Chapter 10

Chapter 10

Courts and tribunals

Once the Department of Communities, Child Safety and Disability Services (the department) decides that a tertiary response is needed for protection of a child, it will either work with a family with their agreement (for example, a safety plan, care agreement or intervention with parental agreement)[1] or it will apply to the Childrens Court of Queensland for assessment and/or child protection orders to secure ongoing intervention.[2] A range of administrative decisions made by the department are also reviewable by the Queensland Civil and Administrative Tribunal.

This chapter will focus on the courts and tribunals that make decisions about child protection. In particular it will explore whether:

- reform of case management is required, including consideration of current legislation, court rules and practice directions
- there should be greater specialisation for child protection matters
- certain applications for child protection orders should be considered by a judge rather than a magistrate
- changes are needed to ensure appropriate and effective use of alternative dispute resolution processes.

10.1 Current status in Queensland

10.1.1 Childrens Court of Queensland

The Childrens Court of Queensland is established under the *Childrens Court Act 1992* and operates under that Act and the *Childrens Court Rules 1997*. The Childrens Court is constituted by a member who is a Childrens Court judge (or, if one is not available, a District Court judge) or a Childrens Court magistrate (or, if one is not available, any magistrate, or two justices of the peace).[3] Among other things, the Childrens Court has jurisdiction over child protection matters and young people who commit criminal offences.

Of relevance to this Commission is the jurisdiction of the Childrens Court to determine applications for assessment and child protection orders. Although s 102 of the *Child Protection Act 1999* provides that the court can be constituted by a judge or magistrate when hearing applications for child protection orders, in practice the significant majority of applications for child protection orders are heard and determined in the Childrens Court by a magistrate. This includes applications for orders ranging from a supervision order, and one- to two-year custody or guardianship orders in favour of the department, to a long-term guardianship order, which is the most intrusive order available to a judicial decision-maker and places a child in the care of the department or another person until the age of 18 years.[4]

Section 102 of the Child Protection Act also provides that the Childrens Court of Queensland must be constituted by a judge when exercising its jurisdiction to hear appeals against the decisions of the court constituted by a magistrate or two justices of the peace.

The Childrens Court of Queensland is headed by a President who is a Childrens Court judge and whose function is to ensure the orderly and expeditious exercise of the jurisdiction of the court when constituted by a Childrens Court judge.[5] The President of the Childrens Court is empowered to make relevant practice directions for the court's operation.[6] However, the bulk of the court work is undertaken by Childrens Court magistrates, who come under the direction of the Chief Magistrate rather than the President. The Childrens Court of Queensland *Annual report* concentrates on its criminal law jurisdiction and does not make any reference to its child protection jurisdiction, which is instead reported in the Magistrates Court *Annual report*.

The Childrens Court Act provides that the Governor in Council may, on the recommendation of the Attorney-General:

- appoint one or more District Court judges as Childrens Court judges; in recommending such an appointment, the Attorney-General must have regard to the appointee's particular interest and expertise in jurisdiction over matters relating to children (s 11)
- appoint one or more magistrates as Childrens Court magistrates (s 14).

There are now 26 District Court judges who hold commissions as Childrens Court judges in Queensland, presiding in Brisbane and other larger regional areas, namely Ipswich, Southport, Beenleigh, Maroochydore, Townsville and Cairns (Childrens Court of Queensland 2012). There is only one Childrens Court magistrate appointed in Queensland who presides over the specialist Childrens Court located in Brisbane, although the Childrens Court Act allows any state magistrate to constitute a Childrens Court when required.[7]

The Childrens Court of Queensland, in exercising its jurisdiction or powers, must have regard to the principles stated in sections 5A to 5C of the Child Protection Act to the

extent that those principles are relevant to decision-making. The Court must state its reasons for the decision.[8] The Childrens Court is not bound by the rules of evidence and may inform itself in any way it thinks fit. The burden of proof applied is the balance of probabilities.[9]

In 2011–12, there were 3,776 initial applications lodged under the Child Protection Act and 885 orders appointing separate legal representatives for children and young people in the Childrens Court (Table 12).

Table 12: Childrens Court lodgements, backlogs and finalisations under the *Child Protection Act 1999*, Queensland, 2005–06 to 2011–12

Year	Lodgements	Age of pending matters (months) as at 30 June				Finalisations	Orders appointing separate representatives for children
		6 or less	Over 6 to 12	Over 12	Total pending		
2005–06	3,587	483	106	28	617	3,545	247
2006–07	3,405	471	101	28	600	3,417	366
2007–08	3,888	672	150	44	866	3,627	935
2008–09	4,075	580	171	46	797	4,156	1,042
2009–10	3,532	456	155	51	662	3,669	815
2010–11	3,959	581	177	37	795	3,826	727
2011–12	3,776	680	248	111	1,039	3,549	885

Source Provided by Department of Justice and Attorney-General.

Notes: Includes lodgement of all initialising applications under the *Child Protection Act 1999*, but excludes secondary applications (i.e. applications for revocation or variation of orders). The counting methodology is consistent with national counting rules as applied in the Report on Government Services. Data on separate representatives may vary from Legal Aid Queensland data because of variation in data counting methods. Reconciliation of figures between years is not possible because of minor variations in pending and finalised figures.

In 2011–12, there were 14 appeals from a Magistrates Court to the Childrens Court of Queensland relating to temporary assessment orders, temporary custody orders, court assessment orders or child protection orders under the Child Protection Act, up from 12 the previous year (Childrens Court of Queensland 2012).

10.1.2 Queensland Civil and Administrative Tribunal

The Queensland Civil and Administrative Tribunal was established on 1 December 2009 as an amalgamation of 18 tribunals and 23 jurisdictions into a 'one-stop shop' for community justice and dispute resolution in Queensland. It took over from the former Children Services Tribunal and has the same jurisdiction to make decisions that the Children Services Tribunal had before the amalgamation. Matters previously heard under the repealed Children Services Tribunal Act are heard in the Human Rights Division of the tribunal.

The Queensland Civil and Administrative Tribunal has the delegated power under the Child Protection Act to hear a range of applications for review of administrative decisions made by the department under the legislation regarding children. The most relevant for the present purposes are decisions under the Child Protection Act about where a child has been placed and what contact they will have with their family.[10]

When making decisions under the Child Protection Act, the tribunal must:

- be constituted by three members, at least one of whom is a legally qualified member
- include, if practicable, a member who is an Aboriginal or Torres Strait Islander if the child in the hearing is Aboriginal or Torres Strait Islander
- be constituted by members who the President of the tribunal considers are committed to the principles in sections 5A to 5C of the Act, have extensive professional knowledge and experience of children and have demonstrated knowledge or experience in one or more of the fields of administrative review, child care, child protection, child welfare, community services, education, health, Indigenous affairs, law, psychology or social work.[11]

In 2011–12, there were 188 applications filed in the Queensland Civil and Administrative Tribunal for review of decisions made under the Child Protection Act (Table 13). Applications for review have remained relatively stable since the transfer of jurisdiction but are down slightly on the number of applications filed with the former Children Services Tribunal at its peak.

Table 13: Review applications filed under the former Children Services Tribunal and the Queensland Civil and Administrative Tribunal by matter type, Queensland, 2000–01 to 2011–12

Year	Tribunal	Matter type for review under			Total applications
		Child Protection Act 1999	*Commission for Children & Young People & Child Guardian Act 2009*	Other (school exclusion; *Child Care Act 2002; Adoption Act 2009)*	
2000–01	CST	38	–	3	**41**
2001–02	CST	47	2	–	**49**
2002–03	CST	50	9	–	**59**
2003–04	CST	109	13	3	**125**
2004–05	CST	142	39	8	**189**
2005–06	CST	149	29	4	**182**
2006–07	CST	172	38	2	**212**
2007–08	CST	231	56	2	**289**
2008–09	CST	224	35	1	**260**
2009–10	CST/QCAT	187	41	3	**231**
2010–11	QCAT	170	37	12	**219**
2011–12	QCAT	188	48	1	**237**

Source: Provided by Queensland Civil and Administrative Tribunal.

Notes: The Children Services Tribunal (CST) commenced operation on 2 February 2001. The 2009–10 data are the sum of applications for CST for the period 01/07/09–30/11/09 and the Queensland Civil and Administrative Tribunal (QCAT) for the period 01/12/09–30/06/10.

10.2 Issues raised about Childrens Court processes

10.2.1 Case management and timeliness

The importance of ensuring that court processes are timely in the child protection arena has been graphically illustrated by His Honour Judge Nicholas Crichton's observation:

> Two months of delay in making decisions in the best interest of a child or young person equates to one per cent of childhood that cannot be restored. (Judge Nicholas Crichton, Family Drug and Alcohol Court)

Timeliness in decision-making is enshrined in the Child Protection Act, which provides that a delay in making a decision in relation to a child should be avoided, unless appropriate for the child.

When considering adjournment periods, the court must take into account the principle that it is in the child's best interests for the application to be decided as soon as possible.[12] Although there is capacity for judges and magistrates to case manage proceedings before them on an individual basis, there is no comprehensive case

management framework (including appropriate rules and practice directions) for the child protection jurisdiction.[13]

To commence an application for an assessment order or child protection order, the department files an application and supporting affidavit. The matter is listed before a Childrens Court magistrate and can be frequently adjourned for various reasons, such as to convene a family group meeting to develop a case plan, to allow parents to obtain legal representation or for a separate representative to be appointed. If the application is contested, the matter is listed for a court-ordered conference, to be convened by a court-appointed convenor. If the matter does not settle at this conference, it is listed for a final hearing.

In theory, this Childrens Court process appears relatively simple. In practice, however, countless variations of that process can occur throughout the life of the matter. There is no identified list of issues to be explored at particular points in the process, such as whether all the parents relevant to the application have been identified, whether sibling matters should be heard together, or whether there are non-parties (such as extended family members) who wish to make submissions as provided for by s 113 of the Child Protection Act.[14] Currently there are no time limits that apply to any stage of the proceedings.

In 2011-12, 3,776 child protection applications were filed. In the same year 12,709 interim orders and 4,356 child protection orders were made (Magistrates Court of Queensland 2012). The relatively high number of interim orders suggests a high rate of mentions and adjournments. It could be argued that mentions and interim orders are one mechanism for the court to ensure case management in individual matters. However, that approach does not factor in the financial and emotional drain of numerous mentions on legally aided parents, children and young people or indeed self-represented litigants. Currently, legal aid funding offers a grant of aid for a maximum of three mentions (Legal Aid Queensland 2012). Any grants of aid for mentions above that number will require further applications for aid and a clear justification of why they are needed.

As Table 12 (above) shows, in 2011–12 there were 248 child protection applications pending that were between 6 and 12 months old and 111 matters that were more than 12 months old. A range of legal stakeholders have offered support for the introduction of a case management system, in the belief that this will improve the timeliness and effectiveness of court processes. Legal Aid Queensland has submitted:

> One of the most significant improvements to the child protection court process would be the establishment of a court case management system, supported by rules of court and practice directions. A case management system for child protection litigation would establish a defined litigation process by outlining a sequence of events that would progress matters in a child focussed, efficient and timely way.[15]

A range of case management models existing in other jurisdictions have been highlighted in submissions.

Less Adversarial Trial family court model

The Less Adversarial Trial model is considered to be 'one of the most significant achievements of the Family Court' (Bryant 2010, p6). The model was trialled in Sydney and Parramatta Family Court in 2004–05 and in Melbourne Family Court in 2005 under the title *Children's cases pilot program*. The model is founded on principles of 'respect, mutuality and inclusion, all of which are hallmarks of a collaborative approach' (Bryant 2010, p6).

The Less Adversarial Trial model was entrenched in legislation through the 2006 Family Law Act amendments. At this time, Division 12A of the *Family Law Act 1975* (Cth) was included, which allowed judges of the Family Court to use inquisitorial methods to focus on specific issues and on arrangements that are in the best interests of the child (Cummins, Scott & Scales 2012). This process is set out in Principles 1 and 2 of Division 12A (s 69ZN of the Family Law Act):

- Principle 1: the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings
- Principle 2: the court is to actively direct, control and manage the conduct of the proceedings.

Division 12A removed control from the parties to the proceedings (or their legal representatives) and placed it in the hands of the judge. The immediate focus must be one that is geared to the needs of the child. As a consequence of the new Division 12A procedures, parties are no longer free to conduct litigation as a forensic contest between each other at the expense of the interests of the child (Harrison 2007). Less adversarial and problem-solving approaches to children's matters are arguably better able to act as a 'check and balance on the executive's power to remove children' (Walsh & Douglas 2011, p650).

The allowance for the parties to speak directly to the judge, who determines how the trial will run, is integral to the Less Adversarial Trial model. This approach allows for the 'judicial officers to take an inquisitorial approach to proceedings, rather than merely adjudicating between two opposing sides' (Walsh & Douglas 2011, p650). This enables a collaborative approach and is essential for enabling single issues of disputed fact to be determined separately and, where warranted, for judgements to be delivered on single issues through the course of the trial. In Queensland this could be of particular benefit in relation to an early hearing and determination on the issue of harm.

The parties themselves are actively involved in the process. The Less Adversarial Trial model enables the judge, in concert with the parties, to determine which issues are contentious and which are not, to direct the evidence to be filed in the proceedings, and to make directions for the conduct of the trial on the first day. This is an essential procedural element, one that allows the parties to talk to the judge without interference from legal representatives, and to consider the issues in dispute. Early evaluations of the model indicated that a 'less adversarial approach can deliver a

faster result, at less cost to the parties, and one which has a higher level of satisfaction for the parties' (Bryant 2010, p7).

The Cummins Inquiry (Cummins, Scott & Scales 2012) highlights that both the Victorian Children's Court and the Law Institute of Victoria support the adoption of the Less Adversarial Trial model. The Victorian Law Reform Commission endorses the conduct of matters under Division 12A of the Family Law Act as an 'excellent model'. The Cummins Inquiry recommends that the Children's Court be empowered through legislative amendment to conduct matters in a similar manner to the way in which the Family Court of Australia conducts matters under Division 12A of the Family Law Act (Cth).

There is no doubt that due consideration of the Less Adversarial Trial model is a worthwhile exercise, but there are limitations which suggest that a wholesale adoption of this approach in practice may not be appropriate for child protection matters. The evaluation of the *Children's cases pilot program: a report to the Family Court of Australia*, presented in June 2006 and conducted by Professor Rosemary Hunter, has highlighted a number of practical difficulties for incorporation of this program into the current child protection system. The primary objective of the originating children's cases program was to 'achieve better outcomes for children, by means of a less adversarial and more child focused court process, and either directly or indirectly providing assistance to the parties that would enable them to parent more co-operatively in the long term' (Hunter 2006, p234).

The entry into the children's cases program by consent of the participants is an integral aspect of the program from a participatory framework and a procedural perspective. This indicates that the success of the program is more likely when participation is given freely. Although it is understandable that private family law issues can be complex, almost all child protection matters are further complicated by significant disadvantage and marginalisation, combined with the interference by the state and the power of the state as a litigant. Further, there are no provisions for the participation or representation of grandparents, extended family members or siblings in the children's cases program. The children's cases program is a specific and valuable source for use in the family law arena, but it is arguable that it does not make provision for the specialised understanding needed, to handle multiple parties and the associated complexities in child protection matters.

Professor Hunter observed that cases involving allegations of domestic violence were viewed as posing the 'greatest challenges for Division 12A proceedings' (2006, p231). The children's cases program was to be used for family court disputes where it was accepted that the dispute was a product of parental conflict, and that 'parties needed to set aside that conflict and if possible mend their parental relationship, in order to promote their children's welfare, this premise does not hold in domestic violence cases' (Hunter 2006, p231). The very nature of domestic violence involves one of the 'parties exercising power and control over the other, in this situation children are likely to be damaged by the abuse perpetrated by one of their parents against the other' (Hunter 2006, p231). Another issue raised in relation to the children's cases program is

a court reliance on lawyers to protect vulnerable clients. It was argued that 'not all legal representatives are attuned to issues of violence, take instructions on that issue, or act to ensure the safety of their client and the children' (Hunter 2006, p233).

Domestic violence is not uncommon in child protection matters. The implicit principles on which the children's cases program was founded, and on which the Less Adversarial Trial model is based – such as setting aside the conflict, mending the parental relationship, that contact with both parents is good for children, looking to the future rather than the past and avoiding adversarialism (Hunter 2006, pp231–2) – further highlight that the children's cases program model used in the private family court context may not directly apply to child protection proceedings without appropriate adaptation. Any model adapted for the child protection jurisdiction would need to appropriately and adequately address the inherent power imbalance in proceedings involving the state against the individual parent, child, young person or other family member.

Docket systems

The Cummins Inquiry considered the introduction of a docket system to be used in conjunction with the Less Adversarial Trial model. A docket system allows for the assignment of one judicial officer to oversee a protection matter from commencement to conclusion, and is seen as providing the opportunity for a more inquisitorial approach to the court process (Cummins, Scott & Scales 2012). This model would help to address concerns that court resources, including judges, magistrates and staff, can be better used in managing the court process for matters that require specialist knowledge and understanding of the critical issues. In particular, this might include matters involving Aboriginal and Torres Strait Islander families and those involving sexual abuse allegations. Cases would be assigned to specialist lists, allowing for greater consistency and case management. The Victorian Children's Court has supported the introduction of a docketing system and has recommended the piloting of the system in an appropriate court location.[16]

Magellan

An evaluation of the Magellan case management model further highlights a number of benefits of the 'one child, one judge' system (Higgins 2007). The Magellan system is a Family Court case management model that manages cases where one or both parties have raised serious allegations of sexual or physical abuse of children in the context of a parenting dispute (Higgins 2007). The Queensland Law Society suggests that this approach is worthy of consideration for child protection matters: [17]

> Litigant satisfaction is high, compared to lots of frustration ... They are satisfied that they've been dealt with, with respect. It's better coming to Court and having the same judicial officers, not being put off. The fact that the Judge is doing it raises the performance level of everyone. When clients have different Registrars, Judges, and so on, clients complain ... It's important to maintain the same judicial officer ... (Higgins 2007, p130)

Having a single judge responsible for managing a matter also increases the likelihood of a consistent approach across the life of the matter. This provides greater confidence for the legal profession in predicting how a matter will proceed, and builds trust between the parties and the court. Further, the satisfaction of litigants that their story will be remembered and understood is vital to the principles of procedural fairness and natural justice.

A judge-led case management process also affects other elements of the process: all the other stakeholders, the independent children's lawyer (best interests legal representatives for children and young people in private family law), lawyers for each of the parties, the family consultant and other expert witnesses all fall under the direction of the judge rather than the registrar. Judges involved in the case management process felt that these factors have led to improved compliance (Higgins 2007).

Judges within the Magellan system have emphasised that a judge-led process communicates an important perception to the parties. In many ways this approach does not necessarily deliver different outcomes, but improves the mechanisms by which those outcomes are arrived at (Higgins 2007).

Although the Magellan model relates to the Family Court system, the problems being dealt with have very similar elements to those being dealt with in the child protection arena (child harm, abuse, neglect, parental alcohol and substance misuse, mental health, homelessness, violence, low socio-economic status and overall marginalisation). It is accepted that these factors further complicate and dominate the child protection system.

Question 37

Should a judge-led case management process be established for child protection proceedings? If so, what should be the key features of such a regime?

10.2.2 Case management and disclosure in child protection matters

Section 190 of the Child Protection Act outlines the law in relation to disclosure of departmental records to a party in a court proceeding. These provisions, and the use of subpoenas, are currently the only mechanisms that enable respondents to gain access to relevant departmental material (other than filed affidavits). The current Childrens Court Rules (and indeed the consultation draft referred to below) allow for the production of documents in a proceeding by way of subpoena. There is no provision for a process of general disclosure as provided for in the Uniform Civil Procedure Rules or the Criminal Code. It is arguable that an interpretation of s 190 of the Child Protection Act suggests that there is no positive duty of disclosure on the department. In the

absence of a clear and unequivocal requirement to disclose, the Childrens Court Rules cannot impose that duty. Further, the current process of issuing subpoenas causes delay, and is a difficult and cumbersome process for self-represented litigants to understand and negotiate.

In the interests of procedural fairness and natural justice, it is arguable that these barriers to disclosure should not be maintained, and indeed a positive duty to disclose should be established because of the importance of the decisions being made and the cost considerations for self-represented and legally aided clients. The court's discretion to accept that certain documents ought not be disclosed, because of their sensitive nature and the risk of any ongoing investigation in child protection matters being compromised, could be maintained under any proposed disclosure regime. In the Moynihan review of the civil and criminal justice system in Queensland, His Honour stated:

> Timely disclosure minimises delay and supports the effective use of public resources. It fosters early pleas of guilty, founds negotiations and reduces wasting resources. Proper and timely disclosure also serves to balance the inequality of power and resources between the executive government (the prosecution) and an accused (citizen charged with an offence). (Moynihan 2008, p86)

The same arguments are easily applied to the child protection jurisdiction.

A range of legal stakeholders have identified the lack of a clear regime to give full and frank disclosure to the other parties in the proceedings of all relevant material relied on by the department in making its decision.[18] This can include original case file documents, risk assessments, relevant witness statements and expert reports that have been considered by the department in its decision-making. The Women's Legal Service points out that:

> … there is no requirement under the Child Protection Act for the Child Protection Agency to provide full disclosure of its material to a party other than a separate representative. The lack of full disclosure of material not only deprives other parties of their right to natural justice it also impedes a party from securing ongoing legal aid funding.[19]

South West Brisbane Community Legal Centre observes:

> We have noted a broad frustration among parties and practitioners resulting from the refusal by the Department to disclose materials at a timely stage and forcing the parties to rely on subpoenas and right to information requests, the Department being unable or unwilling to negotiate an outcome in a matter until the morning of the trial when Crown Law becomes involved.[20]

According to the Queensland Law Society there is:

> … no other litigation involving the State acting as a model litigant that requires a party to the dispute to subpoena the model litigant for disclosure of material that is relevant to the dispute/litigation. It is concerning that an application can be brought against a person, and that person does not have the right to have the full details and supporting

> documentation. We consider that this brings into question issues of natural justice and procedural fairness in these important matters.[21]

This lack of disclosure strikes at the heart of a fair and transparent process:

> … the principles of natural justice and procedural fairness (used interchangeably here) have always been central to the common law and its protections against abuses of State power. In Kioa v West, Mason J explained that it is a 'fundamental rule of the common law doctrine of natural justice' that 'generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.' In addition, the principles of natural justice forbid participation in a decision by a person who is affected by ostensible or actual bias. The dictates of the rules of procedural fairness are those 'which are appropriate and adapted to the circumstances of the particular case, having regard to the intention of the legislature, and any expectations that the particular Act brings about. The decision-making process as a whole, rather than just isolated "sub-decisions", must be looked to in order to determine whether or not procedural fairness has occurred …' (Walsh & Douglas 2012)

Any duty of disclosure could have due regard to establishing appropriate safeguards: for example, in circumstances where the release of the information would compromise the safety of the child or where there is a serious public interest consideration. Any provision in this regard might be informed by the Criminal Code, Uniform Civil Procedure Rules and Family Law Rules, although this should be appropriately adapted to suit child protection litigation. The duty of disclosure could also be supported by the development of a case management guide similar to the United Kingdom's Public Law Outline (see below).

In 2010, the Department of Justice and Attorney-General began a review of the Childrens Court Rules. This review sought submissions from stakeholders about the process of court proceedings in the Childrens Court. Stakeholders included the department, Legal Aid Queensland, the Queensland Law Society and the Bar Association of Queensland. The Department of Justice and Attorney-General is in the process of negotiating amendments to the current rules and the Commission has considered this consultation in the context of its own work. These amendments are a crucial starting point.

Adapting the United Kingdom Public Law Outline to establish a disclosure regime

In April 2008, the United Kingdom reformed its child protection proceedings after the 2006 *Review of the child care proceedings system in England and Wales* (Department of Constitutional Affairs and Department for Education and Skills 2006). Reforms were implemented through the introduction of:

- Practice Direction: Guide to Case Management in Public Law Outline, initially a 41-page document produced by the Ministry of Justice

- Children Act 1989 Guidance and Regulations, Volume 1: Court Orders in England, and the Children Act 1989 Guidance and Regulations, Volume 1: Court Orders (Wales) in Wales.

The overall aim of these reforms was to ensure the efficiency of child protection proceedings by reducing delay and improving outcomes for families with children in care. The reforms focused on the department's equivalent agency in the United Kingdom undertaking a number of pre-proceedings processes to provide an opportunity for the social worker to work with the family (with the intention of avoiding a contested court proceeding) and to ensure that all necessary information would be put before the court if and once proceedings were initiated.

In 2009, the Public Law Outline was reviewed by the Ministry of Justice (Jessiman, Keogh & Brophy 2009). The review found overall that the Public Law Outline provided clear structure for child protection proceedings, but it did note that there were inconsistencies in compliance with the requirements and that the paperwork was overly burdensome for local authorities. As a result of this finding, the Public Law Outline was revised to a 31-page practice direction.[22] The revised Public Law Outline sought to reduce the number of documents required at the time of issue of the application, and to further clarify the 'timetable for the child principle'.

The main principles of the Public Law Outline were to ensure continuity and consistency for the progress and determination of child protection matters. This involved allocating no more than two case management judges for each matter, who are responsible for every stage in the proceedings through to final hearing. Each case is managed in a consistent way, using standard steps detailed in the Public Law Outline.

There are four stages prescribed by the Public Law Outline:

- Issue and first appointment. The local authority files the C110 application form[23] and annexes documents where available (in compliance with the pre-proceedings checklist).[24] At the point of filing, the court gives standard directions.[25] By day 3, the relevant children's guardian should be allocated and the local authority serves all the documents on the parties. By day 6, the first appointment is to occur, in which the court will confirm initial case management directions to progress the matter through stages 2–3.
- Case management conference (to occur no later than day 45). The conference should identify the issues that need to be resolved, confirm the timetable for the child and provide case management directions. An advocates meeting occurs no later than two days before the case management conference. This meeting allows legal representatives to draft a case management order for the upcoming case management conference (to be filed before the case management conference), identify experts and draft questions for them. In this meeting, legal representatives should consider information on the application form, case summaries from all other parties, case analysis and recommendations.

- Issues resolution hearing to occur between weeks 16 and 25. The hearing is used to resolve and narrow issues in dispute. An advocates meeting is to occur between days 2 and 7 before this hearing, in which parties are to consider each other's case summaries, case analysis and recommendations, and draft a case management order (which is to be filed before the issues resolution hearing).
- Final hearing.

10.2.3 Specialist Children's Court magistrates or availability of specialist expertise

A range of stakeholders have made submissions to the Commission supporting a specialist jurisdiction for child protection matters, including calls for the appointment of additional dedicated specialist magistrates.[26] It is argued that a specialist child protection jurisdiction could be created for decision-making for children and young people. The Queensland Law Society highlights this point and states:[27]

> In other states the magistracy contains several specialised Childrens Court magistrates. For example:
>
> - In NSW, there are 13 specialist children's magistrates and five children's registrars to assist in administrative matters in the Children's Court
> - In Victoria, there are 12 full-time Children's Court magistrates
> - In Western Australia, there are four full-time Children's Court magistrates and one casual magistrate
> - In South Australia, there are two District Court judges and two specialist magistrates
> - In Tasmania, there is one specialist magistrate.

Tilbury and Mazerolle (in press) note that the limited skills and specialisation among Queensland magistrates and judges in relation to children's matters was a strong theme in consultations they conducted. However, they also note that the size of the state and its decentralised population were seen as barriers to increased specialisation, as resources dictate that local courts must be generalist (Tilbury & Mazerolle (in press), pp18–9).

Given the vast extent of Queensland and the state's limited number of specialist magistrates, consideration should also be given to how non-specialist magistrates can use and get access to specialist expertise.

Section 107 of the Child Protection Act provides that the Childrens Court may appoint a person having special knowledge or skill to help the court. In reality, to have any utility such a power must be supported by an appropriate budget allocation. The Queensland Civil and Administrative Tribunal model provides the potential for a multi-disciplinary team from a range of professional disciplines to constitute the decision-making panel. The decisions made in child protection law by both the Childrens Court and the

Queensland Civil and Administrative Tribunal intersect with a wide range of social science considerations, including attachment theory, an understanding of child development, risk assessments and psychiatric assessments. The Commission has heard from a range of mental health professionals about developments in that field in understanding the impact of long-term abuse on brain development in children.[28] The challenge is for decision-makers and lawyers to keep abreast of significant developments in various research fields. In matters involving Aboriginal and Torres Strait Islanders, families from culturally and linguistically diverse backgrounds, or families with members who have cognitive or other impairments, magistrates may need help to understand family and parenting practices.

Children's Court clinics

The Children's Court of Victoria has access to the Children's Court Clinic: 'an independent body which conducts assessments and provides reports on children and their families at the request of the Children's Court magistrates throughout Victoria' (Children's Court of Victoria 2011a, p31). In 2010–11, the clinic received 613 child protection referrals. In the same year, 3,317 child protection applications were initiated in the Family Division. The clinic is funded by the Children's Court of Victoria (Children's Court of Victoria 2011b).

The Australian Law Reform Commission noted that the clinic was generally well regarded and functioned efficiently (Australian Law Reform Commission 1997). The Commission recommended that similar clinics be incorporated into children's courts nationwide. The Australian Law Reform Commission observed that such clinics are of benefit in child protection matters, given that they offer consistent clinical assessment of what are usually complex family dynamics involving vulnerable people and sometimes disturbing facts or situations. The report noted that the clinics would need to be adequately resourced to provide the court and legal representatives with expert advice on the best interests of the child. Contrary to this recommendation, not all states have access to Children's Court clinics.

New South Wales also has a Children's Court clinic, which was established under s 15B of the *Children and Young Persons (Care and Protection) Act 1998.* The clinic provides independent clinical assessment of children and families to the Children's Court when required, pursuant to sections 52–59 of the Act.

Further, it is acknowledged that the Family Court and the Federal Magistrates Court use in-house family consultants who are available to complete family reports at the request of the courts and provide counselling for parties if needed.

In the Queensland context, if an independent assessment is required, such reports are commissioned by parties to the child protection proceedings. In practice this is mainly the department and the separate representative. Anecdotal evidence suggests that there are often significant time delays involved in commissioning such reports, and there is a particular problem with lack of skilled assessors available in rural and remote

areas to complete such work. There also could be a disparity in the quality of relevant reports paid for by the department compared with those paid for by a separate representative who is legally aided, given the different amounts of funding allocated for these services.[29]

Question 38

Should the number of dedicated specialist Childrens Court magistrates be increased? If so, where should they be located?

Question 39

What sort of expert advice should the Childrens Court have access to, and in what kinds of decisions should the court be seeking advice?

10.2.5 Applications for long-term guardianship orders

A long-term guardianship order provides for the department or a suitable person to have guardianship decision-making for a child up to the age of 18 years. Currently the order is made by a Childrens Court magistrate. The Queensland Law Society has submitted to the Commission that:

> Given the seriousness and significance of these orders for children and their families, perhaps there would be some benefit in these decisions lying with the higher jurisdiction. We note that a provision allowing for this would be comparable to s 77, Youth Justice Act 1992 where a Magistrate is to refrain from exercising its jurisdiction to determine an indictable offence unless it is satisfied that the charge can be adequately dealt with summarily by the court. Also s 39, Federal Magistrates Act 1999 and Rule 8.02, Federal Magistrates Court Rules 2001 provide for the factors to be considered when transferring a matter from the Federal Magistrates Court to the Federal Court or the Family Court.[30]

In the United Kingdom, child protection matters can be heard at three levels:

- Magistrate Court level in the family proceedings court. The matter will be heard by a District Court judge and possibly two magistrates (non-legally qualified individuals who have been specifically trained to hear cases about children and families).
- County (District) Court level in the family proceedings court. The matter will be heard by a District Court judge.
- Complex matters are heard in the family division of the High Court, headed by the President, which has jurisdiction to hear, among other matters, all matrimonial matters, the *Children Act 1989* (UK) and the *Child Abduction and Custody Act 1985* (UK).

As pointed out by the Queensland Law Society, when dealing with children's issues, a similar jurisdictional distinction is made in Australia between the Federal Magistrates Court of Australia and the Family Court of Australia.

Another issue regarding long-term guardianship was raised by the Aboriginal and Torres Strait Islander Legal Service, which submitted that 'when determining applications for long term guardianship, the inquiry should consider recommending legislative reform to raise the standard of proof to "must be satisfied to a high level of probability"'.[31]

Question 40

Should certain applications for child protection orders (such as those seeking guardianship or, at the very least, long-term guardianship until a child is 18) be elevated for consideration by a Childrens Court judge or a Justice of the Supreme Court of Queensland?

10.2.6 Alternative dispute resolution processes

Current arrangements in Queensland

Currently in Queensland there are two mechanisms that could be considered alternative dispute resolution processes available in child protection matters before the Childrens Court:

- family group meetings (convened by the department)
- court-ordered conferences (in the Childrens Court and convened by the Department of Justice and Attorney-General).

Family group meetings

The 2004 Crime and Misconduct Commission report on abuse in foster care made a number of recommendations in relation to case planning, including that:

- the department conduct family group meetings for all children requiring protection (recommendation 7.37)
- case plans must be submitted to the court before an order can be made (recommendation 7.38)
- case plan reviews are carried out every six months (recommendation 7.36)
- all relevant stakeholders are invited to participate in every planning meeting (recommendation 7.39) (Crime and Misconduct Commission 2004).

In 2005, further legislative amendments were commenced to address these recommendations.[32]

Section 51C of the Child Protection Act requires that the chief executive must ensure that a case plan is developed for each child in need of protection and who needs ongoing help under the Act. It must be carried out in a way that enables timely decision-making, is consistent with the principles of the Act and encourages and facilitates the participation of all attendees (s 51D of the Act). Section 51G of the Child Protection Act states that the purposes of family group meetings are to provide family-based responses to children's protection and care needs and to ensure an inclusive process for planning and decision-making relating to children's wellbeing, protection and care needs.

Section 51H of the Child Protection Act requires that a family group meeting be convened:

- to develop a case plan
- to review a case plan and prepare a revised case plan
- to consider, make recommendations about, or otherwise deal with, another matter relating to the child's wellbeing, protection and care needs
- if the Childrens Court orders that it must be convened under s 68 of the Act.

For Aboriginal and Torres Strait Islander families, s 6(5) of the Child Protection Act provides that:

> ... as far as is reasonably practicable, the chief executive or an authorised officer must try to conduct consultations, negotiations, family group meetings and other proceedings involving an Aboriginal person or Torres Strait Islander (whether a child or not) in a way and in a place that is appropriate to Aboriginal tradition or Island custom.

In Chapter 7 above the Commission proposed that legislative changes be made to delegate the coordination and facilitation of family group meetings for Aboriginal and Torres Strait Islander families to suitably accredited Aboriginal and Torres Strait Islander child and family wellbeing services (see 7.3.1).

The Commission has received submissions observing that the current family group meeting process in Queensland could benefit from aspects of the family group conferencing model adopted in New Zealand.[33] However, it should be noted that the legislative amendments that introduced family group meetings in 2005 were in fact based, in part, on consideration of the New Zealand model (Harris 2008; Department of Communities, Child Safety and Disability Services 2012f). In his Second Reading speech, Minister Reynolds observed:

> Provision for these meetings is consistent with contemporary best practice approaches in child protection and with models in other jurisdictions within Australia and in other countries, such as the United Kingdom, the United States and New Zealand.[34]

To guide practice, the department has outlined how to prepare for and participate in family group meetings and case planning in the *Child safety practice manual* (Department of Communities, Child Safety and Disability Services 2012c) and has developed a *Family group meeting convenor handbook* (Department of Communities, Child Safety and Disability Services 2012f). Although both are valuable resources, there is a strong focus on preparation of departmental participants rather than non-departmental participants such as children, young people and families. It is important that resources are developed to support family group meetings and that other similar processes emphasise the importance of the genuine participation of children, young people and their families.

A number of stakeholders have made submissions to the Commission that a major failure of the current family group meeting model is that the meeting convenor is a departmental officer and is not independent of the department, and that the meetings are held at Child Safety service centres.[35] There is provision in the Child Protection Act for a private convenor to be appointed to facilitate these meetings.[36] Since the introduction of the family group meeting process in Queensland, a range of convenor options have been adopted, including outsourcing to a private convenor, establishing a dedicated specialist position or, in certain instances, using another departmental officer, preferably one who does not have any decision-making responsibility for the matter (Murray 2007). It is worth noting that Harris (2008) has commented that, although New Zealand facilitators are employed by the child protection service, they are employed within specialist positions.

The risk of a preparation process that is focused significantly on departmental participants is that it may serve to reinforce any existing power imbalance. The Commission is advised that some family group meeting convenors make time to meet with children, young people and their families to redress this imbalance. However, it would appear that overall the current departmental approach to family group meetings has lost sight of the importance of 'private family time' in involving and empowering the family to identify placement options, support contact arrangements and assist in developing responses to solve the identified child protection problems.[37] This is a key feature of the Maori model and is more in the spirit of developing a partnership between the family, departmental officers and other professionals to work on addressing child protection concerns and building parenting capacity.

The Family Inclusion Network has observed that parents, faced with an imbalance of power in the family group meeting, report feeling anxious, intimidated and compelled to agree to unreasonable conditions and targets (2007, p6). Though Healy, Darlington and Yellowlees (2012) comment that family group conferencing is a solution-based and collaborative decision-making model that aims to share the power and responsibility for decisions about children, their observational study of 11 family group meetings found that there was no legal requirement for families to be offered private family time or for the family group meeting to be held at a neutral venue.

The Australian Association of Social Workers has similarly observed that 'there is a dominance of professional voices and the absence of opportunities for private family time'.[38] This potentially intimidating environment is a major problem for Aboriginal and Torres Strait Islander families, for those from culturally and linguistically diverse backgrounds (especially those who have war and refugee experiences) and for those with reduced cognitive impairment. Firestone (2009, p102) observes that, for parents:

> … the issues discussed are deeply personal and the consequences are much more significant in their day-to-day lives. As a result, when children have been removed from the home, it is typically the parents who feel a greater pressure to settle the dispute and compromise early, in the hope that their children will be returned to their care sooner. Ironically, the greater increased personal stake that parents have in the outcome can actually contribute to their disempowerment.

Cultural differences in communication norms and language difficulties may not be adequately identified or understood, with a risk that the family does not feel supported to contribute to discussions and, more importantly, decision-making.

Legal Aid Queensland observes that key opportunities to inform and engage families are not being effectively used and are becoming an 'overly bureaucratic exercise'.[39] Section 51X of the Child Protection Act provides for the preparation of a review report in relation to case planning. This is an important process to review progress to date to determine whether or not the case plan goals have been achieved. This review should apply not only to the family but also to the department. Although it would be most beneficial if the review report was available before the family group meeting to help the family to prepare, this is usually not the case. South West Brisbane Community Legal Centre has commented: 'Section 51X reviews are not completed until after the case planning meeting and are not used to guide the development of the new case plan.'[40] Further, key assessments that the department intends to rely on to support decision-making should be available in advance for consideration.

There is a provision in s 51M of the Child Protection Act that the department should provide information to the family about the details of the family group meeting beforehand, including who will be attending. This is not always used in a way that is helpful to the family as they prepare. The Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service proposes 'consulting with families prior to family group meetings to see whether there are extended family or community members who should be involved in case planning and also to ascertain whether changes could be made to make the process more comfortable for the participants'.[41] A lack of meaningful cultural planning and the inadequate cultural competence of some departmental officers have been highlighted as barriers to participation in practice.[42]

Family group meetings that discuss case planning can become particularly combative when litigation is under way. The department may try to argue that a family group meeting to discuss a case plan is about case planning only and is entirely separate from the court process. The Australian Association of Social Workers (Queensland) argues that 'family group meetings may be used by child safety officers as a forum for

collecting evidence against families' and the intent of the family group meeting process has been 'diminished as workers experience the pressure to meet both Court and performance obligations'.[43] In contrast, lawyers consider a case plan to be a crucial piece of evidence and a family group meeting a crucial opportunity to advocate for their clients. Indeed, s 59 of the Child Protection Act provides that the Childrens Court Queensland cannot make a child protection order without a case plan. In litigation, lawyers for parents will seek to argue that case planning has not provided an adequate opportunity for parents to demonstrate that they are willing and able. Lawyers for children (both separate representatives and direct representatives) will seek to argue that, unless their clients' needs are adequately and appropriately addressed in a case plan, the lawyers may not be able to support the making of the order sought by the department.

Question 41

What, if any, changes should be made to the family group meeting process to ensure that it is an effective mechanism for encouraging children, young people and families to participate in decision-making?

Court-ordered conferences

Section 59 of the Child Protection Act provides that, if a child protection matter before the court is contested, then a court-ordered conference should be convened, or at least a reasonable attempt to convene one should be made before the court may make a child protection order. The Child Protection Act and the Childrens Court Rules provide limited guidance as to how, when and why a court-ordered conference is convened. The court registrar must appoint a chairperson (the chair) to convene the conference as soon as practicable after the order is made and the chair 'must have the qualifications or experience prescribed under the rules of court made under the *Childrens Court Act 1992*' (s 69 of the Child Protection Act).

In relation to court-ordered conferences, the Child Protection Act provides:

- that the chair and the parties must attend the conference (s 70); a child is a party (as defined by the dictionary in the Child Protection Act) but is not compelled to attend; legal representatives and the recognised entity may attend, but all other attendees must obtain the chair's approval
- that discussions at the court-ordered conference are inadmissible in a proceeding before any court other than with the consent of all the parties (s 71)
- that the chair must file a report of the conference to indicate whether the parties have reached an agreement, to confirm a mention time or to set the matter down for final hearing (s 72).

Rule 19 of the Childrens Court Rules provides that the chair must have an ability to facilitate voluntary dispute resolution processes and a knowledge and understanding of the issues and processes for the protection of children under the Child Protection Act. The *Child safety practice manual* provides limited guidance to departmental officers, including only one reference to the court-ordered conference in its glossary of terms.

Table 14 shows some variations but no clear trend in the number of court-ordered conferences since 2005–06. The data does not enable us to know what proportion of matters involve a court-ordered conference – the number of lodgements shown in Table 12 relates to applications for both assessment and child protection orders (court-ordered conferences are only ordered to occur in applications for child protection orders).

Table 14: Court-ordered conferences, Office of Child Protection Conferencing, Department of Justice and Attorney-General, Queensland, 2005–06 to 2010–11

	2005–06	2006–07	2007–08	2008–09	2009–10	2010–11
Number of court-ordered conferences	583	632	748	705	638	596
Average case load per coordinator per month	19	26	22	20	18	17

Source: Department of Communities, Child Safety & Disability Services 2012a.

Currently there is a lack of clarity about at what stage in the child protection proceedings a court-ordered conference should be convened and for what purpose. Reading the provisions in the Child Protection Act and Childrens Court Rules in their totality, it is reasonably clear that the court-ordered conference is intended to provide an alternative dispute resolution process when a party does not agree with the department's application. It should be understood that when a party contests an application this could be in relation to all critical issues as set out in s 59 of the Child Protection Act (that is, harm, whether a parent is willing and able, whether the case plan or the order sought is appropriate) or could be limited to particular concerns such as the type of order sought. The court-ordered conference can be convened without the filing of all relevant material, including crucial expert assessments. This means that parents, children and young people are often at a disadvantage because the department is not required to outline its case at this point in the process. Legal Aid Queensland submits:

> … none of those matters can be addressed at a COC [court-ordered conference] unless there has been full disclosure by the Department of the evidence it has in respect of its intervention in the family. Lawyers representing parties in child protection proceedings cannot advise their clients to mediate about and/or accept untested allegations by Departmental officers if the evidentiary basis of the allegations has not been clearly disclosed. Without appropriate disclosure, there cannot be effective engagement in a COC.

> It is submitted that … COCs would offer a far more effective opportunity for settlement discussions if all parties have disclosed their positions and evidence in advance.
>
> The current model, where material is not filed until shortly before a trial, encourages settlement discussions on the first day of hearing rather than at the COC, causing matters to take longer to resolve and burdening the court with trials that must be catered for in the court diary but regularly do not proceed to a full hearing.[44]

Departmental officers who attend court-ordered conferences often do so without the benefit of formal legal advice before they attend and are not legally represented. This means they do not have access to advice to help them identify possible deficiencies in their own application. This can impair the ability to reach an agreement. Added to this, the relevant departmental decision-makers may not attend the court-ordered conference. This means that the delegated decision-maker with the authority to change the application for a child protection order is not present, often rendering settlement discussions ineffectual.[45]

In addition to these concerns, regional court-ordered conferences are often being held by phone because the current Department of Justice and Attorney-General convenors are based in Brisbane and only limited travel is approved.[46] This places Aboriginal and Torres Strait Islander, culturally and linguistically diverse families, and those with cognitive impairment at a particular disadvantage, and can undermine the building of rapport and trust. A further complication is the use of interpreters. Ms Diana McDonnell, acting manager of the Maryborough Child Safety service centre, reports that 'parents have voiced to the court coordinator that they feel undervalued and disempowered by the process'.[47]

The Queensland Law Society highlights that legal representation is not always available for parents at court-ordered conferences.[48] South West Brisbane Community Legal Centre submits that 'subject children are currently not allowed to attend court ordered conferences even when it is their application'.[49] Legal Aid Queensland has submitted that at the conclusion of the conference the court-ordered conference reports are filed with the Childrens Court by the chairperson pursuant to s 72 of the Child Protection Act, but are not subsequently served on all parties.[50]

Question 42

What, if any, changes should be made to court-ordered conferences to ensure that this is an effective mechanism for discussing possible settlement in child protection litigation?

Given the range of issues highlighted by stakeholders, it is arguable that family group meetings, court-ordered conferences and compulsory conferences (referred to below) need to be clearly established as models of alternative dispute resolution. This process

could involve consideration by the department, legal stakeholders and the courts and tribunals about:

- an accepted definition of alternative dispute resolution, guided by established terms
- development of a shared language and understanding about the aims of these processes (for example, Legal Aid Queensland in its submission recommends the adoption of the Signs of Safety model,[51] which is described in more detail in Chapter 4 of this discussion paper and further below)
- when these mechanisms should occur in the process of decision-making and litigation
- the establishment of guidelines for the operation of these mechanisms, giving due consideration to the inherent power imbalance in child protection proceedings and the concepts of natural justice and procedural fairness
- the qualifications and skills required for those convening these processes.

Firestone (2009) identifies some of the benefits of involving and empowering parents in child protection mediation:

- increased exchange of information among the parties
- greater input from all parties, leading to improvement in the quality of agreements
- reinforcement of the role of parents by providing them with the opportunity to contribute to solutions
- increased sense of ownership and understanding by parents of the agreement
- increased compliance with the agreement
- reduced conflict between parents and professionals and increased ability of the group to work effectively as a team
- increased confidence of parents in the child protection process.

Mayer (2009) highlights the importance of 'buy-in' by key stakeholders to effectively support conferencing and mediation models used in child protection, and proposes a range of strategies to do this, including providing training opportunities. Certainly, in the development of the Western Australian model explored below there has been a focus on this collaborative and multi-disciplinary approach.

A review of other jurisdictions

United Kingdom

As described earlier, the Public Law Outline[52] details the requirement for a number of conferences to occur throughout the care proceedings, to ensure that all parties and the court are in agreement about the issues in dispute and the facts that relate to each

issue. The outline details processes to occur pre-proceedings and includes a detailed pre-proceedings checklist of documents to be annexed to the application form after proceedings are filed.

Once the concerns of the local authority have reached a point where the threshold appears to have been met,[53] a meeting is held with the social workers and legal advisers (legal planning meeting/legal gateway meeting), and a decision is made as to whether the threshold has actually been met and whether the concerns require immediate legal action to ensure the child's safety. If a decision is made to apply for a protection order, but the concerns do not require immediate action, the social work team manager will issue a 'letter before proceedings'. This letter states that the local authority (social worker, manager) would like to meet with the parents and their legal representative to discuss the concerns with a view to reaching agreement on what should occur to safeguard the child. If no agreement is reached, the local authority will begin legal proceedings.

Once proceedings are commenced, regular advocacy meetings are to occur before each stage of the Public Law Outline to discuss and narrow issues in dispute in preparation for the case management conference and interim resolution hearing.

Victoria

The final report of the Protecting Victoria's Vulnerable Children Inquiry proposed multiple alternative dispute resolution opportunities at critical points in child protection proceedings. The Inquiry recommended:

- an initial family group meeting run by the department to determine child protection concerns
- a child safety conference once an application for a child protection order is commenced to appropriately divert matters away from the court where possible
- a new model conference before the trial to determine whether there is any possibility of settlement or, if not, to narrow the issues for the trial (Cummins, Scott & Scales 2012).
- The new model conference was trialled on particular cases in the Victorian Children's Court over a six-month period in 2010, and from January 2011 the model was applied to child protection matters. The trial was evaluated in 2012 and is being improved and expanded.

Western Australia

In Western Australia, the *Children and Community Services Act 2004* (WA) details the use of pre-hearing conferences (ss 136–137). Related to these provisions is *Practice Direction 1 of 2012 – Signs of Safety Pre-Hearing Conferences*, which notes that all parties must complete a Signs of Safety Pre-Hearing Conference document. This document gives a summary of disputed facts and other relevant information from each

party. The conference is to occur as early in the proceedings as possible. The Signs of Safety Pre-Hearing Conference is aimed at resolving protection applications early, in a less adversarial way and by involving family members informally. The aim of the conference is to be collaborative and to focus on the future protection of the child. Everything discussed in the conference is confidential, and it is presided over by a judge, a magistrate or a convenor appointed by the President of the Court.[54] There is also provision for a Signs of Safety lawyer-assisted pre-birth meeting to be conducted by a facilitator.

A pilot of the conference model began in November 2009 after collaboration between Legal Aid Western Australia, the Department of Child Protection, King Edward Memorial Hospital for Women and the Perth Children's Court. As part of the implementation of the pilot, Legal Aid Western Australia and the Department of Child Protection developed a training program for a combined pool of facilitators (who run the meetings) and convenors (who run the conferences) to prepare them for their roles in the pilot. They also provided a separate training program to lawyers representing the department, parents and children. Modelling the collaborative approach required in the process, each training group included legal practitioners from the Department of Child Protection, Legal Aid Western Australia, Aboriginal Legal Services, Community Legal Centres, private firms and support agencies. 'A team from Legal Aid [WA], the [Department of Child Protection] Legal Services and Best Practice Unit also provided seminars to staff at [departmental] district offices involved in the pilot (including Peel and Wheatbelt-Northam), to the President and magistrates of the Children's Court and to social work staff at King Edward' (Howieson & Coburn 2011, p19).

In March 2010 an evaluation of the pilot was commenced and a final report was published in June 2011. The final report noted:

> The primary finding of the Inquiry is that the Pilot is delivering a product that is more effective, inclusive and constructive than previous models. Most participants clearly acknowledge that the benefits of the Conferences and Meetings outweigh the risks, and hence the focus on the Pilot seems to have shifted from 'if' to 'how'. That is, instead of the participants asking the question, 'Should we have the Conferences and Meetings?' they are asking, 'How can the Conferences and Meetings work in the best possible way?' (Howieson & Coburn 2011)

The evaluation report made a number of recommendations to expand the pilot regionally, improve processes and develop child-inclusive models. It is arguable that the most interesting and important aspect of this work is the attempt to develop a common language and shared understanding of the purpose of the alternative dispute resolution models being employed. A recommendation for the next steps in the project's development is the need for greater collaboration between professionals to cement their understanding of Signs of Safety and the alternative dispute resolution framework, and to increase their confidence in these processes.

Chapter 4 of this discussion paper provides additional details about the Signs of Safety approach.

New South Wales

In New South Wales, s 65 of the *Children and Young Person (Care and Protection) Act 1998* (NSW) and Practice Note 3 detail the alternative dispute resolution process to be followed. A matter cannot proceed to a final hearing until such a process has been undertaken, unless a Children's Court registrar has dispensed with this requirement.[55] The conference is held before a Children's Court registrar and should be convened as soon as possible in the proceedings to facilitate early resolution. The conference may be held at different stages in the proceedings if deemed appropriate.[56]

Care Circles are currently used in New South Wales as an alternative avenue for care matters (once it has been established that a child is at risk) involving Aboriginal or Torres Strait Islander children. In 2008, the New South Wales Attorney General's Department began piloting the use of Care Circles in the Nowra region (Best 2011). Care Circles aim to increase the participation of Aboriginal families and communities in child protection proceedings before the Children's Court.

Care Circles may be convened at the discretion of a magistrate once a decision has been made that a child is in need of protection (Department of Attorney General and Justice 2011). The membership of the circles includes a magistrate, the Care Circle project officer, the child protection case worker and manager, the child's family and their legal representatives, and the child's legal representatives. Each circle is also attended by three trained Aboriginal community representatives.

Care Circles may provide input on a range of matters before the court, but they act in an advisory role only. The matters that may be considered by Care Circles include:

- what interim arrangement there should be for the care of the child
- what services and support can be made available to the family
- where the child should live
- what contact arrangements should be in place
- alternative family placements
- any other matters considered relevant to the child's care.

The Cultural and Indigenous Research Centre Australia (2010) has prepared an evaluation report on the New South Wales program based on nine Care Circles conducted in the Nowra pilot. They concluded that the families involved felt that the program provided opportunities for input that were not available in traditional court processes. In response to the report's favourable conclusions, the New South Wales Government expanded Care Circles to the Lismore region (Smith 2011).

In December 2012, the Australian Institute of Criminology released an evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the New South Wales Children's Court. This report considered changes to alternative

dispute resolution processes that were implemented after the Wood Report recommended embedding alternative dispute resolution processes in care and protection proceedings (Morgan et al. 2012). The findings of the report are positive in many respects, suggesting ongoing use, and observing benefits in improving stakeholder relationships across the child protection sector and in resolving disputes, or at the very least narrowing the issues for dispute.

Implications for Queensland

Any future reform process in Queensland will greatly benefit from due consideration of the changes in all these jurisdictions. Two further challenges that Queensland faces are the need for access for rural and remote communities and, given the key problem of over-representation of Aboriginal and Torres Strait Islander families in the child protection jurisdiction, the need for a culturally appropriate alternative dispute resolution model.

10.3 Issues raised about the jurisdiction and role of the Queensland Civil and Administrative Tribunal

As noted earlier, the Queensland Civil and Administrative Tribunal can review administrative decisions of the department about the placement of a child and the contact arrangements concerning that child.

The Queensland Civil and Administrative Tribunal Act only has limited procedural provisions. Specific procedures that apply to these matters are set out in the *Queensland Civil and Administrative Tribunal Rules 2009* (QCAT Rules) and the President's practice directions. A new part inserted into the Child Protection Act on 1 October 2010 addresses the specific provision for the conduct of reviews under that Act, overriding the general procedural matters in the Queensland Civil and Administrative Tribunal Act to provide for these proceedings. Chapter 2A of the Child Protection Act specifically outlines:

- the guiding principles to which the tribunal must have regard
- how to make applications and send notices of application to the tribunal
- the constitution of the tribunal
- privacy of hearings and confidentiality
- children's participation in proceedings – including, for example, cross examination and legal representation
- the conduct of compulsory conferences
- how the tribunal's decisions and recommendations will be given effect.

10.3.1 Use of the review process

There are currently over 7,500 children and young people in the out-of-home care system, yet only 188 applications to review decisions under the Child Protection Act were made in the 2011–12 financial year (refer to Table 13).

Although this low number of review applications could mean that children, young people and families are largely satisfied with departmental decision-making, an alternative explanation offered by a number of stakeholders[57] is that there is a lack of awareness about the review rights of children and families in relation to these decisions, despite the requirement to notify them of these rights.[58] Of particular note is that the numbers of children and young people seeking review to the Queensland Civil and Administrative Tribunal is extremely low, with only four of the 2011–12 applicants being a child or young person (Table 15).

Table 15: Applicants for Children Services Tribunal and Queensland Civil and Administrative Tribunal reviews under the *Child Protection Act 1999* by applicant type, Queensland, 2007–08 to 2011–12

Applicant type	2007–08	2008–09	2009–10	2010–11	2011–12
	CST	CST	CST/QCAT	QCAT	QCAT
Carer	54	34	56	45	42
Parent	141	170	136	86	124
Relative	20	30	44	33	33
Child/young person	1	3	6	3	4
On behalf of child	25	18	Not captured	Not captured	Not captured

Source: Provided by Queensland Civil and Administrative Tribunal.

Notes: Numbers may not correspond with numbers for applications as more than one applicant may file a single review application.

10.3.2 Specialist expertise within the Queensland Civil and Administrative Tribunal

As noted earlier in the chapter, the Child Protection Act requires that the constitution of the Queensland Civil and Administrative Tribunal include members who are committed to the principles in the Act and who have an extensive professional knowledge and experience of children. Questions have been raised with the Commission about whether there has been or will be a loss of specialist expertise in child protection matters since making them part of the larger tribunal. Although the Australian Association of Social Work Queensland supported the tribunal as a multi-disciplinary review mechanism, it also submitted that:

> Key to an effective QCAT process remains having a multi disciplinary tribunal panel, with child protection expertise being crucial. The AASW would further support the need for an increased focus on ensuring all tribunal members have particular understanding

> and expertise in child protection matters, as opposed to general tribunal experience. Further, we would be considered [sic] if the current panel constitution is further diluted by opening this up to panel members with non child protection expertise.[59]

10.3.3 Other issues concerning Queensland Civil and Administrative Tribunal processes

Other issues raised with the Commission relate to natural justice and procedural fairness in Queensland Civil and Administrative Tribunal proceedings. The department may attend tribunal hearings (such as the compulsory conference) with a range of departmental officers, including past and present child safety officers, team leaders and in some instances Child Safety service centre managers. This means that a self-represented applicant could attend the Queensland Civil and Administrative Tribunal with anywhere between two and four departmental officers in attendance. These departmental officers often stay for the duration of the matter, taking part in discussions or waiting to see whether they are required. This can create an intimidating environment for applicants.

10.3.4 Alternative dispute resolution in the Queensland Civil and Administrative Tribunal– compulsory conference

Section 99N of the Child Protection Act provides for a compulsory conference and that it may be used to:

- identify information to be given to the tribunal by the parties
- give the parties information about the tribunal's practice and procedures
- refer the parties to alternative dispute resolution.

The Queensland Civil and Administrative Tribunal's website states that the aims of compulsory conferences are to:

- identify and clarify the issues between the parties
- find a solution to the dispute without proceeding to a hearing
- identify the questions to be decided by the tribunal
- make orders and give directions to resolve the dispute
- if the proceeding is not settled, to make orders and give directions about how the case will proceed so that it can be resolved (Queensland Civil and Administrative Tribunal 2012a).

In practice, the compulsory conference is the key alternative dispute resolution process used in the Queensland Civil and Administrative Tribunal. The tribunal has a practice direction that details the procedure to be followed if agreement is not reached at a compulsory conference.[60] The *Child safety practice manual* has no reference to Queensland Civil and Administrative Tribunal compulsory conferences.

In response to a request for information by the Commission, the tribunal provided the following information about applicable case management processes in child protection matters:

> **Step 1:** Upon receipt of applications for matters that fall under the Human Rights Division – Child Protection List the application is allocated to a registry officer based on the level of complexity of the application and experience of the staff. Registry staff follow procedures as detailed in the registry practices and procedures manual. The tribunal is also involved early upon receipt of the application and provides guidance to registry staff on how the application is case managed.
>
> **Step 2:** The decision maker (or Department) is sent an 'Information Notice to Decision-maker about Application for Review under section 99E (1) of the *Child Protection Act 1999*'. This notice requires the decision maker (the Department) to provide details to QCAT of parties who are entitled to apply for a review within seven (7) days of receiving such notice. Once those details are received by QCAT, the relevant notices are issued to all parties regarding the current application.
>
> **Step 3:** The decision maker (or Department) must provide the following to the tribunal in a reasonable period of not more than 28 days after the decision maker is given a copy of the application for the review, the written statement of reasons for the decision and any document or thing in the decision maker's possession or control that may be relevant to the tribunal's review of the decision. QCAT's Practice Direction 6 of 2011 'Access to documents in applications for review and referral matters' applies to require an indexed and page numbered bundle, in date or other logical order, of any documents or other things in its possession or control that may be relevant to the tribunal's review of the decision, or consideration of the matter to every other party to the proceedings.
>
> **Step 4:** A Stay Hearing (where requested)/Compulsory Conference is scheduled and a hearing scheduled if the matter is not resolved (for example, withdrawn, agreement reached etc). The Tribunal will in some instances, list the matter for directions hearing to assist in preparation for future proceedings. Directions to the parties are also commonly made at a compulsory conference.
>
> Prior to the Compulsory Conference registry staff communicate with parties by correspondence, phone and email. All outgoing correspondence has the name, direct phone number and email of the registry staff member.

The Queensland Civil and Administrative Tribunal has reported high settlement rates at the compulsory conference stage, but this should be assessed with caution.[61] From the perspective of the tribunal and the department this may be considered a positive result, but it is only meaningful if the department's undertakings given to support settlement negotiations in the Queensland Civil and Administrative Tribunal prove genuine once the matter is finalised before the tribunal. Furthermore, the withdrawal of applications before the tribunal requires further analysis to determine the reasons for withdrawal. The Queensland Public Interest Law Clearing House makes this observation about withdrawal:

> The aggrieved parent then withdrew their review application, as the decision which was the subject of the review no longer stood. Although this achieved a resolution of the

> matter for the parent concerned, it was a resolution which was achieved at significant expense, which did not hold the Department accountable for its erroneous decision-making, and which did not result in the development of any precedent which may be drawn upon to guide the Department, QCAT, and applicants who have commenced review proceedings about what is a good decision-making process. We understand the motivation for such an approach is non-adversarial resolution of matters where an ongoing relationship between the parent and/or carer and the Department is important. However, the value of formal decisions, which can have a normative effect on decision makers, is lost.[62]

The Commission has also heard from those legally representing or supporting applicants for review that the department will often provide lengthy reasons for decisions just prior to a compulsory conference, affording already marginalised and disadvantaged clients very little opportunity to consider what is often 'voluminous or complex material', yet there remains an expectation that these applicants must be ready to respond in the compulsory conference process.[63] This is despite the requirements set out in s 158 of the Queensland Civil and Administrative Tribunal Act in relation to notice of reasons being required 28 days before a compulsory conference. It is understandable that matters may be listed as a matter of urgency (such as stay proceedings), which may make compliance with this requirement difficult. However, it is still a concerning barrier to participation for marginalised and disadvantaged applicants, who often have literacy or language difficulties, cognitive impairment or mental health problems.

Question 43

What, if any, changes should be made to the compulsory conference process to ensure that it is an effective dispute resolution process in the Queensland Civil and Administrative Tribunal proceedings?

10.3.5 Interface between the Queensland Civil and Administrative Tribunal and the Childrens Court

Some submissions have argued that placement and contact decisions should be able to be made by the Childrens Court of Queensland where applications for assessment and child protection orders are ongoing. Both the Queensland Law Society and Legal Aid Queensland have argued that, where matters are before the Childrens Court for determination, decisions about placement and contact should be considered in that forum rather than by the Queensland Civil and Administrative Tribunal.[64]

The Child Protection Act currently provides that a review matter before the tribunal may be suspended if it relates to a matter already before the Childrens Court, if the President is satisfied that the matters would effectively decide the same issue and that the matters will be dealt with quickly by the court (s 99M). Legal Aid Queensland

submits that this review jurisdiction should be able to be exercised by the Childrens Court without reference from the Queensland Civil and Administrative Tribunal. It argues that the Childrens Court has the ability to appoint a person having specialist knowledge or skills pursuant to s 107 of the Act to replicate what happens at the tribunal (where the matter is often determined by a panel of three members – see section 10.1.2 above). This process would allow the court to make a decision dealing more comprehensively with all the circumstances of the child and would therefore be more efficient and in the best interests of the child.[65]

Question 44

Should the Childrens Court be empowered to deal with review applications about placement and contact instead of the Queensland Civil and Administrative Tribunal, and without reference to the tribunal where there are ongoing proceedings in the Childrens Court to which the review decision relates?

10.4 Issues still being considered by the Commission

The Commission is aware that there are other issues to be considered in relation to court and tribunal processes. Some of these are whether:

- the process of coming to a settlement agreement in child protection matters needs further legislative clarification – for example, should there be legislative recognition of 'consent' orders?
- there is adequate funding for and appropriately competent legal representation for all parties involved in child protection matters, including parents, children and departmental officers
- the range of child protection orders currently available is adequate and appropriate
- reform is needed to improve the involvement of recognised entities in providing cultural advice to the department, the Childrens Court of Queensland and the Queensland Civil and Administrative Tribunal
- there is a need for specialist training and accreditation for lawyers and decision-makers in child protection matters.

The Commission welcomes comment on these and any other matters that could help to make the court and tribunal processes in Queensland more effective.

Question 45

What other changes are needed to improve the effectiveness of the court and tribunal processes in child protection matters?

[1] *Child Protection Act 1999* (Qld) ch 2, part 3B.
[2] *Child Protection Act 1999* (Qld) ch 2, parts 2, 3, 3AA, 4.
[3] *Childrens Court Act 1992* (Qld) s 5. Note that it also provides for two justices of the peace to constitute the court if no magistrates are available.
[4] *Child Protection Act 1999* (Qld) s 61.
[5] *Childrens Court Act 1992* (Qld) ss 9, 10.
[6] *Childrens Court Act 1992* (Qld) s 8.
[7] *Childrens Court Act 1992* (Qld) s 5.
[8] *Child Protection Act 1999* (Qld) s 104.
[9] *Child Protection Act 1999* (Qld) s 105.
[10] *Child Protection Act 1999* (Qld) ss 51VA, 78, 86(2), 86(4), 87(2), 89, 129, 136–138, 140, 247, sch 2.
[11] *Child Protection Act 1999* (Qld) s 99H.
[12] *Child Protection Act 1999* (Qld) ss 5B(n), 66(3).
[13] *Childrens Court Act 1992* (Qld) s 8.
[14] Submission of Queensland Law Society, 19 October 2012 [p28].
[15] Submission of Legal Aid Queensland, 26 October 2012 [p11]. See also Submission of Queensland Law Society, 19 October 2012 [pp8–9]; Submission of Women's Legal Service, September 2012 [p4]; Submission of South West Brisbane Community Legal Centre, 28 September 2012 [p7].
[16] Children's Court of Victoria, Submission to the Protecting Victoria's Vulnerable Children Inquiry, April 2011 [p47].
[17] Submission of Queensland Law Society, 19 October 2012 [p36].
[18] Submission of Queensland Law Society, 19 October 2012 [pp8–9]; Submission of Legal Aid Queensland, 26 October 2012 [pp11–12]; Submission of Women's Legal Service, September 2012 [p4]; Submission of South West Brisbane Community Legal Centre, 28 September 2012 [p7].
[19] Submission of Women's Legal Service, September 2012 [p4].
[20] Submission of South West Brisbane Community Legal Centre, 28 September 2012 [p7].
[21] Submission of Queensland Law Society, 19 October 2012 [p9].
[22] Family Division, *Practice direction – public law proceedings guide to case management*, 6 April 2012.
[23] C110 Application under the Children Act 1989 for a care or supervision order form. Available from: ‹http://webarchive.nationalarchives.gov.uk/20110218200720/http://www.hmcourts-service.gov.uk/cms/479.htm›.
[24] This includes filing 'annex documents' – social work chronology, initial social work statement, initial and core assessments; letters before proceedings; schedule of proposed findings and care plan.
[25] Including pre-proceedings checklist compliance; allocate or transfer file; appoint children's guardian; appoint solicitor for child; case analysis for first appointment; appoint guardian ad litem or litigation friend for protected party or any non-subject child who is a party, including the official solicitor (i.e. akin to adult guardian), where appropriate, and list the matter for first appointment.
[26] Submission of South West Brisbane Community Legal Centre, 28 September 2012 [p8]; Submission of Youth Advocacy Centre, October 2012 [pp3–4]; Submission of Legal Aid Queensland, 26 October 2012 [p14]; Submission of Queensland Law Society, 19 October 2012 [pp39–41].
[27] Submission of Queensland Law Society, 19 October 2012 [p40].
[28] Exhibit 122, Submission of Brett McDermott, November 2012.
[29] Exhibit 114, Statement of Grant Thomson, 26 October 2012 [pp9–10].
[30] Submission of Queensland Law Society, 19 October 2012 [p9].

[31] Submission of Aboriginal and Torres Strait Islander Legal Service, 21 December 2012 [p28].
[32] *Child Protection Act 1999* (Qld) s 59, part 3A.
[33] Submission of Aboriginal and Torres Strait Islander Legal Service, November 2012 [p20].
[34] Hon. MF Reynolds, *Hansard*, Queensland, Legislative Assembly, 28 September 2004, p2399.
[35] Submission of Australian Association of Social Workers (Queensland), August 2012 [pp6–7]; Submission of Queensland Public Interest Law Clearing House, September 2012 [p19]; Submission of Aboriginal and Torres Strait Islander Women's Legal Service NQ, October 2012 [p13; p20]; Submission of Legal Aid Queensland, 26 October 2012 [p16]. See also Walsh and Douglas 2012.
[36] *Child Protection Act 1999* (Qld) s 51I.
[37] Submission of Aboriginal and Torres Strait Islander Legal Service, November 2012 [p20]; Submission of Australian Association of Social Workers (Queensland), August 2012 [p7].
[38] Submission of Australian Association of Social Workers (Queensland), August 2012 [p7]. See also Submission of Queensland Public Interest Law Clearing House, September 2012 [p18]; Submission of South West Brisbane Community Legal Centre, 28 September 2012 [pp5–6].
[39] Submission of Legal Aid Queensland, 26 October 2012 [p16].
[40] Submission of South West Brisbane Community Legal Centre, 28 September 2012 [p5].
[41] Submission of Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service, September 2012 [p21].
[42] Submission of Aboriginal and Torres Strait Islander Legal Service, November 2012 [pp8–9]; Submission of Aboriginal and Torres Strait Islander Women's Legal Service NQ, October 2012 [pp11–12].
[43] Submission of Australian Association of Social Workers (Queensland), August 2012 [p6].
[44] Submission of Legal Aid Queensland, 26 October 2012 [p17].
[45] Submission of Aboriginal and Torres Strait Islander Legal Service, 21 December 2012 [p31].
[46] Submission of Legal Aid Queensland, 26 October 2012 [p18]; Statement of Diana McDonnell, 5 October 2012 [p7: para 54].
[47] Statement of Diana McDonnell, 5 October 2012 [p7: para 54].
[48] Submission of Queensland Law Society, 19 October 2012 [p17].
[49] Submission of South West Brisbane Community Legal Centre, 28 September 2012 [p7].
[50] Submission of Legal Aid Queensland, 26 October 2012 [p17].
[51] Submission of Legal Aid Queensland, 26 October 2012 [pp15–6].
[52] Family Procedure Rules, *Practice Direction 12A – public law proceedings guide to case management: April 2010*, 6 April 2010.
[53] *Children Act 1989* (UK) s 31.
[54] *Children and Community Services Act 2004* (WA) s 136(4).
[55] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65(1A).
[56] Children's Court of New South Wales, *Practice Note No 3 – alternative dispute resolution procedures in the Children's Court*, 4 February 2011.
[57] Submission of Aboriginal and Torres Strait Islander Legal Service, November 2012 [p17]; Submission of Youth Advocacy Centre, October 2012 [p7]; Submission of Queensland Law Society, 19 October 2012 [p12]; Submission of Queensland Public Interest Law Clearing House, September 2012 [p5]; Submission of PeakCare Queensland, October 2012 [p96].
[58] *Child Protection Act 1992* (Qld) ss 85–86.
[59] Submission of Australian Association of Social Workers (Queensland), August 2012 [p16].
[60] Queensland Civil and Administrative Tribunal, *Practice Direction No 6 of 2010 – compulsory conferences and mediations*, 20 April 2010.
[61] Queensland Civil and Administrative Tribunal, *Practice Direction No 6 of 2010 – compulsory conferences and mediations*, 20 April 2010.
[62] Submission of Queensland Public Interest Law Clearing House, September 2012 [p19].

[63] Submission of Queensland Law Society, 19 October 2012 [p24]; Submission of Aboriginal and Torres Strait Islander Legal Service, 21 December 2012 [p30].
[64] Submission of Queensland Law Society, 19 October 2012 [pp18–9]; Submission of Legal Aid Queensland, 26 October 2012 [p15]. See also Submission of Aboriginal and Torres Strait Islander Legal Service, 21 December 2012 [p30].
[65] Submission of Legal Aid Queensland, 26 October 2012 [p15].