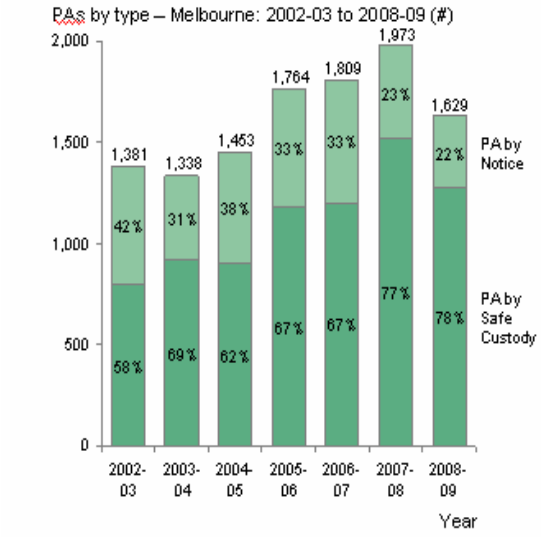
[27] [2011] VSC42 per Bell J.

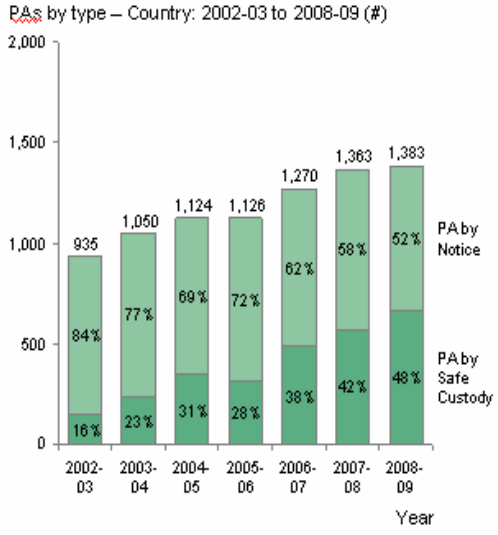
Applications by safe custody (apprehensions)

Applications by safe custody (apprehensions) have become the principal way for DHS to bring a case before the court. The court agrees with the VLRC that this should not be the preferred method of bringing a case to court.

In 2010, BCG conducted some research on this issue.

Graph 1: Primary applications (protection applications) by safe custody in Melbourne and the country





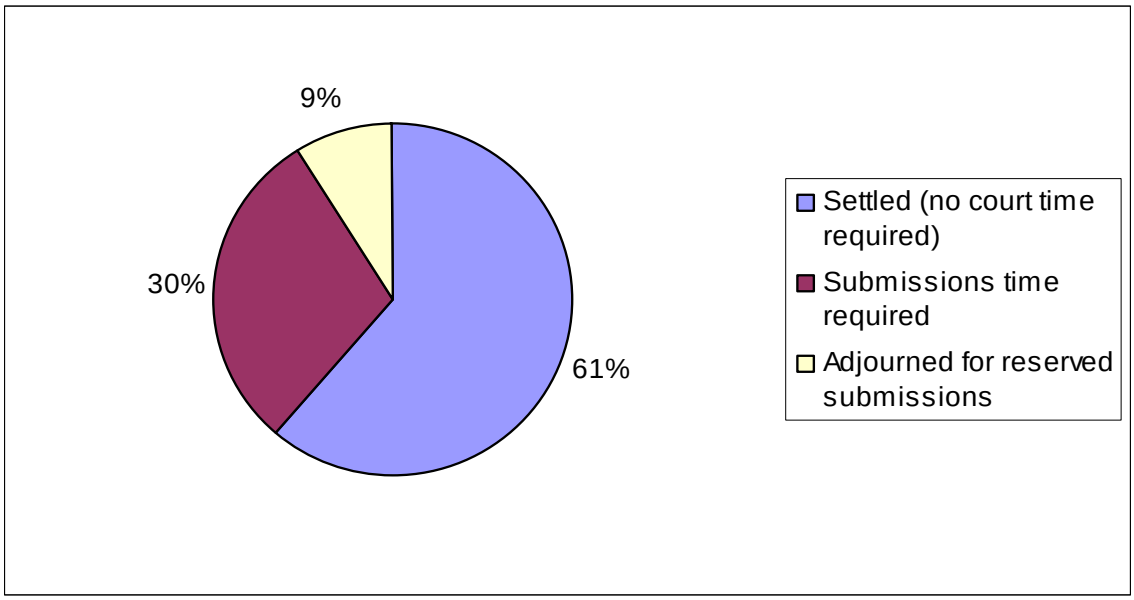
These graphs show Child Protection's increasing use, over time, of the apprehension process. By 2008-09, close to 80% of matters listed at Melbourne commenced by 'apprehension'. This is significant because the removal of a child from the family and coming to court within 24 hours to seek orders on the child's placement is generally an extremely confronting and distressing process for families, children and child protection workers.

When the matter comes before the court, emotions are raw and, unsurprisingly, there is often a sense of grievance and opposition from family members. This process contributes to family members adopting an 'adversarial' stance at the very beginning of the court process.

In the court's experience, the majority of lawyers allocated to parents/guardians and children after the case arrives at court assist the process by commencing negotiations with DHS on an appropriate resolution of the case. This explains why many apprehensions are resolved on an interim basis without recourse to a submissions hearing.

67 applications by safe custody were listed at the Melbourne Children's Court between 10 and 24 August 2011. 41 of those applications settled, 20 required submissions time and a further six applications were adjourned for reserved submissions.

Graph 2: Applications by safe custody that were resolved at Melbourne Children's Court between 10 and 24 August 2011



In its submission to the VLRC, the court estimated that in about 50% of apprehensions, children are returned to parent/s or placed with a suitable person (family member or friend). It should not take a court event to bring people with information about the family together or to start a conversation about how best to protect the child. This is part of the VLRC point about having properly structured interventions through Family Group Conferences early in the process.

There is a further point to be made about the current DHS practice of proceeding by way of apprehension. Work undertaken by BCG reveals that the time taken between intake and filing of an application by safe custody has grown over the past few years. In 2006-07, the average time from intake to filing was 20 days. Three years later, this had increased to 42 days.[28]

During the same period, the number of cases substantiated by DHS fell from 6,939 to 6,815. This period between intake and filing of an application is an important time and it needs to be subject to detailed research. If substantiations are falling and applications to the court are growing, DHS must be focusing on the hard cases. It is clear that DHS already know a significant percentage of these families. It is reasonable to ask why DHS is not bringing the families to court before the crisis event that precipitates the apprehension. That would be more consistent with good practice and more consistent with a sound understanding of cumulative harm.

[28] See BCG materials provided to the Child Protection Proceedings Taskforce.

It appears to the court that the time between intake and filing of an apprehension is a period where many cases seem to enter a 'waiting time'. In the BCG work for the Child Protection Proceedings Taskforce it is noted that the number and proportion of applications made after more than 70 days from the date of intake report is increasing, "*indicating some child protection workers may be waiting for a development in the case to warrant*"[29] apprehending the child.

This observation resonates with the experience of the judicial officers in the court. Regularly the court is presented with apprehensions that centre on a crisis event.[30] In this approach, DHS continues to focus on 'event' based interventions rather than intervening earlier to support the family. Clearly, DHS regards the authority of an order as a powerful tool in encouraging family compliance.

Cumulative harm

Cumulative harm is a concept well understood and applied by the court. Some submissions[31] maintain that the court does not understand the concept. This assessment does not reference any research, and the court can only assume that it is based on anecdote.

'Cumulative harm' was introduced into the legislation by section 162(2) of the CYFA which provides that for the purposes of proving harm pursuant to subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances. From the court's perspective, this legislation was hardly necessary as it had long been part of the common law and therefore applied by this court. In an English case involving the interpretation of very similar English child protection legislation, Lord Nicholls of Birkenhead [32] said:

> "*Facts which are minor or even trivial if considered in isolation, when taken together, may suffice to satisfy the court of the likelihood of future harm.*"

Ms Robyn Miller[33] when explaining the rationale for the inclusion of section 162(2) in the CYFA said as follows:

> "*One of the unintended consequences of the practice, which developed from the Children and Young Persons Act 1989, is that intake and initial investigations were increasingly based on episodic assessments, which were focused on immediate risk and safety, and less focused on the developmental wellbeing of children, and patterns of abuse and neglect over time.*"[34]

The court agrees with this analysis. The legislative provisions were not introduced because of some problem with the court's application of the principle but because

[29] Child Protection Proceedings Taskforce (Background Materials) 19 February 2010. BCG.
[30] This would be consistent with the very high rates of proof in Victoria under the headings physical harm and emotional harm.
[31] See, for example, the submission of Professor Humphreys.
[32] *In re H. & Others (Minors)* [1996] AC 563, 591.
[33] The Principal Child Protection Practitioner, DHS.
[34] "*Cumulative Harm: A Conceptual Overview*" (December 2006) at p. 11.

child protection workers were not applying the principle in their daily work. Unfortunately, the problem with workers intervening in a crisis and using the crisis as the basis for the apprehension is, as discussed above, continuing. One does not have to look far to find evidence of the failure within Child Protection to give cumulative harm the priority it should have.

The recent finding of the State Coroner in the case of Aaron[35] shows how, in 2008, Child Protection were still locked into 'episodic responses' and failed to comprehend the concept of cumulative harm and respond appropriately. The State Coroner said this at pages 45 and 46 in relation to 'episodic responses/lacking analysis' –

> 83. *The DHS material reveals years of serious reports of child protection concerns for Aaron. The DHS interventions are characterised, at best, by a few months of involvement, some apparent level of "settling" of the issues and then a withdrawal with no apparent ongoing monitoring of Aaron's safety and well-being. The 'episodic' nature of DHS intervention into and withdrawal from Aaron's life over the years without a more strategic and planned involvement was not desirable and failed to take into account the need to look at Aaron's history and assess his behaviour and risks to his emotional and psychological safety in the context of his own history, rather than against some bench mark of 'high risk adolescents' generally.*

In relation to 'Lack of evidence of comprehension of cumulative harm', the State Coroner stated:

> *84. Whilst it is not difficult to understand how and why this may happen a few times, by the time DHS are receiving notification 6,7,8,9 and beyond, it is simply unacceptable that, with all of the expertise available to a child protection authority, it does not, at the very least comprehend the likely risk of cumulative harm for Aaron from years of exposure to the disruptions and issues detailed above.*

In relation to 'Failed to seek Statutory Intervention' the State Coroner reported -

> *85. When Aaron was 5 to 6 years old, he was subject to his seventh child protection notification. This notification was not from a concerned member of the public, this notification came from the Family Court of Australia, pursuant to its statutory powers. The end result of that report was that the concerns were 'not substantiated'. Aaron acquired seven more notifications after this. One cannot help but wonder at what point a reasonable child protection worker, looking at Aaron's history might have considered that, given the extraordinary number of notifications about this boy's risk of harm inside his family and the increasingly concerning nature of those reports as he reaches adolescence, that the patterns inside his family were not amenable to on-going voluntary involvement."*

[35] The findings are attached to this submission as Appendix 2. It is cited as Coroners Court reference 1430/08.

In November 2009, the Ombudsman delivered his report on the DHS Child Protection Program[36]. There is a discussion of cumulative harm at paragraphs 208-213. It commences –

> *"Throughout my investigation, it has been apparent that the department's capacity to respond is so stretched that cumulative harm to children has not been given the priority and attention that it should" A case review conducted by the Principal Practitioner identified several barriers for the department when recognising and responding to cumulative harm:*
>
> - *an event-orientated approach to child protection can result in practitioners (child protection workers) failing to observe or be able to act in response to a pattern of maltreatment*
> - *information is not carried over from one notification (report) to the next and therefore information is lost over time*
> - *assumptions are made that the problems presented in previous notifications (reports) are resolved at closure*
> - *risk frameworks consider pattern and history with the aim of predicting future behaviour of carers and likelihood of harm rather than establishing the cumulative harm suffered*
> - *IT systems summarise and categorise previous contact, and since workloads in Child Protection are demanding the assumption is made that reading case files is neither necessary nor a priority*
>
> *As I understand it, because the department and Child First separately received reports in relation to children, there may be times when the pattern of reports is not captured and therefore cumulative harm is not properly assessed. My investigators identified several cases where insufficient consideration had been given to the issue of cumulative harm.*

The court refers to case study 11 in the Ombudsman's report where Child Protection referred a matter to Child First with little evidence that the history of concern about the family was properly considered. In relation to that case, the Ombudsman's report stated –

> *"The department has a performance measure requiring a unit manager to review a case if there have been more than two reports within a 12-month period. The review is intended to determine whether further investigation is required on the basis of cumulative harm. In 2008, the department conducted a survey for the purpose of evaluating compliance with this performance measure and found only 52% compliance state-wide with this requirement. It was noted that there were 'significant variations between the regions' and the process had 'not yet become consistently embedded in practice across the state.'*

The court also refers to the most recent report of the Victorian Child Death Review Committee[37] which identified "the disjunction between the policy intention to respond more effectively to cumulative harm and practice that was actually occurring in relation to vulnerable adolescents which overall remains episodic and minimal.

[36] Ombudsman Victoria – Own Motion Investigation into the Department of Human Services Child Protection Program, November 2009 pp. 40-41.
[37] Annual Report of Inquiries into the Deaths of Children Known to Child Protection 2011 (Victorian Child Death Review Committee) page 47.

Assessments focus primarily on current events and do not give sufficient attention to family histories and longstanding patterns of functioning".

In the court's experience, Child Protection practice is still geared, for whatever reason, to a crisis event not the family history. The court also believes there is some confusion within Child Protection about the use of the words 'cumulative harm' in the court. There are six grounds for proving that a child is in need of protection. Cumulative harm is not one of the grounds. It is clear from s.162(2) of the CYFA that cumulative harm is an evidentiary concept for the purposes of proof under one of the six grounds in s.162(1). Just because in a particular case the court does not explicitly refer to 'cumulative harm' in finding a particular ground proved, does not mean that the court does not understand or apply the concept.

In Summary

- The court submits that there is a need to move away from apprehensions as the principal way of bringing families before the court.
- Changes to the apprehension process, together with a focus on the importance of conferencing and the development of specialist lists, will result in a less adversarial environment and be of benefit to children, families and child protection workers.
- The current apprehension process is affecting DHS ability to focus on 'cumulative harm'.

SECTION FOUR

Contested Hearings and Court Culture

One of the themes that has emerged from the inquiry is the claim that the Family Division of the court is too 'adversarial'. The court notes that this was something that the taskforce[38] considered and commented on -

> "*The Ombudsman's report stated that the Children's Court was overly adversarial. In his report on the NSW child protection system, Commissioner James Wood expressed the view that the term "overly adversarial" was unhelpful when considering how any jurisdiction might improve its processes. The reason for this, he stated, was that "it was not always clear what was meant by 'adversarial' and it seems likely that the term means different things to different people who use it."*
>
> *Commissioner Wood preferred an approach that considered which areas of practice and procedure might require change and improvement and he used that as the starting point for his recommendations, rather than whether the court was 'overly adversarial'.*
>
> *The taskforce found Commissioner Wood's approach helpful.*
>
> *"If there is an issue about the adversarial process, the Children's Court would welcome legislative recognition of a less adversarial approach. The recent amendments to Division 12A of the Family Law Act 1975 prescribing less adversarial trials offer one possible model for the Children's Court.*
>
> *Short of conducting less adversarial trials, the taskforce recommends implementation of a new dispute resolution process in the Children's Court."*

The court notes that some submissions made to the inquiry seem to suggest that Victoria is somehow more adversarial than other Children's Courts in Australia, the United States, England and Wales. The court urges caution in the acceptance of such a claim. Each child protection authority maintains that their system is too adversarial. Complaints of this type were made to the Wood review in NSW, the Layton review in South Australia and, most recently, to the Family Justice Review, in England and Wales. [39]

This does not mean that the Children's Court does not support an inquisitorial approach or less adversarial system. Clearly the court does. The court has proposed detailed legislative amendments to achieve that goal.[40] The court simply notes that wherever courts determine child protection cases, there have been vocal critics of that

[38] Membership of which included the Secretary DOJ, Secretary DHS, the Child Safety Commissioner, the Managing Director of VLA and the President of the Children's Court. The quote comes from p. 19 of the Taskforce report.
[39] Each of these inquiries rejected the notion of moving to a panel or tribunal system.
[40] See footnote 4 of this submission.

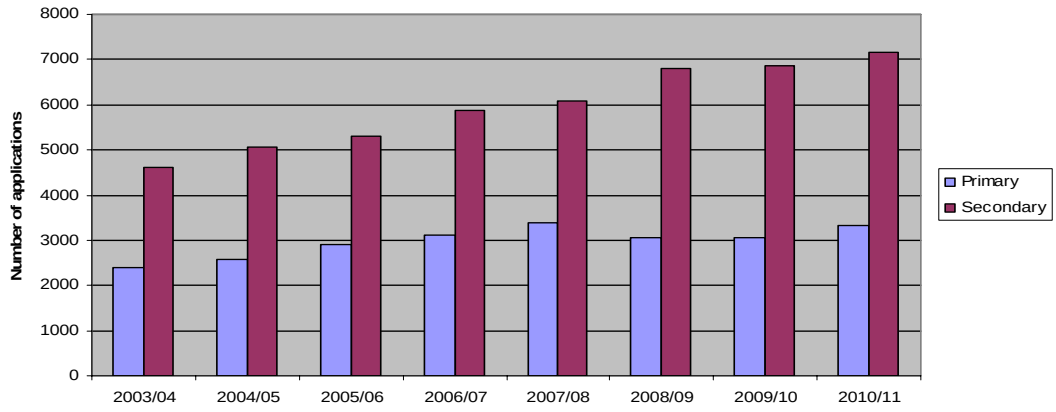
model from within child protection services and community agencies. The court made submissions to the VLRC on the adversarial nature of the court process and refers the panel specifically to the discussion at pp. 28 – 31 of that submission.

The court proposes in this submission to comment further on contested cases, court culture, and the implementation of alternative dispute resolution processes.

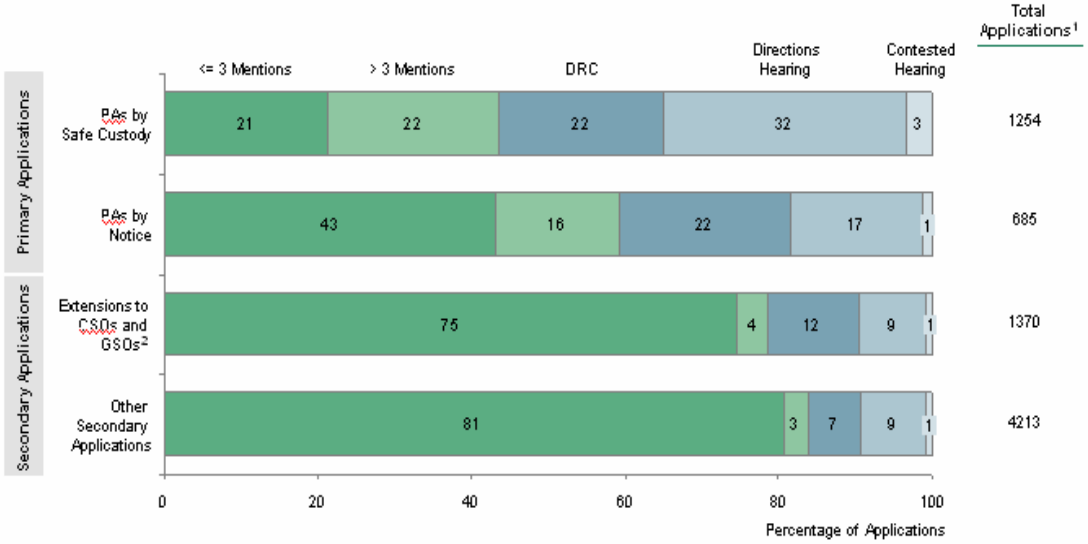
Contested cases

Every year, the Children's Court resolves more secondary applications than primary applications.[41] These applications include breaches, extensions, variations and revocations and constitute a significant part of the court's work.

Graph 3: Numbers of primary and secondary applications from 2003-04 to 2010-11



Graph 4: Primary applications by safe custody most likely to proceed past mention, grouped by furthest point reached in court process – 2008-09 (%)



1. All Applications for which final orders were made in 2008-09. This figure excludes Applications relating to siblings with identical hearings 2. Custody to Secretary Orders and Guardianship to Secretary Orders

Note: Percentage of Applications that proceeded to Final Contests based on the percentage of Applications listed for Final Contest that actually run as Final Contest hearings: Children's Court Monthly Listing reports

Source: Children's Court Registry data; BCG analysis

[41] The numbers in graph 4 are lower than those in graph 3 because BCG counted families rather than individual applications made for each child within the family.

Graph 4 confirms that only a very small percentage of all applications before the court proceed to a final contest. 99% of secondary applications resolved without the need for a final contest. Depending on whether the matter was an extension or some other type of application, between 75% and 81% of these applications resolved within three mentions. The progress of these matters is best described as swift and uncontentious.

Of the primary applications, only 1% of protection applications by notice proceeded to final contest. Significantly, in these cases the child is usually still within the family and this seems to enable the cases to proceed more smoothly than the apprehensions. On the other hand, of the applications by safe custody, only 43% resolved at a mention stage (22% had more than three mentions before resolution) and 3% proceeded to final contest. The Melbourne court is trying to do two things to manage these cases in a way that will address delay and reduce the number of contests. First, cases that have not resolved by the second mention are referred into the NMC process. Second, the NMC process provides the parties with an opportunity to work out solutions in a forum that is non-adversarial.

The court provides this information to support its submission that one of the problems with our current system, setting a case on the path to fractious disputation, is the current use of apprehensions. The apprehension process sets family against worker in a way that has potential to carry through the process. If there is a distorting influence in the court system, it comes from the over reliance on apprehending children and bringing them to court for immediate orders with conditions.

At the public sittings of the inquiry in Melbourne on 5 July 2011, Professor Scott made the point that –

> "*the model you're suggesting from Scotland is fundamentally not designed for the typical situation coming before the Children's Court…*"

As part of her response, Ms Cronin stated –

> "*A large part of what we're talking about is actually the need to move the entire system more to an early intervention, moving the whole system further up because you're right, they are different cases, but what we want to look at is shifting the system so that there is a much narrower gateway into removing children and putting them in out of home care".* [42]

If there is going to be a strong investment in early intervention that results in less removal of children and placement in out of home care (which would be a good thing) there will be, presumably, much less reliance on apprehensions and, as a result a much easier and gentler court process.

[42] See transcript of evidence from 5 July 2011 at page 127.

The adversarial system and court culture

When talking about an adversarial culture, it needs to be remembered that workers (or experts or anybody else) are not required to give evidence at the Children's Court very often. This submission has already highlighted that once parties start talking to each other at court, many of the placement decisions are agreed without the need for submissions time.[43] If an apprehension does go to a submissions contest, the court does not hear evidence and the matter proceeds on submissions from counsel.

Of those matters that then go to an evidence based IAO contest, approximately 80% settle before the contest date or on the contest date. The BCG research confirms that the most difficult cases are those that have commenced by apprehension and yet only 3% of these matters 'run' as contested hearings.

Those cases that do run as contested hearings have been through ADR and through a directions hearing. They are the hardest cases. The parties have been unable to resolve the case and some or all of the facts are not agreed. Because they are the hardest cases those who give evidence in them must expect to have their views and assessments scrutinised. The outcome of the cases will be of profound importance to the child and the future of the family unit.

All parties have the right to a proper hearing of the evidence and the right to challenge the evidence. In these cases, those who are representing families or children will often strongly challenge evidence given by important and central witnesses such as the child protection worker or an expert witness. The court understands how a young and inexperienced child protection worker – poorly trained for court, overworked, under-prepared and poorly supervised – may find the whole process confronting and overwhelming. In such a case, the process will be resented. Similarly, some experts, particularly those not used to court process and having their professional opinions challenged, resent the process and see it as disrespectful.

The Ombudsman highlighted a child protection service that is under extreme pressure. Some of the significant problems are exposed in cross-examination in a courtroom. Issues such as the compromised capacity of Child Protection to investigate comprehensively the families reported to them, how the critical response to children in need of care is sometimes inappropriate and that case planning for children in care is often inadequate and poorly executed.

In its submission to the VLRC, the court highlighted the range of functions that Child Protection has to perform. Child Protection is:

- the authority charged with the responsibility of delivering assistance to children and families;
- the investigating body for reports made to DHS;
- a party to proceedings in the Children's Court; and
- the agency that generally initiates and conducts the proceedings including initiating proceedings for alleged breach of court orders.

The court believes that this broad range of not entirely complementary functions can make the work of the child protection worker very difficult and does from time to

[43]This is one reason why the VLRC presented its option of structured, early negotiation by way of Family Group Conference.

time result in a lack of objectivity in the way in which matters are litigated in the Children's Court. It sometimes makes it difficult for DHS to perform properly the function of a model litigant.[44] The court agrees with the discussion in the VLRC report that Child Protection should not have to perform all these roles.

The submission of the CPSU to the panel highlighted another problem for the child protection witness that the court observes reasonably frequently; a problem that clearly causes stress. The union submission says –

> *"All caseworkers need to have the right to write notes of their view/assessment on the appropriate file or CRIS record where their recommendations are overturned and they feel the need to do so. They also need to be able to honestly represent their view if asked in court, they cannot be asked to perjure themselves to maintain the Department's position, but must ensure they communicate in addition what the Department's position is."*[45]

It is important however, that we do not confuse the strong challenging of evidence with a view that the court is 'derisory or disrespectful' of child protection workers. The implication seems to be that the court is kind and respectful of parents, children, lawyers, and everyone else in the process but not the child protection worker or witnesses for DHS. The suggestion that judicial officers do not take the judicial oath seriously and do not understand the difference between proper and improper behaviour towards witnesses in court is rejected. In relation to this issue, the President of the Children's Court has received two complaints in the last five years about the conduct of judicial officers at the Melbourne court.

One particular submission to the panel is critical of some judicial officers. The court would be interested in knowing whether the writer based her views on active or inactive research. Put simply, how many contested hearings had she observed? How many judicial officers had she observed in court? It should also be noted that the majority of lawyers who represent families and children at contested hearings are barristers who are bound by the particular ethical obligations imposed upon them by the Victorian Bar. Rarely do the solicitors at Melbourne – who seem to be the lawyers accused of being part of a 'culture' – conduct contested hearings.

As the court observed earlier in this submission, difficulties faced by child protection workers in their dealings with the legal process are not merely a Victorian phenomenon. They are universal. It is worthwhile quoting The Honourable Judge Leonard P. Edwards' opinion about the very similar American experience:

> *"The court system presents problems for child protection agencies that they continue to struggle with today. First, in order to participate in court proceedings, they have had to create and maintain staff familiar with the law. This has meant hiring lawyers to present the agency position in court as well as developing legal expertise among the social worker staff to interpret court orders. Second, to obtain approval for their actions, child protection agencies have been required to learn how legal decisions are made, how evidence must be gathered, and how court procedures dictate*

[44] Refer to Chapter 4.1.6 in Research Materials on the website of the Children's Court of Victoria: www.childrenscourt.vic.gov.au.
[45] See page 36 of the CPSU submission.

> *the presentation of evidence. Third, they have had to learn about the formality of court proceedings, the power of the judge, and the power that attorneys have to shape court proceedings.*
>
> *For the line social worker, the formality of court proceedings and the adversarial process have presented the most difficult problems. Nothing in their training prepares social workers for evidence collection, report writing, and direct and cross-examination under the rules of evidence. Many social workers find the court process to be an overly formal setting, demeaning and inhospitable, where the truth is sacrificed for procedural rules and the free exchange of information and ideas is difficult, if not impossible."*[46]

Conditions at Melbourne Children's Court

The court acknowledges that the experience of many workers (and others) in the waiting areas of the Melbourne Children's Court is difficult and that the conditions are less than ideal. Problems with over-crowding were recognised by the Child Protection Proceedings Taskforce –

> "*The Family Division is now too small to contain the large number of families, lawyers and protective workers who attend the court each day. Child Protection is emotionally demanding and the overcrowding contributes to the distress, anxiety and agitation of those who are at the court. Put simply, there are too many people in too small a space. It is not a good place for a child*" (at p. 27) – and by the VLRC (see the commentary at pp. 354 - 357).

The court has roving security to protect workers from abusive family members. In addition, the court understands how overcrowding could be alleviated by moving some work out of Melbourne. The court supports the principle of decentralisation but notes that there are no suburban courts with the capacity (or facilities) to hear Family Division cases. The President of the Children's Court has made representations to the DOJ Legal Master Plan Working Group on the importance of designing future courts to accommodate the needs of families and child protection workers.

In June 2009 the court moved Southern Region cases to the Moorabbin Justice Centre. Child Protection supported that move. That court does not present the problems that are a feature of the Melbourne court and many of the lawyers from Melbourne attend at Moorabbin. The court intends to move Eastern Region cases to the WCJC as soon as that centre is available for use. The court will also be able to move its Conference Unit off-site when the WCJC is operational. The court also supports the relocation of the Children's Court Clinic to an off-site venue. The court plans to use the space created by these moves to develop more 'user friendly space' at Melbourne.

[46] Judge Leonard P. Edwards, "Mediation in Child Protection Cases". Judge Edwards' impressive background is detailed at footnote 43 of the court's submission to the VLRC.

Behaviour of parties

The court supports the development of a 'code of conduct' to help generate respectful relationships between parties to proceedings. The court understands that VLA and DHS have developed a draft code that has been referred to the Law Institute for comment. The court has worked with VLA and the Law Institute to develop a process for accreditation of lawyers working in the Children's Court. The court is represented on the committee that is advancing this issue.

The court is of the strong view that the panel of lawyers practising at the Melbourne court needs to be expanded. Put simply, there are not enough lawyers representing children and families. When the court moves to the WCJC, there will have to be more lawyers because the court will be operating in three court buildings in the Melbourne metropolitan area. The court will continue working with VLA on this issue. The court is also in discussions with the Women's Legal Service in an effort to encourage their lawyers to be involved in the work of the court.

As far as bullying lawyers are concerned, the court can say that judicial officers are aware of their obligations in running their courtrooms. If there has been bad behaviour outside the courtroom, it should be reported to the judicial officer handling the case, or reported to the President of the court.[47] In addition, bullying behaviour by lawyers can be referred to the relevant professional bodies i.e. the Law Institute, the Legal Services Commissioner or the Bar Council.

Training

As already detailed in this submission, the court is strongly committed to joint training of child protection workers and lawyers as a way of ensuring that each understands the role of the other. Such training should also encourage courteous and respectful behaviour.

When the President of the Children's Court visited Western Australia in 2010 as part of the work of the taskforce, he was impressed by the joint training sessions that Legal Aid were conducting in that state. When the President inquired whether the sessions were successful in changing 'culture' and encouraging mutual understanding of the role of each 'player' in the system, he was told that the training had been successful but that it had taken about three years to 'bite'. There have been some joint training sessions in Victoria and there will be many more. The court is committed to participating in joint training and is represented on the board established by DOJ to develop an ongoing program for child protection workers, lawyers and court staff. This activity is supported by funding and collaboration at the highest level of each of the participating agencies and the court.

Alternative Dispute Resolution (ADR)

Many of the criticisms about the Children's Court being overly adversarial fail to acknowledge the existence of ADR processes within the court.

The court has a longstanding commitment to ADR as a means of assisting a non-adversarial approach to case resolution. Over recent years, the court has led a review of its ADR processes with a view to ensuring that those processes are even more

[47] In the term of the current President, there has not been one written complaint about a lawyer's behaviour in the corridors of the court.

responsive and focused on achieving appropriate settlements at an earlier stage in proceedings.

The court began its reform processes well before the release of the Ombudsman's report in November 2009. In late 2008, the President of the Children's Court asked Mr Neil Twist from the Appropriate Dispute Resolution Unit in DOJ, to chair a working group to review the current approach to ADR in the Children's Court and assess how this approach could be enhanced and improved. The working group convened for the first time on 8 December 2008 and included representatives from DOJ, VLA, DHS, CPLO and the court. The working group met regularly throughout 2009 and developed a model that was endorsed by the taskforce.

The court is now implementing the new model process in Melbourne, as detailed below. The court would like to expand the model throughout the state. Additional resources would be required to support such an expansion.

New Model Conferences (NMCs)

The resources made available following the report of the taskforce enabled the court to implement a new model for conferencing. The NMC model initially commenced as a pilot for all applications from the Footscray office of DHS. This form of conferencing, now applies to all those cases coming to court from the North and West Metropolitan Region of Melbourne. The model is no longer a pilot. NMCs will be used for cases from Southern and Eastern Metropolitan Regions when the WCJC becomes available.

The working group meets regularly to monitor the implementation. It has a sub-committee that will provide advice on the best way for the voice of children to be represented in the NMC process. Ms Robyn Miller, DHS is participating in the work of that committee.

The current legislative framework for conferencing is flawed

In its submission to the VLRC, the court explained its concerns about the current legislative provisions that govern conferencing.[48] In summary, the provisions do not provide effective compliance mechanisms, do not deal with the challenges of child participation and provide for two ADR models, one of which, the 'Advisory Conference', has proved so unattractive to court users that such a conference has only once been held.

The old DRC process had a number of deficiencies. These included –

- limited opportunities for the sessional convenors to access the court files and prepare the conference;
- no funding for such preparation;
- no requirement that the parties prepare or exchange any documentation prior to the conference;
- lawyers focusing on other matters proceeding in the court building;
- DHS not represented by decision makers; and
- no insistence that parties attend.

[48] Refer to p. 36 of the court's submission to the VLRC.

The sessional convenors, as far as the court is concerned, provided an excellent service given the severe limitations of the funding and the legislation. It needs to be acknowledged that until recently, the rate of remuneration for the sessional convenors was not particularly generous, and did not reflect the professional skills of the mediators, the challenges of the jurisdiction and the significance of the issues that are dealt with. The DRC model's effectiveness was a reflection of its poor resourcing.

The NMC model has a number of features that distinguish it from the DRC process and from other ADR processes in protective jurisdictions around Australia. Those features include -

- prescriptive 'Guidelines' that govern procedural matters and describe the court's expectations as to the behaviour of the various participants;
- appropriate risk assessment;
- an expectation that all relevant family members and other significant persons attend;
- holding of an NMC, except where there are security and custody issues, at a venue away from the court to encourage uninterrupted, concentrated participation by all parties in a less crowded, less stressful environment;
- the requirement that each party advise all other parties and the convenor of their position in writing well before the NMC commences;
- the implementation of a rigorous, standardised ADR model based on the Harvard model to achieve uniformity and predictability in terms of ADR processes;
- an intensive intake procedure with a focus on identifying security issues, alternative venue issues and ensuring that the participants are well prepared for the NMC; and
- an expectation that the department be represented for at least the concluding stages of the NMC, if not the whole conference.

As outlined in the court's earlier submission, the court agreed with the VLRC view that convenors of family decision-making processes should have appropriate qualifications and training. The court adopted the recommendation from the taskforce report that all convenors conducting NMCs be trained and accredited in mediation in accordance with the National Mediator Accreditation Scheme (NMAS). However, convenors do not currently have the powers to grant adjournment orders for a further conference or a mention hearing. If convenors did have such powers, this would reduce court time for all parties involved. Judicial registrars in the Magistrate's Court jurisdiction currently have those powers and it is the court's view that convenors need the authority to make such orders in routine and less complex matters.

Evaluating New Model Conferencing

Notwithstanding the geographically limited range of NMC availability, a sufficient number of conferences have taken place for the court to be able to assess the reforms and to consider how the process could be strengthened. Monthly statistics for NMCs are set out on the following page.

Table 2: NMC monthly statistics at Melbourne Children's Court from August 2010 – June 2011

	LISTINGS		CANCELLATIONS		OUTCOMES					
Month	**No. of NMCs Listed**	**No. of NMCs Conducted**	**No. of NMCs cancelled prior to NMC**	**No. of NMCs cancelled at NMC**	**Settled (final order)**	**Settled on interim basis (IPO)**	**Adj for further MNC**	**Adj for further mention**	**Not settled (contest booked)**	**% of NMCs conducted & not settled (contest booked)**
Aug 2010	2	1	1	-	-	-	-	1	-	0.0%
Sept 2010	13	7	2	4	4	1	-	1	1	14.3%
Oct 2010	8	7	-	1	3	1	2	1	-	0.0%
Nov 2010	10	9	1	0	5	-	-	1	3	33.3%
Dec 2010	11	7	3	1	5	-	-	2	-	0.0%
Jan 2011	11	2	9	-	2	-	-	-	-	0.0%
Feb 2011	20	12	2	6	5	1	-	3	3	25.0%
Mar 2011	43	26	5	12	11	-	3	7	5	19.2%
Apr 2011	44	27	7	10	11	1	1	9	5	18.5%
May 2011	51	30	11	10	14	4	4	3	5	16.7%
June 2011	44	32	6	6	16	2	2	9	3	9.4%
TOTAL	**257**	**160**	**47**	**50**	**76**	**10**	**12**	**37**	**25**	**15.6%**

A number of conclusions can be drawn from the above figures:

1. The conferences are producing a significant number of settlements. As at 30 June 2011, 76 out of 160 conferences settled outright, resulting in a 47% settlement rate.
2. A partial settlement rate, (expressed as an IPO, the booking of a further NMC or an adjournment to a mention) applied in 59 out of 160 matters, (36% partial settlement rate).
3. Only 15.6% of matters went straight to a contest on the basis of no resolution.
4. If the court were to adopt the widely accepted national model of assessing ADR process success rates (with success being defined as the achieving of either full or partial settlement) then the NMC overall success rate is 84 %.
5. The cancellation rate for booked conferences (either in the days leading up to the conference or on the day itself) is high. The most recent figures would suggest that close to 40% of booked conferences do not take place on the original listing date. Reasons for NMCs being cancelled prior to the conference include the convenor, a representative from DHS or a party is unavailable, a party is ill, there is a lack of childcare for the family, the case is not ready or a Family Violence Intervention Order prevents the NMC from taking place.

Cancellation rates

The court notes that those conferences which are cancelled with some notice given (i.e. in the week or so leading up to the conference), are re-scheduled, with a new conference listed. Similarly, a significant number of conferences, which are cancelled

on the day, are also rescheduled. Cancellation of a conference on the day usually occurs because a parent(s) does not attend.

The court (and the working group) is concerned at the number of conferences that do not proceed. The court is trialling different methods of addressing this problem including diverting some resources to allow the conference intake officer to focus on risk assessments and engagement with parents, and the sending of SMS reminders to conference participants. The court has not conducted any research to verify whether SMS reminders have a positive impact on attendance.

The court has raised with the working group a potential solution that involves listing a directions hearing one week prior to the conference date to ensure the conference will be ready to proceed on the due date.

Comparisons between the New Model Conferencing process and other Alternative Dispute Resolution processes

Some comparisons can be made with other ADR models in other jurisdictions to assess the value of the NMC process. The court's initial comparison has been with the Western Australian Signs of Safety Pilot.

The Final Evaluation Report (June 2011) of the Western Australian model indicated that:

- of the 74 conferences scheduled, 68 took place and 11 resulted in a complete settlement, a settlement rate of 16%. By comparison, the NMC settlement rates are approximately three times that figure;
- of the 68 conferences that took place, 50 involved a partial settlement. If we adopt the definition of a settlement as including a partial settlement, then the Western Australian model achieves an 89% settlement rate; and
- the Signs of Safety model operates outside the court system and as such does not have quite the same focus on ensuring that all relevant family members are present. Out of the 68 conferences conducted, only 42 had both parents in attendance. If our NMC convenors were to accept such a level of absenteeism then the cancellation rates for Victoria would be significantly lower.

Other ADR models that might be worth examining to assess the efficacy of the NMC process include the various schemes established by state and territory Legal Aid bodies to deal with disputes under the Family Law Act. The schemes were subject to evaluation by KPMG in 2008[49]. The settlement rates of the various schemes (settlement being defined as being both full and partial settlement) are summarised below:

- Queensland: 1,846 matters out of 2,391 settled (78% settlement rate)
- New South Wales: 1,962 matters out of 2,449 settled (80% settlement rate)
- Victoria: 772 matters out of 925 settled (83% settlement rate)
- South Australia: 304 matters out of 370 settled (82% settlement rate)
- Western Australia: 283 matters out of 349 settled (81% settlement rate)
- Northern Territory: 80 matters out of 102 settled (78% settlement rate)
- Tasmania: 305 matters out of 491 settled (80% settlement rate)

[49] Attorney-General's Department Family Dispute Resolution Services in Legal Aid Commissions Evaluation Report (December 2008)

- ACT: 83 matters out of 102 settled (81% settlement rate)

The NMC settlement rate of 84% compares very favourably with the various ADR processes undertaken in Family Law Act matters. The Children's Court NMC success rate exceeds the figures from each state or territory even though Children's Court matters have a number of complicating aspects not present in family law cases. These include the involvement of the state as a party, multiple parties, parties with multiple chronic health, disability, substance abuse issues, parties with no financial incentive to settle and the frequent involvement of children as participating parties.

Unlike the Western Australian model, the Children's Court NMC process is not a pilot. It is an established part of the court's procedures, supported by the court's judicial officers and staff. In addition, an NMC is effectively a compulsory part of the court's procedures; only in appropriate circumstances will the parties be excused from participating in an NMC. In Western Australia, conferences can only take place with the consent of each party, a factor that may also in part explain the low cancellation rates in that state. The focus on very young children in the Western Australian pilot also means that children are rarely involved as parties in the process; indeed, the court notes that of the 68 conferences held, only one involved a child participating.

In Victoria where every child over the age of seven is treated as a party, the majority of NMC's will involve at least one child participating. In addition, the Victorian legislation provides that step-parents have a right to participate, thereby further adding to the complexities involved in listing, preparing and holding an NMC.

In conclusion, the Children's Court submits that its established, innovative ADR processes are not only extremely successful but demonstrate the court's leading role in developing and implementing less adversarial processes within the existing legislative framework.

Other aspects of New Model Conferencing

The Children's Court of Victoria is determined to continue to work with DHS, VLA, and other court users in advancing two important matters.

Aboriginal co-convenors
The court supports the principle of having Aboriginal co-convenors in those conferences that involve Aboriginal families. This is currently being advanced with DOJ and the Aboriginal community. There would need to be appropriate training for those who are willing (and qualified) to participate.

Children's participation
Children over the age of seven are treated as parties in the Children's Court and, for the most part, their lawyers operate on an instructional basis. This is in contrast to how children are represented in other jurisdictions.

The nature of ADR processes and in particular, the expectation that the participants will identify issues and develop resolution options, usually involves intensive participation. In the case of children, such an expectation is at odds with the court's often-stated view that children need (as far as possible) to be kept away from the court and its processes.

However, the nature of ADR is such that at the very least the legal representatives of any party need to be able to update their instructions during the conference. Facilitating such instruction taking may involve having the child at the conference (in appropriate cases with mature children), having the child near the conference or ensuring that the child can be contacted by telephone. Such arrangements require considerable liaison between lawyers, protective workers and parents. They also involve dealing with fundamental issues such as transport, child care (i.e. who will care for the child who has attended the conference venue but may not be actually participating in the conference itself) and liaising with a school (if the child is to be contacted by telephone during the conference).

Recognising the challenges involved, the court has established a specialist subcommittee to review arrangements for the participation of children in the NMC process. Members of the sub-committee are considering appropriate reforms.

In Summary

- The court resolved close to 7,000 secondary applications in 2008-09. Between 75%-81% of these cases resolved within three mentions. Only 1% of secondary applications proceeded to final contest. Only 1% of applications by notice proceed to final contest.
- Cases that commence as apprehensions take longer to resolve and are more likely to proceed to contest. The court is trying to manage these cases efficiently by early referral to conferencing and, in the case of applications from the North and West Metropolitan Region, by the use of NMCs.
- The number of cases where workers are required to give evidence is very small. The court supports conferencing as a way of assisting parties to resolve disputes without the need for a contested hearing. Within the constraints of the current legislation, the court has led measures to improve ADR and develop problem-solving approaches.
- The court acknowledges that the experience for workers appearing in court can be difficult. This is in part because their training does not adequately prepare them for the experience of court. The pressures of their own workplace and caseloads further compound this. The court acknowledges that the conditions at the Melbourne court are also less than ideal and create stress for those required to attend court.
- The court is committed to implementing measures to assist in addressing these issues including moving some further matters out of the Melbourne court, participating in collaborative training and encouraging measures designed to improve collaborative practice.

SECTION FIVE

Responses to Other Themes and Issues

The importance of a unified system – the harm of a fragmented system

The court submits that the system should not be fragmented. The court has already referred to views expressed about the Scottish system that the existence of different decision-making arenas for child protection was cumbersome. The VLRC did not support a fragmented approach. Indeed it recommended expanding the Children's Court jurisdiction to enable it to have concurrent jurisdiction in relation to hearing caseplan reviews. This was desirable "for reasons of both efficiency and accessibility for participants".[50]

It is sensible to recognise the strengths of the current system, including the fact that very few cases actually require a final contest. Currently, the court event initiates the 'informal bargaining' that results in a resolution of the case. The VLRC properly noted that a better approach is to encourage the parties to "use supported and child centred agreement-making processes in order to reach negotiated outcomes".[51] This approach recognises the importance of moving along a continuum from non-adversarial conferencing through to judicial conferencing to a court hearing that is inquisitorial or conducted in accordance with LAT principles. In its earlier submission to the panel, the court endorsed that approach while proposing its NMC process as a good model for 'front end' conferencing.

It has been suggested that the court should not have a role in determining the conditions on particular orders. The suggestion arises most frequently in relation to court orders on frequency of child contact. The court would make the following comments on this suggestion –

- If ADR is to be an important first step in a process of less adversarial determination, independent mediators must be able to discuss all the significant matters that are relevant to a case. To exclude discussion about the conditions on a proposed order would cripple the conferencing process and lead to a significant increase in the number of contested cases. This is contrary to everything the court has been doing to enhance its ADR processes.
- In contested cases, the court hears evidence that enables it to make an appropriate decision about what is in the best interests of the child. At the end of a contested hearing, the court provides an independent and informed decision about the whole case, including the conditions on an order that would best protect the child. The court submits that it would not be a sensible process for the court to determine proof of an application and, upon proof, the most appropriate order to be made, but then allow one of the parties to determine what the conditions attached to an order should be. Nor, in the court's view, is such a process in the best interests of children generally. Would this 'administrative' decision-making, if introduced, be subject to appeal to the Victorian Civil and Administrative Tribunal (VCAT)? If so, the matter will become the subject of further litigation. If

[50] See VLRC report at page 344.
[51] See VLRC report at page 214.

not, how does a parent or child challenge decisions that have been made on improper grounds? Regrettably, there have been a number of cases where the court has heard evidence (or had submissions made) on frequency of child contact that focus on the ability of DHS to facilitate a particular frequency of access (i.e. resources available) and less often on the impact of a particular level of access on the subject child.

- In some cases, parents will consent to proof (and to an order) but seek to have the court rule on the frequency of child contact. This is because there is no agreement on that issue. The contest is about a clearly defined issue. If there is no independent assessment of this issue, many parents are likely to contest both proof of the application and the order that should be made.

Reducing the range of orders

The court has been asked to comment on whether the range of orders available in Victoria should be reduced. The court submits that generally the current range of orders is appropriate. Two particular orders, Custody to Third Party Orders and Temporary Assessment Orders are used sparingly and do not seem to serve any current purpose. On the other hand, the court submits that the Supervised Custody Order has been a valuable addition to the range of orders available to the court. If that order was not available, it is likely that there would be more contested hearings. The court also submits that the Long-term Guardianship Order has been beneficial for those young people placed on such an order.

Child as a party

The court agrees that a child or young person should be a formally recognised party to the proceedings before the court. The court has also indicated in its earlier submission to the panel that all children should be represented and the basis upon which they should be represented. As a matter of principle, the court agrees that a child should not be required to attend court unless the child has the capacity to understand the proceedings and has expressed a wish to be at court. This will require legislative amendment. It may also require a change to the VLA fee structure.

A court of record

The court is not opposed to being a 'court of record'. In the overwhelming majority of final contests, the court already provides detailed written reasons. Proceedings in the court are recorded and copies of recordings are made available to parties on the payment of a fee ($50). The court has published some de-identified decisions on its website. The cases published are those that raise a point of principle as opposed to those determined on the facts. The recent Court of Appeal decision in *R v Smith* [2011] VSCA 185 at [32] to [33] is relevant to this issue with the court stating -

> [32] "*As is apparent from the reasons of Lasry AJA, this appeal and application give rise to no point of principle. When the proposed new arrangement for non-publication comes into force, a decision of this kind will no longer be published generally but only to parties. The intent of the new arrangement is to reduce the volume of fact specific decisions which judges and practitioners are obliged to review. A decision which is stated as involving no point of principle will not be able to be cited without leave*

> *of the court."* [33] "*It is expected that those arrangements will come into force, with proper notice to practitioners, in the near future.*"

Like the Court of Appeal, the Children's Court sees no benefit in publishing every decision. However, if the court were required to do so, it would need substantial administrative assistance as every decision would need to be de-identified.

Specialist lists

The court is involved in developing a specialist list for Koori cases in the Family Division. A first step in that process is the appointment of a Koori Support Program Manager. The court sought funding for this grade 5 position through budget and revenue retention processes but was not successful. The court has applied for funding through the Justice Finance Committee, and is currently awaiting their decision.

Magistrate Gregory Levine has recently been awarded a Churchill Fellowship to research family drug treatment courts in the USA and UK and develop a model for introduction of such courts into Australian jurisdictions.

The President of the court is keen to continue a discussion with the CEOs of QEC, Tweddle and Mercy on the establishment of a specialist zero to three-year old list.

Obviously, the development of these lists would depend on the court being supported with appropriate resourcing.

The court is also establishing a specialist list for sex abuse cases. This will be discussed under the next heading.

Sex abuse cases

Professor Cathy Humphreys has indicated in her submission to the panel that the Children's Court is requiring evidence 'beyond the balance of probabilities' in sex abuse cases and that "*Until recently, child protection workers had virtually stopped substantiating child sex abuse and only putting cases forward on the basis of emotional abuse or physical abuse*." The court would be interested to see the research that supports both those propositions. The court submits that both assertions are incorrect.

The Children's Court Research Materials (available on the court's website) have a thorough discussion of the proof required in sexual abuse matters. In section 4.8.4 it is stated –

> "It follows that the *Briginshaw* formulation does not give rise to a third standard of proof. It simply stands for the proposition that where a civil case involves allegations of criminal conduct, fraud or moral wrongdoing, which may lead to grave consequences for the impugned party, the judicial approach should be a closer scrutiny of the evidence. Mc Hugh J put it pithily in an exchange with the NSW Solicitor General during argument in *Witham v Holloway* (1995) 183 CLR 525 [Transcript of proceedings 10/2/1995]:

> "There are only two standards of proof: balance of probabilities and proof beyond reasonable doubt. I know *Briginshaw* is cited like it was some sort of ritual incantation. It has never impressed me too much. I mean it really means no more than 'Oh, we had better look at this a bit more closely than we might otherwise', but it is still a balance of probabilities test in the end."[52]

The court understands the test to be applied.

On the second point made by Professor Humphreys, the court has prepared a table that shows the assertion is incorrect. The table indicates notifications, investigations and substantiations at various times over the last twenty years. It shows no recent change in practice. It does show how remarkably consistent the numbers have been over time.

Table 3: Notifications, investigations and substantiations (1992-2010)

Year	Notifications	Investigations	Substantiations
1992-93	2,450	1,679	577
1997-98	4,480	2,031	607
2002-03	4,390	1,694	562
2006-07	3,877	1,482	479
2009-10	N/A	N/A	522

The court submits that the problem with low rates of notification and substantiation is a community problem. Victoria has historically had very low rates of notification, investigation and substantiation in this area. This is not some fault of the court.

However, the court appreciates the need for appropriate management of these cases. The court already has a sex offenders list in its Criminal Division. The success of that list has inspired the court to look at developing a similar specialist list in the Family Division. A multi-disciplinary working group supports the court in advancing this important reform. Membership of the working group includes – the President of the Children's Court, Magistrate Jennifer Bowles, Magistrate Belinda Wallington, Ms Robyn Miller, Principal Practitioner, Child Protection, Professor James Ogloff, Monash University, Associate Professor Rosemary Sheehan, Monash University, Dr Darryl Higgins, Australian Institute of Family Studies, Jenny Wing, Child Protection Society, Tom Nairn (SOCIT) Victoria Police, Di Garner, Adolescent Forensic Mental Health and Dr Carmel Fahey, Children's Court Clinic.

Members of the Committee have developed an application for a research grant to study the best model for the specialist list and the resource implications for its establishment. The court is committed to this reform. The work of this committee is one of the many examples of the court, DOJ, VLA, DHS and other agencies working strongly together.

High frequency child contact

The court refers to the discussion of this issue at pages 97 and 98 of its submission to the VLRC. The court also refers to the full discussion of this matter in the 'Research

[52] See the full discussion in the Research Materials, chapter 4.8.4.

Materials' on its website.[53] These materials contain a reference to the 2009 American Judge's Guide. A copy of the Guide has been provided to the panel as Appendix 3 to this submission. The Guide was prepared by both lawyers and social scientists. The project was overseen by an advisory committee consisting of some of the most respected scientists and judicial officers, including Dr Joy Osofsky, Professor of Public Health, Psychiatry and Paediatrics at Louisiana State University Health Sciences Centre. The discussion on frequency of child contact occurs at pages 72-73; 97-98 and 105-106.

In Summary

- The court does not support fragmenting decision-making or limiting its ability to determine the conditions on any particular order.
- The court submits that the current range of orders is generally appropriate but notes that two particular orders do not seem to serve any current purpose.
- The court agrees that a child or young person should be a formally recognised party to the proceedings before the court and that a child should not be required to attend court unless the child has the capacity to understand the proceedings and wishes to attend the proceedings.
- The court is committed to establishing specialist lists for Koori families and sex abuse cases but requires appropriate resources to do so.

[53] Refer to Research Materials chapter 4.14.

SECTION SIX

The Children's Court Clinic

In a small minority of cases in the Family Division - usually the most difficult and most heavily contested – the court can call on expert evidence from the Children's Court Clinic to assist in its deliberations.[54]

In 2009-10, the clinic accepted 725 child protection referrals from the Family Division of the Children's Court. In the same year 9,915 applications were initiated in the Family Division.

Benefits of the Children's Court Clinic

The Children's Court Clinic can offer a judicial officer psychological or psychiatric assessments of children and families involved in child protection proceedings (in addition to material provided by DHS). The report of the clinician engaged by the clinic will often constitute the only independent expert evidence before the court.

In 1997, the Australian Law Reform Commission noted that the clinic was well regarded and operated efficiently. The commission recommended that similar clinics be attached to children's courts nationwide, and adequately resourced to provide the court and legal representatives with expert advice on the best interests of the child.[55] New South Wales established a clinic based on the Victorian model in 2001.

Challenging clinicians at court

It has been asserted that there is no process for challenging a clinic assessment. This is not correct. A clinician submitting a report must be available for cross-examination when subpoenaed by a party or required to attend by notice given by the child, a parent, the Secretary of DHS or the court (section 550 CYFA).

The Clinic and its independence

It has also been suggested that the court attaches too much weight to clinic reports. The court understands that it is alleged that there is a high degree of alignment between clinic recommendations and court orders and that this shows some sort of partiality towards 'one side over another.' The court makes the following points in response to this allegation:

- It is a most serious allegation to make against a court that its decision-making is partial or governed by influences apart from the evidence that is presented to it. The court suspects that people who make such claims have limited experience of the court, rarely, if ever, observe contested cases and would appear not to have read the reasons for decision in any given case. Those who do have standing to institute appeals very rarely do so.
- It is appropriate to ask those who make such allegations, how they are able, so confidently, to assert that there is a strong alignment between clinic recommendations and court decisions. Where is the research to support such an assertion?
- The court strongly encourages research. Associate Professor Jeanette Lawrence from the University of Melbourne has been involved in significant and on-going research in the Children's Court for the past four years. The

[54] The court is also able to call on the clinic to assist in cases before the Criminal Division.
[55] Seen and heard: priority for children in the legal process (ALRC Report 84), p. 154.

court has supported Associate Professor Lawrence's research, which has expanded into research on the Children's Court Clinic. The court has encouraged this additional research. The court is able to provide an interim report on a comparison of clinicians' recommendations and Children's Court orders. The results are instructive. The interim report is attached as Appendix 4. In summary, it reveals that in relation to final substantive orders, judicial officers made orders that were consistent with recommendations made by the clinic in 57% of cases. The report confirms the importance of acting on research rather than anecdote or assertion.

The court submits that there are four important issues in relation to the clinic for the Department of Justice to address. They are –

- a proper model of governance; (This would involve the creation of a "board" that would be responsible for overseeing management of the clinic, the appointment of staff (including sessionals), professional development, clinical performance appraisals, and complaints. The board would have appropriate representation from the fields of forensic psychology/psychiatry, family and children's law and management. Funding for the clinic would not come from the budget of the Children's Court.)
- locating the clinic out of the court building at a venue nearby;
- paying appropriate rates for clinicians (full-time and sessional); and
- properly supporting the Clinic to better serve country courts.

The Children's Court Clinic (funded from the Children's Court budget) continues to be under-funded annually, to a significant degree (39% deficit in 2010-11). The total workload of the Family Division of the Children's Court has increased 9% annually since 2004. The additional judicial and registry resources have not been matched by investment in the Children's Court Clinic. A budget sustainability strategy will need to be considered to support the additional resources required.

In Summary

- ❖ The Children's Court Clinic provides reports that inform the decision-making of the court. The clinic provides professional assessments of children and families involved in child protection.
- ❖ Recent research shows that the orders made by judicial officers are consistent with recommendations made by the clinic in 57% of cases.
- ❖ The clinic requires additional resources to maintain its ability to provide high-quality services to the court.

CONCLUSION

The court has a crucial role in the child protection system. It makes decisions regarding the removal and placement of children, as well as the provision of services for families, in an open forum, according to legal standards and based on the evidence presented. The court provides reasons for decision and is accountable through an appeal process.

In every state and territory in Australia and in England, Wales, New Zealand and the majority of American states, a court is regarded as the most appropriate body to review a decision by a child protection agency to intervene in the life of a family.

The court actively supports and has been actively involved in developing less adversarial trials, a better model of conferencing and the development of specialist lists.

The court confirms the reforms to the child protection system recommended in its original submission to the panel, namely –

- a strong investment in prevention and early intervention;
- an enhanced family care conference process;
- a new way of commencing applications;
- investment in court resources to strengthen the court's capacity to conduct NMCs throughout the state, engage in problem solving approaches and adopt a less adversarial trial model;
- investment in court infrastructure to enable better decentralisation of cases throughout metropolitan Melbourne; and
- investment in court resources to enable stronger support to regional venues of the Children's Court.