

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2017 04406

ZD¹

Appellant

v

Secretary to the Department of Health and
Human Services & Anor

Respondents

JUDGE: OSBORN JA
WHERE HELD: Melbourne
DATE OF HEARING: 22 November, 15 December 2017
DATE OF JUDGMENT: 22 December 2017
CASE MAY BE CITED AS: ZD v Secretary to the Department of Health and Human
Services
MEDIUM NEUTRAL CITATION: [2017] VSC 806

COURTS - Appeal from decision of Children's Court Magistrate in respect of condition to vaccinate children imposed in the best interests of the child as part of interim accommodation order pursuant to s 263(7) of the *Children Youth and Families Act 2005* - Whether decision beyond power or otherwise misconceived nature and scope of power - Whether power extends to making decisions with significant long-term consequences for child - Appeal dismissed.

HUMAN RIGHTS - Best interests of the child - *Charter of Human Rights and Responsibilities Act 2006* considered.

STATUTORY INTERPRETATION - Meaning of 'any condition' for the purpose of s 263(7) of the *Children Youth and Families Act 2005*.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	Mr J McLoughlin	Victoria Legal Aid
For the First Respondent	Mr I R L Freckelton QC	Department of Health and Human Services

¹ To ensure that there is no possibility of identification, this judgment has been anonymised by the adoption of a pseudonym in place of the name of the appellant and second respondent.

For the Attorney-General

Ms M J Richards SC with
Mr D A Bruno

Victorian Government
Solicitor's Office

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HIS HONOUR:

Introduction

1 This case concerns the power of a Children’s Court Magistrate to authorise the vaccination of young children as an incident to the making of an interim accommodation order (‘IAO’).

2 The power in issue is the power granted by s 263(7) of the *Children Youth and Families Act 2005* (‘CYFA’):

An interim accommodation order may include any conditions that the Court or bail justice considers should be included in the best interests of the child.

3 In the present case, the condition imposed by the Magistrate provided in the order for each child that:

The child may be immunised in accordance with DHHS immunisation schedule and in accordance with the approved immunisation program (as attached to this minute).

4 The appellant (the children’s mother) appeals this condition pursuant to s 271(1)(b) of the CYFA which gives her standing as a parent to do so.

5 Section 271 provides for an appeal on the merits. In this regard, it is to be contrasted with a raft of other provisions in the legislation of this State (including s 430P of the CYFA) which provide for an appeal to the Supreme Court from decisions of magistrates on questions of law only.

6 It is accepted that, on the hearing of appeals pursuant to s 271 of the CYFA, the evidence before the magistrate may be supplemented by further evidence bearing on the best interests of the child.²

7 In the present case, however, the Magistrate’s decision that the condition was in the best interests of the child is not challenged by the grounds of appeal.

8 Whilst it is apparent that neither the appellant or the second respondent (the

² *Purcell v RM* [2004] VSC 14 [22]; *The Secretary, Department of Human Services v Merigan* [2006] VSC 129; *Department of Human Services v DR* [2013] VSC 579; *Secretary to the Department of Human Services v Children’s Court of Victoria* [2014] VSC 609 [24].

children's father) believes vaccination of their children is necessary or desirable, the grounds of appeal are directed to the fundamental question of whether the relevant power to impose conditions under the CYFA enabled the Magistrate to impose the condition which he did.

9 In essence, the appellant submits that the Magistrate's power to impose conditions in the best interests of a child does not extend to making decisions which have significant long-term consequences for that child.

10 For the reasons set out below, I am satisfied the Magistrate did have the power to make the order which he did.

11 In summary:

- (a) the plain meaning of the relevant provision is that the Court is given a wide discretion governed by the overriding principle of the best interests of the child;
- (b) that principle reflects the paramount consideration under the Act;³
- (c) limitations imposed by the Act upon the Secretary's administrative powers cannot found an implication concerning the powers of the Children's Court;
- (d) the interim nature of the order does not prevent the imposition of a condition of the type in issue;
- (e) such condition related directly to the circumstances of the accommodation of the children;
- (f) the condition is valid;
- (g) the action proposed pursuant to the condition is authorised in any event by other conditions of the IAO;
- (h) where the intention of the provision is clear there is no scope for the *Charter of*

³ See s 10(1).

Human Rights and Responsibilities Act 2006 ('the Charter') to affect its construction, but in any event, properly understood, the provisions of the Charter support the above conclusions.

- 12 Because the underlying question relating to the best interests of the children should be resolved expeditiously, the initial hearing of this matter was brought on at short notice. In the event, it became apparent on the initial hearing that notification which should have been given pursuant to s 35 of the Charter had not been given. In turn, following the subsequent giving of notice and intervention by the Attorney-General, a second hearing was required.
- 13 Partly in consequence of this sequential hearing and because it accords with the logic of my ultimate conclusions, I shall deal first with the question of statutory construction without reference to the Charter and then come to the Charter arguments.
- 14 The appeal raises underlying issues of principle which affect the ongoing interests of many members of the public. Those principles concern the capacity of a magistrate to make certain types of decision in the best interests of the child. They are not limited in their application to decisions concerning immunisation. Because of this I would wish to record that Victoria Legal Aid has acted commendably in facilitating the application and representing clients who would otherwise lack the means to bring an effective case before the Court.

Background facts

- 15 The three children the subjects of the IAOs are aged 5, 3 and 2 years of age. In August 2016, the first respondent ('DHHS') instituted proceedings in the Children's Court on the basis that the children were in need of protection. In September 2016, the Children's Court found that the children were in need of protection within the meaning of s 162 of the CYFA.
- 16 In turn, the children were the subject of Family Preservation Orders made pursuant to s 280 of the CYFA, which placed the children in the day-to-day care of their

mother and father subject to a series of conditions made under s 280(1) of the CYFA.

17 In August 2017, the Secretary instituted breach proceedings in the Children's Court in respect of the Family Preservation Orders pursuant to s 312 of the CYFA. The allegations of breach were characterised by the Magistrate in his reasons with respect to the variation application as being 'of a very serious nature'. I agree, but it is unnecessary to detail them further for the purposes of this decision.

18 On 8 August 2017, IAOs were made placing the children in foster care.

19 In September 2017, the Secretary instituted an application to vary the IAOs pursuant to s 268(2) of the CYFA. The grounds of the application were:

Request for [the children] to be immunised as currently at high risk from measles outbreak and unable to be sustained in out of home care placements due to no immunisations. [Two of the children] unable to attend childcare.

20 The variation sought to insert a condition in the IAOs which would allow for the children to be vaccinated. The mother objected to this variation. The Court directed that the parties file written submissions and then gave them the opportunity to be heard with respect to these submissions. The Magistrate concluded that it was in the best interests of the children that the condition be inserted.

The Magistrate's reasons

21 The Magistrate gave careful and comprehensive reasons for his decision in which, amongst other things, he recorded the following matters:

- Substantial practical difficulties were confronting the foster carers because the children were not immunised;
- A concession was made by DHHS that immunisation was not authorised pursuant to s 175A of the CYFA or s 597 of the CYFA;
- Reliance was placed by the appellant upon the provisions of s 175C of the CYFA which deal with circumstances in which the Secretary must consult with the parents of a child.

22 The Magistrate expressed his reasons for decision as follows:

30. Pursuant to s 263(7) of the Act, *'an interim accommodation order may include any conditions that the Court or bail justice consider should be included in the best interests of the child.'*
31. The Court must act protectively in this jurisdiction and in doing so, must act upon the best interest principles set out at s 10 of the Act. These principles inform the Court as to the matters to be taken into account. The matters referred to are not exhaustive and pursuant to subsection 10(3)(r) the Court may consider *'any other relevant consideration'*.
32. As such, the legislation allows a wide discretion as to what matters may be taken into account in determining what is in the best interests of the child.
33. The Court must protect a child from harm, always ensuring that any intervention into the relationship between parent and child is limited to that necessary to secure the safety and well being of the child. The Court must also consider the desirability of continuity and permanency in the child's care (3f) and the desirability of making decisions as expeditiously as possible and the possible harmful effect of delay in making a decision or taking an action.
34. Having taken all submissions into account, the Court finds –
 - (a) firstly that sufficient grounds are available for the Court to allow the variation application to proceed; and
 - (b) Secondly in considering the s 10 principles set out in this legislation, noting the protective nature of this jurisdiction, and the wide powers vested in the Court pursuant to s 263, sufficient grounds are present and active to allow the variation sought by the DHHS.

The CYFA

23 The structure of the CYFA is as follows. Chapter 1 sets out preliminary matters. Chapter 2 provides for matters of administration, including the functions and powers of the Secretary.⁴

24 Chapter 3 provides for child and family services. Chapter 4 relates to children in protection. Chapter 5 relates to children and the criminal law. Chapter 6 provides for offences. Chapter 7 provides for the Children's Court of Victoria. Chapter 8 provides for other general matters.

⁴ Sections 15 and 16.

25 This case concerns the power of the Children’s Court established under ch 7, with respect to an order made under ch 4, in the exercise of a discretion guided by the purpose and principles stated in ch 1.

26 Section 1 of the CYFA sets out the Act’s main purposes, including:

(b) to provide for the protection of children; and

...

(d) to continue The Children’s Court of Victoria as a specialist court dealing with matters relating to children.

27 Section 3 of the CYFA sets out a series of definitions, two of which relate to concepts central to the appellant’s case:

‘major long-term issue’, in relation to a child, means an issue about the care, wellbeing and development of the child that is of a long-term nature and includes an issue of that nature about –

(a) the child’s education (both current or future); and

(b) the child’s religious and cultural upbringing; and

(c) the child’s health; and

(d) the child’s name.

...

‘parental responsibility’, in relation to a child, means all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children;

28 Part 1.2 of the CYFA sets out a series of principles to which ‘are intended to give guidance in the administration of [the Act]’.⁵ Pursuant to s 8(1), decision makers must have regard to the principles in pt 1.2 (where relevant) in making any decision or taking any action or providing any service under the Act.⁶

29 Four things may be noted about the following provisions in this part. First, s 8 sets out a hierarchy of decision makers, namely, the Court (ie the Children’s Court);⁷ the

⁵ Section 9(1).

⁶ But this does not apply in relation to any decision or action under ch 5 or ch 7 (in relation to any matter under ch 5).

⁷ Section 8(1).

Secretary;⁸ and a community service.⁹

30 Secondly, s 10(1) states the primary principle to be considered in the administration of the CYFA:

- (1) For the purposes of this Act the best interests of the child must always be paramount.

31 Thirdly, ss 10(2) and (3) make clear that the identification of the child's best interests may involve the consideration and weighing of a series of factors. Section 10(2) provides:

- (2) When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.

32 Section 10(3) goes on to articulate more specific considerations. The first two of these bear on the importance of the family unit:

- (3) In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—
 - (a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;
 - (b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;

33 Section 10(3)(f) further refers to 'the desirability of continuity and permanency in the child's care'.

34 On the other hand, the sub-section identifies the need for expeditious decisions:

- (fa) the desirability of making decisions as expeditiously as possible and the possible harmful effect of delay in making a decision or taking an

⁸ Section 8(2).

⁹ Section 8(3).

action;¹⁰

35 It also specifically refers to access to health services:

- (n) the desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities;¹¹

36 Consistently with the hierarchy referred to in s 8, div 3 of pt 1.2 sets out decision-making principles relating to the Secretary or a community service (but not to the Court). The decision-making principles envisage that, amongst other things:

the child and all relevant family members (except if their participation would be detrimental to the safety or wellbeing of the child) should be encouraged and given adequate opportunity to participate fully in the decision-making process;¹²

37 It is relevant next to turn to the provisions of ch 4 which relate to children in need of protection. Section 162 articulates a series of circumstances in which a child is to be regarded as in need of protection for the purposes of the CYFA. For present purposes, when considering the construction of s 263(7), it is relevant to refer to s 162(1)(f):

the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.

38 Chapter 4 goes on to articulate the responsibilities of the Minister¹³ and of the Secretary.¹⁴ Sections 175A–175C contain a series of provisions enabling the Secretary to make day-to-day arrangements for children in out of home care. These provisions utilise the concept of 'major long-term issue':

175A Secretary may specify certain issues

- (1) The Secretary may specify issues relating to a child in out of home care about which a person who has care of the child may be authorised to make decisions.

¹⁰ Section 10(3)(fa).

¹¹ Section 10(3)(n).

¹² Section 11(f).

¹³ Pt 4.2, s 164.

¹⁴ Pt 4.3, ss 166–80.

Example

The Secretary may specify issues including but not limited to—

- the signing of school consent forms; or
 - obtaining routine medical care for the child; or
 - the day to day treatment of a child who suffers from a chronic or serious health condition.
- (2) The Secretary must not specify an issue under subsection (1) that is a major long-term issue in relation to a child who is subject to an interim accommodation order, a family reunification order or a therapeutic treatment (placement) order.
- (3) The issues specified by the Secretary under this section may be specified in relation to—
- (a) a particular child; or
 - (b) a child subject to a particular type of order; or
 - (c) a person who provides a certain category of care under this Act.

175B Authorisation of carer to make certain decisions

- (1) This section applies if a child is placed in out of home care in accordance with—
- (a) an interim accommodation order; or
 - (b) a protection order that confers parental responsibility for the child on the Secretary.
- (2) The Secretary or the person in charge of an out of home care service may authorise a person who has care of the child to make decisions in relation to the child on the issues specified by the Secretary under section 175A.
- (3) A person who is authorised under subsection (2) may make a decision in relation to the child on a specified issue, when the child is under that person's care, without consulting the Secretary about that issue.

39 In turn, when a child is subject to an IAO or the Secretary has parental responsibility for a child under certain other orders, specific constraints apply:

175C When Secretary must consult with parent of child

- (1) This section applies if—
- (a) a child who is subject to an interim accommodation order has been placed in out of home care; or

- (b) the Secretary has parental responsibility for a child under a family reunification order or a therapeutic treatment (placement) order.
- (2) The Secretary must, to the fullest extent possible, work with and engage any parent with whom the child is intended to be reunified in making case planning decisions for the child.
- (3) The Secretary must not make a decision about a major long-term issue in relation to the child if a parent who has parental responsibility for the child disagrees with the decision.
- (4) Subsection (3) does not apply to a decision about a major long-term issue that the Secretary is expressly authorised to make under this Act.
- (5) The Secretary may make a decision on an issue in relation to the child that is not a major long-term issue without the agreement of a parent of the child.

40 The distinction between major long-term issues and other issues drawn in ss 175A-C is central to the appellant's case.

41 Returning to the structure of ch 4 of the CYFA, provision is made for reporting in pt 4.4, disclosure of information in pt 4.5, investigation in pt 4.6, procedure in the Family Division in pt 4.7, protective intervention in pt 4.8, protection orders in pt 4.9, permanent care orders in pt 4.10, and appeals and reviews in pt 4.11.¹⁵ The appellant also relies upon the interim character of the IAO when considered in the framework of these provisions as a whole.

42 Provision is made for IAOs in div 5 of pt 4.8 which relate to protective intervention. Before the provision for IAOs, provision is made sequentially for temporary assessment orders in div 1, action by a protective intervener in div 2, and for a child in need of therapeutic treatment in div 3 and irreconcilable differences in div 4. After div 5 relating to IAOs, provision is also made for undertakings (div 6).

43 Section 262 provides for the circumstances in which an IAO may be made, including those where a protection application is filed with the appropriate registrar.¹⁶

44 Section 263 provides, first, that an IAO may provide for the release of the child

¹⁵ The further provisions of pt 4 are not contextually relevant.

¹⁶ Section 262(1)(b).

pending the hearing or alternatively for the child's placement in a series of alternative ways.¹⁷ These include placement with a declared hospital or a disability service provider.¹⁸

45 Section 263(7) is the sub-section which governs the condition in issue in this case.

46 Section 264(1) provides that an IAO remains in force for the period specified in the order.

47 Section 264(2) limits the length of an IAO placing a child in various forms of custodial placement.

48 Section 265(1) provides that a parent is entitled to know a child's whereabouts under an IAO unless the Court directs otherwise. Such direction may only be given if the Court is of the opinion it is in the best interests of the child (s 265(2)).

49 Section 267 provides for the extension of an IAO, and s 268 provides for the variation of an IAO. The other provisions relating to IAOs need not be noticed for present purposes, save for s 271, which provides for the right of appeal to which I have already referred.

50 Part 4.9 of the CYFA relates to protection orders. The appellant draws attention to the fact that these range through a hierarchy which, amongst other things, is graduated according to the extent to which parental responsibility is transferred from the parents to the Secretary. The CYFA expressly stipulates where parental responsibility lies in respect of each type of protection order (apart from an undertaking). The types of orders which can be made are outlined in s 275(1) as follows:

(a) an order requiring a person to give an undertaking;

(b) a family preservation order;

¹⁷ Section 263(1).

¹⁸ Section 263(1)(f) and (g).

- (c) a family reunification order;
- (d) a care by Secretary order; and
- (e) a long-term care order.

51 Lastly, for present purposes, it may be noted that the general provisions of the CYFA include s 597 which gives the Secretary powers in relation to medical services and operations. Section 597(1) provides, amongst other things, that the Secretary may at any time order that a child under an IAO in a series of alternative types of placement ‘be examined to determine his or her medical, physical, intellectual or mental condition’.

52 Pursuant to s 597(4), a child accommodated in such placements pursuant to an IAO may also be the subject of consent by the Secretary to medical treatment or a surgical or other operation or admission to hospital if –

- (b) a registered medical practitioner has advised that the medical treatment or operation or admission to hospital is necessary to avoid a serious threat to the health of the child; and
- (c) the child’s parent –
 - (i) refuses to give his or her consent; or
 - (ii) cannot be found within a time which is reasonable in the circumstances.

Statutory Interpretation

53 The relevant principles of statutory interpretation were summarised by Garde J in *A & B v Children’s Court of Victoria*:¹⁹

Interpretation of the Act must begin and end in consideration of the ordinary and grammatical meaning of the text of the relevant provisions,²⁰ having regard to their context and legislative purpose.²¹ The natural and grammatical meaning of almost any given phrase may alter by virtue of its context in a sentence, a section or an Act.²² The provisions of the Act must be construed

¹⁹ [2012] VSC 589 [72]–[73] (citations in original updated).

²⁰ *R v Getachew* (2012) 248 CLR 22, 27–8 [11] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²¹ *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ).

²² *WBM v Commissioner of Police* (2012) 43 VR 446, 454 [31] (Warren CJ).

on the basis that they are intended to give effect to harmonious goals.²³

A construction which promotes the purpose or object underlying the Act should be preferred to a construction which would not.²⁴ This 'may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. [But] the purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction'.²⁵

The grounds of appeal

54 The grounds of appeal raise two issues:

- (1) Did the Magistrate act beyond power because the condition imposed involved a decision about a major long-term issue in respect of children subject to an IAO?
- (2) Did the Magistrate mistake the nature and scope of his powers to include conditions under s 263(7) of the Act?

Analysis

55 The appellant's submissions can be reduced to three contentions:

- (a) the order under appeal is not properly characterised as a condition;
- (b) the notion of 'best interests' is so broad that it must be qualified by its context;
- (c) the power to impose conditions should not be construed as extending to a power to make decisions which involve major long-term issues for children because:
 - (i) read as a whole, the CYFA recognises such decisions require the consent of the children's parents; and/or
 - (ii) the purpose of an IAO is to make interim provision only for the welfare of a child.

²³ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [70] (McHugh, Gummow, Kirby and Hayne JJ).

²⁴ *Interpretation of Legislation Act 1984* s 35(a); *AB v Western Australia* (2011) 244 CLR 390, 398 [10].

²⁵ *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

56 In essence, DHHS submits that:

- (a) the terms of s 263(7) are plain;
- (b) there is no reason to read down the notion of 'best interests' which governs its operation; and
- (c) the bases on which the appellant seeks to limit the scope of s 263(7) by implication should be rejected.

57 The first and second propositions advanced by the appellant and noted above were put forward incidentally to the appellant's core submission concerning issues affecting major long-term issues. Nonetheless, it is convenient to address them separately in the first instance.

The power to impose conditions

58 The IAO placed the children with suitable persons as foster parents pending the hearing of the Secretary's substantive application for further protection of the children.

59 The condition in issue goes to the health and welfare of the children whilst in that placement. It also goes directly to factors affecting the capacity of the foster parents to utilise child care facilities and to care for the older child who is subject to being sent home from school in the event of any perceived threat that he may contract measles or other diseases against which vaccination guards.

60 All of these matters support the view that the condition is one directly and reasonably relating to the basis on which the children are accommodated during the IAO.

61 The appellant submits in the context of this provision the word 'condition' more naturally means a situation that must exist before something else is permitted, the limitations within which something is allowed to happen, or an obligation which must be fulfilled in return for something being allowed to happen or be done.

62 I do not accept that the concept is so limited. It may extend to any matter affecting the terms on which a child is accommodated under an IAO, provided of course that it meets the basal test of being in the best interests of the child.

The breadth of the concept of best interest

63 In the course of the appellant's submission it was contended that the concept of best interests was so broad that it could extend to matters unrelated to the purpose of an IAO.

64 I accept that hypothetically this may be so and that the power to impose conditions is constrained by the purpose of an IAO and the terms in which it is granted.

65 But for the reasons I have stated, I am not persuaded the condition in the present case goes beyond the purpose of seeking to ensure the best interests of the children during the operation of the IAOs by reference to a consideration which bears directly on the capacity to accommodate the children safely and appropriately.

66 I should add that there are obvious practical reasons why the legislation might adopt the flexible touchstone of the best interests of the child rather than a more prescriptive formulation of this power. It is not possible to anticipate all the circumstances which might be relevant to the adequacy of the terms on which a child is accommodated under an IAO.

Parental responsibility

67 The appellant submits that s 263(7) should not be construed in a way which enables the Court to exercise parental responsibility in respect of the child. It is submitted that the Legislature cannot have intended that the making of an IAO would impact on parental responsibility with respect to major long-term issues.

68 There are three elements to this submission:

- (a) the provisions in respect of the making of an IAO sit within a coherent structure of protective orders under pt 4 of the Act under which the extent to which the transfer of parental responsibility from the parents to the Secretary

is graduated;

- (b) ss 175A–C authorises the Secretary to delegate routine day-to-day decisions about a child in out of home care to the child’s carer. But s 175A(2) forbids the delegation to carers of decisions about major long-term issues and s 175C forbids the Secretary from making a decision about a major long-term issue if a parent who has parental responsibility disagrees with the decision, unless it is a decision ‘that the Secretary is expressly authorised to make under this Act’. Such authorisation may occur under s 597 in cases of medical emergency or be expressly conferred by the making of certain protection orders; and
- (c) an IAO is an interim order designed to address the immediate risks to the welfare of the child pending the resolution of substantive process. An IAO may be made on interlocutory application supported by limited and potentially contentious evidence. It is inconsistent with the nature of such an order that the power to make it would permit a Court to interfere in an enduring way with fundamental aspects of the relationship between the child and parent.

The structural argument

69 The submissions concerning the existence of a structured range of protection measures available under the CYFA and the limitations upon the powers of the Secretary when a child is placed in out of home care pursuant to an IAO may be accepted.

70 But it does not follow that either the structure of the Act or the limitations on the Secretary’s powers give rise to the implication for which the appellant contends.

71 First, the plain words of s 263(7) extend to ‘any’ conditions that the Court considers should be included in the best interests of the child. The word ‘any’ should be given

full force and effect.²⁶

72 Secondly, the Act distinguishes from the outset between the making of administrative decisions by the Secretary and decision-making by the Court.²⁷ As the Secretary submits, because the powers of each are distinct, no implication can be derived from the Secretary's powers with respect to the extent of the Court's powers.

73 Thirdly, the fact that the power of the Secretary under an IAO to give directions with respect to day-to-day decisions is expressly conditioned by reference to the notion of major long-term issues, whilst the relevant power of the Court is not expressed to be so conditioned, supports the view that the power of the Court is relevantly unconstrained rather than conditioned by this notion.

74 Fourthly, the objective of the best interests of the child is paramount in the administration of the relevant parts of the CYFA by reason of s 10. The plain intention of s 263(7) is to give the best interests of the child primacy over other considerations in fixing conditions included in an IAO. There is no reason to conclude that the notion of best interests under s 263(7) is narrower than that provided for in s 10. When the CYFA is read as a whole, it is plain that it is not.

75 Fifthly, the notion of best interests is specifically required by s 10(3)(n) of the CYFA to include consideration of the desirability of the child being supported to gain access to appropriate health services.

76 This provision reflects article 24 of the United Nations Convention on the Rights of the Child which requires state parties to recognise the right of a child to the enjoyment of the highest attainable standard of health.²⁸

77 Nonetheless, the core objective of best interests provided for in s 10 of the CYFA is itself also conditioned by notions of proportionality and the need to have regard to

²⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[71] and the cases there cited.

²⁷ See ss 8-11.

²⁸ See [108] below.

the relationship between parent and child. In particular, ss 10(3)(a) and (b) of the CYFA address the importance of the family unit. Consideration of the parents' position is thus provided for in this way.

78 Sixthly, at common law, the overriding consideration of the child's best interests will itself limit parental power to control decisions with respect to the appropriateness of medical procedures.²⁹ The construction I prefer is consistent with this principle.

79 Seventhly, the exercise of the power to impose conditions in the best interests of the child is subject to appeal on the merits to this Court, which is itself the repository of the *parens patriae* power to make orders with respect to medical treatment in the best interests of a child and contrary to the wishes of a parent.³⁰

80 Eighthly, the construction question raised by the present appeal should not be viewed entirely through the prism of the immunisation issue which triggered the present proceeding. As I have noted above, the circumstances which provide the basis for an IAO may be an application based upon the fact that a child is in need because a parent refuses to allow medical treatment. In turn, the magistrate has, amongst other options, the power to place a child on an IAO in a hospital or with a disability provider or within the care of persons other than the child's parents. It would be anomalous if the magistrate could not impose conditions facilitating medical treatment as part of an integrated order in circumstances which arise out of health issues (including those resulting from a failure by parents to give consent to treatment) particularly where the magistrate orders a placement which is intended to provide for medical treatment.

81 Likewise, it is very difficult to attribute an intention to the legislation to limit the power of a magistrate to provide for treatment during the term of an IAO by reference to decisions with respect to major long-term issues. Obvious difficulty

²⁹ *Secretary for the Department of Health and Community Services v JWB ('Marion's Case')* (1992) 175 CLR 218, 240 (Mason CJ, Dawson, Toohey and Gaudron JJ).

³⁰ *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 [12]; *Re Beth* [2013] VSC 189 [115]-[127].

would arise with respect to decisions relating to children suffering from severe chronic illnesses such as Type I diabetes, epilepsy, neurological conditions affecting movement, kidney or liver disease. The long-term well-being and development of the child may require recurrent appropriate decision-making in such cases. It cannot sensibly be the intention of the legislation that the magistrate's power to impose conditions with respect to the safe accommodation of a child suffering from such conditions is limited by the application of the suggested criterion.

82 In summary, neither the plain words of s 263(7), nor its context, nor the purpose and objectives of the CYFA support the appellant's case that a reading of the Act as a harmonious whole requires the implication with respect to parental responsibility for which the appellant contends.

83 Furthermore, if there is a tension between the provisions of the Act (which may be doubted), then the terms of s 263(7) must be respected and that tension falls to be resolved by reference to the concept of best interests as articulated in s 10.

The interim nature of the order

84 It is true that an IAO is by definition preliminary in nature, but that does not logically of itself mean that a requirement to resolve issues with long-term consequence may not arise during its currency. After all, a child may be in need within the terms of the statute, precisely because of a risk to health or development.

85 Moreover, there is no relevant statutory time limit upon the length of the term of an IAO and there is a power for its ongoing extension so that the IAO may last for some material period of time.

86 The fact that the IAO is an interim order only is a factor which might logically bear upon the exercise of the Magistrate's discretion in a particular case, but it does not give rise to a necessary implication that the range of conditions which may be imposed in the best interests of a child will necessarily be confined to matters having short-term consequences only.

87 Likewise, the fact that an IAO may sometimes be made in circumstances of evidentiary controversy does not support the conclusion that a limitation upon the potential ambit of conditions imposed in the best interests of the child must be implied. Once again, the strength of the Secretary's case may be a matter which the Magistrate regards as relevant to his or her discretion, but the potential for controversy could not of itself result in an automatic constraint upon the power to impose conditions.

88 Indeed, it may be that the circumstances giving rise to an IAO are uncontested, or that although contested, there is incontrovertible evidence to which the Magistrate may have regard. Video footage of sexual misconduct provided by police to DHHS officers in the present case exemplifies the kind of evidence which a Magistrate might regard as significant in this context.

89 Once again, the fact that the order is appealable upon the merits to this Court, is a material safeguard against the making of interim orders which are disproportionate to the merits of a particular case.

90 I should add for completeness that there is of course no challenge in this appeal to the Magistrate's decision to impose an IAO. What is in issue is simply the subsequent decision to impose a condition as part of that IAO relating to the vaccination of the children.

Charter of Human Rights and Responsibilities Act 2006

91 During the hearing of the appeal, the parties sought to rely on the Charter in support of their respective proposed interpretations of s 263(7) of the CYFA.

92 The appellant relied on s 17(1) of the Charter, which provides for the right to protection of families and children, in support of her submission that s 263(7) of the CYFA is limited to 'arrangements for the temporary accommodation of a child' and/or must not 'impact on parental responsibility', such that it does not empower the Court to make the order.

93 Section 17(1) of the Charter states:

17 Protection of families and children

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

94 The appellant submitted that s 17(1) of the Charter is reflected in ss 10(3)(a)-(b) of the CYFA, which require consideration of the need to protect and assist the parent and child as the fundamental group unit of society, and the need to strengthen, preserve and promote positive relationships between children and their parents and family members.

95 DHHS relied on s 17(2) of the Charter which provides for the right relating to the protection of children, in support of its submission that s 263(7) gives the court broad powers to make conditions it considers to be in the best interests of the child, including the order.

96 Section 17(2) of the Charter states:

Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

97 As a result of these submissions, the Court directed that notice be given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), pursuant to s 35(1) of the Charter, that a question had arisen as to the interpretation of a statutory provision in accordance with the Charter.

98 The Attorney-General intervened pursuant to s 34 of the Charter and made both written and oral submissions on the applicability of the Charter to the interpretation of s 263(7) of the CYFA.

99 Apart from s 17 of the Charter, the Attorney-General also made submissions on ss 10(c) and 13(a) of the Charter, the rights relating to protection from medical treatment without consent and to privacy, respectively, as being potentially relevant

to the present case. The VEOHRC did not intervene.

100 Sections 10(c) and 13(a) of the Charter state:

10 Protection from torture and cruel, inhuman or degrading treatment

A person must not be –

...

- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

13 Privacy and reputation

A person has the right –

- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with;

...

101 Before considering these particular rights, it is necessary to decide whether the Charter has any bearing on the question of the construction of s 263(7) of the CYFA at all. That is because, as the Attorney-General submitted, the Charter rights identified will be relevant to its construction only when the interpretative provision of the Charter applies.³¹

102 Section 32(1) is the interpretative provision of the Charter. It reads:

32 Interpretation

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

...

103 A number of principles governing the operation of s 32(1) have emerged from the authorities. First, s 32(1) neither requires nor authorises a departure from the standard techniques of statutory construction.³² These techniques require fidelity to

³¹ No suggestion was made that Charter rights were to be considered other than in relation to the interpretation of s 263(7) of the CYFA, whether by operation of s 6(2)(b) or s 38 of the Charter or otherwise.

³² *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38]–[40], 47–8 [46], 50 [50]–[51] (French CJ), 85–6 [146(v)–(vi)], 92 [170] (Gummow J), 123 [280] (Hayne J), 210 [544], 217 [565]–[566] (Crennan and Kiefel

the words of the relevant provision.

104 Secondly, where a provision interpreted in accordance with ordinary techniques is capable of only one meaning, s 32(1) of the Charter will have no work to do. Section 32(1) has been found to operate similarly to the principle of legality, in that it is relevant only when a constructional choice is open to a court and not when the language of the relevant provision is clear and unequivocal.³³

105 Thirdly, where a provision interpreted in accordance with ordinary techniques is capable of more than one meaning, s 32(1) requires the meaning that best accords with Charter rights to be adopted.³⁴

106 For the reasons given above, I have determined that s 263(7) of the CYFA is not capable of more than one interpretation. It follows that s 32(1) of the Charter, and that the Charter rights identified as potentially relevant, do not assist in the construction to s 263(7) of the CYFA and cannot be used as a basis for preferring some alternative construction than that already identified.

107 It is therefore not strictly necessary to say anything further concerning the Charter. However, since detailed submissions were directed to the Charter, particularly by the Attorney-General who intervened for that purpose, I make the following brief observations.

108 The bulk of the parties' submissions on the Charter were directed to the rights in s 17. Section 17(2), which is aimed at the protection of children in their best interests,³⁵

JJ), 250 [684] (Bell J); *Slaveski v Smith* (2012) 34 VR 206, 214 [20] ('*Slaveski*'); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 382-3 [83]-[85] ('*Nigro*').

³³ *Nigro* (2013) 41 VR 359, 383 [85]; *Slaveski* (2012) 34 VR 206, 215 [23]-[24]. See also *R v DA* [2016] VSCA 325 [44] and the cases there cited; *Noone v Operation Smile (Aust) Inc* (2012) 38 VR 569, 608 [139] (Nettle JA); *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 12-3 [25] (Nettle JA), 63-4 [188]-[195] (Tate JA) ('*Taha*').

³⁴ *Slaveski* (2012) 34 VR 206, 215 [24], 219 [45]; *Carolan v The Queen* (2015) 48 VR 87 [46]; *R v DA* [2016] VSCA 325 [44]. See also *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 468 [97] (Warren CJ, Hansen JA agreeing); *Nigro* (2013) 41 VR 359, 383 [85]; *Taha* (2013) 49 VR 1, 12-3 [25] (Nettle JA), 62-3 [191]-[193], 64 [195] (Tate JA).

³⁵ The content of the right is informed by the United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990): *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251 [260]-[262]; *Certain Children v Minister for Families and Children* [2016] VSC 796 [146]. See also *Application for Bail by HL* [2017] VSC 1

is given effect by the CYFA, under which the best interests of the child are paramount. As discussed above, s 10 of the CYFA requires a number of factors to be taken into account in making decisions or taking action pursuant to that Act in order to give effect to the best interests of the child. For the reasons given above, the construction of s 263(7) that I prefer does give effect to those best interests, through consideration of the factors in s 10 of the CYFA, and is therefore compatible with s 17(2) of the Charter.

109 In addition, the considerations set out in s 10 of the CYFA include those that expressly attempt to protect the family unit and so give effect to the right in s 17(1) of the Charter. For example, ss 10(3)(a)-(b) of the CYFA, set out above, recognise the need to protect families as the fundamental group unit of society and the need to strengthen, preserve and promote positive family relationships. It cannot be said that a construction of s 263(7) of the CYFA that has properly taken the factors in s 10 into account is inconsistent with the rights in s 17 of the Charter.

110 Even if s 17(1) is read as encompassing a specific right of parents to make some decisions for their children with respect to medical treatment, which it is not

[123], in which it was also found that the CYFA itself provides guidance on the content of the right in s 17(2).

Articles 24(1)-(2) of the Convention on the Rights of the Child state:

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;
 - (f) To develop preventive health care, guidance for parents and family planning education and services.

necessary for me to decide, that right would not extend to the right to make decisions in a way that interfered with the best interests of the children as protected under s 17(2). In other words, limiting such a right would be justified in order to give effect to the right in s 17(2).³⁶

111 Section 13(a) of the Charter is of no further assistance. A condition properly imposed under s 263(7), made by taking into account the considerations required under s 10 of the CYFA, would be neither unlawful nor arbitrary and therefore not in contravention of the right in s 13(a), even if it were to interfere with privacy or family.

112 Section 10(c) of the Charter provides protection against, among other things, medical treatment without consent. The Attorney-General and DHHS submitted that it is a personal integrity right that resides with the person who may be subject to medical treatment. None of the parties submitted that it conferred rights on parents to withhold consent to medical treatment of their children. In the case of children who, by virtue of their age, are incapable of consenting to treatment themselves,³⁷ its application is more complex but must be informed by the best interests of the child in conformity with s 17(2).

113 In my opinion, the construction of s 263(7) of the CYFA identified above is not incompatible with the Charter rights raised by the parties and, if anything, the Charter, and s 17 in particular, further support that construction.

Conclusion

114 It follows that the appeal should be dismissed. In my view, the Magistrate did not err in concluding that he had power to make the orders which he imposed.

115 For completeness, however, I note that the IAOs in issue contained the following further specific conditions:

6 Mother must allow the child to be taken to a paediatrician for

³⁶ See *Marion's Case* (1992) 175 CLR 218, 240 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 1 NZLR 134, 144–6.

³⁷ *Marion's Case* (1992) 175 CLR 218, 237–9 (Mason CJ, Dawson, Toohey and Gaudron JJ).

assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DHHS.

- 7 Father must allow the child to be taken to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DHHS.

116 In the event, the affidavit material before this Court shows that the children have attended a paediatrician who identified no health concerns to prevent the children being immunised and referred the children to a local general practitioner for recommended immunisation to be commenced. In my view, these further conditions also authorise the proposed vaccinations. Treatment may be preventative as well as curative or ameliorative.
