Child Protection Review

Environmental scan

October 2016

**Abstract**

An overview of current issues in child protection and the context in which legal services are provided to people in the Victorian child protection system.

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# Executive summary

The Victoria Legal Aid (VLA) Child protection review (the review) commenced in March 2016. The review will examine the efficiency and effectiveness of child protection legal services currently provided in Victoria. The purpose of the review is to provide child protection legal services that are:

* timely and appropriate
* better at supporting children[[1]](#footnote-1), particularly those at risk of long term disadvantage
* more consistent across the state, and
* of higher quality.

More details about the review are available on the VLA website at [Child protection legal aid services review](http://www.legalaid.vic.gov.au/information-for-lawyers/how-we-are-improving-our-services/child-protection-legal-aid-services-review) (http://www.legalaid.vic.gov.au/information-for-lawyers/how-we-are-improving-our-services/child-protection-legal-aid-services-review).

The Environmental scan (the scan) is designed to provide an objective review of the current and anticipated environmental factors that impact upon the delivery of child protection legal services. These include, for example, reference to the political, economic and demographic environment in which we currently operate.

The purpose of the scan is to:

* help situate the review within a broader context
* identify key trends and environmental factors that are (or have the potential to) impact upon the current and future delivery of child protection legal services, and
* help situate Victorian child protection legal services within a broader national and international context.

Based on the information gleaned, the scan will note the opportunities and challenges that form the framework in which VLA delivers and funds child protection legal services. The scan includes:

1. a brief history of reports, inquiries and reviews into the Victorian child protection system
2. a summary of the existing child protection framework and available legal services
3. an assessment of the current and likely future legal-political and funding environment
4. a snapshot of current demand for services and predicted demand over time
5. an assessment of geographic and jurisdictional service gaps (in broad terms)
6. client experiences of child protection legal service delivery
7. a comparative analysis of all state and territory child protection laws (guiding principles) and the corresponding responses by each Legal Aid Commission in terms of their provision of child protection legal services, and
8. a brief comparative analysis of child protection service models in countries with comparable legal systems.

## Reports, inquiries and reviews

The determination of when a child or young person is in need of protection by the state, the framework in which that assessment is made and the manner in which protection is afforded, has been the topic of debate since the 1860s.[[2]](#footnote-2) Since then there have been numerous reviews, producing voluminous reports and a myriad of recommendations. These have resulted in many attempts at reforming the child protection system, which have met with varying levels of success.

This history of review and change is not unique to Victoria. A similar pattern, of major reviews and legislative reform, can be observed in other Australian jurisdictions and internationally.

The reports, inquiries and reviews into the child protection system have a number of key, recurring themes in the examination and assessment of Victoria’s child protection system:

* when and how the State should intervene into a family
* best practice service delivery to children in the child protection system, and
* the design and delivery of child protection legal services, which is set by legislative frameworks and child protection policies.

## The child protection framework

* The Department of Health and Human Services (DHHS) responds to reports of suspected child abuse or neglect, carries out investigations and, if an allegation is substantiated acts to reduce the risk to the child or young person.
* This may include taking a matter before the Family Division of the Children’s Court to obtain a court order allowing them to place the child under DHHS formal supervision or remove them from the family.

Victoria’s child protection system is governed by the *Children, Youth and Families Act 2005* (CYFA). The CYFA mandates that the State act to protect children in certain circumstances, including on the grounds of a significant risk of harm to a child. The CYFA makes clear that the legislation provides a framework not only for protecting children but providing community services to support children and families.

Child Protection practitioners at DHHS respond to reports of suspected child abuse or neglect, carry out investigations. If an allegation is substantiated DHHS staff act to reduce the risk to the child or young person. This may include taking a matter before the Family Division of the Children’s Court.[[3]](#footnote-3)

Other key factors within the child protection system include, the Children’s Court, the Commissioner for Children and Young People, Community Service Organisations (delivering child, adult and family services), kinship and foster carers and of course, the children, young people and families responding to the system.

## Victoria Legal Aid’s role in the child protection system

Victoria Legal Aid (VLA) has a significant presence in the Family Division of the Children’s Court, providing legal advice and representation services to Victorians who are involved in matters before the court. Most families with whom DHHS Child Protection has involvement are low income and disadvantaged. They are some of Victoria’s most vulnerable citizens. Their poverty is often intergenerational and is multidimensional, with one or more of the following factors also generally present: lack of education, inadequate housing, social isolation, mental illness, family violence, or drug and/or alcohol abuse.

Child protection is the largest program within the Family, Youth and Children’s Law Program and the third largest within VLA. VLA staff lawyers, private practitioners and community legal centres (CLCs) deliver child protection legal aid services across Victoria.

In 2015/16, the Child Protection program accounted for $21.3m or 14.2% of the VLA budget. It delivered around 4,500 duty lawyer services and 7,712 grants of legal assistance. Demand for services is increasing, with the number of grants of assistance increasing by 20% between 2013/14 and 2015/16. Duty lawyer services increased by 9% in the last year.

## Current demand for services and future demand

A further 15% increase in grants of assistance is forecast for 2016/17, representing additional expenditure of around $2.9m.

The growth in demand is being driven by increases in reports to DHHS. In 2014–15, DHHS received 91,586 reports,[[4]](#footnote-4) up from 82,056 in 2013–14 and 73,272 in 2012–13[[5]](#footnote-5). Of that figure, 14,115 were substantiated, leading to 4,927 applications to the Children’s Court[[6]](#footnote-6). Nearly all substantiated cases will result in a case planning meeting.[[7]](#footnote-7)

The last decade has witnessed an increase in the number and rate of children in out-of-home care (OOHC), particularly Aboriginal and/or Torres Strait Islander children.[[8]](#footnote-8) The rate of Aboriginal and/or Torres Strait Islander children and young people in OOHC has increased from 29.8 to 71.5 per 100,000, with the number of children and young people in OOHC tripling from 552 to 1,511. Of particular concern is the recent sharp increase in the number of children in OOHC in the last two years – a 63% increase for Aboriginal and/or Torres Strait Islander children and young people and 30% for non-Aboriginal and/or Torres Strait Islander children and young people. Around one in 12 Victorian Aboriginal and/or Torres Strait Islander children and young people is in OOHC.

## Legal service provision across Victoria and social disadvantage

While almost half of new applications to the Children’s Court are in regional areas, these attract only around 40% of the primary grants of assistance. Further, there are differences between regional areas of Victoria, with some having very low rates of grants relative to applications to the Children’s Court. This suggests that some people in regional areas may be missing out on representation that they may otherwise receive in other parts of Victoria.

The differences in the level of legal representation in regional areas needs to be considered in light of the findings in the 2012 Cummins Report that:

* children in rural Victoria are much more likely to be placed in out-of-home care[[9]](#footnote-9), and
* there is a strong correlation between reports to child protection per-capita and indicators of disadvantage, with more reports in areas experiencing greater disadvantage[[10]](#footnote-10).

Further, when compared to metropolitan children, children in regional areas experience much higher rates of:

* substantiated abuse
* children and young people on a Protection Order (double the metropolitan rate)
* children and young people in OOHC (more than double than with metropolitan rate), and
* the highest rates of children and young people in OOHC was in Gippsland (9.7 per 1,000 population), the Grampians (8.9 per 1,000 population) and Mallee (7.4 per 1,000 population).[[11]](#footnote-11)

Social disadvantage has been shown to be geographically concentrated[[12]](#footnote-12) and some population groups are consistently overrepresented in data about disadvantage.[[13]](#footnote-13) These groups figure highly in the people assisted by VLA’s child protection program.

## Gaps in service provision

There are gaps in the current system of legal assistance service provision. The guidelines do not provide for universal access to free legal assistance. They are focused on legal proceedings and do not provide assistance for case planning, early intervention or post-order support. Additionally, there are some people who are unable to access adequate support in the present system. This includes people with a mental illness or cognitive impairment, and people with proceedings that need to be transferred between the Children’s Court and the Family Law Courts.

## Client experience

There is limited data available as to the level of satisfaction amongst service users about the assistance that they received. While it is generally positive, there is a call for more time to be available for lawyers to spend with their clients.

## Service provision across Australia

The service provision models adopted by the Australian state and territory Legal Aid Commissions varies, although there are similarities. The service models tend to be designed in response to the child protection system they are servicing. All states and territories use a mixed model of service delivery, utilising in-house and private lawyers, as well as some Community Legal Service lawyers. All states and territories provide free legal advice by telephone regarding child protection.

Victoria, New South Wales and Western Australia are the only states to offer a duty lawyer service to assist children and parents responding to initiating applications. Queensland is currently piloting two separate duty lawyer services in the regional courts of Beenleigh and Cairns. New South Wales and Queensland provide a grant of legal aid to enable assistance and representation prior to the commencement of child protection proceedings.

All states and territories provide a grant of legal aid to enable assistance and legal representation for eligible clients responding to child protection proceedings.

New South Wales and Queensland provide a grant of legal aid to enable assistance and representation following the conclusion of child protection proceedings. In New South Wales, the grant funds representation at a case planning meeting where conditions as to contact and support services may be decided. In Queensland, this grant is not subject to a merits assessment and includes attendance at a post-order family group conference. Queensland and New South Wales Legal Aid Commissions are piloting early intervention services involving mothers who have been the subject of unborn reports. These pilots operate in partnership with hospitals and social workers from their equivalent DHHS.

## International comparisons of service provision

There are different approaches to issues of child neglect and maltreatment adopted in different countries. Examining these assists us to understand the different response that are adopted over time and in different places.

In the 1990s two key approaches were common[[14]](#footnote-14):

The *child protection* approach (adopted in Australia) tends to view child protection as distinct from other services for children and young people with lower levels of need. They tend to delay intervention and adopt a more legalistic approach.

In contrast, the *family service* approach (adopted in a number of European countries) is seen as needs based; child protection investigations are seen as part of the service system for children and young people in need and their families. The child protection agency deals with allegations of maltreatment, as well as providing family support services for children who may be in need but not likely to suffer significant harm.

More recently, a third approach, described as *child focused* has emerged, which features a combination of child protection and family service approaches.

It is notable that in a number of other countries child protection legal services are provided to everyone, regardless of their income.

# Glossary of abbreviations

CLC Community legal centre

CYFA *Children, Youth and Families Act 2005* (Vic)

CYPA *Children and Young Persons Act 1989* (Vic)

DHHS Department of Health and Human Services

FGC Family group conferencing

ICL Independent children’s lawyer

IRSED Index of Relative Socio-Economic Disadvantage

OOHC Out-of-home care

RCVF Royal Commission into Family Violence

Review Child Protection Review

SEIFA Socio-Economic Indexes for Areas

VCAT Victorian Civil and Administrative Tribunal

VLA Victoria Legal Aid

1. Reports, inquiries and reviews

The determination of when a child is in need of protection by the state, the framework in which that assessment is made and the manner in which protection is afforded has been the subject of debate since the 1860s.[[15]](#footnote-15) Since that time, there have been numerous reviews, producing voluminous reports and a myriad of recommendations. These have resulted in many attempts at reforming the child protection system which have met with varying levels of success. Consideration of some key milestones in the child protection system since the 1980s assists in understanding the present framework (see also [Figure 1](#Figure1)).

The **‘Carney Report’** (1984)[[16]](#footnote-16) was a major review of the child protection system. The recommendations of the report formed the basis for the *Children and Young Persons Act 1989* (Vic) (CYPA). This saw the creation of a specialist Family Division in the Children’s Court to consider child protection matters.

The **‘Fogarty Report’** (1989)[[17]](#footnote-17) lead to the abolition of the ‘dual track system’ – the split of responsibility for child protection between police and child protection staff. This also coincided with the introduction of mandatory reporting laws in Victoria.

The **‘Child Protection Outcomes Project’** (2003)[[18]](#footnote-18) was initiated by the then Department of Human Services (DHS). The DHS commissioned the Allen Consulting Group which concluded that the CYPA no longer provided an appropriate framework for the child protection system.

The ***Children, Youth and Families Act 2005* (VIC)** (CYFA)[[19]](#footnote-19), was adopted in light of the findings of the Child Protection Outcomes Report. It formed part of a national move toward a more ‘professional’ and legalistic approach.[[20]](#footnote-20) During the Second Reading speech the Minister for Children spoke of moves toward early intervention, prevention and best practice, with the reforms being informed by national and international experience. The Minister went on to say:

‘The Children, Youth and Families Bill is a critical foundation to take these reforms forward. With this bill, we have a once-in-a-generation opportunity for comprehensive legislative change – changes that are critical to implement new policies and ways of delivering services to make a sustainable difference in the lives of vulnerable children and young people.’[[21]](#footnote-21)

The **‘Own motion investigation of DHS Child Protection Program’** (2009)[[22]](#footnote-22) by the Victorian Ombudsman noted that this was the eighth major review of the Victorian child protection system in the preceding 30 years.[[23]](#footnote-23) The Ombudsman recommended the Victorian Law Reform Commission examine alternative legislative arrangements to reduce disputation and focus on the best interests of the child – this was only four years after the introduction of the CYFA. The report also called for greater transparency and consistency in the decision making processes of the DHS and that it report on unallocated files (families without a child protection worker assigned to assist them).

The **‘Protection Applications in the Children’s Court’ Report,[[24]](#footnote-24)** by the VLRC was completed in October 2010. It made further recommendations for change, with recommendations focused on increasing the use of appropriate dispute resolution in child protection proceedings, citing the successful application of family group conferencing in New Zealand.

The **‘Own motion investigation into out-of-home care’ Report** (2010)[[25]](#footnote-25) by the Victorian Ombudsman concluded:

‘Evidence emerging from research into outcomes for children in care has eroded the assumption that simply removing children at risk of harm from their homes and placing them in care will improve their wellbeing.’[[26]](#footnote-26)

The Ombudsman noted that there had been a move from State to private provision of care, through the introduction of service agreements. The report observed that:

‘Despite ongoing reforms of the out-of-home care system, some children do not experience out-of-home care placements as the secure and safe environment they should be. Rather, they are subjected to further abuse and neglect.’[[27]](#footnote-27)

The **‘Cummins Inquiry’** (2012)[[28]](#footnote-28) (*Protecting Victoria’s Vulnerable Children Inquiry*) contained 20 findings and 90 recommendations. A number of the recommendations have since been implemented, most notably the recent legislative changes to permanency. These will be discussed further in this document. The inquiry also proposed the greater use of alternate dispute resolution, along the lines of the family conferencing employed in New Zealand, which received broad support but has not been realised.

Since release of the Cummins Inquiry report, there have been a number of other reports, including:

* two from the **Office of the Public Advocate** [[29]](#footnote-29)
* the **‘… as a good parent would …’** report by the Commissioner for Children and Young People [[30]](#footnote-30)
* the **Royal Commission into Family Violence** (RCFV)[[31]](#footnote-31)
* the **Residential Care Services for Children**, March 2014 and **Early Intervention Services for Vulnerable Children and Families**, May 2015 reports by the Victorian Auditor-General.

All have made recommendations designed to improve the child protection system. The RCFV report also made recommendations concerning changes to service intake and processes that impact upon service delivery.

There are several other pending reports that are relevant, including:

* **‘Taskforce 1000’**[[32]](#footnote-32) by the Department of Health and Human Services (DHHS) and the Commissioner for Aboriginal Children and Young People, which examines the treatment of Aboriginal and/or Torres Strait Islander children in out-of-home care
* The pending **Family Law Council report into Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems**
* The **Royal Commission into Institutional Responses to Child Sexual Abuse[[33]](#footnote-33)**, which is likely to make recommendations that impact upon this area, and
* The **review of the permanency amendments** by the Commissioner for Children and Young People.[[34]](#footnote-34)

In April 2016 the Victorian Government announced the **Roadmap for Reform: Strong Families, Safe Children.[[35]](#footnote-35)** This include initiatives to improve monitoring and oversight frameworks, strengthen home-based care options and introduce minimum qualifications and additional training for staff working with children in care.

Many of these initiatives are already underway, with announcements in June this year of the move of 140 young people out of residential care into kinship placements[[36]](#footnote-36) and in August of a $5.44 million funding package to assist Aboriginal and/or Torres Strait Islander young people in out-of-home care to remain connected to their culture and heritage.[[37]](#footnote-37)

Commonwealth and State Governments, through the *National Framework for Protecting Australia’s Children* 2009–2020, have committed to work together to better protect vulnerable children, acknowledging that ‘protecting Australia’s children is everyone’s responsibility’[[38]](#footnote-38).

Commonwealth and State Governments, through the *National Plan to Reduce Violence against Women and their Children* 2010–2022, have committed to work together to reduce violence against women and their children because ‘reducing violence is everyone’s business’.[[39]](#footnote-39)

This history of review and change is not unique to Victoria. A similar pattern, of major reviews and legislative reform, can be observed in other Australian jurisdictions and internationally. There has been a general sense that despite great effort and good intentions previous attempts to improve the child protection system have failed to achieve their intended outcomes. The reviews have tended to highlight the need for renewed focus on prevention, earlier intervention and reducing the number of children in care. The 2015 review of the New Zealand system captures this sentiment in the opening line of the report:

‘Regular reviews of the contemporary care system in New Zealand have been undertaken, but not one has produced sustained positive changes in the lives of our vulnerable young people.[[40]](#footnote-40)’

This brief history of reports, inquiries and reviews into the child protection system reveals a number of key, recurring themes in the examination and assessment of Victoria’s child protection system, including:

* when and how the State should intervene into a family
* best practice service delivery to children in the child protection system, and
* the design and delivery of child protection legal services, which is set by legislative frameworks and child protection policies.

Figure 1: Child Protection timeline

1. The child protection framework and the legal service response

Victoria’s child protection system is governed by the CYFA. The CYFA requires that the State act to protect children in certain circumstances, including when there is a significant risk of harm to a child. The CYFA provides a framework not only for protecting children but providing community services to support children and families. The CYFA requires the responsible Minister to establish and maintain child protection services. The State’s obligations under the CYFA are performed by the DHHS.

Child Protection practitioners at DHHS are delegated to act as protective interveners to respond to reports of suspected child abuse or neglect, carry out investigations and, if an allegation is substantiated by the investigation, to reduce the risk to the child or young person. This may include taking a matter before the Family Division of the Children’s Court[[41]](#footnote-41) to ensure children and young people are protected and safe from harm, including by placing them under DHHS formal supervision or by removing them from the family. DHHS child protection applications taken before the Children’s Court are conducted by the DHHS Child Protection Litigation Office[[42]](#footnote-42) and DHHS rural court officers, instructed by the relevant child protection practitioner.

Key actors within the child protection system include the DHHS, the Children’s Court, the Commissioner for Children and Young People, Community Service Organisations (delivering child, adult and family services), kinship and foster carers and of course, the children, young people and families responding to the system. VLA provides legal advice and representation services to people who are involved in matters before the Children’s Court, both in the Family Division and the Criminal Division.

* + 1. VLA Child Protection Program

The removal of a child or young person from the family is one of the most serious actions that the State can take. The CYFA aims to encourage the participation of children, young people and their families in the decision-making processes that affect their lives, particularly for children and young people when the State initiates legal proceedings via a protection application. The right of children and young people to have their voices heard in legal proceedings that affect their lives empowers them, gives them a sense of self-worth, and promotes the idea that they, the subject of proceedings, are important participants in the process. This right is enshrined in the United Nations Convention on the Rights of the Child.[[43]](#footnote-43)

VLA has a significant presence in the Family Division of the Children’s Court, providing legal advice and representation services to Victorians who are involved in matters before the court. This is partly because children aged 10 or older are required to be legally represented in child protection proceedings. Further, most families with whom DHHS Child Protection has involvement are low income and disadvantaged. They are some of Victoria’s most vulnerable citizens. Their poverty is often intergenerational and is multidimensional, with one or more of the following factors also generally present: lack of education, inadequate housing, social isolation, mental illness, family violence, or drug and/or alcohol abuse.

These parents cannot afford to pay for private legal representation and they generally meet VLA’s means test for grants of legal assistance. As a result, VLA is involved in relation to almost every party who is legally represented in Children’s Court Family Division proceedings in Victoria, either directly representing a party via our staff practice or as the arranger of funding for their legal representation.

Relevant information concerning the VLA Child Protection program:

* The objective of the VLA Child Protection program is to assist children and parents responding to child protection applications by the state by helping to ensure that any legal intervention is limited to that which is necessary to promote the child's, safety, wellbeing and development.
* Child Protection is the largest program within the Family, Youth and Children’s Law Program and the third largest within VLA. In 2015/16, the Child Protection program accounted for $21.3m or 14.2% of the VLA budget. The number of grants of assistance increased by 20% between 2013/14 and 2015/16.
* VLA staff lawyers, private practitioners and community legal centres (CLCs) deliver child protection legal aid services.
* To deliver VLA funded child protection services, private practitioners and CLCs must be on the VLA s. 29A Child Protection Panel. The panel was established to ensure that practitioners delivering this service have the requisite experience and knowledge. VLA staff deliver around 10% of the services conducted pursuant to a grant of assistance. Private practitioners deliver around 89% and CLCs the balance.
* Within VLA, the Melbourne office based Child Protection team is responsible for providing legal services for children and families involved in the child protection system at the Melbourne and Moorabbin Children’s courts. The Youth Crime team and regional office staff also provide child protection legal services, with the Youth Crime lawyers assisting the Child Protection team and regional office staff servicing clients at the Broadmeadows and regional (country) Children’s courts.
* The Victorian Aboriginal Legal Service and the Aboriginal Family Violence Prevention Legal Service provide services to Aboriginal and/or Torres Strait Islander children and parents.
* A pilot with Women’s Legal Service and Loddon-Campaspe CLC is underway to delivery new child protection services at the Moorabbin Justice Centre and in the Bendigo region respectively. The services are able to assist with family violence and family law matters, in addition to the child protection proceedings.
* VLA currently delivers or funds the delivery of the following suite of child protection legal services:
	+ Community Legal Education
	+ legal information (including cold and warm referrals)
	+ legal advice, through a free telephone advice line
	+ minor assistance
	+ duty lawyer services, and
	+ casework under a grant of legal assistance.[[44]](#footnote-44)
		1. Scope of services

In 2014–15, DHHS received 91,586 reports relating to children across Victoria,[[45]](#footnote-45) up from 82,056 in 2013–14 and 73,272 in 2012–13.[[46]](#footnote-46) Of that total figure, 14,115 were substantiated, which required a decision to be made as to the extent of support and intervention necessary to ensure the child’s safety and wellbeing. Of the 14,115 substantiations, there were 4,927 initiations to the Children’s Court.[[47]](#footnote-47) This means that in 2014–15, of all reports received and substantiated, 65% were dealt with without recourse to court or court-based legal assistance. Nearly all substantiated cases will result in a case planning meeting.[[48]](#footnote-48)

### Community Legal Education

While some forms of direct legal education concerning child protection is delivered, there is no systematic program for this.

### Legal information and advice

Some information about the child protection system is available on the VLA website. This provides basic information about what to do and how to obtain legal assistance.

Presently the primary form of legal assistance for pre-court events is telephone advice. Pre-court events include case planning meetings, where protective concerns are discussed, a care plan is developed, which must accord with a nominated plan on the ‘permanency hierarchy’ and conditions or ‘actions’ are agreed too.[[49]](#footnote-49)

Parents and children engaged on a voluntary basis with DHHS, may contact Legal Help and speak with a lawyer from the Melbourne based Child Protection or Youth Crime program. Prior to advice being provided, Legal Help will conduct a ‘conflict of interest’ check. In circumstances where a ‘conflict of interest’ is identified, the caller may only receive ‘procedural advice’[[50]](#footnote-50) which is of limited assistance.

In 2015/16 there were around 2,000 telephone legal information and advice services provided.

### Duty lawyer

The delivery of face-to-face legal services typically commences once proceedings are at court. Child protection duty lawyer services are provided by a combination of in-house lawyers, private practitioners and, to a lesser extent, by Community Legal Centre lawyers. Clients frequently present with a range of complex needs and legal issues that may cross multiple jurisdictions. The duty lawyer service is provided at the first hearing date of an initiating application, most commonly, a protection application. The service generally transitions to ongoing casework for the child protection matter and, in some instances a variety of other legal needs under one or more grants of aid. As such, the child protection duty lawyer scheme serves as the primary intake mechanism for ongoing child protection casework and to a lesser extent family law, family violence, youth crime and other legal matters.

The process by which VLA becomes aware of applications for protection orders, and can thereby arrange representation, varies from region to region. In some regions, the DHHS provides advance notice of proposed applications. This enables arrangements to be made for legal representation of parties. In other areas this information is provided on the day, or the DHHS may have contacted local practitioners to arrange representation.

### Grant of assistance

At present, grants of aid for child protection matters are provided principally under two specific guidelines.[[51]](#footnote-51) State Family Guideline 1 provides that VLA may make a grant of legal assistance to a child who is the subject of an application in the Family Division of the Children’s Court. As noted, children aged 10 and over are represented. Under State Family Guideline 2, VLA may make a grant of legal assistance for a person to respond to certain proceedings in the Family Division of the Children’s Court if that person is a parent or otherwise meets the guideline’s criteria. The bulk of grants of assistance under this guideline are to parents. The parties and matters that are eligible for a grant of assistance are set out in detail in the guideline.

Further guidelines were introduced to respond to the legislative changes to the CYFA that commenced on 1 March 2016, including funding for a child or parent to seek an internal and then external administrative review of a DHHS case planning decision in some circumstances, funding a child or parent to initiate or respond to an application to revoke a protection order in limited circumstances and simplified grants funding for Interim Accommodation Order appeals.

VLA does not currently fund **post-court** assistance or representation for clients at DHHS case planning meetings where decisions relating to ‘permanency’ and contact between parents and children may be decided.[[52]](#footnote-52)

1. Current demand for services and predicted future demand

Across Australia, the number of matters reported to child protection services, together with the number of substantiations and orders, has been increasing over recent years. Similarly, the cost of child protection has been increasing rapidly. The Productivity Commission notes:

Total recurrent expenditure on child protection, out-of-home care, family support services and intensive family support services was $4.3 billion nationally in 2014–15 (a real increase of $239.2 million (5.8 per cent) from 2013–14) of which out-of-home care services accounted for the majority (56.2 per cent, or $2.4 billion). Nationally, annual real expenditure on these services has increased by $472.5 million since 2011–12, an average increase of 3.9 per cent per year for the past four years.[[53]](#footnote-53)

The cost of the system had increased from $752 per Australian child, in 2011–12, to $815 in 2014–15.[[54]](#footnote-54)

The increase in activity has also been experienced in Victoria. As Chart 1[[55]](#footnote-55) illustrates, the number of child protection reports, investigations and substantiations doubled between 2005–06 and 2014–15. While the number of substantiations has increased (107%) over this period, there has been greater growth in reports (141%). What is evident from the data is that the majority of matters are dealt with by referrals to other services and supports.

Chart 1 – Child protection trend



The increase in the number of matters substantiated appears to have an impact on the numbers of matters initiated in the Family Division of the Children’s Court, although the link is not a direct, one-for-one, relationship. The increase in substantiations has not translated into an equal increase in the number of initiations, although both have risen in recent years ([Chart 2](#Chart2)).[[56]](#footnote-56) The rate of substantiated reports leading to a court application has also changed over time:

* there being 1 initiation for each 2.6 substantiations in 2005/06
* increasing to 1 for each 2.2 substantiations in 2009/10, and
* dropping to 2.9 substantiations per initiation in 2014/15.

This suggests that more matters, which have been substantiated, are now being dealt with outside of the court process. The trend also indicates that while the number of substantiations may vary, an increase in substantiations leads to an increase in court activity. As noted, there is limited legal assistance provided prior to a matter going to court. These trends establish increased activity both inside and outside of court, and highlight the challenges of responsive funding, which meets the changing needs of children and parents in child protection.

Chart 2 – Grants of assistance, substantiations and initiations

There also appears to be a correlation between substantiations and initiations, on the one hand, and grants of assistance on the other.[[57]](#footnote-57) Over the last decade there have been similar increases in initiations (42%) and grants (46%). The decline in grants of assistance in 2012–13 is attributable to changes in eligibility guidelines that restricted access, reducing the growth in the number of grants.

Chart 2.1 – Primary grants and initiations (Victoria)

It is estimated that there are about 1.6 children in each family group in the Children’s Court. Chart 2.1 depicts the number of primary grants of assistance and the number of family groups. Both of these have increased by around 9% from 2013/14 to 2015/16.

In 2015/16, the Child Protection Program delivered around 4,500 duty lawyer services and 7,712 grants of legal assistance. This represented a 9% increase in duty lawyer services and a 13% increase in the number of grants of assistance from 2014/15. A further 15% increase in grants of assistance is forecast for 2016/17, representing additional expenditure of around $2.9m. The provision of additional funding to the DHHS for the provision of additional frontline staff, and the significant increase in reporting of family violence incidents and subsequent reports to the DHHS, have been key drivers of demand and are anticipated to continue to impact forecast growth. On the basis of the trends identified above, the projected number of reports for 2016/17, contained in the Victorian State Budget, is likely to lead to an additional 850 grants of assistance, costing in excess of $2.1m, as well as more duty lawyer services.

The experience of the last 10 years suggests that, absent a reduction in the number of applications made by the DHHS, demand for services is likely to continue to rise. This will lead to an increase in expenditure by VLA on child protection legal services. Continued growth in this area, combined with growth in summary crime and family violence, will place ongoing pressure on the VLA budget.

* + 1. Children and young people in ‘out-of-home care’[[58]](#footnote-58)

Chart 3 – Children in OOHC



The last decade has witnessed an increase in the number and rate of children in out-of-home care (OOHC), particularly Aboriginal and/or Torres Strait Islander children (see [Chart 3](#Chart3) and [Chart 4](#Chart4)).[[59]](#footnote-59) The rate of Aboriginal and/or Torres Strait Islander children in OOHC has increased from 29.8 to 71.5 per 100,000, with the number of children in OOHC tripling from 552 to 1,511. While over that period the rate for non-Aboriginal children increased from 3.7 to 5.7, and the number doubled from 4,794 to 8,567 (Productivity Commission, 2016). Of particular concern is the recent sharp increase in the number of children in OOHC in the last two years – a 63% increase for Aboriginal and/or Torres Strait Islander children and 30% for non-Aboriginal children. Around one in 12 Victorian Aboriginal and/or Torres Strait Islander children is in OOHC, in contrast to the rate of one in 200 non-Aboriginal children.[[60]](#footnote-60) In 2014/15, approximately 40% of Victorian Aboriginal and/or Torres Strait Islander children were subject to a reports, investigation or substantiation (and 6.5% of non-Aboriginal children).[[61]](#footnote-61)

As noted, there have been a number of policy and funding announcements made detailing programs designed to address the steep incline in children in out-of-home care. These initiatives are in their early stages and the results will not be known for some time.

Chart 4 – Rate of children per 100,000 in OOHC



1. Geographical service gaps
	* 1. Geographical measures

This part examines the pattern of services across Victoria, and considers:

* what legal services are currently provided across Victoria geographic location, and
* whether the legal services currently provided meet the demand for services in each geographical location.

In order to understand the distribution on child protection services it is useful to have an appreciation of the characteristics of Victorian children. As at 2013–14:

* Victoria was home to 1,257,905 children aged 0 to 17[[62]](#footnote-62)
* 1.3% or 16,000 were Aboriginal and/or Torres Strait Islander children[[63]](#footnote-63)
* 2% or 25,000 children required assistance with core needs indicating that they had a profound disability,[[64]](#footnote-64) and
* 26.7% or 335,860 of Victorian children lived in regional areas.[[65]](#footnote-65)
	+ 1. Ascertaining demand in regional and rural Victoria

Limited data is available on the regional location of child protection reports and substantiations, as this information is generally reported at a state-wide level. This makes it difficult to accurately gauge the level of potential or actual demand for child protection legal services in regional and rural Victoria. What is available is information about where applications are initiated and where grants of assistance are made.

Chart 5 – All grants of assistance and primary initiations (% of total metro and regional)

Chart 5[[66]](#footnote-66) depicts primary initiations[[67]](#footnote-67) commenced at metropolitan Melbourne Children’s Courts (Melbourne, Moorabbin and Broadmeadows) and Regional courts areas as categorised by the court (Barwon South West, Grampians, Loddon Mallee, Hume and Gippsland). It also shows all grants of legal assistance, primary and secondary,[[68]](#footnote-68) by VLA in the same groupings as the court data.

This chart shows that:

* there has been a stable division between metropolitan and regional areas in the proportion of initiations, at around 56% to 44%, save that in 2015/16 there was almost an equal number of initiations in both areas
* there has been a relatively stable divide in the total number of grants of assistance, although there was a much higher proportion in metropolitan areas (64%) than regional areas, 46%
* the convergence in initiations in 2015/16 saw the division in grants reduce slightly in metropolitan Melbourne (60%) and increase correspondingly in regional Victoria (40%).

This suggests that there is a misalignment of grants of assistance to initiations.

This can be examined further by considering primary grants of assistance relative to primary initiations by family group.[[69]](#footnote-69) The number of grants of assistance relative to the initiations by family group is much greater in metropolitan Melbourne than it is in regional areas – see [Chart 6](#Chart6). In fact, grants of assistance in metropolitan Melbourne increased in 2015/16 despite the number of initiations falling slightly from the previous year.

Chart 6 – Metro and regional initiations per family and primary grants of assistance

The difference between metropolitan Melbourne and regional Victoria, and between regions, is highlighted when considering the number of grants per family group. It is noted children under the age of 10 are not usually represented, and the eligibility guidelines for assistance restrict the circumstances when assistance will be available to parents. As such, the average number of grants for each family group is likely to be less than two.

[Chart 7](#Chart7)[[70]](#footnote-70) shows that in 2015/16, in the metropolitan area there was around 1.7 grants of assistance for each family group. Whereas, in regional areas the average was 1.2 grants of assistance per family group. In some areas this falls to less than one grant of assistance for each family group.

Chart 7 – Primary applications and primary grants of assistance

[Chart 5](#Chart5) and [Chart 6](#Chart6) indicate that there is a disproportionately high number of applications for protection orders in regional areas (almost 50% of all primary applications), relative to the population (around 26%). This not being matched in the provision of legal representation, although there are differences between regions.

* + 1. Nexus between socioeconomic disadvantage and child protection

It is worth considering the information concerning the distribution of legal representation in light of the findings in the 2012 Cummins Report that:

* that children in regional Victoria are much more likely to be placed in out-of-home care[[71]](#footnote-71), and
* there is a strong correlation between reports to child protection per-capita and indicators of disadvantage, with more reports in areas experiencing greater disadvantage.[[72]](#footnote-72)

Similarly, the 2012 *State of Victoria’s Children Report* (2011–12)[[73]](#footnote-73), examined how children in different areas were faring against key indicators[[74]](#footnote-74). It found that children in regional areas, when compared to metropolitan children, experienced much higher rates of:

* substantiated abuse
* children on a Protection Order (double the metropolitan rate)
* children in OOHC (more than double than with metropolitan rate), and
* the highest rates of children in OOHC was in Gippsland (9.7 per 1,000 population), the Grampians (8.9 per 1,000 population) and Mallee (7.4 per 1,000 population).

This indicates the relatively high level of need in regional areas.

Disadvantage has been shown to be geographically concentrated[[75]](#footnote-75) and some population groups are consistently overrepresented in data about disadvantage. In Victoria these groups are: Aboriginal and/or Torres Strait Islanders, one parent families, people with non-English speaking backgrounds, the unemployed and people with a disability.[[76]](#footnote-76)

Data collated by the VLA Child Protection Program indicates that these same groups are representative of the client population accessing child protection legal assistance. In 2014/15 of over 6,000 clients in receipt of a grant of assistance:

* 60% were female
* 36% were aged 15 years or under
* 9% identified as being an Aboriginal or Torres Strait Islander person
* 53% were in receipt of a government pension or benefit, with most in receipt of either a parenting payment or Newstart. The bulk of the remaining clients were children and did not have an income, and
* 17% had a disability.

A longitudinal review of VLA’s most frequent users of legal aid services identified that they were likely to have sought help from VLA across multiple law areas (criminal, civil and family) and were significantly more likely to have seen us for a **child protection** or family violence issue before the age of 18. The key risk factors were one or more of the following:

* early contact with VLA (prior to 18 years of age)
* criminal offending at a young age, specifically between 10–17 years of age
* having a psychiatric issue, acquired brain injury or a cognitive disability, and
* identifying as an Aboriginal or Torres Strait Islander.

Regional Victoria has a larger proportion of Aboriginal and Torres Strait Islanders, as well as one-parent families and unemployed people.[[77]](#footnote-77) The Socio-Economic Indexes for Areas (SEIFA)[[78]](#footnote-78) indicates that 11.6% (or 145,916) Victorian children live in the most socio-economically disadvantaged geographical areas in Victoria.

Nationally, of children and young people who were the subject of a substantiated child protection report, 42% were from the areas of the lowest socioeconomic status. Aboriginal and Torres Strait Islander children were far more likely to be from areas of the lowest socioeconomic status – 57% compared to 37% for non-Aboriginal and/or Torres Strait Islander children and young people.[[79]](#footnote-79)

A review of the major population centres in the rural areas[[80]](#footnote-80) shows:

* all had an Index of Relative Socio-Economic Disadvantage (IRSED) score that was lower than average, indicating higher levels of socio-economic disadvantage
* the population of Aboriginal and/or Torres Strait Islanders were proportionately higher in all nominated regional areas, particularly Bairnsdale (Gippsland) and the Mallee, and
* both Gippsland and Mallee also had higher than average rates of unemployment and a greater than average proportion of one parent families.

See [Annexure 1](#_Annexure_1_–) for a more detailed examination of the data.

* + 1. A snapshot of regional services
* Eight major regional city Children’s Court to service regional and rural Victoria (Geelong, Warrnambool, Ballarat, Horsham, Bendigo, Shepparton, Bairnsdale and Morwell). These are serviced by generalist magistrates. The headquarter courts also service smaller courts in their district. Magistrates attend Mildura from Melbourne for a six-week circuit.
* The specialist Children’s Court services Melbourne, MJC and Broadmeadows.



* 21 DHHS offices located to service regional and rural Victoria (Geelong, Colac, Warrnambool, Portland, Hamilton, Ararat, Ballarat, Horsham, Mildura, Bendigo, Shepparton, Seymour, Benalla, Wangaratta, Wodonga, Warrigal, Traralgon, Sale, Leongatha, Bairnsdale and Morwell), with a number of metropolitan offices throughout Melbourne.



* Eight VLA offices located to service regional and rural Victoria (Geelong, Warrnambool, Ballarat, Horsham, Bendigo, Shepparton, Bairnsdale and Morwell). The Child Protection Team and the Youth Crime Team, both based in Melbourne service the Melbourne Children’s Court and the Moorabbin Justice Centre. Staff from the Broadmeadows office services the Broadmeadows Children’s Court.



* Six Community Legal Services that provide child protection legal services (Loddon-Campaspe CLC, Victorian Aboriginal Legal Services and Aboriginal Family Violence Prevention and Legal Service, Hume Riverina Community Legal Centre, Women’s Legal Service and Emma House Domestic Violence Services).



* 33 private practitioners on the section 29A Child Protection Lawyer Panel who service regional and rural Victoria (seven for Barwon South West (Geelong, Warrnambool), seven for Grampians (Ballarat, Horsham), four for Loddon Mallee (Bendigo/Mildura), eight for Hume (Shepparton) and seven for Gippsland (Bairnsdale, Morwell)) and 30 firms in metropolitan Melbourne.



It would appear that there is a high level of need for child protection legal services in regional Victoria, which experience greater social disadvantage and higher levels of state intervention into families. Despite this, the level of legal services pursuant to a grant of assistance[[81]](#footnote-81) currently provided does not appear to be reflecting the demand.

1. Gaps in access to legal assistance

This section will examine the extent of legal service coverage currently available to children, young people and parents navigating each stage of the child protection process.

The scan shall seek to identify gaps across the following three key areas:

* gaps relating to matters in court
* gaps in service provision before and after court, and
* gaps that may arise within the broader legislative framework.

The identification of gaps in legal service coverage helps the review situate its purpose within the current legal and funding context. It also draws the focus of the review towards coverage gaps and the impact they may have upon children and young people, particularly those at risk of long term disadvantage.

* + 1. Gaps within the current funding guidelines

As outlined in the section entitled [Scope of services](#ScopeOfServices), grants of aid for the majority of child protection matters are provided under State Family Guideline 1 and State Family Guideline 2.[[82]](#footnote-82) Guidelines 1 and 2 may be summarised as follows:

* a child is eligible for a grant of assistance if they are the subject of an application in the Family Division of the Children’s Court
* a parent or third party may be eligible for a grant of assistance in respect of a Protection Application if they have reasonable prospects of their child being placed in their care[[83]](#footnote-83), and
* a parent or third party may be eligible for a grant of assistance in respect of any secondary application, including an application to breach, vary, extend, revoke or make a permanent care order) where they oppose any aspect of the application, including the grounds, proposed order or any condition of the proposed order or where they seek to have included a particular condition relating to a substantive issue which will significantly affect their lifestyle or their family lifestyle.

In response to the 2016 legislative amendments made to the CYFA, VLA expanded the delivery of child protection legal services to Guidelines 3, 4 and 5, which provide:

* legal aid may be granted to a child or parent to appeal, or respond to an appeal against, an interim accommodation order – where there are reasonable prospects of the child being immediately placed in the care of a parent and, where it is a parent applicant, that parent has reasonable prospects of the child being placed in their care (guideline 3)
* to replace legal aid funding that was previously available for court review proceedings at the 12-month mark, a new guideline to fund requests for an internal DHHS administrative review of a case plan decision and, where unsuccessful, an external VCAT review of a case plan decision in limited circumstances (guideline 4), and
* funding to assist a child or parent to initiate, or respond to, an application to revoke a family reunification order in circumstances where there are reasonable prospects of the child being immediately placed in the care of a parent and, where it is a parent applicant, that parent has reasonable prospects of the child being placed in their care (guideline 5).

Each guideline limits its scope with the inclusion of numerous threshold tests, which include the means test[[84]](#footnote-84) and State reasonableness test[[85]](#footnote-85), in addition to more particularised, content based tests such as: ‘are there reasonable prospects of reunification within the legislated timeframe’ or ‘where DHHS propose out-of-home care’. These give rise to service gaps for particular client groups or matter types, such as:

* parents who are responding to a protection application will not receive funding to dispute grounds of an application, disposition (proposed order) or conditions in circumstances where they do not have reasonable prospects of having the child returned to their care
* parents wanting to be involved in the placement of children where the child may not be returning to the parents’ care, on an interim or final basis. This particularly important for Aboriginal and/or Torres Strait Islander children in order to maintain a cultural connection and identity
* third parties, such as carers or grandparents, are not eligible for funding to seek internal or external review of case planning decisions, even if the decision relates directly to them, and
* children and parents may only seek to review a case planning decision in limited circumstances[[86]](#footnote-86).

The application of threshold tests limits the availability of legal services, and this is necessary as part of the need to manage the ‘legal aid fund’, particular in an environment where demand continues to grow. However, it is necessary to consider whether gaps created from within the guidelines reduce the overall effectiveness of child protection legal services, and if so, how best to address this issue.

* + 1. Gaps in service provision before and after court

As previously outlined, around one third of all substantiated reports result in the initiation of court proceedings. While the number of voluntary engagements reached, between DHHS with families, prior to the commencement of proceedings is not publically available, there were 1,200 children placed in OOHC in 2014/15 on a voluntary basis.[[87]](#footnote-87)

The legislative changes that commenced in March 2016 are underpinned by a focus on case planning. The case plan must be developed at the early stage of a matter and must contain a ‘permanency objective’.[[88]](#footnote-88)

Case planning must:

* commence from the point of substantiation
* include a permanency objective
* include an ‘actions table’, which ‘will set out the goals, tasks and timelines to implement the case plan’[[89]](#footnote-89), and
* include a cultural support plan where the child is Aboriginal or Torres Strait Islander and in court ordered out-of-home care.

The introduction of strict timeframes for reunification mean that children who have been in court ordered out-of-home care for two years or more, must be placed on a Care by Secretary order, or long-term Care by Secretary order, neither of which have conditions attached to them. This means that all decisions relating to the operation of Care by Secretary orders and long-term Care by Secretary orders, will occur within the case planning framework.

The case plan clearly is an important event in the determining the approach that will be taken. VLA does not currently fund legal assistance or representation to attend case planning meetings.

* + 1. Gaps that may arise within the broader legislative framework

Children and parents who traverse the child protection jurisdiction may cross into other legislative frameworks, or experience gaps within the existing Children’s Court framework. This section examines gaps that arise in the context of family and mental health law and how this impacts upon legal service delivery from a client perspective. It is not intended to represent an exhaustive examination of this issue.

### Example 1: Family Law

The Family Law Courts[[90]](#footnote-90) and Children’s Court jurisdictions overlap and yet ‘there are significant investigatory and jurisdictional gaps between the two systems’.[[91]](#footnote-91) The Family Law Council summarise this fragmentation with the following observation:

‘the reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse’[[92]](#footnote-92)

There is a wealth of literature outlining the jurisdictional gaps between the family law and child protection systems, written from a Family Court perspective.[[93]](#footnote-93) These may be summarised as follows:

* The Family Courts are governed by federal legislation whereas the Children’s Court is governed by State or territory based legislation, as are the corresponding child protection departments.
* Family Courts do not have independent forensic capacity, as they operate in a private law context and the individual parties have responsibility for the conduct and cost – unless legally aided – of the litigation.
* There remains some uncertainty as to the Family Courts power to make an order which places a child with a State or territory based child protection department without the department’s consent.
* Investigations that are conducted by the child protection departments in a family law context are completed within the child protection framework for risk assessment, which has a higher threshold for substantiation and involvement.
* Concerns that disgruntled parties may use the fragmented system to ‘forum shop’ so as to re-litigate issues within a different court to obtain a different outcome, leading to re-telling stories and compounding trauma.[[94]](#footnote-94)
* General lack of cooperation between jurisdictions including the sharing of information between courts.

The Magellan list in the Family Court is an example of effective cooperation between the Family Court and the child protection system. Key aspects of the program are:[[95]](#footnote-95)

* having a judge manage the process
* cooperation with other organisations, such as DHHS, which have had contact with the family
* a focus on the children in the dispute – with the appointment of an independent children’s lawyer (ICL) in almost all cases
* the court’s ability to order expert investigations and assessments from the respective state/territory child protection agency and/or a court family consultant, and
* tight time frames.

There are distinct issues that arise where proceedings are transferred from the Family Courts into the Children’s Court and vice versa, that are less frequently described. The issues may be summarised as follows:

* uncertainty as to whether the Children’s Court is able to make family law orders, such as parenting orders
* a lack of familiarity, on the part of practitioners and Children’s Court Magistrates, resulting in confusion as to the process for transferring matters into the federal jurisdiction
* a lack of practitioner knowledge and expertise in family law matters resulting in a lack of awareness of options available to clients within the federal jurisdiction.

The Australian Law Reform Commission’s report on Family Violence (2010)[[96]](#footnote-96) described three stages or intersections when a decision as to whether a case should be in the Family or Children’s court may arise:

1. during DHHS investigation, prior to the commencement of proceedings in the Children’s Court, when risk has been substantiated but a protective carer is identified and a reference to a family court is possible
2. where proceedings have been commenced in the Children’s Court but a protective carer has been identified and the risks are such that the DHHS are seeking to withdraw upon attainment of family law orders securing placement, and
3. after a hearing in the Children’s Court, where protective matters are resolved (whether by withdrawal or expiration of a protective order) but a dispute remains between the parents as to who the child shall live with or spend time with.[[97]](#footnote-97)

From a client perspective, traversing the two jurisdictions can be confusing, time-consuming and repetitive. Only four firms on the Melbourne metropolitan s. 29A Child Protection panel are also on the Family Law or ICL panels, which means that there is a limited number who can deliver high quality services needed by clients in both jurisdictions. By comparison, there are 36 regional firms who sit on the s. 29A Child Protection panel and also the Family Law or ICL panels.

In the case of children who have been represented on a direct interest model in the Children’s Court, a change of jurisdiction to the Family Court can mean no lawyer, a new lawyer or a different type of lawyer, one that acts on ‘best interests’.

### Example 2: Mental Health and disability law

The presence of mental health problems, cognitive impairment or intellectual disability may be seen by child protection authorities as ‘key risk factors’ for child abuse and neglect[[98]](#footnote-98). One or more of these factors are often present for families engaged with the child protection system.

An estimated 24% of all Victorian children are listed on a Health Care Card, indicating some form of disadvantage or parental ill health or disability. The risk factor that most commonly affects Victorian families with a child entering school is a history of parental mental health issues (6.5%)[[99]](#footnote-99)

Aboriginal children (7.4%), males (5.6%), children from the most disadvantaged areas (4.5%) and children from one parent families (6.0%) were more likely to have an intellectual disability, learning disability or developmental delay[[100]](#footnote-100)

Children in OOHC were 11 times more likely to attend a ‘special school’ than the general population.[[101]](#footnote-101)

These disabilities may affect the ‘capacity’ of the parent, child or young person to be involved in proceedings. Generally, there is a presumption of capacity – the ability to understand *the nature and possible consequences* of the proceeding or *capable of adequately conducting or giving reliable instructions*. Where a person lacks capacity the conduct of their proceedings can be undertaken by a person who does not suffer their limitations.

A number of different terms are used to describe the legal position of the person who takes on the role of conduct of the proceedings for the person deemed to lack capacity – such as ‘*next friend’, ‘guardian ad litem’, ‘litigation guardian’*, or ‘case guardian’. In Victoria, the Office of the Public Advocate (OPA) advocates on behalf of persons deemed incapable. As litigation guardian, they may also apply for a grant of legal assistance as they effectively ‘stand in the shoes’ of the person they advocate on behalf of.

There have been occasions where, following the request of the Children’s court, a member of the OPA has advocated on behalf of a person with a disability. This service has only been extended to clients in metropolitan Melbourne. The OPA is not currently resourced to assist clients in their capacity as ‘litigation guardian’ in the Children’s Court jurisdiction.

There is uncertainty as to whether the Children’s Court has jurisdiction to appoint a litigation guardian. Order 15.03 of the *Magistrates Court General Civil Procedure Rules 2010*, provides that a litigation guardian must be appointed where a person is ‘under a disability’. However, this applies only to ‘civil proceedings’ pursuant to the *Magistrates’ Court Act 1989*, of which proceedings in the Children’s Court appear excluded.

A child or young person before the Children’s Court deemed to lack capacity may be represented by a lawyer acting on a ‘best interests’ basis[[102]](#footnote-102). However, there is no similar provision available to parties over the age of 18.

Parents detained as an involuntary psychiatric patient are generally unable to attend court (even under supervision) and, as a consequence, they are frequently absent from proceedings involving their children.

This disconnection between mental health, disability law and the Children’s Court means that a cohort of especially vulnerable clients is either not receiving legal services or legal services that fail to respond to their specific needs.

1. Client experiences

There is limited information available concerning the experiences of clients of the Child Protection Program. However, one potential source is from the Client Satisfaction Survey conducted by VLA in 2015. We surveyed clients who had received legal aid services in 2014–15 financial year. These included clients who had used our Legal Help telephone information service, legal advice, duty lawyer and legal representation (case work) services across all our program areas – civil, criminal and family law. For legal representation, it also included clients who had received services from private practitioners as well as VLA salaried lawyers.

The most recent Survey was conducted in 2015. While the number and range of respondents was limited (no children were surveyed) this still provides some useful information.

The survey indicates a high degree of satisfaction with the services provided, although the number of respondents who received a child protection service is small (see [Table 4](#Table4)).

Table 4a: Client Satisfaction Survey – Family Law

| **Satisfaction with the outcome** | **Legal advice****total (n=310)** | **Legal advice****CP (n=9)** | **Casework****total (n=321)** | **Casework****CP (n=34)** | **Duty lawyer****total (n=290)** | **Duty lawyer****CP (n=6)** |
| --- | --- | --- | --- | --- | --- | --- |
| Extremely satisfied | 27% | 50% | 46% | 51% | 33% | 29% |
| Satisfied | 21% | 13% | 24% | 25% | 31% | 56% |
| Neutral | 13% | 0% | 11% | 7% | 11% | 15% |
| Dissatisfied | 11% | 13% | 7% | 8% | 9% | 0% |
| Very dissatisfied | 12% | 13% | 7% | 5% | 11% | 0% |
| Not applicable or don't know | 16% | 13% | 4% | 4% | 5% | 0% |
| Total Satisfied | 48% | 62% | 70% | 76% | 64% | 85% |

Q [2, 3, 4] How satisfied were you with the outcome of your case? Would you say you were…? (SR)

Table 4b: Likelihood of Legal Aid recommendation

| **Recommending Legal Aid** | **Legal advice****total (n=310)** | **Legal advice****CP (n=9)** | **Casework****total (n=321)** | **Casework****CP (n=34)** | **Duty lawyer****total (n=290)** | **Duty lawyer****CP (n=6)** |
| --- | --- | --- | --- | --- | --- | --- |
| Yes | 83% | 75% | 91% | 92% | 86% | 100% |
| No | 10% | 25% | 5% | 4% | 5% | 0% |
| Don’t know | 8% | 0% | 4% | 3% | 10% | 0% |

Many of the comments as to possible improvements expressed the desire that lawyers spend more time with them, but acknowledging that the lawyers were busy. There was also a wish for contact to be made prior to the day at court. Some pertinent comments include:

* *‘They’re so flat out, the government funding isn’t there.’*
* *‘The application process was difficult at first, and finding out who your lawyer is ... I only met them on the day of court. Meeting before then would have definitely helped with my anxiety.’*
* *‘Legal aid could meet up or discuss over the phone the strategy or the case few days before the court date.’*
* *‘Ensure lawyers communicate more frequently with clients, so that clients know exactly what stage their application/matter is at.’*
1. Comparative analysis of all State and territory Legal Aid Commissions

As child protection is the responsibility of individual states and territories, each jurisdiction has its own legislative framework and system of service delivery. Details of the relevant legislation and key components are contained in [Annexure 2](#_Annexure_2_–).

While the detail differs, there is a high degree of consistency between Australian jurisdictions. However, two significant points of difference are:

* + 1. the use of a fault based threshold for the making of Protection Orders in Victoria, and
		2. the absence of permanency planning timeframes other than in Victoria and New South Wales.

Victoria is the only State that uses a fault based threshold for the making of Protection Orders. For a court to be satisfied that a child or young person is in need of protection, it must make a finding on one of the ‘grounds’ of harm. For example, the court will find that a child is in need of protection where the child has suffered harm (physical/sexual/emotional) and the ‘child’s parent have not protected or are unlikely to protect, the child from harm’.[[103]](#footnote-103)

The fault based threshold introduces a forensic aspect to child protection investigations, where ‘proof’ of likely or actual harm is required to be established via written court reports. Focusing on ‘proof’ or ‘fault’ rather than ‘risk of harm’ and ‘safety’ can be unhelpful from a family engagement perspective. There are consequences for parents who concede ‘fault’, including its use in future Working with Children Checks. This use of a fault based threshold is significant from a legal service perspective, as ‘proof’ of an application is a bases for legal dispute.

The permanency provisions in New South Wales are less restrictive than those in Victoria. The NSW legislation reserves the overriding discretion of the NSW Children’s Court to make a range of orders, unlike to position under the Victorian framework where the court no longer has a power to order reunification after a child has been out-of-home for two years.

Table 5: Key principles guiding the legislation (availability)

| **Jurisdiction** | **Best interest principle** | **Early intervention** | **Participation by children and young people** | **Culturally specific responses to ATSI people** | **Permanency planning – associated timeframes** | **Limited intervention or hierarchy of intervention** | **No-fault threshold for making Protection Orders** |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Victoria**  | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** | **No** |
| **ACT** | **Yes** | **Yes** | **Yes** | **Yes** | **No** | **Yes** | **Yes** |
| **NSW** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** |
| **NT** | **Yes** | **Yes** | **Yes** | **Yes** | **No** | **Yes** | **Yes** |
| **QLD** | **Yes** | **Yes** | **Yes** | **Yes** | **No** | **Yes** | **Yes** |
| **SA** | **Yes** | **Yes** | **Yes** | **Yes** | **No** | **Yes** | **Yes** |
| **TAS** | **Yes** | **Yes** | **Yes** | **Yes** | **No** | **Yes** | **Yes** |
| **WA** | **Yes** | **Yes** | **Yes** | **Yes** | **No** | **Yes** | **Yes** |

Similarly, each state and territory has its own Legal Aid Commission, which is responsible for the provision of child protection legal services that may include – legal information, education, advice and legal representation as a ‘duty’ or in some instances, on an ongoing basis.

Table 6: Comparative analysis of child protection legal services provided by state and territory Legal Aid Commissions (availability)

| **Jurisdiction** | **Pre-court assistance** | **Duty Lawyer Service** | **Court based assistance** | **Post-court assistance** | **Third Parties** | **Initiate application** | **Administrative review** |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Victoria | **No** | **Yes** | **Yes** | **No** | **Yes** | **Yes** | **Yes** |
| ACT | **No** | **No** | **Yes** | **No** | **Yes** | **No** | **No** |
| NSW | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** |
| NT | **No** | **No** | **Yes** | **No** | **No** | **No** | **No** |
| Qld | **Yes** | **No** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** |
| SA | **No** | **No** | **Yes** | **No** | **No** [[104]](#footnote-104) | **No** | **No** |
| Tasmania | **No** | **No** | **Yes** | **No** | **Yes** | **Yes** | **No** |
| WA | **No** | **Yes** | **Yes** | **No** | **Yes** | **No** | **No** |

The varied approaches adopted by the state and territory Legal Aid Commissions in their delivery of child protection legal services, may be summarised as follows:

* All states and territories use a mixed model of service delivery, utilising in-house and private lawyers, as well as some Community Legal Service lawyers. In addition to Victoria, three jurisdictions have a strong Community Legal Service presence, particularly in the provision of legal services for Aboriginal and Torres Strait Islander clients – Queensland, New South Wales and the Northern Territory.
* All states and territories provide free legal advice by telephone regarding child protection. New South Wales offers free face-to-face clinics in their city office where no appointment is required as well as face-to-face scheduled appointments on designated days at other offices.
* Queensland, New South Wales and Western Australia have information ‘tool-kits’ for parents and children that are easily accessible, with Queensland having the most comprehensive and user-friendly document, prepared by South West Brisbane Community Legal Centre.
* Victoria, New South Wales and Western Australia are the only states to offer a duty lawyer service to assist children and parents responding to initiating applications. Queensland is currently piloting two separate duty lawyer services in the regional courts of Beenleigh and Cairns.
* New South Wales and Queensland provide a grant of legal aid to enable assistance and representation prior to the commencement of child protection proceedings. In Queensland, this grant is not subject to a merits assessment. In New South Wales, this grant may include appearances at ‘Alternate Dispute Resolution’ as well as ‘pre-litigation contact dispute mediation’.
* All states and territories provide a grant of legal aid to enable assistance and legal representation for eligible clients responding to child protection proceedings.
* Eligibility thresholds for Queensland, Tasmania and Western Australian provide assistance where the Department is seeking to remove custody or guardianship and/or the child is already removed from the parent’s care and there are reasonable prospects of challenging that disposition or order or special circumstances exist.
* Tasmania requires a nominal contribution of $60 from all clients above the age of 18.
* Australian Capital Territory and South Australia capped the amount of service that can be provided. In the ACT, the services provided are capped at $15,000 and in South Australia, at $12,500 for each party and $17,000 for independent representation of a child.
* New South Wales and Queensland provide a grant of legal aid to enable assistance and representation following the conclusion of child protection proceedings. In New South Wales, the grant funds representation at a case planning meeting where conditions as to contact and support services may be decided. In Queensland, this grant is not subject to a merits assessment and includes attendance at a post-order Family Group Conference.
* Victoria, New South Wales and Queensland provide, in limited circumstances, a grant of legal aid for legal representation at an administrative review.
* Victoria, New South Wales and Queensland provide, in limited circumstances, a grant of legal aid to initiate child protection proceedings.
* All states and territories identify children and Aboriginal and Torres Strait Islanders as priority client groups.
* Queensland and New South Wales Legal Aid Commissions are piloting early intervention services involving mothers who have been the subject of unborn reports. These pilots operate in partnership with hospitals and social workers from their equivalent DHHS.

In summary, Legal Aid New South Wales appears to offer the most comprehensive package of child protection legal services. It also operates within a similar legislative framework, suggesting that there is merit in examining the arrangements more closely.

Legal Aid NSW receives a higher level of Commonwealth and State funding per capita than Victoria Legal Aid. If VLA received the same level of funding per Victorian, this would see an additional payment of $4 million annually from the Commonwealth and $22 million annually from the State.[[105]](#footnote-105)

1. Comparison with international jurisdictions

It is important to examine the approach adopted in other places in order to identify possible improvements to service design. However, services and policies are designed within their country specific context, which makes a direct transfer difficult and possibly unwise. Thus it is necessary to understand the context and assess the relative merits and potential problems. This section explores the similarities and differences in the child protection systems in operation in New Zealand, Canada, England, Scotland, Norway, and Sweden.

* + 1. Different approaches

There are different approaches to issues of child neglect and maltreatment. Examining these assists us to understand the different response that are adopted over time and in different places.

In the 1990s two key approaches were common:[[106]](#footnote-106)

* Anglo-American countries, including Australia, New Zealand, England, the United States and Canada adopted a *child protection* approach
* Nordic and Continental European countries, such as Sweden, Belgium and Norway adopted a *family service* approach.

The *child protection* approach tends to view child protection as distinct from other services for children with lower levels of need. They to delay intervention and adopt a more legalistic approach.

In contrast, the *family service* approach is seen as needs based; child protection investigations are seen as part of the service system for children in need and their families. The child protection agency deals with allegations of maltreatment, as well as providing family support services for children who may be in need but not likely to suffer significant harm.

Since the 1990s, questions have been raised as to whether these approaches continue to apply to child protection systems.[[107]](#footnote-107) Gilbert, Parton and Skivens suggest that, as countries have sought to strike a new balance between child protection and family services, a new orientation has emerged which is described as *child-focused.[[108]](#footnote-108)* The focus has become the child’s overall wellbeing and development.

Gilbert, Parton and Skivens outline the different approaches (Table 7).[[109]](#footnote-109) They also argue that while the emphasis varies, all countries have a mix of approaches.[[110]](#footnote-110)

Table 7: The different approaches to issues of child neglect and maltreatment

|  |  |  |  |
| --- | --- | --- | --- |
| **Approach** | **Child Focus** | **Family Service** | **Child Protection** |
| **Driver for intervention** | The individual child’s needs in a present and future perspective; society’s needs for healthy and contributory citizens | The family unit needs assistance | Parents being neglectful and abusive towards children (maltreatment) |
| **Role of the State** | Paternalistic/defamilialisation- State assumes parent role; but seeks to refamilialise child by foster home/kinship care/adoption | Parental support; the state seeks to strengthen family relations | Sanctioning; the State functions as ‘watchdog’ to ensure child’s safety |
| **Problem frame** | Child’s development and unequal outcomes for children | Social/psychological (such as system, poverty and racism) | Individual/moralistic |
| **Aim of intervention** | Promote wellbeing via social investment and/or equal opportunity  | Prevention/social bonding | Protection/harm reduction |
| **State-parent relationship**  | Substitutive/partnership | Partnership | Adversarial  |
| **Balance of rights** | Children’s rights/parents’ responsibility | Parents’ rights to family life mediated by professional social workers  | Children’s/parents’ rights enforced through legal means  |

See Table 8 in [Annexure 3](#_Annexure_3_–) for an examination of how the different orientations to child protection translate in terms of service delivery ‘on the ground’.[[111]](#footnote-111)

The review was unable to locate analysis or research, which considered how the different orientations to child protection translated in terms of legal services delivery.

Australia has traditionally been viewed as a child protection oriented system. However, since 2002 the States and Territories have embarked on reforms to build capacity and strengthen families with a view to preventing abuse and neglect.[[112]](#footnote-112) This shift in focus was endorsed in the first National Framework for Protecting Australia’s Children 2009–2020, which provides an overarching framework for developments in policy and practice that acknowledges:

*Australia needs to move from seeing ‘protecting children’ merely as a response to abuse and neglect to one of promoting the safety and wellbeing of children.*[[113]](#footnote-113)

The 2016 Victorian ‘Road Map to Reform’ suggests an attempt to move further in this direction. Consideration is required as to how this shift in focus impacts upon legal service delivery, particularly in the context of amending legislation in Victoria[[114]](#footnote-114), which inserts a child focused case planning system with a child protection legislative framework.

* + 1. International approaches to child protection

### Example 1: New Zealand

The New Zealand child protection system adopts a mix of orientations, best categorised as principally *child protection* with a *strong child and family service* focus. The *Children, Young Persons and Their Families Act 1989* (NZ) governs child protection in New Zealand and is administered by the Ministry of Social Welfare.[[115]](#footnote-115) The guiding principles of the Act are:

* that the child’s welfare and interests are paramount in all matters relating to the administration and application of the Act, and
* that the family is carer for and protector of the child, supported by the state in its role.

The Act was lauded for its focus on family participation in decision making and has been described as ‘an Act strongly influenced by Maori culture’.[[116]](#footnote-116)

There are four features of the current NZ legislation that diverge from Victoria:

1. judicial authorisation is required before a child can be involuntarily removed from his or her family by child protection workers, even in emergency circumstances – only the police have the power to remove a child without warrant[[117]](#footnote-117) where this ‘is critically necessary to protect a child from injury or death’[[118]](#footnote-118)
2. Family Group Conferencing (FGC) is mandatory before commencing court proceedings in relation to the care and protection of a child
3. the grounds ascribed by the court when making a care and protection order include ‘no fault’ characteristics, which enable parents to concede grounds without a finding of personal fault or omission, and
4. once proceedings are initiated, parents and children are required to prepare written responses to the court, in affidavit form.

The NZ system has garnered much international attention and praise for its use of FGC. Notwithstanding its strong foundations, NZ has encountered similar difficulties with its child protection system as experienced in Australia (and elsewhere), not least the gross over-representation of Maori children in out-of-home care. The Modernising Child, Youth and Family Expert Panel conducted a comprehensive review and delivered its report in December 2015, entitled *Investing in New Zealand’s Children and their Families* (referred to as ‘Investing in Children’ report). The report recommends a complete and ‘radical’ overhaul of Children, Youth and Family services[[119]](#footnote-119) (See [Annexure 4](#_Annexure_4_–) for details of the recommendations).

The NZ Legal Aid Grants Handbook outlines the eligibility requirements for parents and children seeking legal assistance in child welfare matters.[[120]](#footnote-120) Like Victoria, adult applicants are required to meet a means and merit ‘or reasonable prospects’ threshold test. Child applicants must satisfy the merit test only. Child protection legal services are provided by ‘lead providers’, who are assessed by Legal Aid to be appropriately qualified to deliver child welfare legal services.[[121]](#footnote-121) Under the current guidelines, child protection applicants are exempt from paying a ‘user charge’, which is a nominal fee set by the Commissioner (currently around A$47).

Grants of assistance for child welfare utilise ‘fixed-fees’ for each separate item or service, with approval provided for a fixed number of each item or service.[[122]](#footnote-122) There are fixed fees for preparation of a matter; attendance at a hearing (by hearing type); attendance at a roundtable conference (a form of court based mediation); and for preparation of a ‘response’, which includes drafting of affidavit materials. Legal assistance is available for representation at a pre-court FGC, although only in ‘special circumstances’ where the applicant has:

* 1. a disability
	2. there are serious power and control issues in the family dynamics, or
	3. there are significant domestic violence issues affecting the applicant.

While duty lawyers are available for criminal law matters (subject to strict guidelines), there is no duty lawyer service for child welfare applications. This is consistent with their prioritisation of FGC prior to court and the inclusion of an ‘urgent hearing’ fixed fee within the guidelines.

The ‘Investing in Children’ report recommended the creation of an independent youth advocacy service to ‘ensure that the voices of children are heard in the design of systems and services’. It too early to predict the impact of such an agency upon the delivery of legal services for children.

### Example 2: Canada

The Canadian child protection system also adopts a mix of orientations, principally *child protection* with a strong *child and family service* focus. In Canada, provincial and territory governments are responsible for the administration and operation of child protection services. Legislation in each province or territory governs the way that such services are provided and by whom; with responsibility for the delivery of child protection services undertaken by local authorities and mandated non-government agencies. It was outside the scope of this scan to assess the various approaches adopted across the ten provinces and three territories of Canada, however, for readers interested, a case study featuring the province of Manitoba is set out in [Annexure 5](#_Annexure_5_–).[[123]](#footnote-123)

In essence, each province or territory has a number of agencies sharing concurrent jurisdiction. Where a child is assessed as being at risk, families may choose which support agency they work with to ensure that support is provided in a culturally appropriate manner.

When the family comes before a court it may order that the child be:

* returned to their parents
* placed with a third party
* placed under the temporary guardianship of the nominated agency, or
* placed under the permanent guardianship of the nominated agency.

Legislation provides for interim and long-terms orders and conditions relating to access with parents.

As with child protection services, legal services vary from province to province and territory to territory:

* most provinces have some form of child representation in child welfare cases, although the form of this representation varies and includes:[[124]](#footnote-124)
	+ **amicus curiae** – lawyers that are neutral and do not advocate for the child and have no obligation to present the child’s wishes
	+ **litigation guardian** – lawyers represent the ‘best interest’ of the child in court
	+ advocate or **child’s lawyer** – acts on the child’s instructions.
* in provinces and territories where children are eligible for legal representation on an ‘instruction’ model, capacity must be established by the lawyer except in circumstances where the legislation dictates an age for capacity[[125]](#footnote-125)
* most provinces and territories require lawyers acting on behalf of children to provide written responses, in affidavit form, which outline details of the child’s wishes and evidence of matters considered by the lawyer where they are making recommendations on ‘best interests’
* in Newfoundland and Labrador, the *Children’s Law Act[[126]](#footnote-126)* enables a judge to interview a child to ascertain their preferences and the legislation enables the child to be advised by a lawyer, who may be present during this interview
* Ontario has the most comprehensive system of representation for children of all ages in child protection proceedings. It has an Office of the Children’s Lawyer (OCL), which is funded separately from Legal Aid Ontario and represents all children in Family Law and child welfare matters.[[127]](#footnote-127) A child can have representation at any stage of a child welfare proceeding upon order of the court, with the child’s capacity determining which model of representation is adopted. The OCL employs a team of specialist children’s lawyers and ‘clinical investigators’ (qualified social workers) who work jointly to represent and support the needs of its child and youth clients. Clinical investigators may also prepare written reports for the lawyer or court when required by either the lawyer or the court[[128]](#footnote-128)
* all provinces and territories provide some level of assistance through local legal aid agencies to children, young people and parents, ranging from duty lawyer services to ongoing assistance during proceeding pursuant to a grant of assistance[[129]](#footnote-129)
* some provinces and territories provide pre-court services to attend mediation or FGCs[[130]](#footnote-130)

### Example 3: England

The English child protection system is viewed as a largely *child protection* oriented system.[[131]](#footnote-131) The *Children Act 1989* provides the current legislative framework for child protection in England. Key principles established by the act include:

* the paramount nature of the child's welfare, and
* the expectations and requirements around duties of care to children.

The 1989 Act was strengthened by the introduction of the *Children Act 2004* (Every Child Matters), which supported the creation of a national framework for reforming children’s services in England and Wales. The amendments were to support reforms designed to enhance interagency service delivery and ‘joined-up’ services. These reforms were the subject of further review in 2008 following the tragic death of a child who was the subject of a child protection plan.[[132]](#footnote-132)

The 2008 review reinforced the importance of a *child protection* orientation, placing renewed focus on protecting children from harm as opposed to promoting the general welfare of children that had been central to the Principal Act.

In 2011, the new Government commissioned a review by Profession Eileen Munro, arguing:

The reforms led by the previous administration were well intentioned … but the child protection system in our country is not working as well as it should.[[133]](#footnote-133)

The Munro report recommended changes to reduce bureaucracy and establish a more child-centred system[[134]](#footnote-134). The impacts of this, in terms of outcomes for children and families, remain unclear.

Some distinguishing features of the English child protection system are:

* the vast majority of matters are dealt with by way of a pre-proceedings process, where parents (but not children) are eligible for legal representation via legal aid
* the Family Proceedings Court, which sits in the Magistrates’ Court, is a unified family court vested with joint-jurisdiction to hear ‘public’ child protection and ‘private’ family law cases. They are also empowered by various legislation, to hear child support, adoption, domestic violence and declaration of parentage cases
* child protection proceedings are subject to the Ministry of Justice, ‘Public Law Outline’ (PLO),[[135]](#footnote-135) which outlines a strict framework for care proceedings that includes pre-court and court based processes. The PLO dictates that except in the most complicated cases, care proceedings take no longer than 26 weeks[[136]](#footnote-136)

The pre-proceedings process was introduced in 2008 as part of the PLO reforms to care proceedings. Its aim was to divert cases of abuse and neglect from the courts, to ensure local authority applications were better prepared and reduce the time courts took to decide child protection cases[[137]](#footnote-137). Local authorities were required to write a ‘letter before proceedings’ to parents, outlining their concerns and inviting them to attend a ‘pre-proceedings meeting’ to discuss how this could be avoided. Legal Aid is available to all parents, without recourse to a means or merit test, so that they can receive advice and support at the meeting.[[138]](#footnote-138) The responsibility for ensuring that the voice and views of the child is given to the local authority.

In 2013, a review of the impact and operation of the pre-proceedings process was conducted by the University of Bristol School of Law[[139]](#footnote-139). The review found that a third of all pre-proceedings cases involved pre-birth assessments and that pre-proceedings succeeded in diverting cases from court.[[140]](#footnote-140)

Upon the initiation of care proceedings, the court may appoint a lawyer for any children through the Children and Family Court Advocacy Support Service (CAFCASS). All children qualify for legal assistance in care proceedings, without recourse to means or merit tests. Parents who have been the victim or domestic violence or who have a ‘child in care’ also automatically qualify for legal aid to be represented by a solicitor, and where required a Barrister, without their financial circumstances being taking into account (ie non-means tested).[[141]](#footnote-141) Solicitors, and where required a barrister, represent the respective Local Authority.

Immediate representation is available pursuant to an ‘Emergency Legal Representation’ grant in circumstances where an application to remove a child from their family home is made by the local authority.[[142]](#footnote-142)

In exceptional circumstances, such as where a parent has a cognitive impairment or mental health issue or has been the victim of domestic violence. legal aid is available for advice or representation for post-court events, such as attendance at child protection conferences that can occur after a court order is made.[[143]](#footnote-143)

### Example 4: Scotland

The children’s hearing system is seen as *child protection* and *child focused* in orientation. The *Children’s Hearings (Scotland) Act 2011* (2011 Act) commenced on 24 June 2013. The 2011 Act made fundamental changes[[144]](#footnote-144) to the child protection hearing processes, which were previously governed by the *Children (Scotland) Act 1995* (the 1995 Act).

Some distinguishing features of the Scottish child protection system are:[[145]](#footnote-145)

* most matters are dealt with by children’s hearings conducted by tribunals of lay volunteers from the community
* the children’s hearings system deals with juvenile justice matters and child protection matters together
* there is a principle that no order or supervision requirement can be made by a court or a children’s hearing, unless it is determined that the making of an order would be better for the child than there being no order at all.[[146]](#footnote-146)

The primary function of a children’s hearing is to determine whether a child requires compulsory measures of supervision. It has significant powers and can decide:

* to make a supervision requirement
* continue to a subsequent hearing to allow further time for investigation
* discharge the referral
* grant a warrant to find or remove a child, or move the child to a place of safety or require the child to submit to medical or other treatment
* decisions relating to a child’s welfare generally, while disputed facts, emergency protection orders and appeals are dealt with by the Sheriff’s Court.[[147]](#footnote-147)

Children have a right to attend the hearing and in general must attend. The parent or ‘relevant person’ is legally required to attend. As far as practicable, a child should have the right to express his or her views and have these views considered.[[148]](#footnote-148) The hearing will make a determination as to whether a child has a legal representative and/or a safeguarder. The role of the safeguarded is analogous to an ICL appointment in the Children’s Court.

The 2011 Act resulted in some significant changes to the Legal Aid guidelines for ‘children’s law’, which are summarised as:[[149]](#footnote-149)

* the availability of publicly-funded representation at children’s hearings via Automatic Children’s Legal Aid
* the transfer of decision-making in applications for children’s legal aid for Sheriff Court proceedings from the courts to the Legal Aid Board
* the introduction of a registration scheme and Code of practice for children’s legal assistance
* the introduction of a duty lawyer scheme, and
* the introduction of a quality assurance scheme.

In Scotland, both children and parents can be represented by lawyers in children’s hearings, with the Scottish Legal Aid Board providing what is referred to as ‘children’s legal aid’ subject to the type of matter and a means test.[[150]](#footnote-150) This includes where the matter is referred to the Scottish Sheriff Court for the statement of grounds to be determined.

Children are eligible for legally aided representation while parents or ‘relevant persons’ may receive assistance where it is ‘necessary to ensure effective participation’. Legal representatives are drawn from a specialist panel, which was previously maintained by the local authority but now by Scottish Legal Aid.

Scottish Legal Aid guidelines provide separate grants; for advice and assistance, initial appearances and subsequent legal aid. This fragmented approach has attracted criticism from the Law Society of Scotland[[151]](#footnote-151) and a lump-sum approach is currently under consideration.

### Example 5: Sweden

Sweden is characterised as having a *family service* approach to child protection, with a mandatory reporting element. It has ‘a holistic child welfare system, which treats prevention, support and protective responses to child abuse and neglect as parts of a whole system’.[[152]](#footnote-152)

The Children and Parents Code[[153]](#footnote-153) establishes that children:

* have a right to care, security and good upbringing
* should be treated with respect for their individuality
* may not be subjected to physical punishment or other degrading treatment

The law also defines the responsibilities of parents (or other caretakers). At the same time, the State ascribes to itself the right to intervene if basic needs are not respected of fulfilled.

Child welfare services are administered by 289 different municipalities or councils, each having a high degree of autonomy in terms of organising and administering support services. The result is great variation, even within cities and large towns, since many are divided into smaller districts. In one town, families-at-risk are placed in an assessment centre during investigation, in another they are provided different forms of social support during the process and in a third they are mainly summoned to the agency's office.

Services and activities generally fall into one of these categories:

* Prevention
* Investigation
* Social support and in-home treatment, and
* Care

Swedish child welfare legislation makes no strict distinction between child protection and youth justice. As such, in addition to creating secure and good conditions for children within the community, local authorities are responsible for:

* (in partnership with families) supporting children's personal, physical and social development
* monitoring children who show signs of unfavourable development, and
* (in partnership with families) making sure that children at risk get the protection and support they need, and – if it is deemed to be in the best interest of the child – having them placed in care outside their families.

In Sweden, ‘legal protection’ is automatically included in virtually all Swedish home and contents, home, and residential and leisure home insurances. The advice for all adults involved in a legal dispute is to first contact their insurance broker to confirm whether they are adequately covered for legal fees.[[154]](#footnote-154) For those that do not hold an insurance policy, they may be eligible for legal aid, but there remains an expectation that individuals make a contribution towards the total cost.[[155]](#footnote-155)

Before an application for legal aid may be made, applicants are required to meet with a lawyer for a one hour ‘advice’ session. The cost of this meeting is to be determined by the individual lawyer.[[156]](#footnote-156) At this meeting, the applicant will have an opportunity to discuss the legal issue with their lawyer, who will then assist them to complete the form.[[157]](#footnote-157)

Children and parents are all eligible for legal aid assistance and representation in child protection cases before the court. Unfortunately, the legal aid guidelines are not available in English, and accordingly details of what grants of assistance are available or whether pre-court assistance was provided could not be ascertained.

### Example 6: Norway

Norway is also characterised as having a *family service* approach to child protection. The Norwegian *Child Welfare Act 1992* provides the legislative framework for child protection processes. The principles of the legislation are as follows:

* all measures should be in the best interests of the children
* the biological principle; ideally, children should be raised by their biological parents and within the family
* the least intrusive form of intervention should be adopted, and
* promotion of stability and continuity.

The child welfare service is primarily a help service for children and families. The system places great importance on family ties and continuity in the child’s upbringing. The underlying assumption is that children should grow up with their parents.

The Ministry of Children, Equality and Social Inclusion is responsible for the general child welfare policy. The local child welfare services in the municipalities handles child welfare cases. The Ministry does not have the authority to intervene nor instruct the child welfare services in individual child welfare cases.

Parents and children are entitled to legal aid in child welfare matters, without recourse to a means test.[[158]](#footnote-158) These types of cases are considered ‘priority cases’. Parents can also receive funding to apply annually for a revocation of any care orders made (subject to merits). It was not possible to ascertain whether legal assistance extended to pre-court proceedings.

A recent Council of Europe report shows that Norway is in the low range of countries with respect to the number of children in alternative care.[[159]](#footnote-159) However, there has been some criticism of the relatively high proportion of children in alternate care who are foreign born nationals, resulting in public protects and accusations of ‘racism’ and ‘kidnapping’ directed at the child welfare authorities.[[160]](#footnote-160)

## Observations arising from the comparative analysis

This survey of other jurisdictions and their respective delivery of legal services reveals:

* there are significant differences between the *child protection, family service and child focused* models adopted in different places. This in turn has implications for the nature and timing of legal services designed to support families and children
* the delivery of legal services tends to reflect the structure of the particular child protection or welfare structure
* that even in jurisdictions that adopt a child protection approach there are different frameworks in place
* legal services are generally designed to support parents and children once court proceedings have been initiated, although some jurisdictions (such as England and Scotland) have introduced funding for pre-court proceedings, which support early intervention
* other *child protection* jurisdictions have been undertaking large scale reforms of their system in an attempt to make it more child focused.

While there are other jurisdictions that have features in common with the Victorian child protection system, the range of legal service delivery appears to offer few alternatives for consideration.

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# Annexure 1 – Analysis of Social Disadvantage

The 2012 *State of Victoria’s Children Report* (2011–12)[[161]](#footnote-161), examined how regional children were faring against key indicators of health, safety, development and learning when compared to metropolitan populations. It found that in 2010–11, children in regional areas, when compared to metropolitan children, experienced much higher rates of:

* substantiated abuse was much higher in rural than in metropolitan Victoria (9.2 and 5.6 per 1,000 population respectively)
* child abuse substantiations were lowest in major cities and increased progressively with levels of remoteness (16.4 per 1,000 population in remote areas, and 5.5 per 1,000 population in major cities and rural 10.9 per 1,000 population)
* Gippsland had the highest rate of substantiated emotional harm (6.5 per 1,000 population) and physical harm (4.5 per 1,000 population) compared with the mean metropolitan rates (2.8 per 1,000 population and 1.8 per 1,000 population respectively)
* the rate of children in rural Victoria on a Protection Order was more than double the metropolitan rate (9.1 per 1,000 population cf 3.9 per 1,000 population)
* the highest rates of children on a Protection Order was in Gippsland (11.4 per 1,000 population) and the Grampians (9.4 per 1,000 population). Rates of children on Protection Orders were lowest in Victoria’s major cities (3.8 per 1,000 population) and highest in outer regional areas (8.5 per 1,000 population)
* the rate of OOHC was more than double in rural (7.6 per 1,000 population) compared with metropolitan Victoria (3.3 per 1,000 population) and Victoria as a whole (4.4 per 1,000 population), with the lowest rates in major cities, and
* the highest rates of children in OOHC was in Gippsland (9.7 per 1,000 population), the Grampians (8.9 per 1,000 population) and Mallee (7.4 per 1,000 population).

Table 2a: Number of children who were the subjects of substantiations by socioeconomic status[[162]](#footnote-162) – Number

| **Socioeconomic status** | **Aboriginal** | **Non-Aboriginal** | **Not stated** | **Total[[163]](#footnote-163)** |
| --- | --- | --- | --- | --- |
| 1 (Lowest SES) | 1,816 | 4,491 | 175 | 6,482 |
|  2 | 517 | 3,275 | 35 | 3,827 |
|  3 | 480 | 2,119 | 16 | 2,615 |
|  4 | 228 | 1,570 | 25 | 1,823 |
| 5 (Highest SES) | 132 | 735 | 6 | 873 |
| **Total** | **3,173** | **12,190** | **257** | **15,620** |

Table 2b: Number of children who were the subjects of substantiations by socioeconomic status[[164]](#footnote-164) – Percentage

| **Socioeconomic status** | **Aboriginal** | **Non-Aboriginal** | **Not stated** | **Total[[165]](#footnote-165)** |
| --- | --- | --- | --- | --- |
|  1 (Lowest SES) | 57.2 | 36.8 | 68.1 | 41.5 |
|  2 | 16.3 | 26.9 | 13.6 | 24.5 |
|  3 | 15.1 | 17.4 | 6.2 | 16.7 |
|  4 | 7.2 | 12.9 | 9.7 | 11.7 |
| 5 (Highest SES) | 4.2 | 6.0 | 2.3 | 5.6 |
|  **Total**  | **100.0** | **100.0** | **100.0** | **100.0** |

**Table 3: Indicators of social disadvantage present in rural and regional Victoria as captured by the 2011 Census[[166]](#footnote-166)**

| **Indicator of social disadvantage** | **Victoria** | **Bairnsdale** | **Ballarat** | **Bendigo** | **Geelong** | **Horsham** | **Mallee** | **Shepp** | **Morwell** | **W'bool** |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **IRSED** | 1016 | 958 | 981 | 934 | 993 | 986 | 934 | 937 | 866 | 942 |
| **Index** |  N/A | 1 | 4 | 1 | 5 | 5 | 1 | 2 | 3 | 5 |
| **Population** | 5,354,042 | 13,243 | 146,235 | 140,614 | 250,651 | 19,279 | 128,171 | 124,894 | 39,705 | 120,659 |
| **ATSI population** | 37,990 | 543 | 1596 | 1811 | 2010 | 281 | 3434 | 3297 | 655 | 1580 |
| **ATSI pop %** | 0.70% | 4.10% | 1.10% | 1.30% | 0.80% | 1.50% | 2.70% | 2.60% | 1.66% | 1.30% |
| **avg weekly h/hold income ATSI** | $962 | $727 | $784 | $787 | $968 | $781 | $704 | $740 | $827.00 | $795.00 |
| **avg weekly h/hold income** | $1,216 | $840 | $935 | $934 | $1,079 | $946 | $853 | $914 | $962.00 | $951.00 |
| **Unemployment** | 5.40% | 8.40% | 5.80% | 5.20% | 5.30% | 3.60% | 5.00% | 5.10% | 7.60% | 4.10% |
| **1 parent families** | 15.50% | 18.80% | 17.40% | 17.80% | 16.30% | 15.40% | 15.40% | 16.00% | 19.60% | 14.80% |

# Annexure 2 – Comparative of assistance provided by Australian Legal Aid Commissions

| **Jurisdiction, Principal Act, Relevant Amendments** | **Key Principles Guiding the Legislation/Matters of note** | **Legal Aid Commission, Legal Services and Guidelines** |
| --- | --- | --- |
| **Australian Capital Territory***Children and Young People Act 2008* (ACT) | * ‘best interests of child paramount consideration’
* Preservation of child’s cultural identity
* Delay in decision making prejudicial to child’s wellbeing
* ATSI Placement Principle
* Hierarchy of intervention, prioritises support for families and contact when children are unable to reside with family members
* Child participation encouraged to extent age and development enable – direct representation
* Pre-court *Family Group Conferences* encouraged
* Care and Protection Orders made in circumstances of ‘risk’ have a no fault threshold
* Public Advocate monitors all court orders and may intervene on behalf of a child or young person
 | **Legal Aid ACT***Pre-court assistance/rep:* No*Duty Lawyer Service:* No*Court based assistance/rep:* Yes *Post-court assistance/rep:* No*Third Parties:* Unclear*Initiate applications:* No*Administrative review:* Potentially*Guidelines:* assistance available ‘for proceedings pursuant to Principal Act, except where the total cost, in the opinion of the CEO, is likely to exceed $15K’ |
| **New South Wales** *Children and Young Persons (Care and Protection) Act 1998* (NSW)*Children and Young Persons (Care and Protection) Amendment (Parental Responsibility Contracts) Act 2006* (NSW)*Child Protection Legislation Amendment Act 2015* (NSW) | * ‘safety, welfare and wellbeing of the child or young person are paramount’
* Child participation encouraged to extent developmental capacity and circumstances

allow – direct and separate* Culture, disability, language, religion and sexuality of child must be taken into account
* Least intrusive intervention consistent with protection of child
* Early intervention
* Retention of relationships with people significant to child
* Permanent placement principles – represent a hierarchy of intervention (restored to care of family, guardianship with relative, kin or suitable person, adoption, parental responsibility of the Minister
* Hierarchy slightly different with respect to ATSI children, with adoption the intervention of last resort
* ATSI principles that include self-determination and participation
* Court to decide within 6 months (where child less than 2) of initial interim order placing child in OOHC, whether permanency plan is accepted. Court may direct Secretary to prepare a different permanency plan if unaccepted. Permanency plan only enforceable to extent it is approved by the Court.
* Court to decide within 12 months (where child above age of 2) of initial interim order placing child in OOHC, whether permanency plan is accepted. Court may direct Secretary to prepare a different permanency plan if unaccepted. Permanency plan only enforceable to extent it is approved by the Court.
* Care and Protection Orders made with no fault threshold.
* Parental responsibility orders may be made to parents, the Minister, suitable persons and include contact conditions
* Guardianship orders may be made to a suitable person until age of 18.
* Contact orders
 | **Legal Aid NSW***Pre-court assistance/rep:* YesADR where no current court proceedings offered as well as pre-litigation contact dispute mediation*Duty Lawyer Service:* Yes*Court based assistance/rep:* Yes *Post-court assistance/rep:* YesPost final orders grant*Third Parties*: Yes*Initiate applications:* Yes, including breach applications*Administrative review:* Yes*Guidelines:* assistance available ‘where applicant has parental responsibility for the child or young person, or from whom an aspect of parental responsibility has been removed by an order of the court’. Applicants must also meet the:* Merit test
* Unpaid Contributions Test
* Availability of Funds Test
* Reasonable Test
* Show ‘exceptional circumstances’ (special hardship) and
* Show a benefit to the child or young person that might be gained by the applicant receiving aid.

\*\* Free face-to-face advice clinics in city office, weekdays from 9 am–4 pm. |
| **Northern Territory***Care and Protection of Children Act 2007* (NT)*Care and Protection of Children Amendment (Permanent Care Orders) Act 2015* (NT) | * ‘best interests of the child are the paramount concern’
* Family has primary responsibility for care of child and contact encouraged if child removed
* Child to be treated in a way that respect’s their dignity and privacy
* Child participation to extent age and development enable – separate representation
* ATSI placement hierarchy
* Permanency planning
* Grounds for making protection orders, no fault threshold
 | **NT Legal Aid Commission***Pre-court assistance/rep:* No, other than telephone advice*Duty Lawyer Service:* No*Court based assistance/rep:* Yes *Post-court assistance/rep:* No*Third Parties:* Unclear*Initiate applications:* No*Administrative review:* No*Guidelines:* assistance available ‘for Respondents in Care and Protection (FACS) proceedings in the Magistrates Court’. |
| **Queensland***Child Protection Act 1999* (QLD)*Child Protection Reform Amendment Act 2014* (QLD) | * ‘safety, wellbeing and best interests of a child are paramount’
* Rights based principles, such as a child’s right to safety, maintenance of family relationships, explore identity/culture, expeditious decision making
* ATSI placement principles
* Child’s family has primary responsibility, supporting families preferred
* Child’s participation to the extent age and development enables – separate and direct representation (in limited circumstances)
* Limited intervention
* Early intervention promoted
* Contact provisions may be attached to all POs
 | **Legal Aid QLD***Pre-court assistance/rep:* Yes, not subject to the merits test*Duty Lawyer Service:* No (although being piloted in 2 smaller, regional Courts)*Court based assistance/rep:* Yes, *Post-court assistance/rep:* Yes, attendance at FGC post-order, not subject to the merits test*Third Parties:* Unclear*Initiate applications:* Yes*Administrative review:* Yes, in limited circumstances*Guidelines:* representation of ‘parents where Dept. seeking custody or short or long-term guardianship order, and either the applicant has reasonable prospects of challenging the order sought or there are special circumstances (ATSI, non-English speaking, physical/psychiatric disability or longstanding ill health, child or other special circs preventing effective negotiation)’. Representation of parents in contested hearings subject to stricter eligibility threshold. \*\* *Complexity in civil law matters* where GOA has been exhausted |
| **South Australia***Children’s Protection Act 1993* (SA) | * Right to safety, care and a stable family environment
* Expedient identification of risk and prompt provision of necessary support, protection or care
* Family as primary means of providing care of children and high priority to supporting and assisting families to carry out this responsibility
* Preservation and strengthening of family relationships
* Child participation to the extent age and development enable – separate representation
* Grounds for protection order no fault threshold
* Strict time limit between lodgement of initial application and commencement of contest is weeks
* Long term guardianship orders (until 18) frequently made (no permanent care)
 | **Legal Services Commission of SA***Pre-court assistance/rep:* No*Duty Lawyer Service:* No*Court based assistance/rep:* Yes *Post-court assistance/rep:* No*Third Parties:* Unclear*Initiate applications:* Unclear*Administrative review:* Potentially*Guidelines:* applications to meet the means, merit, forum tests and comply with Funding Guidelines, which sets a funding cap of $12,500 for each party and $17,500 for independent representation of a child. \*\* 10-week time limit from initiation to contest (s. 39 of the Act) to mandate expeditious resolution |
| **Tasmania***Children, Young Persons and their Families Act 1997* (TAS)*Children, Young Persons and their Families Amendment Act 2009* (TAS) | * ‘best interest of the child must be paramount’
* Primary responsibility for child’s care and protection lies with family
* High priority given to supporting families in preference to intervening
* Preserving and strengthening family relationships where child removed
* Preserving and enhancing child’s cultural identity
* Child participation to the extent that age development enables – separate representation
* FGC encouraged
* Grounds for making protection order no fault threshold
* Restriction on making equivalent long-term guardianship order similar to s. 276 of CYFA 2005 (VIC)
 | **Legal Aid Commission of TAS***Pre-court assistance/rep:* No*Duty Lawyer Service:* No*Court based assistance/rep:* Yes *Post-court assistance/rep:* No*Third Parties:* Yes*Initiate applications:* Potentially*Administrative review:* No*Guidelines:* assistance available where ‘proceedings may result in the removal of a child from the care of the person seeking aid where that person is the normal carer of the child, subject to means and merit’. Assistance also available for separate representation of child subject to merits.\* Respondents contesting expected to complete Affidavits in support\*\* Nominal contribution of $60 charged to all clients above age of 18 |
| **Western Australia***Children and Community Services Act 2004* (WA) | * ‘best interests of the child paramount’
* Need to protect child from harm, capacity of parents or other persons to offer such protection
* Nature of child’s relationship with parents, siblings, other relatives, attitude of parent’s to parental responsibility
* Participation of child to the extent that age and development enable – separate representation
* Importance of continuity and stability in child’s living arrangement
* Preservation of contact with parents, siblings, family when placed away from home
* ATSI placement principle
* Prompt decision making
* Intervention only in circumstances where no other reasonable safeguard
* Limited orders available
 | **Legal Aid WA***Pre-court assistance/rep:* No*Duty Lawyer Service:* Yes*Court based assistance/rep:* Yes *Post-court assistance/rep:* No*Third Parties:* Yes*Initiate applications:* No*Administrative review:* No*Guidelines:* an ‘advice and investigation’ grant available if beyond scope of DL to provide. Aid that ‘includes representation up to and including defended hearing available if outside normal level of representation provided by DL, and there are reasonable chances of successfully opposing application and children have been taken into care of CEO or special circumstances exist’. GOA available for separate representatives where Court ordered and Commission decides it’s reasonable to do so. \*\* Respondents contesting an application required to lodge written materials |
| **Victoria** *Children, Youth and Families Act 2005* (VIC)*Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (VIC) | * ‘best interests of the child paramount’
* Child participation encouraged to extent developmental capacity and circumstances

allow – direct and best interest* Culture, disability, language, religion and sexuality of child must be taken into account
* Least intrusive intervention consistent with protection of child
* Early intervention
* Permanent placement principles – hierarchy of intervention
* Desirability of expeditious decision making
* ATSI placement principle
* Strict timelines for reunification provide as follows:
1. Court may order a Family Reunification Order for a period with the effect of a child being in court ordered out-of-home care for up to 12 months.
2. Court may only extend a Family Reunification Order where compelling evidence exists that a parent is likely to permanently resume care of child during the period of extension and provided the extension will not have the effect of the child being in court ordered out-of-home care for more than 24 months.
3. The Court is disempowered from ordering a child return to the care of his/her parent once the child has been in OOHC for a cumulative period of 24 months. This decision may only be made administratively by the Department.
* Grounds for making Protection Orders contain a fault-based threshold: ‘*the child has or is likely to suffer harm and the parents have not protected or are unlikely to protect the child from harm’*
 | **Victoria Legal Aid** *Pre-court assistance/rep:* No*Duty Lawyer Service:* Yes*Court based assistance/rep:* Yes *Post-court assistance/rep:* No*Third Parties:* Yes*Initiate applications:* No*Administrative review:* Yes*Guidelines:*‘Reasonable prospects of a child being placed in the parent’s care’ OR DHHS are seeking particular orders that would have the effect of removing custody and guardianship from parents. Restriction placed on pursuing contact only unless the parent is under 18.  |

# Annexure 3 – National orientation toward child abuse

Table 8

| **Country** | **Who provides CP services** | **Workforce** |
| --- | --- | --- |
| **Australia** | State and Territory governments | Public service social workers or equivalent  |
| **New Zealand** | The national government | Public servant social workers |
| **United Kingdom** | Local authorities (Councils) | Social workers  |
| **Canada** | Local authorities and non-government agencies/mandated agencies | Social workers  |
| **Sweden** | Local authorities/municipalities  | Varied workforce and locally determined. Staff may include professionals in social work, health, education or psychology |
| **Belgium**  | Health centres/Confidential Doctors Centres | Multi-disciplinary teams – doctors, nurses, social workers and psychologists |

# Annexure 4 – Summary of New Zealand 2015 review

The Modernising Child, Youth and Family Expert Panel conducted a comprehensive review and delivered its report in December 2015, entitled *Investing in New Zealand’s Children and their Families* (referred to as ‘Investing in Children’ report).

The report recommends a complete and ‘radical’ overhaul of Children, Youth and Family services[[167]](#footnote-167).

The package of reforms, which is expected to take up to five years to be fully implemented, includes:

* A new child-centred operating model with a greater focus on harm and trauma prevention and early intervention. It will provide a single point of accountability for the long-term wellbeing of vulnerable children, with the voice of the child represented in planning and strategy.
* A social investment approach using actuarial valuations and evidence of what works will identify the best way of targeting early interventions, to ensure that vulnerable children receive the care and support they need, when they need it.
* Direct purchasing of vital services such as health, education and counselling support to allow funding to follow the child, so that young people can gain immediate access to assistance.
* A stronger focus on reducing the over-representation of Maori young people in the system. Currently, 60 per cent of children in care are Maori. Strategic partnerships will be developed with iwi groups and NGOs.
* Legislation to be introduced this year raising the age of state care to a young person’s 18th birthday, with transition support being considered up to the age of 25. Cabinet has also agreed to investigate raising the youth justice age to 17.
* Legislation establishing an independent *youth advocacy service* to ensure that the voices of children and young people are heard in the design of systems and services.

In terms of specific legislative changes, the report notes the following:

* support better integration of care and protection and youth justice processes
* support better alignment with related legislation, such as family violence legislation
* amended care provisions to support stable care from the earliest opportunity
* raising the age of criminal responsibility from 10 to 12
* ensuring better transitional support for young people leaving care by increasing the age of protection to 18, thereby allowing orders to be made until 21
* a raft of changes to support a more ‘child-focused’ legislative framework.

It is unclear how the amended care provisions might look or whether they will utilise similar ‘time-frames’ to those adopted in the Victorian amendments. The overall focus appears to remain participatory, which is reflected in the quality and breadth of consultation documented in the excellent Investing in Children report.

NZ continues to represent an exciting space in terms of its delivery of child protection services and remains a jurisdiction to observe keenly over the next five years.

# Annexure 5 – Manitoba, Canada

Intake and investigation processes in Canada vary between provinces, however the responsibility for child welfare is mainly undertaken by local authorities and mandated non-government agencies. It was outside the scope of this scan to assess the various approaches adopted across the ten provinces and three territories of Canada-so it will focus on Manitoba.[[168]](#footnote-168)

In 2013 Manitoba had the highest population of indigenous residents of any Canadian province, 16.7 per cent (around 200,000 people) – four times the Canadian average of 4.3 per cent[[169]](#footnote-169). The median age among the First Nations population in Manitoba was 21 years old, compared to 41 years old among non-aboriginal Manitobans.[[170]](#footnote-170)

*The Child and Family Services Act (Manitoba)* provides responsibility for children and family services is given to four Children’s Service Authorities, three of which service Aboriginal communities. These are:

* First Nations (Indigenous) of Northern Manitoba Child and Family Services Authority
* First Nations of Southern Manitoba Child and Family Services Authority
* Metis Child and Family Services Authority, and
* General Child and Family Services Authority (for all non-Indigenous families).

Authorities are responsible for the design and management of the delivery of statutory, voluntary and preventative family services in accordance with provincial law. While the provincial government still maintains ultimate responsibility, the four Children’s Service Authorities have significant rights and responsibilities. A primary aim is to ensure that all interventions received are culturally sensitive and appropriate.

The four Children’s Service Authorities (CSA) have ‘concurrent jurisdiction’. This shared responsibility for the same area at the same time requires a high level of inter-agency coordination. Children and families entering the child protection system for the first time may nominate the authority that they most identify with in order to receive services that best meet their cultural needs. They are then ‘streamed’ into the appropriate authority.

In metropolitan areas, initial intake is undertaken by a Joint Intake Response Unit, which operates as a 24-hour centralised intake service, run by qualified social services staff. If the child is in immediate danger, an emergency response (usually involving police) is called.

After the ‘streaming’ process, families are referred for further assessment by the nominated CSA, which will then provide support services or conduct formal child protection investigations in access where high risk has been established.

In establishing the four authorities, the Manitoba government has recognised the value of culturally appropriate services. However, the approach is not a system that allows for self-determination of Indigenous authorities[[171]](#footnote-171). The CSAs rely upon guidelines, risk assessments, streaming processes and legislation that are imposed by the Provincial government. Managing the differences between traditional values and beliefs and provincial legislation has represented a significant challenge for Indigenous authorities[[172]](#footnote-172).

Where a child has been assessed to be ‘in need of protection’, the CSA may apply to the Court for an order pursuant to *The Child and Family Services Act*. The orders sought may involve the child or young person:

* being returned to their parents
* being placed with a third party
* being placed under the temporary guardianship of the nominated agency for 6, 12 or 24 months depending on the child’s age
* or placed under the permanent guardianship of the nominated agency.

The legislation provides for interim and long-terms orders and conditions relating to access with parents. Children and young people are eligible for legal representation and may instruct from the age of 12.

Legal Aid Manitoba has a Child Protection Legal Office. They offer an ‘innovative service at all Winnipeg courtrooms devoted to child protection matters. Low income parents who arrive at court without an attorney are provided with immediate information, legal advice and short-term representation by a lawyer working for Legal Aid Manitoba. A team of lawyers and a paralegal provide follow up assistance. Almost all cases are resolved before going to trial’[[173]](#footnote-173).

The Child Protection Legal Office has one supervising lawyer, one fulltime lawyer, one articled clerk and three administrative support staff, at its Winnipeg office[[174]](#footnote-174). No other child protection services have been identified in conducting this scan. It is unclear whether Legal Aid Manitoba utilise private practitioners to provide child protection legal services.

The history of Canada and the treatment of the indigenous population during the last two hundred years has many parallels with the experience in Australia. From around 1,880 many indigenous children in Canada were removed from their families and placed into residential schools, often long distances from their families, so that they could be ‘civilised’. A recent decision of the Canadian Human Rights Tribunal notes:

‘Living conditions in many cases were appalling, giving place to disease, hunger, stress, and despair. Children were often cold, overworked, shamed and could not speak their native language for fear of severe punishment, including some students who had needles inserted into their tongues. Many children were verbally, sexually and/or physically abused. There were instances where students were forced to eat their own vomit. Some children were locked in closets, cages, and basements. Others managed to run away, but some of those who did so during the winter months died in the cold weather. Many children committed suicide as a result of attending a Residential School.

Overall, a large number of Aboriginal children under the supervision of the Residential Schools system died while ‘in-care’ (see A National Crime at p. 51). Many of those who managed to survive the ordeal are psychologically scarred as a result. In addition to the impacts on individuals, Dr. Milloy also explained how the Residential Schools affected First Nations communities as a whole. In losing future generations to the Residential Schools, the culture, language and the very survival of many First Nations communities was put in jeopardy.’[[175]](#footnote-175)

The proceedings concerned the inadequate and discriminatory funding of child protection services for indigenous communities.

This history set out in the decision has strong echoes of the ‘Bringing them home’ report (1997) of the Australian Human Rights Commission.

# Annexure 6 – English legal framework

Under the present English framework, concerns about the welfare of a child are reported to the social services department of local authorities. A practitioner in the social services department then determines whether the request warrants assessment by the local authority’s children’s social care services. The screening process determines whether:

* no further action is required
* the child is considered ‘a child in need’ of family support services, or
* a ‘care plan’ is warranted.[[176]](#footnote-176)

A care plan may be made in circumstances where urgent action or safeguard is required or there is a continuing risk of significant harm.

The *Children Act 1989* provides that a child protection intervention is required where a child is suffering, or are likely to suffer, significant harm. There are no absolute criteria for determining intervention as harm may be judged according to a single event or events.[[177]](#footnote-177) A child under the age of 18 years can be subject to a care or placement order, which results in them being cared for or parented by the local council. This is equivalent to children on care by Secretary Orders in Australia.

Since 2004, all local authorities have been required to appoint Independent Reviewing Officers (IROs) to advocate on behalf of children’s interests throughout the care planning process. IROs are qualified social workers who are appointed by the local child protection authorities. They are physically situated within the local child protection authorities’ buildings, which for many continues to represent a source of consternation. This lack of independence has led to the effectiveness of IROs being questioned and in April 2011, the introduction of national statutory guidance to strengthen their role.

The changes made clear that the IRO is responsible for monitoring the child’s care plan on an ongoing basis, not just at the point when the case is being reviewed, and specifies the steps that they should take to prepare for review meetings, including speaking directly with the child. IROs can now refer cases to the Children and Family Court Advocacy Support Service (CAFCASS)[[178]](#footnote-178) if the failure to implement aspects of the care plan might be considered a breach of the child's human rights, with a view to CAFCASS initiating legal proceedings[[179]](#footnote-179).

# Annexure 7 – Scotland 2011 legislative changes

The 2011 Act made some fundamental structural changes to the children's hearings system:

* the creation of a National Convener, to act, for the first time, as a figurehead for children’s hearing panel members and ensure they are consistently supported to a high standard
* the creation of a dedicated national body, Children's Hearings Scotland (CHS), to support the National Convener in the delivery of their functions associated with the recruitment, selection, training, retention and support of panel members
* the establishment of Area Support Teams by the National Convener in collaboration with local authorities that will support the hearings system at a local level
* the creation of a national Children's Panel (children’s hearing panel members)
* the creation of a national Safeguarder panel to improve consistency and standards and improve understanding within the system of the role of Safeguarder.

The 2011 Act also made a number of changes to the law by which a children's hearing makes decisions:

* the grounds of referral were revised and modernised
* pre-hearing panels were created to make some procedural decisions in advance of the children's hearing
* the legal orders panel members can make were simplified and modernised
* more flexibility was given to the interim decisions panel members can make
* changes were made to how a solicitor is made available to assist a child, relevant person and certain others at a hearing.
1. The term children includes both children and young people, acknowledging that the needs and responses of these groups may differ in some instances. [↑](#footnote-ref-1)
2. Swain, S 2014, History of Child Protection Legislation, Royal Commission into Institutional Responses to Child Sexual Abuse; Secretary to the Department of Human Services v Sanding [2011] VSC 42 (22 February 2011); and A & B v Children's Court of Victoria & Ors [2012] VSC 589 (5 December 2012) [↑](#footnote-ref-2)
3. The CYFA provides for the existence of the Children’s Court of Victoria with four divisions: the Family Division (for child

protection proceedings but also family violence intervention order matters) and the Criminal Division (for criminal charges

against children), as well as two specialist divisions (being the Koori Court (Criminal Division) and the Neighbourhood Justice Division). [↑](#footnote-ref-3)
4. CP Quarterly Measures 2014-15: [http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research,-data-and-statistics/additional-data-selected-child-protection](http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research%2C-data-and-statistics/additional-data-selected-child-protection) [↑](#footnote-ref-4)
5. Productivity Commission, Report on Government Services 2015, Volume f, Chapter 15 [↑](#footnote-ref-5)
6. Children’s Court of Victoria, Annual Report 2014-15, p. 5 [↑](#footnote-ref-6)
7. “A case plan is to be prepared for all children where protective concerns have been substantiated”: DHHS Child Protection Manual: <http://www.cpmanual.vic.gov.au/policies-and-procedures/case-planning/case-planning-policy>: “A case plan is to be prepared for all children where protective concerns have been substantiated”. [↑](#footnote-ref-7)
8. Data from the Report on Government Services 2016, Volume f, Chapter 15 [↑](#footnote-ref-8)
9. Ibid [↑](#footnote-ref-9)
10. Ibid [↑](#footnote-ref-10)
11. Annual State of Victoria’s Children report (2011): *A report on how children in regional and rural Victoria are faring* [↑](#footnote-ref-11)
12. PHIDU 2010 [http://phidu.torrens.edu.au/help-and-information/about-our-data/statistical-information] Atlases of census data since 1999; ABS 2010 [↑](#footnote-ref-12)
13. Victorian Population Bulletin[http://www.dtpli.vic.gov.au/data-and-research/population/census-2011/victorian-population-bulletin] This includes, Aborigines and/or Torres Strait Islanders; one parent families; people with non-English speaking backgrounds; the unemployed; and people with a disability. [↑](#footnote-ref-13)
14. Gilbert, 1997, Hetherington et al, 1997 [↑](#footnote-ref-14)
15. Swain, S 2014, History of Child Protection Legislation, Royal Commission into Institutional Responses to Child Sexual Abuse; Secretary to the Department of Human Services v Sanding [2011] VSC 42 (22 February 2011); and A & B v Children's Court of Victoria & Ors [2012] VSC 589 (5 December 2012) [↑](#footnote-ref-15)
16. Victoria, The Child Welfare Practice and Legislation and Review, Carney, Terry: *Report* (1984) [↑](#footnote-ref-16)
17. Justice John Fogarty, *Protective Services for Children in Victoria: An Interim Report (1989)* [↑](#footnote-ref-17)
18. Allen Consulting Group: *Protecting children: the Child Protection Outcomes Project: final report for the Victorian Department of Human Services* (2003) [↑](#footnote-ref-18)
19. *Children, Youth and Families Act* (2005) (Vic) [↑](#footnote-ref-19)
20. *History of child protection services*, Australian Institute of Family Studies, January 2015 https://aifs.gov.au/cfca/publications/history-child-protection-services [↑](#footnote-ref-20)
21. Hansard, 6 October 2005, Legislative Assembly, p1368 [↑](#footnote-ref-21)
22. Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009); [↑](#footnote-ref-22)
23. Victorian Law Reform Commission (VLRC), *Protection Applications in the Children's Court: Final Report* (2010), Chapter 2, p. 40; [↑](#footnote-ref-23)
24. Ibid [↑](#footnote-ref-24)
25. Office of the Victorian Ombudsman, *Own Motion Investigation into Child Protection—Out of Home Care* (2010). [↑](#footnote-ref-25)
26. Ibid, p9. [↑](#footnote-ref-26)
27. Ibid [↑](#footnote-ref-27)
28. The Honourable Phillip Cummins, Prof. Dorothy Scott and Bill Scales, *Protecting Victoria’s Vulnerable Children Inquiry* (2012) [↑](#footnote-ref-28)
29. Office of the Public Advocate, *Whatever happened to the village, the removal of children from parents with a disability (2013) and Rebuilding the village: Supporting families where a parent has a disability* (2015) [↑](#footnote-ref-29)
30. Commission for Children and Young People, “…as a good parent would…” (2015) [↑](#footnote-ref-30)
31. Royal Commission into Family Violence: Final Report (2016) [↑](#footnote-ref-31)
32. *The Taskforce 1000* report is yet to be finalised [↑](#footnote-ref-32)
33. <https://www.childabuseroyalcommission.gov.au/> [↑](#footnote-ref-33)
34. <http://www.ccyp.vic.gov.au/aboutus/news/inquiry-permanency-amendments.htm> [↑](#footnote-ref-34)
35. [http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/projects-and-initiatives/roadmap-for-reform-strong-families,-safe-children](http://www.dhs.vic.gov.au/about-the-department/plans%2C-programs-and-projects/projects-and-initiatives/roadmap-for-reform-strong-families%2C-safe-children) [↑](#footnote-ref-35)
36. Minister for Families and Children (2016) *Auditor General Praises Residential Care Reforms* [Press Release]. Accessed 4 October 2016 at <<http://www.premier.vic.gov.au/auditor-general-praises-residential-care-reform/>> [↑](#footnote-ref-36)
37. Minister for Families and Children (2016) *Keeping Aboriginal Children Connected with their Culture* [Press Release]. Accessed 4 October 2016 at < <http://www.jennymikakos.com.au/media-releases/keeping-aboriginal-children-connected-with-their-culture/>> [↑](#footnote-ref-37)
38. National Framework for Protecting Australia’s Children 2009-2020, Foreword. <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business> [↑](#footnote-ref-38)
39. National Plan to Reduce Violence against Women and their Children 2010-2022, Foreword. <https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022> [↑](#footnote-ref-39)
40. Modernising Child, Youth and Family Expert Panel, *Investing in New Zealand’s Children and their Families* (December 2015), Foreword, p.3 [↑](#footnote-ref-40)
41. The CYFA provides for the existence of the Children’s Court of Victoria with four divisions: the Family Division (for child

protection proceedings but also family violence intervention order matters) and the Criminal Division (for criminal charges

against children), as well as two specialist divisions (being the Koori Court (Criminal Division) and the Neighbourhood Justice Division). [↑](#footnote-ref-41)
42. The Child Protection Litigation Office is a legal unit within the DHHS responsible for providing legal representation to the metropolitan divisions of DHHS for all matters before the Family Division of the Children’s Court. [↑](#footnote-ref-42)
43. United Nations Convention on the Rights of Child, opened for signature on 20 November 1989 (entered into force on 20 September 1990), Article 12. [↑](#footnote-ref-43)
44. Details of the types of services provided in these categories are located in the VLA Annual Report <http://annualreport.vla.vic.gov.au/glossary> [↑](#footnote-ref-44)
45. CP Quarterly Measures 2014-15: [http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research,-data-and-statistics/additional-data-selected-child-protection](http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research%2C-data-and-statistics/additional-data-selected-child-protection) [↑](#footnote-ref-45)
46. Report on Government Services 2016, Volume f, Chapter 15 [↑](#footnote-ref-46)
47. Children’s Court of Victoria, Annual Report 2014-15, p. 5 [↑](#footnote-ref-47)
48. “A case plan is to be prepared for all children where protective concerns have been substantiated”: DHHS Child Protection Manual: <http://www.cpmanual.vic.gov.au/policies-and-procedures/case-planning/case-planning-policy>: “A case plan is to be prepared for all children where protective concerns have been substantiated”. [↑](#footnote-ref-48)
49. DHHS Child Protection Manual: see policies on case planning [http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/case-planning] and permanency planning [http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/identifying-and-achieving-permanency-objective] where a permanency objective must be nominated (in order of preference): family preservation, family reunification, adoption, permanent care and long term out of home care. [↑](#footnote-ref-49)
50. This is limited to information about the court processes and the law in general terms, but does not include advice about the persons own circumstances. [↑](#footnote-ref-50)
51. VLA Handbook for Lawyers, Chapter 6, State Family Guidelines, <https://handbook.vla.vic.gov.au/handbook/6-state-family-guidelines> [↑](#footnote-ref-51)
52. Pursuant to the March 2016 amendments, decisions regarding contact and all other conditions will now be made by DHHS for all children who have been in court ordered out of home care for greater than 2 years and are subject to Care by Secretary Orders and long-term Care by Secretary Orders. [↑](#footnote-ref-52)
53. Productivity Commission 2016, Report on Government Services, Volume f, Chapter 15.7 [↑](#footnote-ref-53)
54. Ibid [↑](#footnote-ref-54)
55. Data from the Report on Government Services 2016, Volume f, Chapter 15 [↑](#footnote-ref-55)
56. Data from the Report on Government Services 2016, Volume f, Chapter 15, Children’s Court of Victoria Annual Reports and VLA data. [↑](#footnote-ref-56)
57. It is important to note that the initiations data is derived from the Children’s Court Annual Reports and relates only to primary applications. The number of secondary initiations relative to primary initiations has been stable. The Court reports the number of applications be reference to each child. VLA grants data relates to individual grants to parents or children. Children are under 10 are not usually represented. The VLA data is for all grants, both primary and secondary, as it was not differentiated prior to 2013. However, the around two-thirds of grants are for primary applications and one third for secondary applications. [↑](#footnote-ref-57)
58. Section 3 of the CYFA provides that ‘out of home’ care means care of a child by a person other than a parent of the child [↑](#footnote-ref-58)
59. Data from the Report on Government Services 2016, Volume f, Chapter 15 [↑](#footnote-ref-59)
60. Road Map to Reform. Data as at April 2015 [↑](#footnote-ref-60)
61. Data from the Report on Government Services 2016, Volume f, Chapter 15, Annual State of Victoria’s Children Report 2013-14, Executive Summary, p.6 [↑](#footnote-ref-61)
62. Annual State of Victoria’s Children Report 2013-14, Executive Summary, p.6 [↑](#footnote-ref-62)
63. Ibid [↑](#footnote-ref-63)
64. Ibid [↑](#footnote-ref-64)
65. Ibid See also Australian Bureau of Statistics, Glossary of Statistical Geographical Terminology: regional/rural/metropolitan http://www.abs.gov.au/ausstats/abs@.nsf/mf/1217.0.55.001#PARALINK7 [↑](#footnote-ref-65)
66. Data captured from VLA and Children’s Court of Victoria, Annual reports 2010-11, 2012-13, 2014-15 [↑](#footnote-ref-66)
67. Primary applications refer to applications for a protection order. This does not include secondary applications, such as applications of an extension of an order. [↑](#footnote-ref-67)
68. VLA data recording did not distinguish between primary and secondary until 2013. However, the number of secondary applications relative to primary applications has been relatively stable. [↑](#footnote-ref-68)
69. The Children’s Court initiation data counts each application for each child. It is estimated that there are 1.6 children in each family grouping. The number of initiations per family is ascertained by dividing total initiations by 1.6. [↑](#footnote-ref-69)
70. Data from Children’s Court of Victoria and VLA [↑](#footnote-ref-70)
71. Cummins Report 2012 [↑](#footnote-ref-71)
72. Ibid [↑](#footnote-ref-72)
73. Annual State of Victoria’s Children report (2011): *A report on how children in regional and rural Victoria are faring* [↑](#footnote-ref-73)
74. Health, safety, development and learning. [↑](#footnote-ref-74)
75. PHIDU 2010 [http://phidu.torrens.edu.au/help-and-information/about-our-data/statistical-information] Atlases of census data since 1999; ABS 2010 [↑](#footnote-ref-75)
76. Victorian Population Bulletin[http://www.dtpli.vic.gov.au/data-and-research/population/census-2011/victorian-population-bulletin] [↑](#footnote-ref-76)
77. Department of Planning and Community Development, *Change and Disadvantage in Regional Victoria: An Overview* (May 2011), <http://www.dtpli.vic.gov.au/__data/assets/pdf_file/0014/223052/Change_and_disadvantage_in_regional_Victoria_overview.pdf> [↑](#footnote-ref-77)
78. SEIFA (Socio-Economic Indexes for Areas) is a Census-based measure that captures population-based characteristics of disadvantage as well as the social or structural characteristics of an area that may limit or promote the ability of its residents to participate fully in society [↑](#footnote-ref-78)
79. Australian Institute of Health and Welfare: Child Protection Australia 2013-14 [↑](#footnote-ref-79)
80. The Local Government Areas of Bairnsdale, Ballarat, Bendigo, Geelong, Horsham, Mallee, Morwell, Shepparton and Warrnambool. [↑](#footnote-ref-80)
81. In this context, legal services meaning duty lawyer services and grants of legal assistance [↑](#footnote-ref-81)
82. The Guidelines may be found at <http://handbook.vla.vic.gov.au/handbook/6-state-family-guidelines> [↑](#footnote-ref-82)
83. ***reasonable prospects*** mean that a prudent and experienced lawyer would consider it ‘more likely than not’ in all the circumstances that satisfaction of the relevant criteria under the guideline (e.g. of the child being placed in the parent’s care, of a case plan being changed, of reunification within the legislated timeframe, that a change in placement was not in the best interests of the child, etc.) can be successfully argued. The prospect of success must be real and not fanciful, having regard to the evidence and circumstances of the case. This requires more than an arguable case. [↑](#footnote-ref-83)
84. ***means test*** means the ‘means test’ as described in [VLA Handbook chapter 12](http://handbook.vla.vic.gov.au/handbook/12-means-test). Further guidance on required documentary proof of income and assets is set out in section 3 of these ‘Simplified grants process – Notes on VLA Guidelines’. Note that VLA does not apply the means test to a child or any financially associated person of the child applying for a grant of assistance under the State Family Guidelines [↑](#footnote-ref-84)
85. ***State Reasonable test*** as described in VLA Handbook Chapter 14 (and is referred to as ‘merit outcome’ in ATLAS [↑](#footnote-ref-85)
86. Circumstances that would satisfy the eligibility criteria include where that there is a current reunification order and the case plan changes to non-reunification or where a child or young person is in out of home care and they seek alternative placement to the one arranged by DHHS; [↑](#footnote-ref-86)
87. Report on Government Services 2016, Volume f, Chapter 15 [↑](#footnote-ref-87)
88. Permanency objectives are listed in s167 of the *CYFA* (2005) and include a hierarchy of intervention – family preservation, family reunification, adoption, permanent care and long term out of home care [↑](#footnote-ref-88)
89. <http://www.cpmanual.vic.gov.au/advice-and-protocols/information-sheets/permanency-children/legistative-changes-overview> [↑](#footnote-ref-89)
90. Family Court of Australia and the Federal Circuit Court [↑](#footnote-ref-90)
91. ALRC: *Family Violence – A National Perspective*, Report 114 (2010) 19.87 [↑](#footnote-ref-91)
92. Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice of the Intersection of Family Violence and Family Law Issues* (2009) 7.2 [↑](#footnote-ref-92)
93. A non-exhaustive sample includes: ALRC: Family Violence, A National Legal Response, Report 114 (2010); Australian Institute of Family Studies, *Child Protection and Family Law* *… joining the dots*, NCPC Issues, No.34; Australian Institute of Family Studies, *Mind(ing) the Gap*, Family Matters, No. 89; VLA Submission to the Access to Justice Review (2016 [↑](#footnote-ref-93)
94. Higgins, D., & Kaspiew, R. (2008). "Mind the gap...": Protecting children in family law cases. *Australian Journal of Family Law*, 22, 235-258 [↑](#footnote-ref-94)
95. Family Court of Australia, Magellan Program, (10 April 2015) http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/child-abuse-allegations/ [↑](#footnote-ref-95)
96. ALRC: Family Violence, A National Legal Response, Report 114 (2010) [↑](#footnote-ref-96)
97. See the VLA submission to the Family Law Council, which addressed this issue in more detail <http://www.legalaid.vic.gov.au/about-us/news/family-law-council-submission-encourages-earlier-identification-of-risk-factors-to-families> [↑](#footnote-ref-97)
98. Australian Institute of Family Studies: *Risk and protective factor for child abuse and neglect*, CFCA Resource Sheet, March 2013 [↑](#footnote-ref-98)
99. Victorian Child Health and Wellbeing Survey (2013): Summary Findings Report [↑](#footnote-ref-99)
100. Ibid [↑](#footnote-ref-100)
101. State of our children report, 2013-14 [↑](#footnote-ref-101)
102. CYFA, s524, ss(4) court appointed best interest lawyer [↑](#footnote-ref-102)
103. Section 162, CYFA [↑](#footnote-ref-103)
104. Third parties do not have a right to be heard. [↑](#footnote-ref-104)
105. See VLA’s submission to the ‘Access to Justice Review’ for more detail <http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-review> [↑](#footnote-ref-105)
106. Gilbert, 1997; Hetherington et al, 1997 [↑](#footnote-ref-106)
107. Gilbert, Parton and Skivenes, Child Protection Systems, International Trends and Orientations, Oxford University Press, 2011 [↑](#footnote-ref-107)
108. Ibid [↑](#footnote-ref-108)
109. Ibid, Table 12.2, p.255 [↑](#footnote-ref-109)
110. Ibid, p255-6 [↑](#footnote-ref-110)
111. Table reproduced from Price-Robertson, Bromfield and Lamont, Child Family Community Australia, Paper 23, Table 2 [↑](#footnote-ref-111)
112. Higgins and Katz, 2008 [↑](#footnote-ref-112)
113. *National Framework for Protecting Australia’s Children 2009-2020*, Council of Australian Governments, 2009, p7 [↑](#footnote-ref-113)
114. *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 (Vic) and Children, Youth and Families Amendment (Restrictions on the making of Protection Orders) Act 2015* (Vic) [↑](#footnote-ref-114)
115. Child Youth and Family Services is a government agency with the Ministry of Social Development and has legal powers to intervene and help children who are being abused or neglected: Ministry of Social Development webpage as at 28 April 2016 [↑](#footnote-ref-115)
116. Victorian Law Reform Commission (VLRC), (2010) Protection Applications in the Children's Court: Final Report page 170 [↑](#footnote-ref-116)
117. *Children, Young Persons and Their Families Act* 1989, s42 [↑](#footnote-ref-117)
118. Ibid s42(1) [↑](#footnote-ref-118)
119. Minister for Social Welfare, Hon Anne Tolley, quoted at https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/investing-in-children/index.html#FinalReportoftheExpertPanelonModernisingChildYouthandFamily1 [↑](#footnote-ref-119)
120. VLA Handbook for Lawyers 2016 http://handbook.vla.vic.gov.au/handbook/6-state-family-guidelines [↑](#footnote-ref-120)
121. Lead providers undergo a similar application process as that applied for acceptance on to the VLA s29A child protection panel. The lead providers must not delegate responsibility to junior practitioners without seeking prior permission from Legal Aid. The Commissioner may refuse to pay for services completed by a non-lead provider. [↑](#footnote-ref-121)
122. The ‘fixed fee’ approach is relatively recent and has been the subject of recent review, with practitioners generally unsupportive, as fees are very low and the pool of lawyers has shrunk significantly as a result. See www.justice.govt.nz/services/...legal...legal-aid...fixed-fee.../family-fixed-fee-review-document for further discussion. [↑](#footnote-ref-122)
123. Price-Robertson, Bromfield and Lamont, International Approaches to Child Protection, Child Family Community Australia Paper 23 [↑](#footnote-ref-123)
124. Department of Justice, Canada, report on ‘Voice of the Child in Legal Proceedings’ (November 2014): <http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/vccp-vecp/voi2c.html> [↑](#footnote-ref-124)
125. Ibid [↑](#footnote-ref-125)
126. *Children’s Law Act* RSNL1990 CHAPTER C-13 s71 ss2 [↑](#footnote-ref-126)
127. The OCL also assists children and young people with respect to financial matters, civil law proceedings and trusts and estates. It does not assist children and young people with respect to education law, immigration law, criminal law, mental health law or social assistance. It is unclear whether all cases are legally aided or only those involving child protection. [↑](#footnote-ref-127)
128. Ontario Ministry for Justice website as at 9/5/2016: <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/family_law_and_child_protection.php> [↑](#footnote-ref-128)
129. Department of Justice, Canada, Legal Aid Services website: <http://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html> as at 9/5/2016 [↑](#footnote-ref-129)
130. Ibid [↑](#footnote-ref-130)
131. For more details regarding the mechanics of child protection decision making and case planning see **Annexure 6**. [↑](#footnote-ref-131)
132. *The Protection of Children in England*, Lord Laming, 2008 [↑](#footnote-ref-132)
133. Tim Loughton, MP, Parliamentary Undersecretary of State, 2011 [↑](#footnote-ref-133)
134. *The Munro Review of Child Protection*, Professor Eileen Munro, 2011 [↑](#footnote-ref-134)
135. Public Law Outline: <http://www.familylaw.co.uk/system/uploads/attachments/0008/5147/PD12A_PLO.pdf> [↑](#footnote-ref-135)
136. *Children and Families Act 2014* (England) [↑](#footnote-ref-136)
137. Masson and Dickens: Care proceedings: the operation and effect of pre-proceedings – what do lawyers need to know? [http://www.familylawweek.co.uk/site.aspx?i=ed114447] [↑](#footnote-ref-137)
138. Department of Education: Court orders and pre-proceedings publication (April 2014) [ https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/306282/Statutory\_guidance\_on\_court\_orders\_and\_pre-proceedings.pdf] [↑](#footnote-ref-138)
139. Masson and Bader, Dickens and Young, The pre-proceedings process for families on the edge of care proceedings, March 2013. [http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/summary.pdf] The study was conducted in 6 local authorities in England and involved analysis of 207 court files, interviews with 16 social work managers, 19 social workers, 16 local authority lawyers, 19 lawyers who represent parents, 36 observed pre-proceeding meetings, 24 interviews with parents following meetings and a focus group with judges. [↑](#footnote-ref-139)
140. Based on the file sample, about a quarter of cases did not enter care proceedings; in a third of these children were protected by kin care or foster care; and in two thirds by improvements in care at home. [↑](#footnote-ref-140)
141. Legal Aid UK, Funding Guidelines (as at May 2016): https://www.govuk/legal-aid/print. It is unclear from desktop research whether having a ‘child in care’ is defined as ‘out of home care’ or the subject of care proceedings. [↑](#footnote-ref-141)
142. Ibid and https://www.gov.uk/legal-aid/eligibility [↑](#footnote-ref-142)
143. <https://www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/help-with-legal-costs-legal-aid/> and <https://www.citizensadvice.org.uk/relationships/children-and-young-people/child-abuse/local-authority-involvement/child-protection-conferences/child-abuse-who-attends-a-child-protection-conference/> [↑](#footnote-ref-143)
144. Details of changes contained in **Annexure 7** [↑](#footnote-ref-144)
145. VLRC, Protection Applications in the Children’s Court, Final Report 19, p180 [↑](#footnote-ref-145)
146. 2011 Act s28(2) [↑](#footnote-ref-146)
147. Where ‘proof’ of an application is disputed by the child or their parents, the matter will be referred to compulsory pre-hearing conference and case management hearing. If no resolution is reached, the application will be referred to the Sheriff’s Court for a determination as to ‘proof’ before the matter is remitted to the children’s hearing process. From 3 June 2013 the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No. 2) 2013 came into effect. This refers to Section 11 of the Children (Scotland) Act 1995 cases and is termed as “expeditious resolution of certain causes”. The changes introduced the pre-hearing conference, joint minute of pre hearing conference and case management hearing. The intention of the new rules is to enhance case management and limit the length and scope of disputes relating to ‘proof’ of an application. It has been designed to produce a more efficient, less costly procedure that is better for the court system, parties, and children. [↑](#footnote-ref-147)
148. 2011 Act s27 [↑](#footnote-ref-148)
149. <http://www.slab.org.uk/providers/mailshots/2013_Jun_to_Dec/newsfeed/Childrens> [↑](#footnote-ref-149)
150. Scottish Legal Aid Board’s *Legal Assistance Handbook for Children’s Proceedings under the Children’s Hearings (Scotland) Act 2011*, viewed at: www.slab.org.uk/handbooks/Children's%20Hearings%20(S)%20Act%202011/wwhelp/wwhimpl/js/html/wwhelp.htm#href=Part%20III%20Children's%20Legal%20Aid/Part%20III%201%20Legal%20aid%20for%20childrens%20proceedings.html [↑](#footnote-ref-150)
151. Law Society of Scotland: Discussion Paper (March 2015) [https://www.lawscot.org.uk/media/391321/legal-assistance-in-scotland-discussion-paper.pdf] [↑](#footnote-ref-151)
152. Price-Robertson et al, p6 [↑](#footnote-ref-152)
153. Children and Parents Code of Sweden: http://www.government.se/information-material/2010/11/parents-and-children---brief-information-about-current-legislation/ [↑](#footnote-ref-153)
154. <http://www.rattshjalp.se/Funktioner/English/Legal-assistance/> [↑](#footnote-ref-154)
155. This is not applicable to children and young people. <http://www.rattshjalp.se/Funktioner/English/Legal-assistance/Legal-aid/> [↑](#footnote-ref-155)
156. Children and young people are not required to pay a fee. Lawyers must take into account income when determining cost of advice. [↑](#footnote-ref-156)
157. Legal Aid Sweden Information booklet: http://www.domstol.se/publikationer/informationsmaterial/legal\_aid\_in\_sweden.pdf [↑](#footnote-ref-157)
158. Norway Legal Aid website (as at 9/5/2016): <http://www.sivilrett.no/who-can-receive-free-legal-aid.307233.no.html> [↑](#footnote-ref-158)
159. http://www.coe.int/en/web/children/alternative-care [↑](#footnote-ref-159)
160. <http://www.newsinenglish.no/2016/01/11/norway-defends-its-child-welfare-laws/> <http://www.thelocal.no/20160415/norway-to-face-world-record-protests-over-child-services> [↑](#footnote-ref-160)
161. Annual State of Victoria’s Children report (2011): *A report on how children in regional and rural Victoria are faring* [↑](#footnote-ref-161)
162. Table taken from 2012 *State of Victoria’s Children report* (2011-12) (Table A9) [↑](#footnote-ref-162)
163. The Index of Relative Socio-Economic Advantage and disadvantage (IRSAD), used here as a measure of SES, broadly assesses ‘people’s access to material and social resources, and their ability to participate in society’ (ABS 2013b). For more information, see ABS 2013b. Socioeconomic data exclude New South Wales, Queensland and Western Australia because location data were not available. Of jurisdictions that provided data, 412 records were excluded either due to missing location data, or because they were unable to be mapped to geographical areas to calculate the index. [↑](#footnote-ref-163)
164. Table taken from 2012 *State of Victoria’s Children report* (2011-12) (Table A9) [↑](#footnote-ref-164)
165. The Index of Relative Socio-Economic Advantage and disadvantage (IRSAD), used here as a measure of SES, broadly assesses ‘people’s access to material and social resources, and their ability to participate in society’ (ABS 2013b). For more information, see ABS 2013b. Socioeconomic data exclude New South Wales, Queensland and Western Australia because location data were not available. Of jurisdictions that provided data, 412 records were excluded either due to missing location data, or because they were unable to be mapped to geographical areas to calculate the index. [↑](#footnote-ref-165)
166. Data captured from Quick Stats for 2011 Census via ABS website [http://www.abs.gov.au/census] [↑](#footnote-ref-166)
167. Minister for Social Welfare, Hon Anne Tolley, quoted at https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/investing-in-children/index.html#FinalReportoftheExpertPanelonModernisingChildYouthandFamily1 [↑](#footnote-ref-167)
168. Price-Robertson, Bromfield and Lamont, *International Approaches to Child Protection,* Child Family Community Australia Paper 23 [↑](#footnote-ref-168)
169. <http://www.statcan.gc.ca> [↑](#footnote-ref-169)
170. <http://www.statcan.gc.ca> [↑](#footnote-ref-170)
171. Price-Robertson et al, op cit [↑](#footnote-ref-171)
172. Mandell et al, 2006 [↑](#footnote-ref-172)
173. <http://www.legalaid.mb.ca/services/child-protection-law-office> [↑](#footnote-ref-173)
174. Legal Aid Manitoba Annual Report 2015 [↑](#footnote-ref-174)
175. First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)

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 [↑](#footnote-ref-175)
176. Horsfall, Higgins, Kaspiew & Bromfield, Australian Institute of Family Studies Submission to the VLRC Review of Child Protection Legislative Arrangements [↑](#footnote-ref-176)
177. HM Government publication: *Working Together to Safeguard Children*, March 2015 [↑](#footnote-ref-177)
178. Cafcass website, *Cafcass’ role in care proceedings* section, viewed at: www.cafcass.gov.uk/about-cafcass/care-proceedings.aspx [↑](#footnote-ref-178)
179. Final Report of the Role of IROs in England, March 2014: http://www.ncb.org.uk/media/1124381/ncb\_the\_role\_of\_independent\_reviewing\_officers\_in\_england\_-\_final2.pdf [↑](#footnote-ref-179)