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**IN THESE RESEARCH MATERIALS A REFERENCE TO THE “FAMILY COURT” OR THE “FAMILY COURT OF AUSTRALIA” IS A REFERENCE TO WHAT IS NOW KNOWN AS THE “FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA”.**

**"What is learned in childhood is engraved in stone."**

Mary McAleese (President of Ireland – Belfast, August 2006)

## **4.1 The Child Protection Service [‘DFFH’]**

Most Victorian children and young people are adequately cared for and nurtured by their family. It is only when parents or caregivers are unable or unwilling to protect children against significant harm that the Child Protection Service of the Victorian Government's Department of Families, Fairness and Housing ('DFFH’ or ‘the Department') – formerly called the Department of Health & Human Services ('DHHS') or the Department of Human Services (‘DHS’ or ‘DOHS’) – intervenes to protect children and young people. The permanent head of the Department is entitled 'the Secretary' [s.3 of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA')]. Section 17 CYFA empowers the Secretary to delegate to any employee or class of employees any function or power of the Secretary under the CYFA except for 7 specific exclusions, the last of which is “this power of delegation”.

### **4.1.1 Functions of the Child Protection Service**

The main functions of the **Child Protection Service** are:

1. to investigate matters where it is alleged that a child is at risk of significant harm;
2. to refer children and families to services that assist in providing the ongoing safety and well-being of the children;
3. to take matters before the Children's Court if the child's safety cannot be ensured within the family;
4. to supervise children on legal orders granted by the Children's Court; and
5. to provide and fund accommodation services, specialist support services, and adoption and permanent care to those children and adolescents in need.

In relation to point (5), an independent report to Parliament on Kinship Care dated June 2022 by the Victorian Auditor-General’s Office (the VAGO report) summarised out of home care (OOHC) in Victoria at p.14 as follows:

“If parents are unable or unwilling to keep their children safe at home, the state’s OOHC system provides alternative care for them. While some children are placed in this system for only a few days or weeks, others spend many years in it.

There are 3 main types of placements:

* **foster care**, where trained carers provide care;
* **residential care**, where children live in community-based care homes;
* **kinship care**, where relatives or other familiar people in a child’s life provide care.

Kinship care is the fastest-growing placement type in Victoria. Available information indicates that:

* over 70% of all children in OOHC live with a kinship carer;
* between 2017 and 2021, the number of children in:
* OOHC grew by 25.2% from 7,571 to 9,498;
* Kinship care grew by 33.2% from 5,577 to 7,429.

Aboriginal and Torres Strait Islander children are significantly over-represented in kinship care. Aboriginal or Torres strait Islander children in Victoria are 20.1 times more likely to be in kinship care than non-Aboriginal or Torres Strait Islander children.”

The key characteristics of kinship carers are summarised in the VAGO report at p.15 as follows:

* 94% are female;
* the average age is 54 with 59% being grandparents or great-grandparents, 16% being an aunt or uncle and 5% being another relative;
* 22% are working part-time, 19% are looking after the home, 19% are working full time and 17% are retired;
* 31% have not completed VCE, 10% have completed VCE and 58% have been educated to a higher level than VCE;
* 40% have a household income of under $40,000, 23% of $40,000-$69,999, 12% of $70,000-$99,999 and 14% of $100,000 or more;
* 55% are in Melbourne and 45% are in the rest of Victoria; and
* 53% are caring for 1 child, 27% for 2 children, 17% for 3 or 4 children and 3% of 5 or more children.

At p.16 the VAGO report noted that DFFH is responsible for designing and delivering programs that provide safe homes for children who cannot live with their family, including kinship care. DFFH also contracts 28 community service organisations and 13 Aboriginal community-controlled organisations to provide OOHC services across Victoria.

In a paper entitled “National comparison of child protection systems”, published by the Australian Institute of Family Studies as No.22 Autumn 2005, the authors Leah Bromfield and Daryl Higgins provided a national snapshot of Australian statutory child protection services and concluded that despite different legislative frameworks and some operational differences, Australian state and territory statutory child protection services are providing very similar models of intervention.

### **4.1.2 Duty of care of the Child Protection Service**

In *Sullivan v Moody* (2001) 207 CLR 562 and two associated cases the High Court emphasised that the primary duty of care of the South Australian equivalent of the Department was to the child. Hence it did not owe any duty of care to a parent insofar as such duty would put it in the position of having incompatible duties to more than one person. At p.582 the Court said:

"[W]hen public authorities, or their officers are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.”

The High Court concluded *Sullivan v Moody* by saying that inconsistency would arise if, in the proper discharge of its responsibilities a Government department was under a legal duty to protect person who were suspected or might be suspected of being the sources of the harm being investigated. The principle in *Sullivan v Moody* was followed in relation to the Victorian child protection authority in *Zunica v State of Victoria* [2004] VSC 80 where Bongiorno J struck out a claim in negligence, malicious prosecution, abuse of process and misfeasance brought by a mother against the Department arising out of a family dispute and a subsequent Children's Court action. See also *Cannon v Tahche* (2002) 5 VR 317.

By contrast, in *SB v State of NSW* [2004] VSC 514 Redlich J held that the NSW child protection authority owed and was in breach of a duty of care to a ward who had been sexually abused by a foster parent and then restored to her natural father who, for the balance of the wardship, pursued an incestuous relationship from which resulted two children. In an exhaustive judgment his Honour analysed a large number of cases in which the common law and statutory duties of child protection authorities were discussed and in so doing distinguished the English line of authority epitomized by *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. At [298]-[300] his Honour held:

[298] “The failure to intervene to protect the Plaintiff was not a policy matter for the Defendant. The present case, unlike *Brodie v Singleton Shire Council* (2001) 206 CLR 512 or *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, does not involve an examination of the spending priorities of a statutory authority, or of the spending discretions of the Minister or the Department, even though, as *Brodie* illustrates, it may be proper and necessary for a court to engage in such an examination in certain cases. This case is not one concerning the conduct of the legislature or the executive in raising revenue or allocating resources and as such is not immune from judicial review on the ground that it is a political matter: see *Graham Barclay Oysters* per Gleeson CJ at 554-555 [7]-[9]. The Defendant’s decision not to exercise its powers to protect the Plaintiff is therefore justiciable. Further, the Defendant’s failure to exercise of its powers to protect the Plaintiff was an operational matter, rather than one of policy, which was theoretically based upon expert or professional opinion and upon general standards of reasonableness. As such, it is subject to a duty of care.

[299] There is no incompatibility between the existence of such a duty and the Department’s statutory responsibilities. The duty would serve to enhance the standards observed by the Department and its officers and will further the principal objectives of the legislation. The imposition of a duty of care on the Defendant does not cut across the legislative intent of the Act, as was the case in *Sullivan v Moody*. As the name of the Act indicates, the general legislative intent of the Act is the protection of child welfare. The duty of care toward children injured by reason of the exercise or failure to exercise powers granted under the Act may clearly co-exist with, and be consistent with, the purposes of the Act. Recognition of a duty would serve to emphasise the primary responsibility of the Department and its officers to promote the welfare of children generally and its wards.

[300] There is no policy reason to protect authorities exercising statutory powers in circumstances where the child is already a ward of the authority. *X v Bedfordshire County Council* is distinguishable as being concerned with an authority that refrains from removing a child from his or her parents in the first place. [Contrast the facts in *Barrett v Enfield London Borough* [2001] 2 AC 550.] The policy considerations which explain that case have been called into question. The concept that social workers will become defensive in the making of delicate or urgent decisions should not be accepted as valid. Even if it were so, it should not constitute a sufficient reason to deny a duty which is imposed upon other professions making equally demanding judgments. For the reasons expressed in the recent decisions to which I have referred, a duty is not to be denied on this ground. The existence of a concurrent common law duty, is likely to encourage the maintenance of higher standards in pursuing the paramount objective of the welfare of the child.”

### **4.1.3 Principles governing decision-making by the Child Protection Service**

Sections 8(2) of the CYFA requires the Secretary of DFFH, where relevant, to have regard to the principles set out in

* s.10 – the “best interests” principle; and
* s.11 – additional general decision-making principles; and
* ss.12-14 – additional decision-making principles for Aboriginal children-

in making any decision or taking any action under the CYFA or in providing any service under the CYFA to children and families. However, s.8(2) does not apply in relation to any decision or action under Chapter 5 [Children and the Criminal Law] or Chapter 7 [The Children’s Court of Victoria] in relation to any matter under Chapter 5.

Section 8(3) imposes a similar obligation on a community service established under s.44 or registered under s.46 of the CYFA.

Section 10(1) of the CYFA provides that for the purposes of the CYFA the best interests of the child must always be paramount.

Section 10(2) requires a decision-maker, in determining whether a decision or action is in the best interests of a child, to consider always 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).

Section 10(3) lists 18 other matters to which consideration must also be given, where relevant, in determining what decision to make or action to take in the best interests of a child.

Sections 11 & 12 of the CYFA list 12 other principles to which consideration must also be given by the Secretary or a community service – expressly not by the Court - in making a decision or taking an action in relation to a child.

Section 13(1) of the CYFA provides that if it is in best interests of an Aboriginal child to be placed in out of home care, in making that placement regard must be had to-

(a) the advice of the relevant Aboriginal agency; and

(b) the criteria in s.13(2); and

(c) the principles in s.14.

All of these principles are discussed in much greater detail in these materials in **Part 5.10** entitled “Decision-making Principles for Family Division matters” in **Chapter 5**: “Family Division – Child Protection”.

### **4.1.4 Voluntary intervention**

Frequently the Department will intervene with the consent of all family members and work voluntarily with the family to provide appropriate protection for a child. In 1997-98 the Department substantiated 7,412 reports but issued only 2,135 protection applications. In 2006-07 it issued a greater proportion of protection applications: 3,077 out of 6,828 substantiations. The proportion fell slightly in 2011-12 when it issued 3,920 protection applications out of 9,075 substantiations and fell again in 2012-13 when it issued 3,804 protection applications out of 10,489 substantiations but increased in 2013-2014. One can infer that it dealt on a voluntary basis with at least some of those substantiations which were not breaches of existing orders.

### **4.1.5 Statutory intervention**

However, in the smaller proportion of cases in which the risk to the child is regarded as serious and/or chronic, the Department will intervene by exercising its statutory powers under the CYFA, powers described by Nathan J in *BS v CGB & DOHS* [2000] VSC 566 as "awesome". It is only in cases where a delegate of the Secretary has decided that parents or caregivers cannot care for a child safely that the Department causes the Children's Court to become involved.

### **4.1.6 The Child Protection Service as a model litigant**

The Department of Families, Fairness and Housing is a Victorian Government Department. So far as is relevant to litigation in the Children’s Court, the “Guidelines on the State of Victoria’s Obligation to Act as a Model Litigant”, set out in Schedule 4 of the Legal Services to Government Panel contract, have provided since 2005:

1. In order to maintain proper standards in litigation, the State of Victoria, its Departments and agencies behave as a model litigant in the conduct of litigation.

2. That obligation requires that the State of Victoria, its Departments and agencies:

* act fairly in handling litigation brought by or against the State or an agency;
* act consistently in the handling of litigation;
* avoid litigation, wherever possible;
* keep the costs of litigation to a minimum, including by not requiring the other party to prove a matter which the State or the agency knows to be true;
* not rely on technical defences unless the State’s or the agency’s interests would be prejudiced by the failure to comply with a particular requirement;
* not take advantage of a person who lacks the resources to litigate a legitimate claim;
* not pursue appeals unless the State or agency believes it has reasonable prospects of success or the appeal is otherwise justified in the public interest.

3. In essence, being a model litigant requires that the State and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State will act as a model litigant has been recognized by the Courts: see, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 142; Kenny v State of South Australia (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1977) 75 FCR 155.

4. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

5. The obligation does not prevent the State and its agencies from acting firmly and properly to protect their interests [including the interests of the children the subject of litigation].

6. The obligation does not prevent the State from enforcing costs orders or seeking to recover its costs.

Similar obligations are contained in the Victorian Public Service Code of Conduct.

The special obligations of a model litigant are in addition to the general obligations of an advocate set out in the Legal Profession Uniform Conduct (Barristers) Rules 2015 (Vic) which in turn expand on the common law obligations summarised by Lord Reid in *Rondel v Worsley* [1969] 1 AC 191 at 227:

“Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what his client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce.”

The special obligations of a model litigant-

* are designed to address the substantial imbalance of power that is often present in litigation between the state and the individual citizen;
* are intended to provide the community with confidence that laws will be administered fairly and equitably;
* are based on an expectation that the State maintains the highest possible standards of probity and professionalism; and
* reflect the common law view that a government official exercising a statutory function shares a common interest with the Court in cooperating to achieve the right result.

The special obligation to act fairly and consistently and to avoid litigation wherever possible means that a model litigant and a legal practitioner conducting a case on behalf of a model litigant-

* must comply with time limits, including those relating to service of documents and provision of reports;
* must be properly prepared, know and understand the case that is being run, make any appropriate concessions and ensure that the Court and the other parties have all relevant information;
* should bring to the Court’s attention facts or submissions that would assist another party’s case where it appears the Court may have overlooked them;
* must not blindly pursue a particular outcome but rather assist the Court to arrive at the most informed outcome;
* must respect and promote the Charter of Human Rights and Responsibilities Act 2006; and
* must be willing to resolve matters where reasonable.

It is the writer’s view that these guidelines apply both to DFFH and to legal practitioners conducting cases on behalf of DFFH but must of course be read subject to the CYFA or any other relevant legislation. See e.g. *DOHS v Ms T & Mr M* [Children’s Court of Victoria-Power M, 12/10/2009] at p.116; *DOHS v Ms D & Mr* *K* [Children’s Court of Victoria-Power M, 15/06/2009] at pp.33-34; *DOHS v Mr M & Ms H* [Children’s Court of Victoria-Power M, 11/05/2009] at p.30. See also the final report of the Victorian Law Reform Commission on “Protection Applications in the Children’s Court” [No.19, 30 June 2010] at pp.395-397.

In *Noone*, *Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors (No 2)* [2011] VSC 153 at [12] Pagone J referred to “the obligation of a public official to act as a model litigant” and added: “A government official exercising a statutory function or duty shares a common interest with the Court in co-operating to achieve the correct result.” His Honour based this dicta on a large number of cases to which he referred in footnote 20 as well as the cases of *E v Secretary of State for the Home Department* [2004] QB 1044, 1070 and *SH (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 1197. His Honour’s dicta applies equally to the Child Protection Service.

In *DOHS v Mr M & Ms H* [Children’s Court of Victoria, 11/05/2009] at p.30, Magistrate Power said of the barrister who had represented the Department in the 13-day contested hearing:

“If I may say so, the way in which [counsel] prosecuted this case on behalf of the Department was exactly how a legal representative for a model litigant – as the Department is required to be – should behave, namely ‘with complete propriety, fairly and in accordance with the highest professional standards’.”

For a related discussion of the Commonwealth’s obligation to act as a model litigant see *Law Institute of Victoria Ltd v Deputy Commissioner of Taxation* [2009] VSC 55 at [19] and the cases cited in footnote 41 thereto.

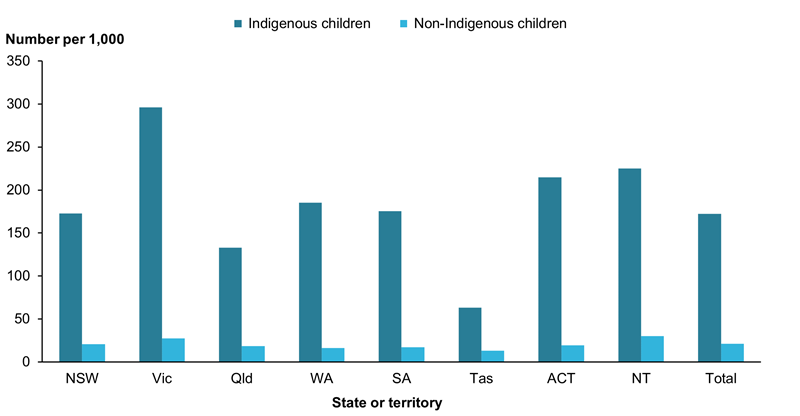
### **4.1.7 DFFH may authorise Aboriginal agency to carry out DFFH functions**

### There is – and has long been – an over-representation of Aboriginal and Torres Strait Islander children in the child protection system both in Victoria and throughout Australia. Table 16A.9 in Part F, section 16 of the Australian Government’s Report on Government Services 2023 shows that the ‘disproportionality ratios’ for Aboriginal and Torres Strait Islander children aged 0-17 years in Victoria in 2021-22 were as follows:

### Notifications: 4.92 – Substantiations 7.52 – Protection orders 13.66 – Out of home care 15.98.

### The Australian Institute of Health and Welfare reported that 58,000 Aboriginal and Torres Strait Islander children received child protection services in 2020–21, a rate of 172 per 1,000 children. In the same period, 112,400 non-First Peoples children received child protection services, a rate of 21 per 1,000 children. The chart below shows that Victoria has the highest rate of First Peoples children receiving child protection services.

#### **Children receiving child protection services, by First Peoples status and state or territory, 2020–21 (rate)**



**Non-First Peoples children**

**First Peoples children**

### The following chart in the Yoorrook Justice Commission second interim report tabled on 04/09/2023 – [Report into Victoria’s Child Protection and Criminal Justice Systems](https://yoorrookforjustice.org.au/wp-content/uploads/2023/08/Yoorrook-for-justice-report.pdf) – details some comparative statistics in relation to First Peoples children in the Victorian child protection system.

### 

### See also the over-representation statistics detailed in **section 4.9.8** below.

Assented to on 27/06/2023, the *Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-determination and Other Matters) Act 2023* makes amendments to multiple Acts, including the replacement detailed below for previous s.18 CYFA. Commencement dates for various sections of the amending Act are set out in s.2. The new sections detailed below came into operation on 28/06/2023.

**Section 18** CYFA – in a form substituted by the *Children and Health Legislation Amendment (Statement of Recognition. Aboriginal Self-determination and Other Matters) Act 2023* – reflects the self-determination provision of the Treaty process referred to in new s.7B(1) CYFA which is referred to in **Part 5.31** of the Research Materials.

In the Second Reading Speech in the Legislative Council on 09/03/2023 Minister Blandthorn explained the rationale for the Aboriginal Self-determination child protection amendments as follows:

“Evidence given to the Yoorrook Justice Commission hearing in December 2022 brought into sharp focus the community’s concerns about the over-representation of Aboriginal children in the child protection system and the extent of children being removed from the care of their family. In an immediate response to this evidence, the Premier made a public commitment to work with the Minister and First Nations communities to devise a new child protection system to address these issues.

This Bill includes proposals that represent very significant steps in progressing self-determination for Aboriginal communities. Steps that we can take now to improve the system as part of first stages of an overhaul to allow greater Aboriginal-led service delivery and improve outcomes for Aboriginal children, young people and communities, as we progress towards treaty.

Victoria is committed to meeting the National Agreement on Closing the Gap target to reduce the rate of over‐representation of Aboriginal children in care by 45% by 2031. This commitment is underpinned by the 2018 Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement that established a landmark partnership between the Aboriginal community, government and the child and family services sector to achieve better outcomes for Aboriginal children and young people. At the heart of Wungurilwil Gapgapduir is a commitment to the reduction of the over‐representation of Aboriginal children in child protection and alternative care. This will be achieved by enabling the advancement of Aboriginal models of care and transferring decision making for Aboriginal children to Aboriginal community-controlled organisations. This Bill is an essential part of achieving that vision.

This Bill also supports the Victorian Aboriginal Affairs Framework, through the Government working in partnership with Aboriginal people to meet the goal that Aboriginal children are raised by Aboriginal families. In particular, the Bill advances the objectives of:

* Eliminating the over‐representation of Aboriginal children and young people in care,
* Increasing Aboriginal care, guardianship and management of Aboriginal children and young people in care, and
* Increasing family reunification for Aboriginal children and young people in care.”

The purpose of **new s.18** is described in the Explanatory Memorandum at p.9 as follows:

“New s.18 provides for seamless authorisation of the functions and powers of the Secretary from protective intervention through to protection orders and other relevant orders to provide for consistency of culturally appropriate service delivery to Aboriginal children and their families. This will also be an expansion of the Secretary’s existing authorisation power as it enables an Aboriginal agency to be authorised to manage a child who is subject to relevant orders, in addition to protection orders. Further it enables an authorisation to be made with respect to classes of Aboriginal children and their siblings, in addition to a specific Aboriginal child and their sibling.”

**New s.18(1)** empowers the Secretary DFFH to authorise the principal officer of an Aboriginal agency – who must be an Aboriginal person [see **s.18(5)**] – to perform the specific functions and exercise the specific powers detailed in **s.18(2)** in respect of the protection of-

1. an Aboriginal child;
2. any non-Aboriginal sibling of an Aboriginal child for whom an authorisation has been made;
3. a child or class of children whom the Secretary believes to be Aboriginal;
4. any non-Aboriginal sibling of an Aboriginal child or class of children for whom an authorisation has been made.

**New s.18(2)** provides that the functions and powers that may be specified are those conferred by or under the CYFA on the Secretary DFFH-

1. as a protective intervener; and
2. to receive reports under s.185 and to investigate those reports; and
3. in relation to a protection order, a temporary assessment order, an interim accommodation order, a therapeutic treatment order, a therapeutic treatment (placement) order and a permanent care order.

**New s.18(3)** provides that such authorisation may only be made with the agreement of the Aboriginal agency and the principal officer. **New s.18(4)** requires the Secretary DFFH, before giving an authorisation, to provide the Aboriginal agency and the principal officer with all the information that is known to the Secretary and that is reasonably necessary to assist the agency and the principal officer to make an informed decision as to whether or not to agree to the authorisation.

**New s.18(6)** provides that before giving an authorisation under paragraphs (a) or (c), the Secretary DFFH must have regard to any view expressed by the child and the parent of the child if those views can be reasonably obtained.

**New s.18(7)** provides that on an authorisation being given, the CYFA applies in relation to the performance of the specified functions or the exercise of the specified powers referred to in **s.18(2)** for the specified child(ren) as if the authorised principal officer were the Secretary.

**Existing ss.181(a) & (b)** provide that for the purposes of the CYFA the following persons are protective interveners:

1. the Secretary DFFH; and
2. all police officers.

**New s.181(c)** complements new s.18 by adding to s.181:

1. the principal officer of an Aboriginal agency authorised under s.18 to perform functions and exercise powers of a protective intervener, to the extent that the principal officer performs those functions and exercises those powers in relation to a child who is the subject of the authorisation.

**New s.18AAA** empowers the Secretary DFFH to revoke an authorisation under s.18(1) in writing at any time and requires the principal officer upon such revocation to provide the Secretary DFFH with all records created by or on behalf of or provided to the Aboriginal agency in respect of the child as a result of the authorisation. **Section 18AAA(4)** provides that despite the revocation of an authorisation in respect of an Aboriginal child or a child or class of children who the Secretary believes to be Aboriginal, an authorisation under ss.18(1)(c) or 18(1)(d) of a non-Aboriginal sibling of the Aboriginal child(ren) continues to have effect until revoked.

**New s.18AAB** requires the principal officer of an Aboriginal agency to notify the Secretary DFFH in writing as soon as practicable if he or she considers that an authorisation under s.18 is no longer in the best interests of a particular child or children who are the subject of the authorisation. On receiving a notification, the Secretary DFFH may revoke the authorisation in accordance with s.18AAA. However, nothing in this section affects the Secretary’s power under s.18AAA to otherwise revoke an authorisation.

**Existing section 18B** empowers the principal officer of an Aboriginal agency to delegate to any person or class of persons employed by the Aboriginal agency any function or power of the Secretary under the CYFA except for “this power of delegation”.

**Existing s.18C** governs the disclosure of information by the Secretary DFFH to the principal officer of an Aboriginal agency. **Existing s.18D** governs the use of information disclosed by the Secretary DFFH to an Aboriginal agency or by its principal officer to any other person under s.18(4).

**New s.19A** **& s.192** govern the use and disclosure of information for the purposes of authorised functions and powers. **New s.192(4)** provides that–

* a reference to the Secretary includes a reference to a principal officer performing functions or exercising powers of the Secretary under a section 18 or 19 authorisation; and
* a reference to a protective intervener includes a reference to a principal officer performing functions or exercising powers of a protective intervener under an authorisation made under section 18.

Recommendation 1c of the Yoorrook Justice Commission second interim report – [Report into Victoria’s Child Protection and Criminal Justice Systems](https://yoorrookforjustice.org.au/wp-content/uploads/2023/08/Yoorrook-for-justice-report.pdf) – requires that the Victorian Government negotiate through Treaty new, dedicated legislation, developed by First Peoples, for the safety, wellbeing and protection of First Peoples children and young people. This new legislation is described by Yoorrook as going “beyond the transfer of existing powers and functions under [s.18] CYFA”.

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## **4.2 Role of the Children’s Court in Child Protection in Victoria**

The following thumbnail sketch of the role of the Children’s Court in child protection in Victoria is taken from a paper prepared by Judge Paul Grant, then President of the Children’s Court of Victoria, in June 2009 and was updated by the writer subsequent to the 2016 amendments.

The Children’s Court is a court of law. It is not a government agency. It is not an ombudsman or commissioner for children. It is not a stakeholder in any other organisation nor is any other organization a stakeholder in it. It does not have any general power to review the operation of the child protection system. Decisions of the Court can involve some general comments on system failures or system strengths but that is not the same as having overall or continuous supervision of the child protection system generally. The Court does not have an investigative arm like the Coroner’s Court. The Court engages in judicial decision making with respect to those applications that come before it. It does not generally have the power to collect evidence or conduct an investigation independent of the parties involved in the case.

The Family Division of the Children’s Court becomes involved in the life of a child when the Child Protection authority decides to invoke the Court’s jurisdiction. It may do this by issuing a notice for a future hearing or alternatively, by placing the child into emergency care and seeking immediate orders from the Court in relation to the child’s placement. On an emergency care application, the Court will determine whether the child remains with the parents or be placed in some type of out of home placement pending the determination of the application. Interim placement of children is by way of an Interim Accommodation Order (IAO). These orders commonly have conditions attached. Determining interim placement is a significant part of the Court’s workload.

The Court also hears secondary applications. These are applications to extend, vary, revoke, extend or breach existing orders.

In making decisions about placement of children, “the best interests of the child must always be paramount”: see section 10 of the Children, Youth and Families Act 2005. The Act lists 21 factors for the Court to consider in determining what decision or action is in the best interests of the child.

Once interim placement is determined, a case is managed through a mention process. Not all cases require a contested hearing. Indeed, the great bulk of cases are resolved by negotiation, with the Court endorsing particular orders. The Court refers potential contests to a conciliation conference process. ADR resolves about 30% of the cases referred to it. A small percentage of cases end up being listed for a contested hearing and a significant percentage of these resolve on the doorstep of the court or during the hearing of evidence.

A young person can be subject to a protection application in the Family Division if he or she is under 17. If a young person is already on a protection order that order can last until the young person’s 18th birthday. For a protection application to be proved, the Court must be satisfied on the balance of probabilities that the child or young person-

1. has been orphaned or abandoned without anyone to care for him or her; or
2. has suffered, or is likely to suffer, significant harm as a result of physical abuse, emotional abuse, sexual abuse or neglect and the parents have not protected (or are unlikely to protect) the child or young person.

Nearly all of the protection applications that come before the Court involve the second category of case. The Court finds the vast majority of such applications proved, mostly on the ground of likelihood of future harm. The Victorian legislation is proactive and intervention by DFFH or an authorised Aboriginal agency is usually timely. In only a small number of cases has a child already suffered harm.

The first decision for the Court is whether, on the balance of probabilities, the child is in need of protection. If the Court is satisfied of that, it must then determine the order to be made in the child’s best interests. The orders the Court can make are those which-

* Require modest intervention in the life of the family. These are cases where the family have responded positively to supports and the protective concerns have been significantly addressed (Undertakings given by one or more family members).
* Keep the child within parental care subject to supervision by the Department of Families, Fairness and Housing. In these cases the family is willing to work with the Department and the Court is satisfied the child will be safe while that occurs. The Court may attach conditions to such order requiring family members to, for example, attend counselling for drug and alcohol abuse, undergo drug testing, take the child to medical appointments, undertake family violence counselling, attend a parenting course, etc. These orders are called family preservation orders and are usually of six to twelve months’ duration.
* Allow Child Protection to decide where the child or young person is to be placed. This is generally in out of home care, for example, with a relative, family friend, foster carer or at a residential unit. With family reunification orders, the plan will usually be re-unification with the parents and the order will have conditions to assist that to occur. In some cases, a child on a family reunification order may be placed in the care of a parent but this is relatively uncommon, at least early in the life of such order. In cases where reunification is not in the best interests of the child, the Court may make a care by Secretary order or a long-term care order, neither or which can contain conditions.

The Court also hears applications for Permanent Care Orders and may make such orders if the child has been out of parental care for at least 6 months of the previous 12 months and if satisfied that reunification with a parent is not in the best interests of the child.

## **4.3 Jurisdiction of Family Division**

When we refer to the jurisdiction of a court we are talking about its legal power to hear and determine a matter. The CYFA is the primary source of the jurisdiction of the Family Division of the Children's Court of Victoria, having entirely replaced the Children and Young Persons Act 1989 (Vic) [‘the CYPA’] on 01/10/2007.

### 

### **4.3.1 Jurisdiction under the CYFA**

Under s.515(1) of the CYFA, the Family Division has jurisdiction to hear and determine a number of Primary Applications & Secondary Applications for orders relating to the protection of children and young persons. These applications are detailed in **Chapter 5** of these Research Materials. That this is a main purpose of the Court appears from ss.1(b) & 1(d) of the Act.

Under s.515(2) of the CYFA, the Family Division also has jurisdiction:

* in relation to the transfer of child protection orders and proceedings between Victoria and another Australian State or Territory or between Victoria and New Zealand [Schedule 1]; and
* to hear and determine applications to make, vary, revoke or extend an intervention order when either the respondent or an affected person is a child: see ss.146-149 of the Family Violence Protection Act 2008 (Vic) [No.52/2008] (‘the FVPA’) and ss.103-106 of the Personal Safety Intervention Orders Act 2010 (Vic) [No.53/2010].

Section 17 of the CYPA provided that the jurisdiction of the Children's Court in relation to any matter over which it has jurisdiction is exclusive, despite anything to the contrary in any other Act. There is no equivalent provision in the CYFA.

### **4.3.2 Jurisdiction under the Family Law Act 1975 (Cth) [as amended]**

Part VII of the Family Law Act 1975 (Cth) [as amended] ['the FLA'] – enacted pursuant to the power under s.51(xxii) of the Commonwealth Constitution to make federal laws with respect to “Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants” – invests certain federal and state courts with jurisdiction to hear and determine specific matters relating to children.

Until recently it was accepted in Victoria as a matter of general practice that paradoxically:

1. the **Magistrates' Court of Victoria** [‘the MCV’] has jurisdiction to hear and determine a number of matters relating to children pursuant to Part VII, including applications for consent parenting orders in certain circumstances; but
2. the **Children's Court of Victoria** [‘the ChCV’] does not have jurisdiction under the FLA.

The Family Law Council agreed, stating baldly in its Final Report on Family Law and Child Protection (September 2002) at p.82:

"At present, Children's Courts and Youth Courts, which have an independent statutory existence from the State or Territory Magistrates' Courts, do not have jurisdiction which Magistrates' Courts have to make consent orders under the FLA."

In mid-2006 eminent senior and junior counsel were briefed by the Victorian Department of Justice for advice on a related question: “Does the Children’s Court have jurisdiction to vary Family Court orders that conflict with intervention orders made under the Crimes (Family Violence) Act 1987 (Vic) [‘the CFVA’]?” [The same question is relevant to the FVPA which replaced the CFVA on 08/12/2008.] In their detailed Memorandum of Advice dated 03/07/2006 counsel’s conclusion was: “The Children’s Court does have jurisdiction to vary Family Court orders that conflict with intervention orders made under the CFVA, provided that the jurisdiction is exercised by a magistrate rather than by the President of the Court.”

In an earlier version of **section 4.3.2** the writer had summarised counsel’s detailed reasoning, noting that, if correct, it leads to highly unattractive consequences for the operation of the Children’s Court. It is an intolerable position that the judicial head of a court should have less power than the puisne judicial members of the court. Section 508(8) of the CYFA [previously s.12(8) of the CYPA] provides that the President may exercise any power conferred on a magistrate by or under this or any other Act. But this provision of State legislation cannot by itself vest federal judicial power on the President. The writer had concluded that “legislative amendment is necessary to invest all judicial members of the Children’s Court of Victoria unambiguously with federal jurisdiction in relation to matters under Part VII of the FLA as is currently invested in the MCV. After all, the ChCV has been described by State parliament in s.1(d) of the CYFA as ‘a specialist court dealing with matters relating to children’.”

Over the years numerous bodies, including the Family Law Council and the Victorian Royal Commission into Family Violence [‘VRCFV’], had also recommended legislative clarification of the historical uncertainty as to whether the ChCV has jurisdiction pursuant to Part VII of the FLA. Two relevant recommendations of the VRCFV are:

“[131] The Victorian Government, through the Council of Australian Governments Law, Crime and Community Safety Council, pursue amendments to the FLA to…make it clear that the ChCV can make orders under Part VII of the FLA in the same circumstances as the MCV (sections 69J and 69N).”

“[133] The Victorian Government amend the CYFA to clarify that the ChCV has the same jurisdiction to make FLA parenting orders as the MCV.”

In order to set the ground for legislative clarification of this complex issue, the Family Law Amendment (Family Violence and Other Measures) Act 2018 (Cth) – implementing a Family Law Council recommendation and partially implementing recommendation 131 of the VRCFV – amended ss.69J & 69N of the FLA and inserted s.69GA as and from 01/09/2018.

Section 69J(1) of the FLA now provides that subject to subsection (5), each court of summary jurisdiction of each State is invested with federal jurisdiction in relation to matters arising under Part VII (other than proceedings for leave in certain adoption matters under s.60G). Subsection (5) – read in conjunction with ss.69J(3) & 69J(4) – prevents a court of summary jurisdiction hearing and determining proceedings under Part VII FLA contrary to a Proclamation of the Governor-General. However, to date there have been no such Proclamations relating to Victorian courts.

Section 69GA of the FLA enables a prescribed state or territory court to hear proceedings (or specified classes of proceedings) under the FLA as if it was a court of summary jurisdiction. Hence the note to s.69J(1) which provides: “This section may apply to proceedings heard in a court prescribed by the regulations for the purposes of s.69GA in the same way as this section would apply if those proceedings were heard in a court of summary jurisdiction.”

Paragraph [40] of the Explanatory Memorandum to the 2018 Amending Act states:

“It is not to be taken that, if a state or territory children’s court is not prescribed by the regulations, then it is not able to make family law orders under Part VII of the FLA as a court of summary jurisdiction. Rather, it is intended that, in cases where there is doubt, a court can be prescribed by regulations so as to remove any doubt as to its capacity to exercise such jurisdiction.”

To date, no Victorian courts have been prescribed in regulations for the purposes of s.69GA.

In order to give effect to recommendation 133 of the VRCFV, as and from 16/02/2022 the following provisions were inserted into the CYFA by the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022 (Vic):

* s.515(4) of the CYFA provides: “The Family Division has any jurisdiction given to the Court by or under the Family Law Act 1975 (Cth).”
* s.588(1)(ba) of the CYFA provides: “The President together with 2 or more magistrates for the Court may jointly make rules of court for or with respect to any matter relating to the jurisdiction of the Family Division of the Court given by s.515(4).”

What is the current end result of this jungle of legislation? Notwithstanding counsel’s thoughtful analysis in 2006, the writer considers that it is not entirely clear that the ChCV (whether constituted by the President or a magistrate) can exercise the jurisdiction which the MCV has under the FLA. However, the writer’s preferred view is:

* Both the ChCV and the MCV remain ‘courts of summary jurisdiction’ within the meaning of s.69J(1) FLA whether constituted by the President, the Chief Magistrate or a magistrate.
* Both the ChCV and the MCV therefore have full jurisdiction under s.69J(1) FLA and the ChCV has concurrent jurisdiction under s.515(4) CYFA to hear and determine matters arising under Part VII of the FLA (other than proceedings under s.60G).
* The fact that a court has conferred jurisdiction does not compel the court to exercise it. For the moment both the ChCV and the MCV have chosen to exercise limited jurisdiction under s.69J(1) FLA.
* Both the ChCV and the MCV do have and do exercise jurisdiction under s.68R FLA to revive, vary, discharge or suspend an FLA contact order in proceedings under the FVPA to make or vary a family violence intervention order.
* Although the ChCV does have broad general jurisdiction under Part VII FLA, it does not yet exercise it in any area other than s.68R.
* The MCV exercises jurisdiction to hear and determine certain Part VII applications, including-
* contested applications for interim FLA parenting orders;
* consent or uncontested applications for final FLA parenting orders;
* applications for FLA recovery orders.

However, because the issue of whether the ChCV is a ‘court of summary jurisdiction’ is still not entirely free of doubt, the writer believes that it would be prudent for the ChCV to be prescribed by Commonwealth regulations made under s.69GA as a state court empowered to hear proceedings (or specified classes of proceedings) under the FLA. If that is done, s.69GA(3) FLA will enable ChCV rules made under s.588(1)(ba) CYFA to be prescribed under the FLA as the relevant rules for the exercise of Part VII FLA jurisdiction in the ChCV: see paragraphs [45]‑[46] of the Explanatory Memorandum to the 2018 amending Commonwealth Act.

In conclusion, for the moment the only jurisdiction which the ChCV is exercising in practice under the FLA is that under s.68R, namely in certain circumstances to revive, vary, discharge or suspend an FLA contact order in proceedings under the FVPA to make or vary a family violence intervention order.

### **4.3.3 Jurisdiction under the Terrorism (Community Protection) Act 2003**

### **Unless otherwise indicated all references to legislative provisions in this section are to the *Terrorism (Community Protection) Act 2003* (TCPA).**

**BACKGROUND**

In 2017, the Victorian Government appointed an Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers to review the operation and effectiveness of Victoria's laws to prevent, monitor, investigate and respond to acts of terrorism and violent extremism.

The *Terrorism (Community Protection) Amendment Act 2021 –* which amends the *Terrorism (Community Protection) Act 2003* – implements four recommendations from the second report of the Expert Panel. These amendments complement existing powers that government and law enforcement agencies can utilise when a person has radicalised to the point where a terrorist attack is being planned or is about to occur. The amendments introduce early intervention pathways and a multi-agency approach to address violent extremism when it arises and also to divert people away from radicalisation before they present a threat to the community. This is achieved by the insertion of new provisions into the TCPA which–

* establish the **Countering Violent Extremism Multi-Agency Panel (CVE MAP)**, constituted by members appointed by the Secretary to the Department of Justice and Community Safety (the Secretary) [s.**22AR**], whose role includes the **provision of advice and proposed support and engagement plans (SEP)** to the Secretary, as well as advice on a supported person’s compliance with an SEP or a **support and engagement order (SEO**) made by a court and any proposed variations [s.**22AS**];
* empower the Chief Commissioner of Police to refer a person to the Secretary for **voluntary case management** if there is a reason to believe that the person is at risk of radicalising towards violent extremism and that a voluntary case management plan may better mitigate that risk than law enforcement methods [s.**22BH(2)**];
* provide for the making by a judicial officer of **SEOs** to address the underlying causes of persons radicalising towards violent extremism [ss.**22CG to 22EG**]; and
* expand the protection of the Supreme Court’s **counter-terrorism intelligence protection order scheme (CTIPO)** in relation to SEO proceedings [ss.**25, 27, 29 & 31A**].

The relevant jurisdiction of the Family Division of the Children’s Court commenced on 02/09/2022. All relevant Forms are available for download from the Children’s Court website. To date, no orders have been made in this jurisdiction.

**MANDATORY CONSIDERATIONS FOR COURT PROCEEDINGS**

**IN RELATION TO SEOs INVOLVING CHILDREN**

Under s.**22CH** a Court which is to hear and determine a matter in relation to an SEO in respect of a respondent or a supported person who is a child must have regard to–

* 1. 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; and
  2. the child's social, individual and cultural identity and religious faith (if any); and
  3. the child's age, maturity and stage of development; and
  4. the importance of allowing the education, training or employment of the child to continue without interruption or disturbance; and
  5. the vulnerability of the child, including whether they have a history of trauma, disability or physical or mental illness; and
  6. the need to minimise stigma to the child.

Section **22EG** requires the respondent or supported person to be legally represented in SEO proceedings in the Children’s Court unless he or she has chosen not to be represented. So far as is practicable to do so having regard to the maturity of the child, the legal representative must act on an instructions basis. See also the Notice for Children in Form 7 [s.**22DZ**].

**JURISDICTION OF THE CHILDREN’S COURT TO MAKE AN SEO**

So far as the Children’s Court is concerned, the major reform is to provide for the **making of an** **SEO**, a civil order made in the Family Division of the Court, whose object is to require a child respondent to engage with services in order to address the underlying causes of his or her radicalisation towards violent extremism [s.**22CG**].

Under s.**22CK** an application by an authorised police officer (APO) for an SEO can only be made in the Children’s Court if the respondent child–

* has turned 14 but has not yet turned 18; and
* has not already been subject to one or more SEOs for an accumulated total period of 2 years (irrespective of whether or not any of those periods were consecutive).

Provided that the pre-conditions in s.**22CK** are met–

* there is no doubt that an SEO made in the Children’s Court can extend beyond the respondent’s 18th birthday [s.**22CQ(4)**];
* there is almost certainly no doubt – given the absence of an express transfer provision between the Children’s Court and the Magistrates’ Court – that the Children’s Court can make an SEO even if the respondent has already turned 18 at the time the order is made.

**PROCEDURE FOR AN APPLICATION FOR THE MAKING OF AN SEO**

1. An application to make an SEO for a respondent child must be in writing in Form 1 and supported by an affidavit by the applicant that sets out various specified details, including the grounds on which the applicant considers that the SEO should be made [s.**22CL**].
2. This documentation must be electronically filed with the Melbourne Children’s Court registry: see paragraph 57 of Practice Direction No.2 of 2022 dated 02/09/2022.
3. Notice of the application must be served on the respondent. The applicant must also give a copy of the application to the Secretary [s.**22CM**].
4. Upon receiving the application, the Secretary must file within a reasonable time–
   1. a report that describes the behaviours and needs of the respondent that are relevant to the application, and, if the respondent has previously been a participant of a voluntary case management plan, that describes the engagement of the respondent with programs and services under that plan; and
   2. a proposed SEP for the respondent [s.**22CN**].
5. The SEP must set out the services and programs with which the respondent is required to engage in order to achieve a therapeutic purpose for the person and how often or when that engagement must occur [s.**22AJ(2)**]. It may also set out required or permissible modes of engagement with those services and programs and outcomes that constitute satisfactory engagement with those services and programs [s.**22AJ(3)**]. And it may also provide that completion of a service or program to the satisfaction of the provider of the service or program is to constitute satisfactory engagement with the service or program. [s.**22AJ(4)**].
6. The court may direct a person to attend and give evidence on the report given under **s.22CN(1)(a)** and/or the proposed SEP under **s.22CN(1)(b)**. If the Secretary is given a direction under **s.22CP(1)**, the Secretary may determine that a particular member of the CVE MAP is to attend and give evidence, in the Secretary’s place, in response to that direction. [s.**22CP**].

**DETERMINATION OF AN APPLICATION FOR AN SEO**

1. The 2021 amending Act authorises a Court to make SEOs to address the underlying causes of persons who are radicalising towards violent extremism. Pursuant to ss.**22CJ & 22CO(1)**, in order to make an SEO the court must make a finding, on the balance of probabilities, that–
2. the respondent is radicalising towards violent extremism; and
3. the court is satisfied that the making of an SEO is an appropriate way to achieve a therapeutic purpose for the respondent.
4. Pursuant to s.**22AG** “radicalising toward violent extremism” means the process of coming to support the commission of a terrorist act under s.**4(2)**, as a means of advancing a political religious or ideological cause, coercing or influencing a government or intimidating the public. A person does not need to have identified or considered a particular act in order to be considered to be radicalising towards violent extremism [s.**22AG(2)**]. Further, the court may find that a person is radicalising towards violent extremism whether or not the court finds that the person is preparing to commit a terrorist act [s.**22CI(4)**].
5. As defined in s.**4**, a “terrorist act” includes an action or threat of an action where–

* serious physical harm or death is caused to a person; or
* serious damage is caused to property; or
* a serious risk is caused to health and safety of the public or a section of the public; or
* a serious disruption or destruction is caused to an electronic system such as an information system or a telecommunications system etc-

with the intention of advancing a political, religious or ideological cause or of coercing the government or intimidating the public. However, s.**4(3)** provides that action will not be considered a terrorist act if it is advocacy, protest, dissent or industrial action and it is not intended to cause serious harm or risk.

1. Pursuant to s.**22AK(1)**, a thing is done or designed to achieve a “therapeutic purpose” if (amongst other matters) it is done or designed–
   1. to address the underlying cause of the person’s radicalisation and other factors which may make the person more susceptible to radicalisation; and
   2. by doing so, to prevent the person from radicalising and have the person become less radicalised.

See s.**22AL** for the meaning of “*underlying cause* of radicalisation”.

1. Section **22CO(3)** provides that In determining whether to make an SEO the court must have regard to–
   1. whether endeavours to obtain informed consent in respect of voluntary case management of the respondent [see ss.**22BP & 22BV**] have previously failed; and
   2. whether such informed consent has been withdrawn [see s.**22BX**]; and
   3. whether the respondent has otherwise previously declined or ceased to voluntarily engage with services and programs of the kind that an SEP can require a person to engage with; and
   4. whether the respondent is likely to continue to be radicalised towards violent extremism if the order is not made; and
   5. the frequency and seriousness of the behaviour in respect of which the court made a finding under s.**22CI(2)** that the behaviour has been engaged in by the respondent and indicates that the respondent is radicalising towards violent extremism;
   6. whether the order is likely to have a significant adverse impact on the respondent; and
   7. any other matters the court considers relevant.
2. Section **22CQ(1)** provides that in making an SEO the court must–
   1. attach to the SEO the SEP given to the court under s.**22CN** (with any variations that the court thinks fit); and
   2. specify in the SEO the period for which the SEO operates; and
   3. specify the days on which the Secretary is required to provide a report in respect to the SEO under s.**22CV**.
3. Section **22CR(1)** provides that the court may attach further conditions to the SEO provided the court considers it an appropriate way to achieve a therapeutic purpose and the condition is no more restrictive than necessary to achieve that purpose. Section **22CR(2)** requires the court to have regard to the age and vulnerability of a respondent child when imposing a condition under s.**22CR(1)**. See s.**22CR(3)** for a non-exhaustive list of sample conditions.
4. Pursuant to s.**22CQ(2)** the maximum period for which an SEO operates–
   1. must not be so long that, at the end of that period, the total period during which the supported person will have been subject to an SEO is 2 years or more; and
   2. in any event, must not be longer than 1 year.
5. An SEO commences on the day the respondent is given the order and ceases to operate at the end of the period specified in the order unless it is revoked sooner [s.**22CS**].
6. A supported person subject to an SEO made by the Magistrates’ Court must not contravene the order without a reasonable excuse. **22CU** makes such contravention an offence which attracts a fine of 10 penalty units. Contravention of an SEO made by the Children’s Court is not an offence.

**REVIEW OF AN SEO**

Section **22CW** provides that on receiving a report from the Secretary in accordance with s.**22CV** on the progress of the supported person (SP) under an SEO, the court may direct that a review hearing is to be held if, on the basis of the report, the court considers that–

* 1. the SP may not be satisfactorily complying with or progressing under the SEO; or
  2. varying or extending the SEO or varying the attached SEP may be an appropriate way to achieve a therapeutic purpose for the SP; or
  3. it may be appropriate to revoke the SEO.

At a review hearing the court may vary or extend an SEO or vary the attached SEP if the court is satisfied it is appropriate to do so to achieve a therapeutic purpose for the SP [s.**22CY(1)**].

Under s.**22CY(6)** the Court may revoke an SEO if the court–

* finds, in accordance with s.**22CI**, that the SP is no longer radicalising towards violent extremism; or
* is not satisfied that an SEO remains an appropriate way to achieve a therapeutic purpose for the SP; and
* is satisfied that it is appropriate to revoke the SEO.

**JURISDICTION OF THE CHILDREN’S COURT TO VARY, REVOKE OR EXTEND AN SEO**

The Children’s Court also has associated powers to **vary, revoke or extend an SEO** made in the Children’s Court.

It is not expressly stated whether an application to vary, revoke or extend an SEO should be filed in the Children’s Court or the Magistrates’ Court if the SP has already turned 18 at the time the relevant application is made. However, the writer prefers an interpretation that once an SEO has been made in the Children’s Court, that Court retains exclusive jurisdiction in relation to any subsequent application to vary, revoke or extend it, irrespective of whether the SP has already turned 18.

**Variation:** An APO or a SP may apply to the court in writing in Form 2 for a variation of an SEO or the attached SEP, supported by an affidavit by the applicant that sets out the grounds for the variation sought and includes the prescribed information [ss.**22DA** & **22DB**].

In relation to an SEO originally made in the Children’s Court, this documentation must be electronically filed with the Melbourne Children’s Court registry: see paragraph 57 of Practice Direction No.2 of 2022 dated 02/09/2022.

Under s.**22DE** the court–

* may vary the SEO or the SEP if satisfied it is an appropriate way to achieve a therapeutic purpose for the SP; and/or
* may vary one or more conditions under s.**22CR** provided the court considers that it would be appropriate to achieve a therapeutic purpose, and that the condition as varied would be no more restrictive than is necessary to achieve that purpose.

**Revocation:** An APO or a SP may apply to the court in writing in Form 2 for a revocation of an SEO, supported by an affidavit by the applicant that sets out the grounds for the revocation sought and includes the prescribed information [ss.**22DR** & **22DS**].

In relation to an SEO originally made in the Children’s Court, this documentation must be electronically filed with the Melbourne Children’s Court registry: see paragraph 57 of Practice Direction No.2 of 2022 dated 02/09/2022.

Under s.**22DV** the court must revoke the SEO if both the applicant and–

1. if the applicant is an APO, the SP; or
2. if the applicant is the SP, the Chief Commissioner of Police-

agree that the SEO should be revoked. If there is no such agreement the court may revoke the SPO if the court-

* finds, in accordance with s.**22CI**, that the SP is no longer radicalising towards violent extremism; or
* is not satisfied that an SEO remains an appropriate way to achieve a therapeutic purpose for the SP; and
* is satisfied that it is appropriate to revoke the SEO.

**Extension:** An APO may apply to the court in writing in Form 3 for the extension of an SEO, supported by an affidavit by the applicant that sets out the grounds for and the period of the extension sought and includes the prescribed information [ss.**22DH** & **22DI**].

An application to extend an SEO must not be made after the order has expired [s.**22DH(2)**]. However, upon the making of a valid application to extend, the SEO continues until the application is determined [s.**22DK**].

In relation to an SEO originally made in the Children’s Court, this documentation must be electronically filed with the Melbourne Children’s Court registry: see paragraph 57 of Practice Direction No.2 of 2022 dated 02/09/2022.

The applicant must serve notice of the application to extend on the SP and give a copy of the notice to the Secretary [s.**22DJ**]. On receiving notice of the application to extend, the Secretary must file a report regarding the SP’s compliance and propose a new SEP if the Secretary considers that would be an appropriate way of achieving a therapeutic purpose for the SP [s.**22DL**]. The court may direct a person to attend and give evidence as to the SP’s compliance with, and progress under, the SEP. If the Secretary is given a direction under **s.22DM(1)**, the Secretary may determine that a particular member of the CVE MAP is to attend and give evidence, in the Secretary’s place, in response to that direction. [s.**22DM**].

Under s.**22DN** the court may extend the order if–

* 1. the court finds that the SP is still radicalising toward violent extremism; and
  2. the court is satisfied that extending the order is an appropriate way to achieve a therapeutic purpose for the SP.

However, pursuant to s.**22DO(2)** the extension of an SEO–

1. must not result in the period of the order exceeding 2 years; or
2. must not be so long that, at the end of the extended period, the total period during which the supported person will have been subject to an SEO is 2 years or more.

**RESTRICTIONS ON PUBLICATION**

In relation to a proceeding–

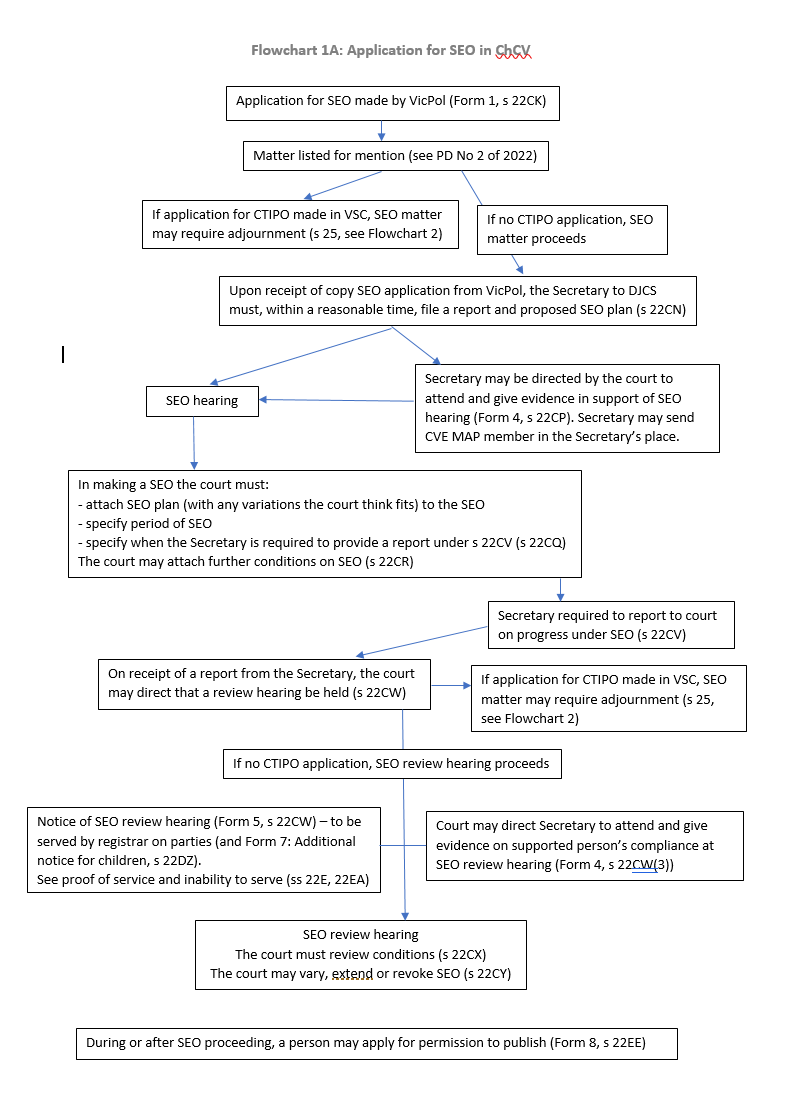
* on an SEO application or an SEO review hearing; or
* for an offence against s.**22CU** (only relevant to an SEO made by the Magistrates’ Court)-

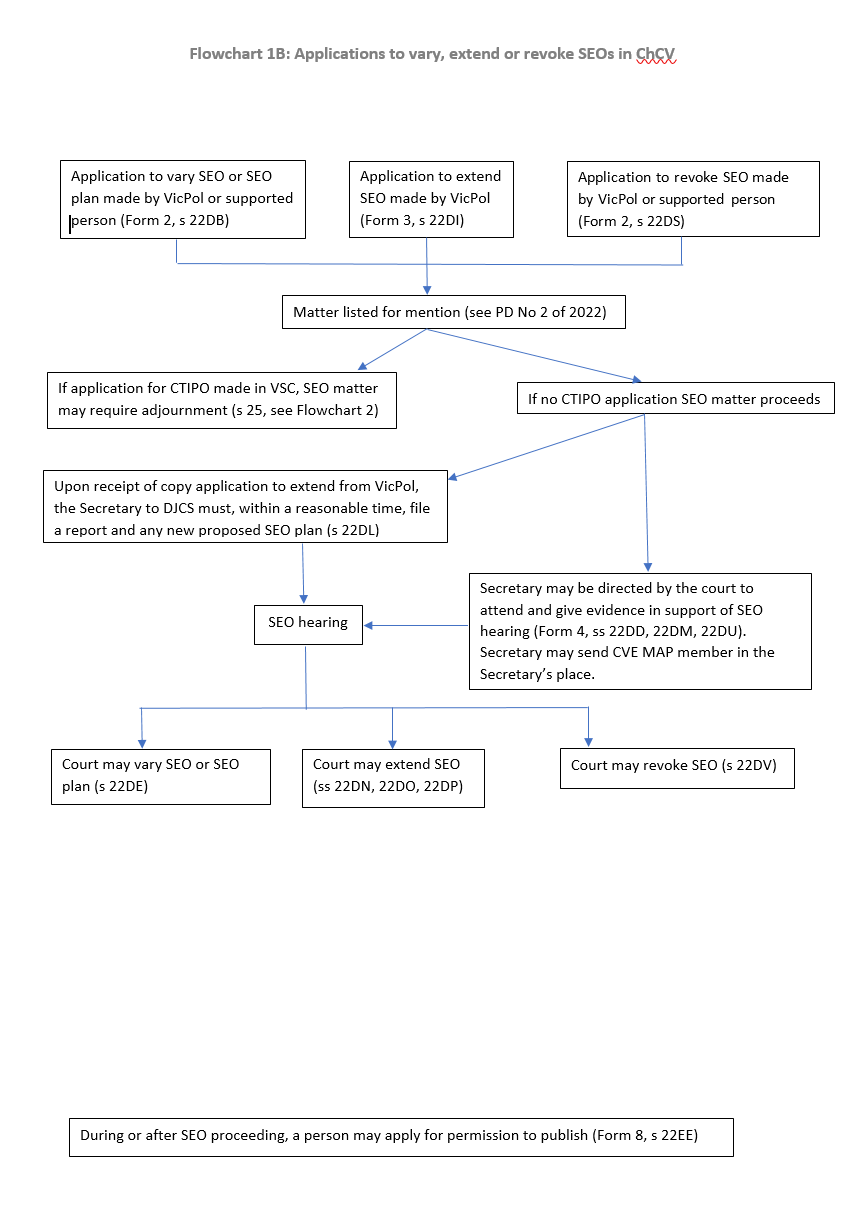
a person must not publish, or cause to be published, a report of the proceeding or about the SEO that contains any particulars likely to lead to the identification of – and/or pictures of – the SP, another party to the proceeding or a person giving evidence unless the court orders that publication is permitted [s.**22EB**]. A non-exhaustive list of identifying particulars is contained in s.**22ED**.

This penalty provision does not apply to information sharing in accordance with Division 6 [s.**22EC**]. Further, the court may make an order permitting the publication if the court reasonably considers it is in the public interest and that it is just to allow the publication in the circumstances [s.**22EE**]. However, no publication is allowed in respect of protected counter-terrorism intelligence matters.

**FLOWCHARTS FOR CHILDREN’S COURT SEO PROCESSES**

**Flowcharts 1A & 1B** below depict the processes in the Children’s Court for applications and orders to make, vary, revoke and extend SEOs.



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**COUNTER-TERRORISM INTELLIGENCE PROTECTION ORDERS (CTIPOs)**

**IN THE SUPREME COURT AND THEIR IMPACT ON THE CHILDREN’S COURT**

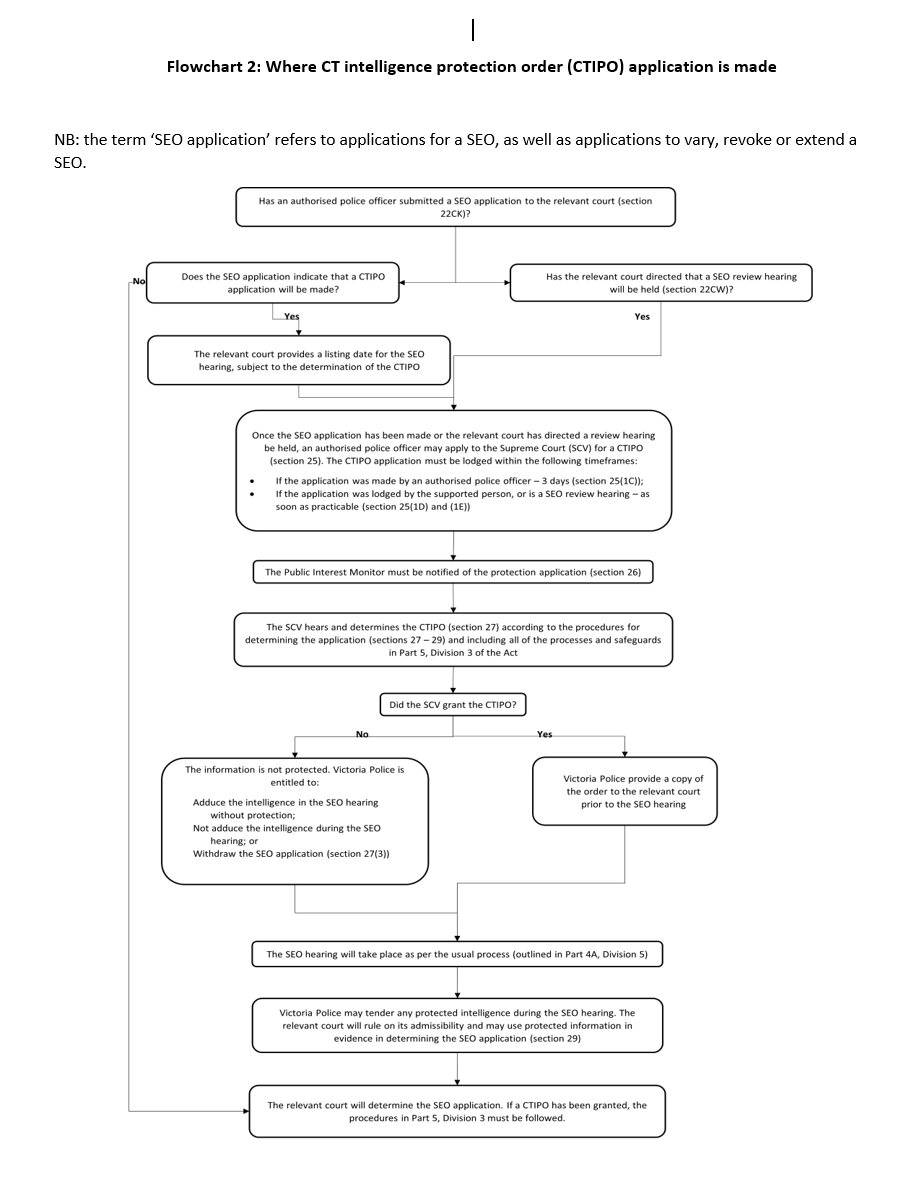
1. The 2021 amending Act expands the existing counter-terrorism intelligence protection order scheme (CTIPO) in **Part 5** of the TCPA. Amended s.**25** allows an APO who is making an SEO application to apply to the Supreme Court for a CTIPO in relation to any information, document or other thing related to the SEO hearing that the APO believes on reasonable grounds is counter-terrorism intelligence.
2. A CTIPO application that relates to an application for an SEO or an APO application for the variation or extension of an SEO must be made no later than 3 days after the substantive application is made [s.**25(1C)**].
3. A CTIPO application that relates to an application by an SP for the variation, extension or revocation of an SEO must be made as soon as practicable after the substantive application is made [s.**25(1D)**].
4. A CTIPO application that relates to an SEO review hearing must be made as soon as practicable after the lower court has directed under s.**22CW(1)** that a review hearing is to be held [s.**25(1E)**].
5. Section **27(1)** provides that the Supreme Court may make a CTIPO in respect of all or part of the information, document or other thing to which the application relates if the court is satisfied that–
6. the information, document, thing or part is counter-terrorism intelligence; and
7. the reasons for maintaining the confidentiality of the intelligence outweigh any prejudice or unfairness to the subject of the substantive SEO application.
8. The making of a CTIPO is not determinative of the admissibility of the protected counter-terrorism intelligence in evidence in the proceeding on the substantive application or hearing [s.**29**].
9. However, s.**31A** requires that unless the Supreme Court orders otherwise, the relevant part of–
10. the hearing of the substantive SEO application; or
11. an SEO review hearing-

must be heard in closed court. If the relevant part is heard in closed court, the only persons who may be present are-

* the APO who made the CTIPO application and his or her legal representatives;
* any special counsel appointed under s.**32** to represent the interests of the subject of the substantive application at the hearing of a protection application and the relevant part of the proceeding on the substantive application;
* any witnesses who may be called to give evidence;
* the presiding judicial officer and any necessary court staff; and
* the Public Interest Monitor notified under s.**26**.

This list of persons entitled to be present does not include the respondent or his or her legal representative, the respondent’s interests in the relevant part being represented by a special counsel.

1. It is an offence to disclose, receive or solicit any information document or other thing if the person knows or is reckless as to the fact that the thing is protected counter-terrorism intelligence [s.**37**].
2. Under s.**27(3)**, if the Supreme Court declines to make a CTIPO in respect of all or any part of the information, document or other thing–
3. no party to the substantive application or hearing is obliged to adduce that material in evidence in the SEO proceeding or hearing; and
4. if the application for a CTIPO was made in respect of a substantive application, the applicant may withdraw the substantive application.
5. **Flowchart 2** below depicts the processes in the Children’s Court where an application has been made to make, vary, revoke or extend an SEO and a CTIPO application is also made in the Supreme Court.

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**Flowcharts 1A & 1B were created by Dr Lisa Lee (Senior Legal Officer, Children’s Court). Flowchart 2 was created by DJCS. The structure and much of the content of this section derives from a memorandum created by Ms Catherine Thwaite (Senior Legal Policy Advisor, Magistrates’ Court).**

### **4.3.4** **Limited powers under the Births, Deaths and Marriages Registration Act 1996**

**INTRODUCTION**

Under s.3 the objects of the *Births, Deaths and Marriages Registration Act 1996* (Vic) [the BDMR Act] are to provide for—

(a) the registration of births, deaths and marriages in Victoria;

1. the registration of changes of name;
2. the keeping of registers for recording and preserving information about births, deaths, marriages, changes of name and adoptions in perpetuity;

(caa) the keeping of information relating to donors and surrogacy arrangements under the *Assisted Reproductive Treatment Act 2008*;

(ca) the alteration of the record of sex in a birth registration;

(d) access to the information in the registers in appropriate cases by government or private agencies and members of the public, from within and outside the State;

(e) the issue of certified and uncertified information from the registers;

(ea) the issue of documents acknowledging the name and sex of persons whose birth is registered in a place other than Victoria;

(eb) the issue of integrated birth certificates to adopted persons; and

(f) the collection and dissemination of statistical information.

In the Second Reading Speech in the Legislative Assembly on 17/10/1966 [Hansard, p.754] it was said in relation to the Register [emphasis added]:

“The Bill obliges the registrar to maintain a register of registrable events – that is, births, changes of name, deaths, marriages or adoptions. The registrar is empowered to conduct an enquiry to find out whether a registrable event has occurred or to find out particulars of a registrable event. **The registrar can correct the register** to reflect the findings of an inquiry to bring an entry about a particular registrable event into conformity with the most reliable information available to the registrar or **at the direction of a court**.”

Section 13 of the BDMR Act lists the cases in which registration of a birth is required or authorised:

**13 Cases in which registration of birth is required or authorised**

If a child is born in the State, the birth must be registered under this Act.

If a court orders the registration of a birth, the birth must be registered under this Act.

A birth may be registered under this Act if a child is born—

(a) in an aircraft during a flight to a place of disembarkation in the State; or

(b) on a vessel during a voyage to a place of disembarkation in the State.

If a child is born outside the Commonwealth, but the child is to become a resident of the State, the birth may be registered under this Act.

The Registrar of Births, Deaths and Marriages Victoria [the Registrar BDMV] may refuse to register a birth under subsection (3) or (4) if the birth is registered under a corresponding law.

Section 14 of the BdMR Act provides:

“A person has the birth of a child registered under this Act by lodging a birthregistration statement with the Registrar in a form and manner required by the Registrar specifying any prescribed particulars.”

The prescribed particulars are detailed in regulation 7 of the *Births, Deaths and Marriages Registration Regulations 2019* and are as follows–

* 1. whether the child was born alive or stillborn;

(b) the child's full name;

(c) the child's sex;

(d) the child's date of birth;

(e) whether the birth was a multiple birth;

(f) the name of the hospital or medical facility the child was born in, or the place of birth, and full name and contact details of the doctor, midwife or other person present at the birth;

(g) whether the child was conceived by a donor treatment procedure, and, if so, the name and business address of the registered ART provider or full name of the doctor who carried out the donor treatment procedure;

(h) the full name, birth name, occupation and usual place of residence of each parent of the child;

(i) the date of birth (or, if unknown, age at the time of the child's birth) and place of birth of each parent of the child;

(j) whether the parents of the child were married and the date and place of that marriage;

(k) whether the parents of the child were in a domestic relationship and the date and place of the registration of that domestic relationship (if applicable);

(l) the full name and date of birth of each previous child of both parents of the child;

(m) the full name and date of birth of each previous child of each parent of the child;

(n) whether a parent of the child is Aboriginal or Torres Strait Islander.

**POWER TO MAKE ORDERS UNDER THE BDMR ACT GENERALLY**

**Power to make orders under the BDMR Act is primarily conferred on the County Court of Victoria. The Children’s Court has only limited incidental powers.** Throughout the BDMR Act, the term “Court” [with a capital C] is used frequently and is defined in s.4(1) as the County Court. By contrast “court” [with a small c] – which refers to any court – is used infrequently.

Section 20 provides an illustration of the distinction between “Court” [with a capital C] and “court” [with a small c]. Subsection (1) confers power on the County Court:

The Court may, on application by an interested person or on its own initiative, order—

(a) the registration of a birth; or

(b) the inclusion of registrable information about a birth or a child’s parents in the Register.

By contrast subsection (2) confers limited incidental power on a broad range of courts, including the Children’s Court:

1. **If a court (including a court of another State or the Commonwealth) finds that—**

**(a) the birth of a person is not registered as required under this Act or a corresponding law [of another State]; or**

**(b) the registrable information [defined in s.4(1)] contained in an entry about a birth in the Register under this Act or a corresponding law is incomplete or incorrect—**

**the court may direct registration of the birth or the inclusion or correction of registrable information in the Register under this Act or the corresponding law (as the case may require).**

In *Clarkson & Zammit* [2014] FCCA 1099 at [53]-[54] the respondent – who was not a party to the proceeding in the Federal Circuit Court of Australia – was named as the father on the child’s birth certificate but he was not the biological father. The applicant mother, supported by the best interests lawyer, proposed orders that the respondent’s name be removed from the child’s birth certificate. After detailing s.20(2) of the BDMR Act, Phibbs J said at [54]: “The respondent is not the father of the child, should not be registered as the father of the child and so an order must be made under this section.” See also *Sofia & Treacy* [2021] FamCA 647 at [15]-[16].

**CHILDREN’S COURT HAS INCIDENTAL POWER TO DIRECT REGISTRATION OF A BIRTH OR INCLUSION OR CORRECTION OF REGISTRABLE INFORMATION**

## **Section 20(2) appears to be the only source of power in the BDMR Act that is expressly vested in the Children’s Court. It is effectively an incidental power and the pre‑condition for its exercise is either that—**

* **a child’s birth is not registered as required; or**
* **the registrable information about a child’s birth is incomplete or incorrect.**

**PRIMARY POWER TO CHANGE A CHILD’S NAME IN VICTORIA VESTS IN BDMV OR THE COUNTY COURT**

Part 4 of the BDMR [ss.24-30] is headed “**Change of Name**”. A new name can be recognised if it is established by repute or usage: see s.30 of the BDMR Act. However, many organisations require written evidence of a change of name.

Application for registration of a change in a child’s name can be made to the Registrar Births, Deaths and Marriages Victoria [BDMV] in the circumstances set out in ss.24-29 BDMR Act: see <https://www.bdm.vic.gov.au/changes-and-corrections/change-your-childs-name/child-born-in-victoria>.

Pursuant to s.26(1) of the BDMR Act, the parents of a child under 18 years of age may apply to the Registrar BDMV for registration of a change of a child’s name if—

(a) the child’s birth is registered in Victoria; or

1. the child-
   * + - 1. was born outside Australia; and
         2. is a child whose birth is not registered in Victoria or another State or a Territory; and
         3. has been ordinarily resident in Victoria for at least 12 months immediately before the application is made.

The Registrar BDMV may waive the 12 month requirement under s.26(1)(b)(iii) in the circumstances set out in ss.26(1A) & 26(1B).

In most cases both parents named on the birth certificate need to complete a change of name application to the Registrar BDMV. If one parent does not agree to the proposed alteration, an order made by a court which has the appropriate power will be necessary to effect an alteration. In this connection s.23 of the BDMR Act provides:

(1) If there is a dispute between parents about a child’s name, either parent may apply to the [County] Court for a resolution of the dispute.

(2) On an application under subsection (1), the [County] Court may—

(a) resolve the dispute about the child’s name as the Court considers appropriate; and

(b) order the Registrar BDMV to register the child’s name in a form specified in the order.

Section 26(3) provides that an application for registration of a change of a child’s name may be made by one parent if—

1. the applicant is the sole parent named in the registration of the child’s birth under the BDMR Act or any other law; or
2. there is no other surviving parent of the child; or
3. the [County] Court approves the proposed change of name.

Section 26(4) provides: “The [County] Court may, on application by a child’s parent, approve a proposed change of name for the child if satisfied that the change is in the child’s best interests.”

Section 26(5) provides: “If the parents of a child are dead, cannot be found, or for some other reason cannot exercise their parental responsibilities to a child, the child’s guardian may apply for registration of a change of the child’s name.” The term ‘guardian’ is not expressly defined in the BDMR Act.

Section 27 provides that a change of a name of a child aged 12 years or more must not be registered unless—

1. the child consents to the change of name; or
2. the child is unable to understand the meaning and implications of the change of name.

Section 28 details the powers of the Registrar BDMV to register a change of name.

**PRIMARY POWER TO ALTER THE RECORD OF SEX OF A PERSON BORN IN VICTORIA VESTS IN BDMV OR THE COUNTY COURT**

In terms which are fairly similar to Part 4 of the BDMR Act, Division 1 of Part 4A [ss.30B‑30D] – headed “**Acknowledgement of sex**” – vests in BDMV and the County Court primary power in relation to altering the record of sex in a child’s birth registration for persons born in Victoria. See in particular—

**Part 4A, Division 1—Persons born in Victoria**

* s.30B Application to alter record of sex in child’s birth registration
* s.30BA Application made by one parent or guardian to alter record of sex in child's birth registration
* s.30BB County court order approving alteration of record of sex in child’s birth registration
* s.30C Alteration of register
* s.30D Issue of new birth certificate.

**PRIMARY POWER TO ISSUE DOCUMENTS ACKNOWLEDGING THE NAME AND SEX OF VICTORIAN RESIDENTS BORN ELSEWHERE VESTS IN BDMV – PRIMARY POWER TO ORDER SUCH ISSUE VESTS IN THE COUNTY COURT**

Division 2 of Part 4A [ss.30E‑30FA] deals with applications and orders for the issue by the Registrar BDMV of a document acknowledging the name and sex of a Victorian resident who was born elsewhere. See in particular—

**Part 4A, Division 2—Victorian residents born elsewhere**

* ss.30E Application for document acknowledging name and sex
* s.30EA Application for document acknowledging child’s name and sex
* s.30EB Application made by one parent or guardian for document acknowledging child’s name and sex
* s.30EC County court order for issue of document acknowledging child’s name and sex
* s.30F Issue of document acknowleding name and sex
* s.30FA Notification to registering authority of issuing of document acknowledging name and sex.

## **4.4 Definitions of 'child' & ‘parent’**

As defined in s.3(1) of the CYFA, ‘**child**’ in Family Division proceedings means:

* for the purposes of any application under the Family Violence Protection Act 2008 (Vic) or the Personal Safety Intervention Orders Act 2010, a person who is under the age of 18 years when an application is made under the respective Act;
* for the purposes of therapeutic treatment proceedings, a person who is of or above the age of 10 years and under the age of 18 years when the order is made;
* for the purposes of any other application in the Family Division, a person who is under the age of 17 years or, if a protection order, a child protection order within the meaning of Schedule 1 or an interim order within the meaning of that Schedule continues in force in respect of him or her, a person who is under the age of 18 years.

Note, however, that s.275(3) of the CYFA – introduced by Act No. 8/2016 – provides that a “care by Secretary order or a long-term care order may be made in relation to a child who is under the age of 18 years but ceases to be in force when the child attains the age of 18 years or marries, whichever happens first.” However, if the ‘child’ referred to in s.275(3) is 17 years old, he or she does not fit within any of the parts of the definition of ‘child’ in s.3(1). The writer considers that this is probably a drafting error and would not read s.275(3) as constrained by s.3(1). But a related difficulty is that the term ‘child’ in the interim accommodation order provisions [ss.262-271] is clearly constrained by s.3(1). Hence, if the subject child has already turned 17 there appears to be no power in the Court to make or to extend an IAO in relation to the child.

Though 'family' is not defined in the CYFA, '**parent**', in relation to a child, is defined in very broad terms in s.3(1) as **including**-

(a) the father and mother of the child; and

(b) the spouse of the father or mother of the child; and

(c) the domestic partner of the father or mother of the child; and

(d) any person who has parental responsibility for the child, other than the Secretary; and

(e) a person whose name is entered as the father of the child in the register of births in the Register maintained by the Registrar of Births, Deaths and Marriages under Part 7 of the Births, Deaths and Marriages Registration Act 1996; and

(f) a person who acknowledges that he is the father of the child by an instrument of the kind described in s.8(2) of the Status of Children Act 1974; and

(g) a person in respect of whom a court has made a declaration or a finding or order that the person is the father of the child.

Prior to the amendments introduced by Act No.72/2001, the CYPA restricted the 'de facto' partner of a parent to a person of the opposite gender. Now, 'domestic partner' of a person is defined in s.3 as "a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender)".

Although there appears to be no case law on the issue, the writer thinks it likely that category (d) is intended to be restricted to persons who have legal parental responsibility for a child as opposed to persons who are merely ‘looking after’ a child, even if for an extended period.

The definition of ‘parent’ in s.3(1) is not expressed to be an exclusive one. This gives rise to the question whether a person who does not fall within any of categories (a) to (g) may nevertheless be held to be a ‘parent’ for the purposes of the CYFA. This was alluded to in dicta of the High Court in the joint judgment in *Masson v Parsons* [2019] HCA 21 at [29]:

“In *In* *re G (Children)*, Baroness Hale of Richmond observed [2006] 1 WLR 2305 at 2316-2317 [33]-[37]; [2006] 4 All ER 241 at 252-253 in relation to comparable English legislation that, according to English contemporary conceptions of parenthood, ‘[t]here are at least three ways in which a person may be or become a natural parent of a child’ depending on the circumstances of the particular case: genetically, gestationally and psychologically. That may also be true of the ordinary, accepted English meaning of ‘parent’ in this country, although it is unnecessary to reach a concluded view on that issue. The significance of her Ladyship's analysis for present purposes, however, is that, just as the question of parentage under the legislation with which she was concerned was one of fact and degree to be determined by applying contemporary conceptions of parenthood to the relevant circumstances, the question of whether a person qualifies under the *Family Law Act* as a parent according to the ordinary, accepted English meaning of ‘parent’ is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of ‘parent’ and the relevant circumstances of the case at hand. The primary judge and the Full Court were correct so to hold.”

In *Re D* [Melbourne Children’s Court-Parkinson M, 15/10/2019] the 9 year old child D had lived with and been cared for by his maternal grandmother G all his life. His mother – who had an intellectual disability – also lived with and was cared for by G. The case ultimately settled with D being placed by consent on a family preservation order in the care of his grandmother G. Accordingly, by virtue of the dicta of Baroness Hale in *In* *re G (Children)*,as approved by the High Court in *Masson v Parsons*:

* G either fits within category (a) of the definition of ‘parent’ in s.3(1) of the CYFA; or
* if not, she is nevertheless a ‘psychological parent’ under the CYFA given that the definition **includes** seven specified categories of persons but is not expressed as being limited to those seven categories.

However, in making the finding that in the unusual circumstances of the case G was a ‘parent’ of the child for the purposes of the CYFA, her Honour did place the following reasons on the oral record, being conscious that there must be some boundary around the concept of ‘parent’:

“Not all grandparents or relatives who provide care to a child could be considered a ‘parent’ under the Act. The circumstances would generally require that the carer stand in the shoes of the parent for a significant and relevant period of time and provide the day to day consistent care *in loco parentis* to the child. This does not mean that a short term carer such as a respite carer or even a carer who regularly provides support or assistance in caring would fall within this definition. It must be a person who has substantial control of day to day regime of the child and has done so without statutory intervention or authority. Therefore foster carers, suitable persons or relatives pursuant to an order of the Court [who] provide interim care or even longer term care under a CBSO would not ordinarily be included in this category.”

**See also a broader discussion of the concept of ‘parent’ contained in section 5.2.3.**

## **4.5 Parental responsibility & contact**

The concepts of ‘custody’ & ‘guardianship’ of a child were central to many of the orders made by the Family Division of the Children’s Court prior to 01/03/2016. The concepts were defined in s.5 & s.4 of the CYFA respectively. These sections are now repealed and the concepts replaced by the new terms ‘parental responsibility’ and ‘major long-term issue’. The concept of contact has not been changed.

### **4.5.1 Parental responsibility – Major long-term issue**

In s.3(1) of the CYFA ‘parental responsibility’, in relation to a child, is defined as “all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children”. This encompasses all the duties, powers and responsibilities which were previously characterized as relating to ‘custody’ and ‘guardianship’. In the absence of a court order to the contrary, the parents of a child have joint parental responsibility for the child.

In s.3(1) of the CYFA ‘major long-term issue’, in relation to a child, is defined as “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–

1. the child’s education (both current or future); and
2. the child’s religious and cultural upbringing; and
3. the child’s health; and
4. the child’s name.”

These are the issues that were previously categorized as ‘guardianship issues’.

### **4.5.2 Where carer may exercise parental responsibility**

Section 175A of the CYFA – in operation since 10/09/2014 but amended as and from 01/03/2016 – empowers the Secretary DFFH to specify certain issues relating to a child in out of home care about which a person who has care of the child may be authorised under s.175B to make decisions. Examples given include-

* the signing of school consent forms;
* obtaining routine medical care for the child;
* the day to day treatment of a child who suffers from a chronic or serious health condition.

The specification may relate either to a particular child, a child subject to a particular type of order or a person who provides a certain category of care. However, if the child is subject to an interim accommodation order, a family reunification order or a therapeutic treatment (placement) order, the specification must not relate to “a major long-term issue”.

Section 175B of the CYFA – also in operation since 10/09/2014 but amended as and from 01/03/2016 – empowers the Secretary or the person in charge of an out of home care service to authorise a person who has care of a child placed in out of home care under-

1. an interim accommodation order; or
2. a protection order that confers parental responsibility on the Secretary-

to make decisions in relation to the child on the issues specified by the Secretary under s.175A.

### **4.5.3 Contact**

In s.3 of the CYFA, 'contact' is defined as the contact of a child with a person who does not have care of the child by way of-

(a) a visit by or to that person, including attendance for a period of time at a place other than the child's usual place of residence; or

(b) communication with that person by letter, telephone or other means-

and includes overnight contact.

In the CYFA, ‘contact’ was termed ‘access’ prior to 01/12/2013. The terms have exactly the same meaning and are used interchangeably in these materials.

It is commonly said that contact is **the right of the child**. The legal basis which grounds the proposition that contact is **a right of the child** derives from the *United Nations Convention on the Rights of the Child* which was adopted by the United Nations and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20/11/1989. It entered into force on 02/09/1990 in accordance with Article 49. Australia became a signatory on 22/08/1990. Three Convention provisions of central importance to this proposition are Articles 7, 9.3 & 12 in Part I of the Convention:

* The latter part of Article 7 states [emphasis added]:

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”

* Article 9.3 states [emphasis added]:

“Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”

* Article 12 states:

“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.”

The Convention has effectively been incorporated into domestic Victorian law, primarily in the ‘best interests principles’ in Part 1.2 of the CYFA. See also–

* s.17 of the *Charter of Human Rights and Responsibilities Act 2006* relating to “Protection of families and children”;
* the judgment of Bell J in DOHS v Sanding [2011] VSC 42; (2011) 36 VR 221, esp. at [11]‑[21] & [209].

The goal of Articles 7 & 9.3 of the Convention and s.17 of the Charter are enshrined in paragraphs (a), (b), (c), (g), (h), (i), (j) & (k) of s.10(3) of the CYFA. In particular, the child’s “right to know and be cared for his or her parents” detailed in Article 7 and the child’s “right…to maintain personal relations and direct contact with both parents on a regular basis” detailed in Article 9.3 have enlivened the following matters in s.10(3) of the CYFA to which the Court must give consideration when they are relevant to any decision or action the Court has determined to make in proceedings in the Family Division–

1. 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;
2. 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;
3. the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;
4. a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child;
5. the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent;
6. contact arrangements between the child and the child’s parents, siblings, family members and other persons significant to the child.

The goal of Article 12 of the Convention is enshrined in s.10(3)(d) of the CYFA:

1. the child’s views and wishes, if they can be reasonably ascertained, …should be given such weight as is appropriate in the circumstances.

The fact that contact is **a right** of the child does not mean that it isn’t a right of the parent as well. However, it appears from the ‘best interests provisions’ in Part 1.2 of the CYFA – and especially from s.10(1) which provides that “For the purposes of [the CYFA] the best interests of the child must always be paramount’ – that contact is primarily **the** right of the child. The result is that the rights of the child in relation to contact and everything else trump the corresponding rights of the parent or any other adult.

### **4.5.4 Terms used in the Family Law Act**

Prior to the Family Law Reform Act 1995 (Cth) the terms "custody", "guardianship" & "access" were central to orders made by the Family Court of Australia. That Act, which came into force on 11/06/1996, amended significant sections of the Family Law Act 1975 (Cth) relating to children. The changes included removal of the old terms and introduction of the concepts of "parental responsibility", “residence”, “contact” and “specific issues orders”. By further amendments made by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) [No.46 of 2006] as and from 22/05/2006 “residence” is now termed “live with” and “contact” is now termed “spend time with”.

These changes were designed to recognise the desirability of continuing joint responsibility for and co-operation in parenting even though a marriage or relationship had broken down. They were prompted by the belief of the government of the day that the old concepts were a source of many of the ongoing difficulties between separated parents as they foster a notion of 'property' in children. The new terminology is not entirely interchangeable with the old: for instance parental responsibility is not exactly the same as guardianship, though they share some common features.

## **4.6 Protective intervention reports [previously termed “Notifications”]**

Most protection applications and breach notices in the Family Division of the Children's Court are initiated by the Department as a consequence of a report received by it of suspected child abuse. Under the CYPA these were termed “notifications”. Under the CYFA they are termed “protective intervention reports”. Save for the change in terminology, the provisions in ss.182‑184, 186, 189-191 & 204-209 of the CYFA are in substantially the same terms as their predecessors in ss.64, 65(2) & 66-67 of the CYPA.

### **4.6.1 Anonymity of protective intervention reporter [notifier]**

A reporter is anonymous. Evidence that identifies the person who made a report as the reporter, or is likely to lead to the identification of that person as the reporter, is only admissible in any legal proceeding if the court or tribunal grants leave for the evidence to be given or if the reporter consents in writing to the admission of that evidence: s.190(2) of the CYFA. Such leave is very rarely granted and may only be granted under s.190(4) if-

(a) in the case of a proceeding in a court or VCAT, the court or tribunal is satisfied that it is necessary for the evidence to be given to ensure the safety and well being of the child;

(b) in any other case, the court or tribunal is satisfied that the interests of justice require the evidence to be given.

### **4.6.2 Mandatory protective intervention report**

A professional person referred to in s.182 of the CYFA who, in the course of practising his or her profession or carrying out the duties of his or her office, position or employment, forms the belief on reasonable grounds that a child is in need of protection from either physical or sexual abuse is required by s.184(1), under pain of a penalty of 10 penalty units, to report to the Secretary that belief and the reasonable grounds for it as soon as practicable–

(a) after forming the belief; and

(b) after each occasion on which he or she becomes aware of any further reasonable grounds for the belief.

The professionals referred to in s.182 are set out in the following table:

|  |  |
| --- | --- |
| **CYFA** | **PROFESSIONAL PERSON** |
| s.182(1)(a) | a registered medical practitioner |
| s.182(1)(b) | a nurse |
| s.182(1)(ba) | a midwife |
| s.182(1)(c) | a person who is registered as a teacher or an early childhood teacher under the *Education and Training Reform Act 2006* or has been granted permission to teach under that Act |
| s.182(1)(d) | the principal of a Government school or a non-Government school within the meaning of the *Education and Training Reform Act 2006* |
| s.182(1)(e) | a police officer |
| s.182(1)(ea) | a person in religious ministry |
| s.182(1)(f) | the proprietor of, or a person with a post-secondary qualification in the care, education or minding of children who is employed by a children’s service to which the *Children’s Services Act 1996* applies or a person who is a nominee within the meaning of that Act for the children’s service |
| s.182(1)(fa) | the approved provider or nominated supervisor of, or a person with a post-secondary qualification in the care, education or minding of children who is employed or engaged by an education and care service within the meaning of the *Education and Care Services National Law (Victoria)* |
| s.182(1)(i) | a registered psychologist |
| s.182(1)(j) | a youth justice officer |
| s.182(1)(k) | a youth parole officer |
| s.182(1)(l) | a member of a prescribed class of persons: by operation of paragraph 13A of the *Children, Youth and Families Regulations 2017* these classes are:   * 1. out of home care workers;   2. school counsellors;   3. youth justice custodial workers. |

Additional professionals are referred to in s.182(1)(g) & 182(1)(h) but if these persons do not fall into any of the above categories they are only mandatory reporters on and from a date which the writer believes has not yet been prescribed:

|  |  |
| --- | --- |
| s.182(1)(g) | a person with a post-secondary qualification in youth, social or welfare work who works in the health, education or community or welfare services field and who is not referred to in s.182(1)(h) |
| s.182(1)(h) | A person employed under Part 3 of the *Public Administration Act 2004* to perform the duties of a youth and child welfare worker |

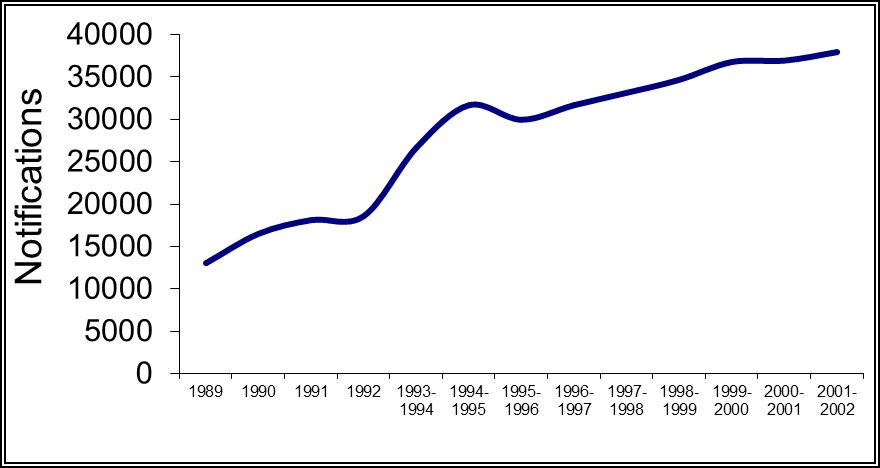
For further information see <https://providers.dffh.vic.gov.au/mandatory-reporting>. This document also contains links to the following DFFH fact sheets which provide detailed information to assist professional groups to comply with mandatory reporting requirements:

* [generic fact sheet](https://providers.dffh.vic.gov.au/mandatory-reporting-child-protection-victoria-generic-factsheet)
* [early childhood fact sheet](https://providers.dffh.vic.gov.au/mandatory-reporting-child-protection-victoria-early-childhood-factsheet)
* [religious ministry fact sheet](https://providers.dffh.vic.gov.au/mandatory-reporting-child-protection-victoria-people-religious-ministry-factsheet)
* [registered psychologists](https://providers.dffh.vic.gov.au/mandatory-reporting-child-protection-victoria-registered-psychologists-factsheet)
* [out of home care workers fact sheet](https://providers.dffh.vic.gov.au/mandatory-reporting-child-protection-victoria-out-home-care-workers-factsheet)
* [school counsellors fact sheet](https://providers.dffh.vic.gov.au/mandatory-reporting-child-protection-victoria-school-counsellors-fact-sheet)
* [youth justice workers](https://providers.dffh.vic.gov.au/mandatory-reporting-child-protection-victoria-youth-justice-workers-factsheet)
* [frequently asked questions](https://providers.dffh.vic.gov.au/mandatory-reporting-child-protection-victoria-frequently-asked-questions).

### **4.6.3 Child protection report statistics (Victoria & Australia) – 1989 to 2023**

### **VICTORIA**

The number of notifications to Victoria's Child Protection Service increased substantially in the 1990s, as illustrated by the following graph provided by Mr Peter Green, Manager DOHS Child Protection & Care in a paper entitled "Towards Better Policing Responses in Child Protection" at XVI World Congress of the International Association of Youth and Family Judges and Magistrates in October 2002. In the 2000s the numbers of notifications were relatively stable although the proportion substantiated fell slightly.



March 1992: Phase out of Police/Child protection Dual Track System

November 1993: Doctors, Police and Nurses mandated to report physical and sexual abuse

July 1994:

Teachers Mandated to report physical and sexual abuse

Some characteristics of Victorian notifications in 2002 were summarised by Mr Green as follows:

* very young children are over represented
* key parental characteristics of investigated families: family violence, alcohol abuse, substance abuse, psychiatric, intellectual and physical disability
* 45% of families investigated are sole parent families (compared to 20% in the general population)
* 77% of families investigated are low income
* 52% of parents have experienced family violence
* 33% of parents investigated have substance abuse problems
* 31% of parents investigated have alcohol abuse problems
* 19% of parents investigated have a psychiatric disability
* the proportion of parents with one or more of these characteristics has increased from 40% to more than 70%, the proportion with 2 or more has increased from 9% to 44%.

The following chart shows child protection notifications by notification sources in Victoria in 1999-2000:



The following table is compiled from “Child protection Australia” publications in the Child Welfare Series published by the Australian Institute of Health and Welfare, Canberra.

|  |  |  |  |
| --- | --- | --- | --- |
| **ORIGIN (IN % TERMS) OF INVESTIGATED VICTORIAN CHILD PROTECTION REPORTS** | | | |
| **SOURCE OF REPORT** | **2007/2008** | **2008/2009** | **2009/2010** |
| Police | 24.7 | 24.8 | 31.0 |
| School personnel | 11.8 | 13.9 | 13.3 |
| Hospital/health centre | 7.8 | 6.9 | 6.1 |
| Parent/guardian | 7.2 | 6.4 | 6.2 |
| Non-government organization | 10.6 | 9.4 | 8.9 |
| Sibling/other relative | 8.3 | 7.3 | 6.6 |
| Anonymous | 0.0 | 0.0 | 0.0 |
| Friend/neighbour | 6.1 | 5.5 | 4.7 |
| Social worker | 0.2 | 0.4 | 0.2 |
| Medical practitioner | 3.2 | 3.5 | 3.4 |
| Departmental officer | 0.1 | 0.3 | 0.2 |
| Other health personnel | 6.4 | 6.9 | 6.0 |
| Childcare personnel | 0.0 | 0.0 | 0.0 |
| Subject child | 0.0 | 0.0 | 0.0 |
| Other | 13.6 | 14.6 | 13.5 |
| **TOTAL** | **100.0%** | **100%** | **100.0%** |

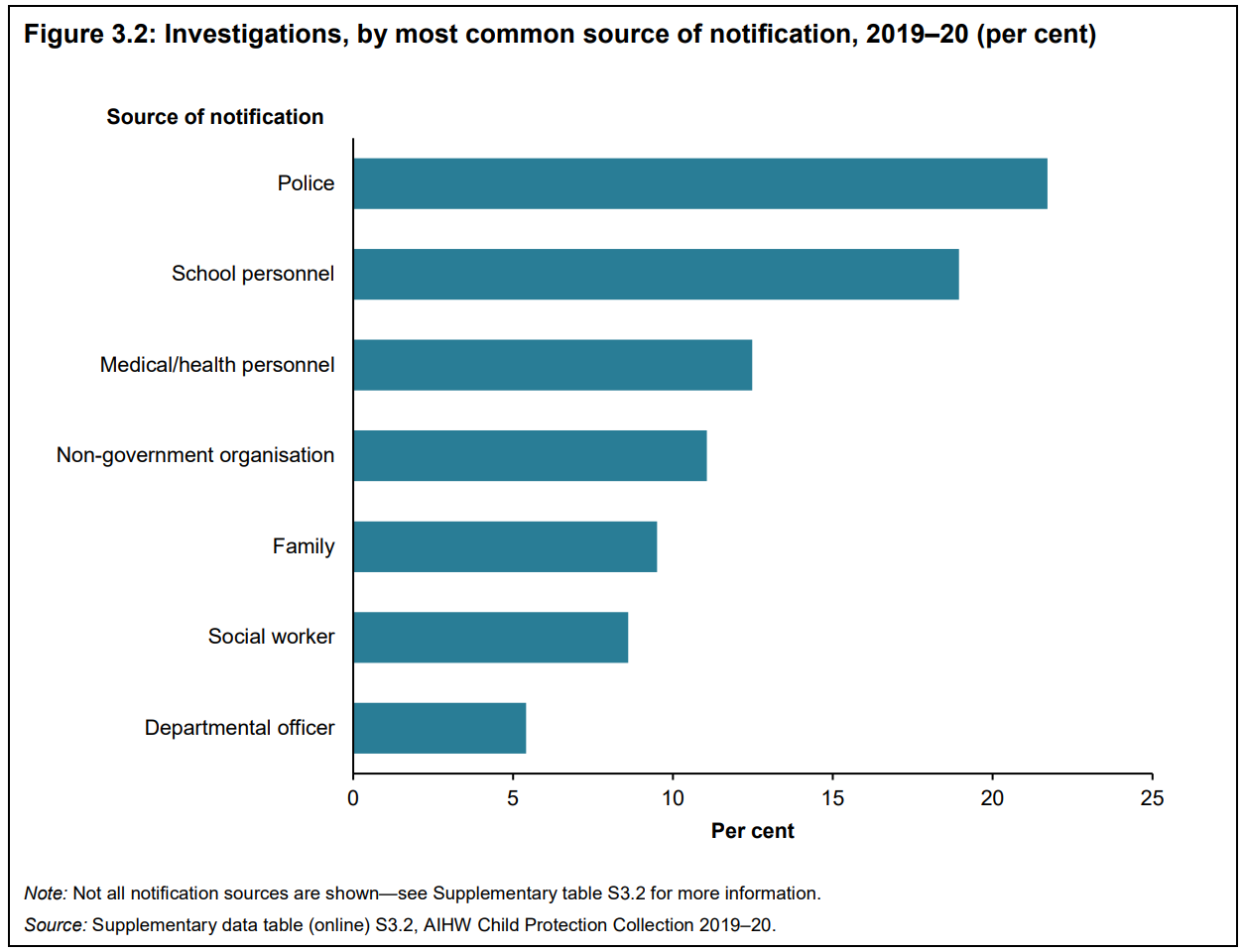
The following snapshots show that the number of Victorian child protection reports continue to grow year after year and of the Victorian child protection reports investigated by DFFH between a half and two thirds were substantiated in the relevant years.

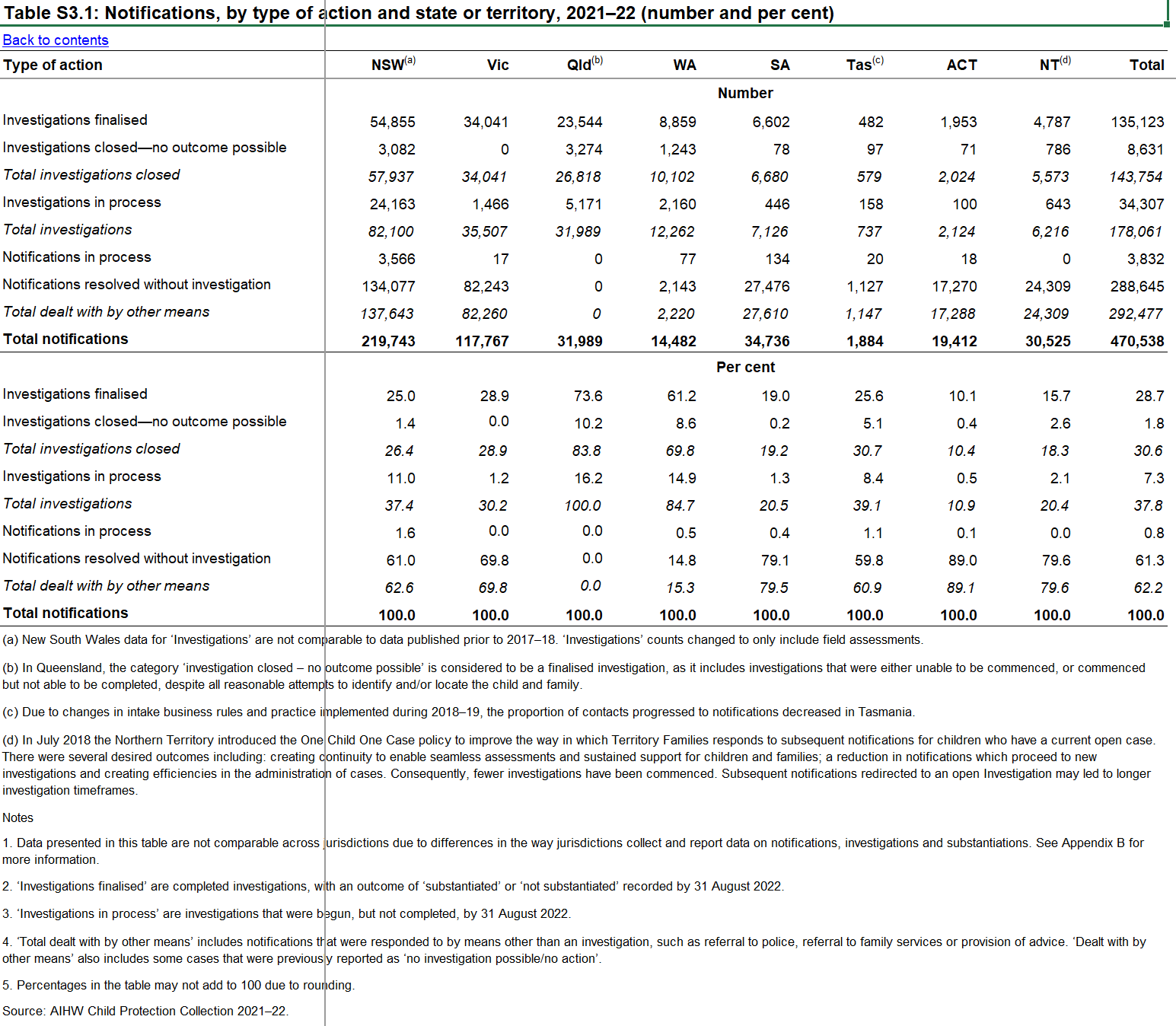
|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **VICTORIAN NOTIFICATIONS/REPORTS** | | | | |
| **YEAR** | **TOTAL NUMBER** | **NUMBER INVESTIGATED** | **NUMBER SUBSTANTIATED** | **NUMBER OF PROTECTION APPLIC’NS** |
| 1997/1998 | 33,164 | 14,682 | 7,412 | 2,135 |
| 2004/2005 | 37,523 | n/a | 7,398 | 2,586 |
| 2005/2006 | 37,987 | n/a | 7,563 | 2,916 |
| 2006/2007 | 38,675 | 10,537 | 6,828 | 3,101 |
| 2007/2008 | 41,607 | 10,080 | 6,365 | 3,353 |
| 2008/2009 | 42,851 | 10,300 | 6,344 | 3,048 |
| 2009/2010 | 48,369 | 12,174 | 6,603 | 3,046 |
| 2010/2011 | 55,718 | 13,941 | 7,643 | 3,270 |
| 2011/2012 | 63,830 | 16,072 | 9,075 | 3,920 |
| 2012/2013 | 73,265 | 17,476 | 10,489 | 3,804 |
| 2013/2014 | 82,056 | 19,206 | 11,395 | 4,290 |
|  |  |  |  |  |
| 2019/2020 | 121,739 | 33,783 | 16,714  [2,341 indigenous] | 5,881 |
| 2020/2021 | 121,715 | 33,320 | 16,830 | 4,723 |
| 2021/2022 | 118,096 | 35,518 | 16,066 | 3,935 |
| 2022/2023 |  |  |  | 3,874 |

### 

### **AUSTRALIA**

As in Victoria, the most common source of child protection reports for finalised investigations throughout Australia was police. In 2009/2010 the national average was 26%. Also as in Victoria, the second most common source of investigated child protection reports was school personnel. In 2009/2010 the national average was 20%, a significantly higher figure than in Victoria. To some extent, this may reflect differences across the states and territories in mandatory reporting requirements. The first chart below shows the most common source of child protection reports across Australia in 2019/2020. The second shows a breakdown of notifications, by type of action and state/territory in 2021/2022.

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## **4.7 Representation of children in the Family Division of the Court**

**"Lawyers, I suppose, were children once."**

Inscription upon the statue of a child in the Inner Temple Garden in London

See also **6.10 Representation of children in intervention order proceedings**.

### **4.7.1 Obligation to afford child a fair hearing**

In *DOHS v Sanding* [2011] VSC 42 Bell J stressed the importance of affording a child a fair hearing in a protection proceeding and of a child being heard in matters affecting him or her.

At [209] his Honour said:

“It is unquestionably important for the voice of a child to be heard in matters affecting them. As I have said, children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should therefore be obtained and given proper consideration. The *Children, Youth and Families Act* contains specific mandatory provisions giving effect to those principles, reflecting fundamental values which are expressed in art.12 of the *Convention on the Rights of the Child*:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or any appropriate body, in a manner consistent with the procedural rules of national law.”

It does not necessarily follow from this that a child will invariably be denied a fair hearing if not legally represented or if not present in Court. The underlying facts in *Sanding* provide a graphic illustration of this where children aged 9 & 7 – who would under the legislation then in force have been regarded as mature enough to give instructions – were neither represented nor present in the impugned proceedings yet the proceeding was held to be fair to them. At [211] Bell J said:

“[W]hat will be required to afford a fair hearing to a child in a protection proceeding will depend on the capacity of the child, the nature of the proceeding, the issues at stake and the circumstances of the case. No particular means of affording a fair hearing are stipulated. As a child may not be mature enough to participate in the proceeding, or may be harmed by that participation, a fair hearing may not require the physical presence of a child in court. It may be possible to obtain the views of the child by other means.”

At [212] his Honour said that the children’s “right to a fair hearing would ordinarily have required the magistrate to hear and consider what they had to say. But these were not ordinary circumstances.” At [214] his Honour explained why:

“In making the revocation and interim accommodation orders, the magistrate knew the court was acting consistently with the wishes of these children. In that practical sense, their views were heard and considered, as required by their right to a fair hearing. Delay would have been contrary to their best interests as children. Therefore his Honour did not act incompatibly with that right by revoking the custody to Secretary orders and returning them to their grandmother on an interim basis without hearing from them personally at the hearing.”

### **4.7.2 Models of child representation**

In *BE v LH & MH* [Children's Court of Victoria, unreported, 04/06/2000] the primary issue for determination was whether or not LH who was aged 6 years 5 months and MH who was aged 5 years 2 months should be represented by a legal practitioner in the contested hearing of a protection application under the CYPA. Mr Power, Magistrate, held that they should not. In the course of his judgment (at pp.5-6) Mr Power referred to six possible models of child representation-

"There are 6 models of child representation which can be distilled from various jurisdictions and from various writings, including an Issues Paper No.18 entitled “*Speaking for ourselves: children and the legal process*” which the Australian Law Reform Commission put out prior to the completion of its 1997 report-

1. The first is **‘the non-representation model’**: in Queensland child protection matters children are rarely represented at all. {ALRC Report #84, [13.30] p.252}
2. The second is **‘the traditional model’**: the advocate whose role is to argue a case strictly upon the child’s instructions. {ALRC Issues Paper #18, [3.12] p.18}
3. The third is **‘the best interests model’**: the advocate who presents and argues his or her own professional view as to the child’s best interests, even if this is inconsistent with the child’s expressed wishes on the issue. {ALRC Issues Paper #18, p.19}
4. The fourth is **‘the counsel assisting model’**: the advocate as objective investigator assisting decision-makers to reach a fully informed assessment of the child’s needs and how those needs can best be met. {ALRC Issues Paper #18, p.19}
5. The fifth is **‘the comforter model’**: the advocate as professional companion for the child, explaining the process to the child and answering questions. {ALRC Issues Paper #18, p.19}
6. The sixth is **‘the Tasmanian model’**, a hybrid model: An example is to be found in the *Children, Young Persons and their Families Bill* 1997 (Tas.) which provides that all children the subject of a care and protection application should be represented unless the child has made an informed decision not to be represented. The representative is to take instructions from the child and act on those instructions unless the representative considers the child unable or unwilling to give instructions. In those cases, the representative will represent the child’s best interests, which are to be assessed by a social scientist. {ALRC Report #84, [13.31] pp.252-3}"

A clinical psychologist from the Children's Court Clinic had seen LH & MH for 1½ hours to assess their capacity to give instructions to a lawyer and to ascertain their wishes. On the basis of her evidence Mr Power found (at p.7) that "neither LH nor MH is mature enough to give instructions in these legal proceedings. That is not because of any delay in their cognitive development but is primarily because of their emotional immaturity." Since the CYPA has adopted model 2, the traditional model, and since LH & MH were not mature enough to give instructions, there was no basis for them to be legally represented.

### **4.7.3 Child usually represented if aged 10 years or more**

There was no authority at common law for a child to be legally represented in non-criminal proceedings in the absence of a parental appointment of a solicitor or a court appointment of a guardian ad litem. In *J v Lieschke* (1987) 162 CLR 447 at 456 Brennan J explained:

“Although it is often undesirable for the appointment of a solicitor for a child to be left solely to the parents or other guardians – especially when the fitness of the parents or guardians to exercise their custodial authority is in issue – it is difficult to perceive the source of legal authority for a solicitor to represent a child in non-criminal proceedings when no order has been made by a court of competent jurisdiction appointing some other person to give the necessary instructions.”

Both the CYFA and its predecessor CYPA change the common law position. Section 525(1) of the CYFA provides that, subject to s.524, a child aged 10 years or more must be legally represented in the following proceedings in the Family Division-

(a) application for IAO;

(b) protection application;

(c) irreconcilable difference application;

(d) application for a temporary assessment order (unless the Court grants leave for the application to proceed ex parte);

(e) application for a therapeutic treatment order or therapeutic treatment (placement) order;

(ea) application for a care by Secretary order;

(eb) application for a long-term care order;

(f) application for a permanent care order;

(g) application for variation of an IAO;

(h) application for variation or revocation of a temporary assessment order, a therapeutic treatment order or therapeutic treatment (placement) order, a family preservation order, a family reunification order or a permanent care order;

(i) application in respect of breach of an IAO or a family preservation order;

(j) application for extension of a family preservation order, a family reunification order or a care by Secretary order;

(k) application for revocation of a care by Secretary order or a long-term care order;

(l) application for an order regarding the exercise of any right, power or duty vested in a person with joint parental responsibility for a child;

(m) application for an order transferring a child protection order within the meaning of Schedule 1 to a participating State;

(n) application for an order transferring a child protection proceeding within the meaning of Schedule 1 to the Children’s Court in a participating State;

(o) application for the revocation of the registration of a document filed under clause 19 of Schedule 1.

This list includes nearly all of the proceedings in the Family Division.

Section 524(8) prohibits a parent from representing a child in the Family Division but permits the Court to grant leave to a non-lawyer, other than a parent, to represent the child except in cases where legal representation is obtained pursuant to s.524(4).

Section 524(1)(a) empowers – but does not require – the Court to adjourn the hearing of any proceeding in the Family Division of the Court at any stage to enable a child aged 10 years or more to obtain legal representation. However, the writer considers this must be read subject to the mandatory representation provisions in s.525(1). Section 524(4A) permits the Court to resume a hearing adjourned to enable a child to obtain legal representation whether or not the child has obtained legal representation.

Section 524(1A) of the CYFA provides that if a child aged 10 years or more is not legally represented in any of the above-listed proceedings, the Court must adjourn the hearing to enable the child to obtain legal representation. However, that obligation does not apply to:

* cases falling within s.216, i.e. where, upon an application for extension of a custody or guardianship to Secretary order, the Court is satisfied that the child has agreed on the terms of the order and that the making of the order is in the best interests of the child;
* cases where the Court has granted leave under s.524(8) for the child to be represented by a non-lawyer; and
* cases where the Court has determined pursuant to s.524(1B) that a child aged 10 years or more is not mature enough to give instructions to a legal practitioner, considering-

1. the child’s ability to form and communicate the child’s own views; and
2. the child’s ability to give instructions in relation to the primary issues in dispute; and
3. any other matter the Court considers relevant.

A representative for a child – other than a legal representative appointed under s.524(4) [as to which see **section 4.7.4** below] – is required by ss.524(9) & 524(10) to act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child. The CYFA has thus adopted model 2 – ‘**the traditional model**’ – as its primary model of child representation, requiring the child’s advocate to argue a case strictly upon the child’s instructions whether or not he or she believes that those instructions are in the best interests of the child.

### **4.7.4 Representation of child under 10 or not mature enough to give instructions**

Prior to 27/03/2013 ss.524(1)(a) & 524(2) of the CYFA had required the Court to adjourn the hearing of any of the Family Division proceedings listed in s.525(1) to enable a child who, in the opinion of the Court, was “mature enough to give instructions” to obtain legal representation. There was no “cut-off” age specified. The legislation referred to maturity rather than chronological age: see *A & B v Children’s Court of Victoria* [2012] VSC 589, especially at [88]-[89] & [100]-[101]. On general advice from the Children's Court Clinic, the cut-off point below which a child was normally regarded by the Court as not mature enough to give instructions was the child's 7th birthday. Notwithstanding-

* the objectives of the CYFA and its predecessor “to enhance the rights of children, young people and their families in their relationships with the court system" [see e.g. CYPA Second Reading Speech, 08/12/1988, p.1150],
* art.12 of the *Convention on the Rights of the Child*,
* the recommendations by the Victorian Law Reform Commission in June 2010; and
* the recommendations by the “Cummins Inquiry” in January 2012-

the amendments made to ss.524 & 525 as and from 27/03/2013 have resulted in children aged under 10 not being entitled to legal representation in any Family Division proceedings in the absence of exceptional circumstances. This is a substantial reduction of the previous statutory rights of children aged 7, 8 & 9.

Since 27/03/2013 s.524(4) applies in exceptional circumstances if the Court determines that it is in the best interests of a child-

* aged under 10 years; or
* aged 10 years or more whom the Court determines under s.524(1B) is not mature enough to give instructions-

to be legally represented in a proceeding in the Family Division. In those circumstances s.524(4) empowers – but does not require – the Court to adjourn the hearing of the proceeding to enable legal representation to be obtained for the child. In the writer’s view, ss.524(1)(a), 524(1A), 524(1B) & 524(4) – when read in combination – now provide a non‑rebuttable statutory presumption that a child under 10 years of age does not have the capacity to give instructions to a legal practitioner.

A Best Interests Lawyer [BIL] appointed under s.524(4) is required by s.524(11)-

(a) to act in accordance with what he or she believes to be in the best interests of the child; and

(b) to communicate to the Court, to the extent to which it is practicable to do so, the instructions given or wishes expressed by the child.

The CYFA has thus adopted model 3 – ‘**the best interests model**’ – as its model of child representation in those limited cases where a legal representative has been appointed under s.524(4). The Court’s computer system indicates that the numbers of BILs appointed are as follows. However, these should be regarded as minimum figures since they do not include any cases for which the BIL order was included on minutes in free-text as an “other order”.

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **2014/15** | **2015/16** | **2016/17** | **2017/18** | **2018/19** | **2019/20** | **2020/21** | **2021/22** |
| **147** | **261** | **291** | **418** | **383** | **349** | **403** | **394** |

It is the writer’s view that the role of an BIL appointed to represent a child under s.524(4) CYFA is broader than that of a traditional *amicus curiae* (literally ‘a friend of the court’) at common law. In relation to the latter, in *JL v Mental Health Tribunal* [2021] VSC 868 the Court had given leave to the Secretary of the Department of Health to appear as amicus curiae to ensure that there was a contradictor. The patient JL – whose compulsory treatment order Ginnane J held to be invalid – had challenged the participation of the Secretary and submitted that the Secretary had acted in a manner inconsistent with the role of an amicus curiae. His Honour rejected JL’s assertion, holding at [32]: “I do not consider that the Secretary’s submissions exceeded the role of providing assistance to the Court.” At [28]‑[31] his Honour said:

[28] “[T]he Court has a discretion whether to allow a person to appear as amicus curiae. The functions of an amicus curiae are more constrained than those of either contradictors or interveners. As Wilcox J stated in *Bropho v Tickner* (1993) 40 FCR 165, 172-3 the amicus curiae’s role is usually ‘confined to assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked.’

[29] The principal role of an amicus curiae is to provide assistance to the Court as Brennan CJ explained in *Levy v The State of Victoria* (1997) 189 CLR 579, 604‑5 (citations omitted):

‘The hearing of an amicus curiae is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted. In *Kruger v The Commonwealth*, speaking for the Court, I said in refusing counsel's application to appear for a person as amicus curiae:

As to his application to be heard as amicus curiae, he fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. The Court must be cautious in considering applications to be heard by persons who would be amicus curiae lest the efficient operation of the Court be prejudiced. Where the Court has parties before it who are willing and able to provide adequate assistance to the Court it is inappropriate to grant the application.

It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an amicus who is willing to offer assistance. All that can be said is that an amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.’

[30] In assisting the Court, an amicus curiae may offer different constructions of the law to those advanced by some or all of the parties. In doing so, the amicus is acting within their proper role, if, as in this case, they are providing assistance to the Court. JL noted that the Secretary submitted that the proceeding should be dismissed, but that was the logical outcome of the interpretation of the Act which the Secretary advanced to assist the Court.

[31] The Secretary did not seek to tender evidence, but made submissions related to the construction and application of the law and the interpretation and operation of the Act. These were important issues to be properly resolved that otherwise would only have been addressed by JL. The Secretary’s submissions assisted the Court.”

While the BIL’s principal role remains to provide assistance to the Court, in doing so the BIL’s statutory duty under s.524(11) requires the BIL to act in what he or she believes to be the best interests of the child and to communicate to the Court, as far as practicable, any instructions or wishes of the child. Accordingly the writer believes that a BIL’s role is broader than that of a common law *amicus curiae* and hence it is entirely appropriate for an BIL to engage in fact finding – for example by interviewing the child and/or relevant adults and/or by visiting the child at the child’s residence – if the BIL believes on reasonable grounds that to do so is in the best interests of the child.

### **4.7.5 Representing more than one child in a proceeding**

Section 524(5) of the CYFA permits more than one child in the same proceeding to be represented by the same legal practitioner with the leave of the Court. Section 524(6) permits the Court to grant leave only if satisfied that no conflict of interest will arise.

In *A & B v Children’s Court of Victoria* [2012] VSC 589 the presiding magistrate had refused to grant leave to two sisters aged 11 and 9 to be represented by the same legal practitioner. The same legal representative had represented the girls over the preceding five months on five or six occasions. Garde J held that the magistrate had made a jurisdictional error by refusing leave for the children to be represented by the same legal practitioner without assessing whether a conflict of interest existed pursuant to s.524(6). At [130] Garde J said:

“A conflict of interest does not exist simply by virtue of clients ‘having different issues’. A lawyer will not have a conflict of interest in acting for two clients in the same proceeding unless the interests of each client genuinely come into conflict or can reasonably be anticipated to come into conflict, so that the independent judgment of the solicitor in relation to one client is compromised by an obligation in relation to a second client.”

In enunciating this test, his Honour referred to the cases of *Bolkiah v KPMG* [1999] 2 AC 222; *Giannarelli v Wraith* (1988) 165 CLR 543 at [555]-[556] and *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394, 398 per Batt JA. His Honour also noted that:

“In *Kallinicos v Hunt* [2005] NSWSC 1181 at [76], the test for conflict of interest (to ground the Court’s inherent jurisdiction to restrain solicitors from acting in a particular case) was ‘whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the integrity of the judicial process and the due administration of justice, including the appearance of justice’.”

### **4.7.6 Child representation in Children's Court and Family Court compared**

Save for those limited cases where a legal representative for a child has been appointed under s.524(4) of the CYFA, the Victorian legislature has adopted model 2 – '**the traditional model'** – for child representation, a model which requires the advocate to argue a case strictly upon the child's instructions {ALRC Issues Paper #18, [3.12] p.18}.

This is the converse of the situation in the Family Court of Australia and the Federal Magistrates’ Court where ‘separate’ child representation under ss.68L & 68LA of the FLA is based on model 3, **'the best interests model'**, a model which requires the advocate to present and argue his or her own professional view as to the child's best interests, even if this is inconsistent with the child's expressed wishes on the issue {ALRC Issues Paper #18, p.19}. In that model the separate representative "is not bound to make submissions to the court about the instructions of a child as to its wishes or otherwise. She or he…should act in an independent and unfettered way in the best interests of the child." See *Bennett* (1991) FLC-92-191. See also *Re K* (1994) 17 Fam LR 537 for guidelines as to when a separate representative should be appointed in proceedings in the Family Court.

Guidelines for child legal representatives in the Family Division of the Children’s Court are contained in the linked Victoria Legal Aid publication “[Representing children in child protection proceedings – A guide for direct instructions and best interests lawyers](https://childrenscourt.vic.gov.au/sites/default/files/2020-11/vla-representing-children-in-child-protection-proceedings-guide.pdf)” (March 2019). In a foreword to the publication Liana Buchanan, Principal Commissioner for Children and Young People, said:

“In my work, I hear regularly from children and young people who have experienced the child protection legal system. I hear of positive experiences where lawyers have taken the time to listen to and engage children and young people in a way that supports their right to effective and meaningful participation.

Too often, though, I hear children and young people describe their experiences of the system in negative terms, as one designed for, and run by, adults. These children and young people, who have often endured abuse and/or neglect, describe the legal process as confusing, disempowering and at times, dehumanising, one where they feel reduced to the sum of protective issues used to describe them.

As the Convention on the Rights of the Child makes clear, children and young people have the right to participate in decisions affecting their lives. Lawyers in child protection proceedings play an essential role in supporting that participation at every stage of the legal process. Participation does not begin and end at the point of taking instructions – it is an ongoing and nuanced dialogue.

Participation means lawyers giving children and young people the information they need to be able to participate, and flexible options about how they want their voice and concerns to be heard.

When deciding what is in children’s best interests, children’s participation is inseparable from their protection.

For this reason, I am very pleased to see Child Participation Principles which set a high standard included in the guide, and I hope lawyers will use these principles as a platform for their professional work with children and young people.

This guide gives practical guidance on how to ensure meaningful participation of children in child protection proceedings. It fulfils a clear need, and I encourage all lawyers who work with children and young people to make this resource part of their everyday work practice.”

In *A & B v Children’s Court of Victoria* [2012] VSC 589 the plaintiffs were two sisters aged 11 & 9 who were the subject of protection applications. A had been physically assaulted by her mother. B had witnessed the assault. Both girls had given consistent instructions that they wanted absolutely no contact with their mother and for the next year they wanted to continue living with their aunt with whom they had been living since the protection applications were taken out. One of the issues in the case involved sexual abuse allegations made by the mother against an uncle C. No instructions had been taken from either child about those allegations because they had been judged to be too young to be informed of them. The presiding magistrate had ordered – under a previous version of ss.524(1) & 524(4) – that A & B each be represented on the “best interests” model, not on the “instructions” model. Garde J granted an application by A & B for an order in the nature of certiorari quashing the magistrate’s order and upholding the plaintiffs’ submission that the children be represented on the “instructions” model under s.524(2) of the CYFA [as it then was]. After tracing at [41]-[62] the legislative history of the legal representation of children in Victorian child protection proceedings and referring at [64] to the history of best interests representation in Commonwealth legislation in *RCB v Forrest* [2012] HCA 47 at [33]-[35], Garde J at [97] & [99] strongly favoured ‘**the instructions model**’ [model 2]:

“The diminished nature of best interests representation as a form of ensuring that children are heard has been recognized in other jurisdictions. The English Court of Appeal in *Mahon v Mahon* [2005] 3 WLR 460 preferred direct instructions representation over best interests representation in cases where children were articulate or capable of participation in the proceedings…Thorpe LJ, with whom Latham and Wall LJJ agreed, acknowledged the greater appreciation and weight that must now be attached to children’s autonomy and consequential right to meaningfully participate in decisions affecting their lives, stressing that ‘**the right to freedom of expression and participation outweighs the paternalistic judgment of welfare**’ [emphasis mine].”

### **4.7.7 Recommendations by Australian Law Reform Commission**

The joint recommendations of the Australian Law Reform Commission & the Human Rights and Equal Opportunity Commission in ALRC Report No.84, based on the United Nations Convention on the Rights of the Child, would make it mandatory for representatives to act for both verbal and pre-verbal children in child protection cases and would require such representatives to go much further than acting on the basis of the child’s instructions or the child’s wishes. {ALRC Report #84, [13.30] p.273}. For example, in relation to non-verbal children the recommended tasks of such representatives would include-

* investigating all relevant facts, parties and people;
* sub-poenaing all documents;
* retaining experts as needed;
* observing the child in the caretaker’s setting and formulating optional plans;
* challenging the basis for experts and agency conclusions in order to ensure accuracy;
* advocating zealously for the legal rights of the child including safety, visitation and sibling contact; and
* ensuring that all relevant and material facts are put before the Court.

But that is not the present state of the law in relation to child representation in Victoria.

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### **4.7.8 Recommendations by Victorian Law Reform Commission**

The final report of the Victorian Law Reform Commission on “Protection Applications in the Children’s Court” [No.19, 30 June 2010] discusses models of legal representation at pp.317-331. At p.331 the Commission expressed the following view:

* Every child or young person who is a party to a protection application should be separately represented on either a best interests model or instructions model, but two or more siblings may be represented by the same lawyer on a best interests basis.
* Children and young persons should be represented on a best interests model by a lawyer unless the lawyer considers that:
  + a mature child or young person has a desire to participate in proceedings and has the understanding and capacity to direct his or her representation;
  + the child or young person, who has had explained to him or her the duty of a lawyer to directly relay the child or young person’s views to the Court, nevertheless is unwilling to accept representation on a best interests basis.

Where both of these conditions are satisfied, a separate practitioner should be appointed to represent the child or young person on the child or young person’s instructions.

But that is not the present state of the law in relation to child representation in Victoria.

### **4.7.9 Recommendations by the “Cummins Inquiry”**

In January 2012 the Department of Premier and Cabinet published a Report of the “Protecting Victoria’s Vulnerable Children Inquiry” conducted by The Honourable Philip Cummins (Chair), Emeritus Professor Dorothy Scott OAM and Mr Bill Scales AO. The Cummins Inquiry’s Recommendation 53 [Volume 2, paragraph 15.3.1, page 378] states:

“The *Children, Youth and Families Act 2005* should be amended to provide that:

* A child named on a protection application should have the formal status of a party to the proceedings;
* A child who is under 10 years of age is presumed not to be capable of providing instructions unless shown otherwise and a child who is 10 years and over is presumed capable of giving instructions unless shown otherwise;
* A child who is not capable of providing instructions should be represented by an independent lawyer on a ‘best interests’ basis; and
* Other than in exceptional circumstances, a child is not required to attend at any stage of the court process in protection proceedings unless the child has expressed a wish to be present in court and has the capacity to understand the process.”

Its Recommendation 54 [Volume 2, paragraph 15.3.1, page 378] states:

“The Victorian Government should develop guidelines to assist the court, tribunal, or the independent children’s lawyer to determine whether the child is capable of giving direct instructions and to provide criteria by which the presumption of capacity can be rebutted.”

The amendments to ss.524 & 525 of the CYFA which came into operation on 27/03/2013 fly in the face of the central aspects of Recommendation 53, namely that all children in protection proceedings be both parties to the proceeding and be legally represented. They also render Recommendation 54 otiose.

### **4.7.10 Representation of child who is not respondent or applicant under the FVPA**

Section 62(1) of the Family Violence Protection Act 2008 (Vic) (‘the FVPA’) provides that if an affected family member in a proceeding under the FVPA is a child and is not the applicant, the child may have legal representation only if the court, on its own initiative-

(a) considers it appropriate in all the circumstances of the case; and

(b) gives leave for the child to be represented.

Section 62(2) of the FVPA provides that in deciding whether to grant such leave, the court must have regard to-

(a) the desirability of protecting children from unnecessary exposure to the court system; and

(b) the harm that could occur to the child and to family relationships if the child is directly represented in the proceeding.

In relation to the representation of children in applications under the FVPA heard in the Children’s Court, it thus appears that there is-

* a conflict in policy between s.524 of the CYFA and s.62 of the FVPA even though an intervention order proceeding is not one of the proceedings listed in s.525(1) of the CYFA for which it is mandatory that a child be represented; and
* a patent inconsistency where a child is neither the applicant nor the respondent.

To the extent of any inconsistency, it is the writer’s view that s.62, being the later enactment, prevails.

## **4.8 Conduct of proceedings in Family Division**

### **4.8.1 Informal procedure**

In addition to-

* following the procedural guidelines set out in s.522 of the CYFA; and
* giving a plain and simple explanation of and reasons for orders as required by s.527-

a judicial officer hearing a proceeding in the Family Division of the Court is required to conduct the proceeding in an informal manner and without regard to legal forms: ss.215(1)(a) & 215(1)(b) of the CYFA. However, these broad sounding provisions do not authorize a judicial officer to depart from the procedures followed by courts acting judicially. They do not authorize the application of ‘palm tree justice’. See *DOHS v Ms B & Mr G* [2008] VChC 1 at pp.27-28 and see the discussion in **section 3.5.6** of these Research Materials.

As from 01/12/2013 s.215B of the CYFA gives judicial officers much greater power to manage the conduct of child protection proceedings in a less adversarial way. The heading of s.215B is “Management of child protection proceedings” but the section refers to “any proceeding before the Family Division under this Act”. Although the wording of s.215B is ambiguous, the writer has been advised that it was intended to be read within the context of the section heading which restricts its operation to child protection proceedings and that it does not apply to the conduct of intervention order proceedings. How in fact the Court is expected to manage joint child protection and intervention order proceedings is unclear.

Section 215B provides:

“(1) Without limiting Part 1.1B [Recognition principles for Aboriginal children and families] or Part 1.2 [best Interests principles] or s.215(1), in any proceeding before the Family Division under this Act, the Court may-

(a) consider the needs of the child and the impact that the proceeding may have on the child;

(b) conduct proceedings in a manner that promotes cooperative relationships between the parties;

(c) ask any person connected to the proceeding whether that person considers that-

(i) the child has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence within the meaning of the Family Violence Protection Act 2008;

(ii) he or she or any other person connected to the proceeding has been, or is at risk of being subjected to family violence;

1. actively direct, control and manage proceedings;
2. narrow the issues in dispute;
3. determine the order in which the issues are decided;
4. give directions or make orders about the timing of steps that are to be taken in proceedings;
5. in deciding whether a particular step is to be taken, consider whether the likely benefits justify the costs of taking it;
6. make appropriate use of technology, such as videoconferencing;
7. deal with as many aspects of the matter on a single occasion as possible;
8. where possible, deal with the matter without requiring the parties attend Court;
9. do any other thing that the Court thinks fit.”

It is the writer’s view that, broad as they are, ss.215(1)(a), 215(1)(b) & 215B of the CYFA do not generally allow the Court to dispense with the rules of natural justice, as Byrne J made clear in *Van Susteren v Packaje Pty Ltd* [2008] VSC 586 at [5]-[6] in relation to similar provisions regulating the conduct of proceedings in the Small Claims Tribunal:

“It is common ground that the Small Claims Tribunal has a considerable degree of latitude in the conduct of its proceedings. It is required by section 98 of the VCAT Act to proceed with as little formality or technicality as is appropriate, and evidence of an informal nature may be received. Section 102 also provides a broad discretion as to the way the tribunal should be conducted… There is of course an obligation on the Small Claims Tribunal, however informal its procedures may be, to respect the rules of natural justice. Accepting that the rules of natural justice will vary depending upon the nature of the hearing, the fact remains that, if it concerns a crucial matter or a vital issue, then the party should be given the opportunity to know, to test and to challenge evidence which is put against that party.”

See also the detailed discussion of natural justice and procedural fairness in relation to the granting of adjournments by the Victorian Civil and Administrative Tribunal by Warren CJ in *Macdiggers Pty Ltd v Maria Dickinson and Peter Dickinson* [2008] VSC 576 at [23]-[28].

The genesis of s.215B is the Less Adversarial Trial [“LAT”] approach in operation in the Family Court of Australia. In *T v T* [2008] FamCAFC 4; (2008) FLC 93-360; (2008) 38 Fam LR 614 the Full Court of the Family Court of Australia (Bryant CJ, Kay & Thackray JJ) highlighted at [163] the Court’s obligation to accord all of the parties procedural fairness and natural justice notwithstanding the LAT provisions:

“Whatever process for adjudication of cases is adopted by the Court, procedural fairness must be accorded to the parties (*R v Ludeke; Ex parte Customs Officers Association of Australia* (1985) 155 CLR 513; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *J v Leischke* (1987) 162 CLR 447. The process adopted in the LAT, particularly on Day 1, gives no warrant to compromise fairness and the usual requirements must be met. These are that determinations be made impartially, on the basis of all relevant material that the parties were able to put before the trial judge, without any pre-judgment and that the parties were given an adequate opportunity to be heard.”

In *DHHS v Mr & Mrs C* [Children’s Court of Victoria-Power M, 09/07/2018] circumstances arose which required the Court to consider the operation of s.215B in two different contexts. This was a case in which the Magistrates’ Court – on application by a police officer – had made an intervention order excluding the father of 4 children from the family home because the Court was satisfied on an interim basis that he had subjected the mother to family violence in the sense of controlling behaviour. The Department had issued protection applications in relation to each of the children on the grounds in ss.162(1)(c) & 162(1)(e) and based on the same protective concerns. Both applications were listed concurrently for contested hearing in the Children’s Court.

At the commencement of the case, the police prosecutor asked to be excused, saying that he would come back to prosecute the intervention order case after the child protection case was completed. The Court refused to excuse him, noting that-

* s.215B(1)(j) empowered the Court to “deal with as many aspects of the matter on a single occasion as possible”; and
* the IVO and protection proceedings could not sensibly be split because the primary issue raised by DHHS in the protection proceedings was the impact on the children of emotional abuse which it alleged that the father had perpetrated against the mother.

After the case was stood down for a period, the Court ultimately struck out the intervention order application at the request of the police prosecutor.

On the fourth full day of the contested hearing counsel for DHHS – with the consent of the other six counsel – very properly said-

“If the Court had a view at this point in relation to the utility or otherwise of calling any further witnesses, DHHS would be guided by any comments if the Court was minded to make them. The critical question is the return of the father and the Court has the assessments provided by the Children’s Court Clinician in her evidence. If the Court feels that there are vacuums that any of the proposed witnesses could speak to, DHHS can arrange that.”

Given that the Court has an independent responsibility under ss.8(1) & 10 CYFA to ensure that any orders it makes are in the best interests of the subject children, the Court said that the case would be adjourned over the weekend and the Court would provide written reasons detailing his interim view of this case based on the evidence heard up to the point. However, the Court did not seek to bind any of the parties to accept these interim findings and orders. Under the heading “**S.215B CYFA & The Adversarial Process**” the Court said at pp.3-4:

“The common law adversarial system underpins the procedure employed in trial proceedings in the Family Division of the Children’s Court of Victoria. In that system it is the primary responsibility of the parties to determine what witnesses are to be called and how they are to be examined and cross-examined. In many instances over the years it has proved to be an inefficient and wasteful process, not infrequently damaging to family relationships and sometimes to the relationship between family members and the Child Protection Authority. To attempt to ameliorate some of the perceived negatives of the adversarial system, in 2013 Parliament enacted s.215B of the *CYFA*…

It was pursuant to ss.215B(1)(d) & 215B(1)(j) that I directed…that the four IVO proceedings and the child protection proceedings were to be dealt with in the one contest. It was obvious that they had to be, that it would be farcical to deal with the child protection proceedings first and independently of the IVO proceedings, given that the central issue in both proceedings related to allegations of emotional abuse by the father of the mother to which the children were exposed and to related allegations of physical and emotional abuse of their mother by [2 of the children].

Giving the parties primary responsibility for deciding on appropriate witnesses in this simple, single-issue case has led to DHHS producing a witness list containing the names and thumbnail sketches of 19 witnesses, not including the mother and father should they wish to give evidence or call any other witnesses…

Further, while s.215B is easy enough to understand, it is rarely easy to apply. This is because one of the foundations of the adversarial system is the doctrine of procedural fairness. For the same reasons as the Court of Appeal held in *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 at [28]-[29] that s.215(1)(d) of the *CYFA* was subject to a requirement to afford procedural fairness to all parties, it seems probable to me that s.215B must be read subject to that doctrine unless to do so would be contrary to the best interests of the subject child.

I am of the strong view that continuation of this trial – which is in many ways a Trial by Ordeal so far as both parents are concerned – is likely to have a negative impact on the family members and on the relationship between the parties and hence is contra-indicated by ss.215B(1)(a) & 215B(1)(b)… A negative impact on the children’s mother has the risk of being translated into a negative impact on the children as well. In addition, continuation of the trial in my view comes nowhere near justifying the costs which would be incurred by both parents and by the Victorian taxpayer and is therefore contra-indicated by s.215B(1)(h).

Having read the thumbnail sketches provided by DHHS of the rest of the witnesses, I think it is unlikely that any of their evidence would fundamentally change my preliminary view on the central disputed issue of the timing of the father’s return to the family home. However, I cannot be certain of that based just on the synopses of their evidence and – as usual in this Court – there are no witness statements available. Further, while I would prefer not to subject both parents to the stress of giving evidence in these proceedings – which would not be necessary if my preliminary view was accepted by all parties – it does not seem fair to require them and their counsel to make that decision in a vacuum. Although the provisions of paragraphs (a), (b), (d), (f) & (h) of s.215B(1) on their face appear to allow it, I am concerned that for me to state that the rest of the witnesses originally foreshadowed by DHHS need not be called may have the unintended effect of denying procedural fairness to one or more of the parties. So I am taking the unusual step of providing the parties with this document which details my interim view of this case based on the evidence I have heard [to date] and which details the findings and orders that I consider to be in the best interests of each of the children based on that evidence.

I do not seek to bind any of the parties to accept these interim findings and orders. If any of the parties wish to proceed with the contested hearing, the Court will provide the time to do so.”

The case ultimately settled on the basis of the proposed orders contained in the Court’s interim written reasons.

### **4.8.2 Whether an adult party may be represented by a ‘litigation guardian’**

In the Family Division of the Children’s Court-

* a child aged under 10 years; or
* a child aged 10 years or more whom the Court determines is not mature enough to give instructions-

may be legally represented by a best interests lawyer (BIL) if the Court is satisfied there are exceptional circumstances and that it is in the best interests of the child to do so: see **sections 4.7.3 & 4.7.4** above.

However, there is an ongoing issue whether the Children’s Court has power to appoint a litigation guardian to represent an **adult** party in the Family Division who is “under disability”.

The issue is neatly analysed by Siobhan Mansfield in an article entitled “Parents lacking capacity” dated 01/04/2017 and published in the Law Institute of Victoria Journal. Ms Mansfield notes:

“As a court of inferior jurisdiction, the Children’s Court possesses no ‘inherent’ powers from which to make such an order. It possesses some of the ‘implied powers’ that ‘may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent’. A court’s implied powers are derived from the doctrine of abuse of process which, although flexible, seems an unlikely vehicle from which to make such a significant appointment.”

It follows that Ms Mansfield considers – and the writer agrees – that if the Children’s Court has any such power, it must have been expressly conferred. Referring to the Magistrates' Court General Civil Procedure Rules 2010 – which have since been re-enacted to like effect in the Magistrates' Court General Civil Procedure Rules 2020 – Ms Mansfield traces the potential source of such power flowing from these Rules and the CYFA as follows:

“[Rules 15.03(3) & 15.01(b) provide] that if, after a proceeding is commenced, a party to the proceeding becomes a person ‘under disability’, the Court must appoint a litigation guardian. People ‘under disability’ are defined as ‘incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the proceeding’. Section 528(1) of the CYFA provides that the Children’s Court has and may exercise all powers and authorities that the Magistrates’ Court has in relation to matters over which it has jurisdiction. Section 528(2) of the CYFA provides that the Magistrates’ Court Act 1989 (Vic) (MCA) has application in all Children’s Court proceedings (subject to consistency with the CYFA), with two exceptions: s.58 and Part 5 – Civil proceedings.”

Ms Mansfield goes on to describe the two conflicting views as follows:

“The provisions for the appointment of a litigation guardian in the Magistrates’ Court apply to civil proceedings. It has been argued that this puts the appointment of litigation guardians within the exceptions provided in s.528(2) [CYFA]. If this argument is accepted, the Children’s Court has no authority to appoint a litigation guardian pursuant to the general civil procedure rules.

A contrary view argues that as the power to make rules is contained in Part 2 of the MCA, it is not excluded from operation in the Children’s Court. This would enable the Children’s Court to appoint a litigation guardian. The *Charter* and Article 13 of the *Convention on the Rights of Persons with Disabilities* [which states that countries ‘shall ensure effective access to justice for persons with disabilities on an equal basis with others’] serve to strengthen this construction. There have been a small number of appointments made by the Court on the basis of this construction.”

In the writer’s opinion, the better view is that the Children’s Court does **not** have jurisdiction to appoint a litigation guardian to represent an adult party in Family Division proceedings whether they are-

* child protection proceedings in the Family Division as listed in s.515(1) CYFA; or
* intervention order proceedings or vexatious proceedings as listed in s.515(2) CYFA.

His reasons are as follows.

First, the writer notes that the Magistrates' Court General Civil Procedure Rules 2020 provide-

* in Rule 1.01(2) that “The object of these Rules is to remake with amendments the rules of procedure in civil proceedings in the Magistrates’ Court of Victoria”;
* in Rule 1.05(1) that “Subject to this Part and to any…provision in these Rules to the contrary, these Rules apply to every civil proceeding commenced in the [Magistrates’] Court”; and
* in Rule 1.05(2) that “These Rules do not apply to a civil proceeding to which the following Rules of the Magistrates’ Court apply except as those Rules provide-
  + - * 1. the Magistrates’ Court (Family Violence Protection) Rules 2018; and…

1. the Magistrates’ Court (Personal Safety Intervention Order) Rules 2011;…”

Secondly, the writer considers that it is irrelevant that the rule-making power in s.16 of the MCA – which is in Part 2 – is not specifically excluded by s.528(2) CYFA. The Magistrates’ Court civil jurisdiction – enshrined in Part 5 of the MCA – is specifically excluded from the jurisdiction of the Children’s Court. Hence, the Rules of procedure for that jurisdiction in the Magistrates’ Court cannot sensibly have any residual application in the Family Division of the Children’s Court. In short, rules of procedure for a jurisdiction cannot have any application in a court which does not have that jurisdiction.

Thirdly, by operation of Rule 1.05(2), the Magistrates' Court General Civil Procedure Rules 2020 are excluded from application in the Magistrates’ Court in proceedings under the Family Violence Protection Act 2008 and the Personal Safety Intervention Order Act 2010 except as provided by the Rules under either Act. However, there are no provisions in either the Magistrates’ Court (Family Violence Protection) Rules 2018 or the Magistrates’ Court (Personal Safety Intervention Order) Rules 2011 which give the Magistrates’ Court power to order the appointment of a litigation guardian to represent any party in proceedings under either Act. Accordingly, in the writer’s view there is no power in the Magistrates’ Court capable of being used in the Children’s Court pursuant to s.528(1) CYFA to order the appointment of a litigation guardian for an adult party in any proceedings under either Act.

The writer has only conducted one child protection contest in which an adult party – the mother – was represented by a litigation guardian. The case – *Re C Children* [Children’s Court of Victoria-Power M, unreported, 18/07/2013] – involved two children aged 9y11m & 15y8m who were living with their father. Their mother had started to display symptoms of schizophrenia in the last trimester before the birth of the older child and had a history of inpatient admissions. Even if it was authorised by law, a practical difficulty with such an appointment is that the litigation guardian is required to act in the best interests of the adult under disability: see ss.4(2) & 16(1)(f) of the Guardianship and Administration Act 1986. By contrast, in child protection proceedings the Children’s Court has to act on the basis that the best interests of the child are paramount: see ss.8(1) & 10(1) CYFA. This difficulty was ameliorated to some extent in this case because during the hearing of the case the mother had advised the litigation guardian (the OPA) who had been appointed by another magistrate: “Whatever is best for my kids is best for me.” But some tension still remained and from time to time in the 14-day hearing counsel for the OPA found herself on a collision course with DFFH and the BIL for the younger child, having assessed what was in the best interests of the children through a different lens, an assessment which was understandably not as well informed as those of the other parties.

### **4.8.3 Court may inform itself as it thinks fit – Rules of evidence not mandatory**

In the Family Division the Court “may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary”: s.215(1)(d) of the CYFA. There is a similar provision in s.93(3) of the Children's Services Act 1986 (A.C.T.): “The Court is not bound by the rules of evidence and may inform itself in any manner it thinks fit.” The proper operation of such a provision was explained by Higgins J in the Supreme Court of the A.C.T. in *A & B v Director of Family Services* (1996) 20 Fam LR 549 at 553-4-

“[I]t should be recognised that such provisions do not render the rules of evidence irrelevant. They should still be applied unless, for sound reason, their application is dispensed with.

In these proceedings, it seems to have been assumed that the rules of evidence relating to both hearsay and to expert evidence had no application.

The proper approach to the application of the rules of evidence in the face of such a provision was considered by Lockhart J in *Pearce v Button* (1985) 65 ALR 83 at 97; 8 FCR 408 at 422. His Honour said-

‘…a judge should be slow to invoke it [a power to dispense with compliance with rules of evidence] where there is a real dispute about matters which go to the heart of the case.’”

Higgins J went on to discuss in detail the dangers inherent in the reception of hearsay evidence, citing dicta of the High Court in *Bannon v R* (1995) 132 ALR 87; 70 ALJR 25 and *Straker v R* (1977) 15 ALR 103; 51 ALJR 690.

In *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 the Court of Appeal discussed the operation of a similar provision in s.52(1)(c) of the Medical Practice Act 1994 (Vic). In rejecting a submission that the words “may inform itself in any way it thinks fit” should be regarded as redundant but holding that the words were subject to a requirement to accord procedural fairness, Maxwell P said at [28]-[29]-

“The words ‘may inform itself…’ were plainly intended to have work to do: cf. *Project Blue Sky Inc v ABA* (1998) 194 CLR 335, 382 [71] (McHugh, Gummow, Kirby & Hayne JJ). They have a meaning and a purpose quite distinct from the meaning and purpose of the words ‘not bound by the rules of evidence’…For the purposes of ‘determining the matter before it’, the panel is authorised to ‘inform itself in any way it thinks fit’ subject always to the overriding obligation to accord procedural fairness. This conclusion accords with what was said by McInerney J when considering analogous provisions in *Wajnberg v Raynor and Melbourne and Metropolitan Board of Works* [1971] VR 665. As Weinberg JA pointed out in argument, an equivalent power is conferred on the Family Division of the Children’s Court: s.215(1)(d) of the CYFA.”

In the dictionary annexed to the Evidence Act 2008 (Vic), “Victorian court” means-

1. the Supreme Court; or
2. any other Court created by Parliament-

and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

It follows that the Children’s Court is a Victorian court within paragraph (b) of the definition. Section 4 of the Evidence Act 2008 (Vic) provides, *inter alia*-

“(1) This Act applies to all proceedings in a Victorian court, including proceedings that-

(a) relate to bail; or

(b) are interlocutory proceedings or proceedings of a similar kind; or

(c) are heard in chambers; or

(d) subject to subsection (2) relate to sentencing.

(2) If such a proceeding relates to sentencing-

(a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and

(b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters – the direction has effect accordingly.”

However, s.8 of the Evidence Act 2008 (Vic) provides- “This Act does not affect the operation of the provisions of any other Act.” Note 4 to s.4 states: “Provisions in other Victorian Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by s.8 of this Act. These include s.215 of the **Children, Youth and Families Act 2005**.” It follows from all of this that the Evidence Act 2008 does not alter the power of the Family Division of the Children’s Court to “inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary”.

The Less Adversarial Trial [‘LAT’] approach currently in operation in the Family Court of Australia has as one of its cornerstones the amendments introduced in 2006 as Division 12A of Part VII of the Family Law Act 1975 (Cth). One of these amendments is the insertion of s.69ZT which provides that in child-related proceedings:

* certain of the rules of evidence do not apply unless – in exceptional circumstances - the Court decides to the contrary; the generally inapplicable rules include the traditional procedures for giving *viva voce* evidence, rules dealing with documents and hearsay evidence, opinion evidence, evidence of judgments and convictions, tendency and coincidence evidence and evidence of credibility [ss.69ZT(1) & 69ZT(3)]; and
* the Court may give such weight (if any) as it thinks fit to evidence admitted either contrary to or in accord with the rules of evidence [ss.69ZT(2) & 69ZT(4)].

The Family Violence Protection Act 2008 (Vic) came into operation in both the Magistrates’ Court and the Children’s Court on 08/12/2008. Section 65 of that Act provides a broad but qualified dispensation from the rules of evidence:

“(1) Subject to this Act, in a proceeding for a family violence intervention order the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary…

(3) The court may refuse to admit, or may limit the use to be made of, evidence if the court is satisfied-

(a) it is just and equitable to do so; or

(b) the probative value of the evidence is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party or misleading or confusing.”

See also s.47 of the Personal Safety Intervention Orders Act 2010 (Vic) to like effect.

In *H v H* [2008] FMCAfam 884 the Federal Magistrates’ Court held that where family violence is a serious issue in proceedings under the Family Law Act 1975 (Cth) “the Court should be careful in admitting into evidence…only that evidence which each of the parties has had an appropriate opportunity to test”.

### **4.8.4 Impact of the “best interests” principle on the Court’s procedure**

*DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 is in many ways a watershed Supreme Court decision on the relationship between the “best interests” principle, the court’s procedural discretion and the rules of natural justice/procedural fairness. In that case four Aboriginal children aged 9, 7, 4 & 2 had been residing in the care of their maternal grandmother under custody to Secretary orders. At [279] Bell J described “the real risk to the wellbeing of the children” as “the drug-taking activity of their mother and her disturbance of the home of the grandmother in which the family was living”. Nine weeks after the custody to Secretary orders were made by consent, the Department removed the children from the care of their grandmother and placed them separately in out of home care with non-Aboriginal families. No family was available to take the four children together and no Aboriginal family was available to take any of them. Within a week of their separation, the behaviour of the two oldest children substantially regressed. The mother made applications to revoke each of the custody to Secretary orders on the basis that the children would live with her mother and that she would not live in the home. A Children’s Court magistrate conducted a “submissions contest” in which he obtained information, but not *viva voce* evidence, from DOHS’ reports and the legal representatives of DOHS, the grandmother and the mother. He then revoked the custody to Secretary orders and placed the children on interim accommodation orders in the grandmother’s care with various conditions. The Department appealed, submitting that the magistrate should have conducted a formal hearing at which at least some formal *viva voce* evidence was taken. The appeal was dismissed.

This was the first Supreme Court endorsement of which the writer is aware of the approval of a “submissions contest” procedure in a case involving anything other than an interim hearing on a protection application by apprehension. In the writer’s view it extends the procedure approved by the Supreme Court in cases such as *G v H [No 2]* [Supreme Court of Victoria-Beach J, unreported, 10/08/1994], *The Secretary DOHS v R & Anor* [2003] VSC 172 at [11] per Ashley J and *P v RM & Ors* [2004] VSC 14 per Gillard J.

In the course of his extensive judgment, Bell J discussed the impact of the best interests of the child on the court’s procedural discretion, saying *inter alia* at [129]-[130], [135]-[137] & [146]-[147]:

[129] “By the established principles, any statutory exclusion of the rules of natural justice must be by express words or plain intendment: see *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395, per Dixon CJ and Webb J and *Annetts v* McCann (1990) 170 CLR 596, 598 per Mason CJ, Deane & McHugh JJ. There are no such express words and there is no such plain intendment in s 215(1) of the *Children, Youth & Families Act*. Therefore the obligation of the Children’s Court to observe the rules of natural justice has not been overridden.

[130] While a court or tribunal operating under flexible procedural provisions must observe the rules of natural justice, this does not mean that those rules can be used to admit the rules of evidence through a side door or, as Brennan J put it in *Re Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492 to allow the rules of evidence to ‘creep back in through a domestic procedural rule’.  **It is well‑established that the rules of evidence ‘form no part of the rules of natural justice’**: *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456, 488 per Diplock LJ; see also *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, 249 per Starke J and 252 per Evatt J; *Mahon v Air New Zealand* [1984] 1 AC 808, 821; *Hayward v Minister for Immigration and Citizenship* [2009] FCA 1313, [64].  **Certainly the rules of evidence may be valuable and should not be lightly discarded, particularly where there is a serious dispute over a matter which may be of importance to the outcome of the proceeding**: *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, 256 per Evatt J; *Kostas v HIA Insurance Services Pty Ltd* (2010) 84 ALJR 228 [17] per French CJ; *Re Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 493 per Brennan J; *Martin v Medical Complaints Tribunal* (2006) 15 Tas R 413, [14]; *A and B v Director of Family Services*(1996) 20 Fam LR 549, 553; *Pearce v Button* (1985) 8 FCR 408, 422; *Clean Ocean Foundation v Environment Protection Authority* (2003) 20 VAR 227, 235.  But courts or tribunals operating under such provisions are not required to apply court‑like rules or to act on evidence alone: *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, 248 per Starke J and 256 per Evatt J; *Wajnberg v Raynor and Melbourne Metropolitan Board of Works* [1971] VR 665, 678.  The provisions are intended to be ‘facultative, not restrictive’ (*Wecker v Secretary, Department of Education, Science and Training* (2008) 168 FCR 272, [95] per Greenwood J) and are intended to free a court or tribunal ‘from constraints otherwise applicable to courts of law and regarded as in appropriate’: *Minister for Immigration and Multicultural Affairs* v *Eshetu*(1999) 197 CLR 611, [49] per Gleeson CJ and McHugh J. As Davies J said as the president of the federal tribunal in *Re Barbaro and Minister for Immigration and Ethnic Affairs*[(1980) 3 ALD 1, 5], flexible procedural provisions allow ‘the nature of the procedures adopted at the hearing and the nature of the evidence which is received … [to] be adapted to the functions which [the tribunal] performs.’” discretion.”

[135] “What is the relationship between the paramountcy principle, the court’s procedural discretion and the rules of natural justice which apply? The well‑established general principle is that the content of the rules of natural justice must take into account the nature of the jurisdiction being exercised: *Kioa v West* (1985) 159 CLR 550, 615, 633-634. Where the jurisdiction is one in which the interests of the child are paramount, the particular content and application of the rules of natural justice will reflect the nature of that jurisdiction. Likewise, the principle will influence the exercise of the court’s procedural discretion.

[136] Thus, in *J v Leischke* (1987) 162 CLR 447 at 457, it was held by Brennan J (with whom Mason, Wilson, Deane & Dawson JJ agreed) that in ‘some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy of the welfare of the child’, but only ‘so far as necessary to avoid frustration of the purpose for which the jurisdiction is conferred’. That principle was applied in the Family Court of Australia in *Separate Representative v E* (1993) 114 FLR 1 by Nicholson CJ and Fogarty J, who held at 14:

‘In the exercise of its jurisdiction to determine disputes relating to the custody, guardianship or welfare of, or access to a child, the Family Court has obligations to regard the child’s welfare as paramount (s 64(1)(a)), to protect the child from harm (s 64(1)(b)(a)), and to make ‘such order in respect of those matters as it considers proper’ (s 64(1)(c)). The rights of the disputants to natural justice are therefore qualified to the extent that those rights encroach on or are in conflict with these obligations.’

[137] Accordingly, the rules of natural justice do not prevent a court, when exercising a wardship, guardianship, protection or like jurisdiction in the best interests of the child, from exercising its discretion to adopt fair procedures which will suit that purpose.”

[146] “While the natural justice afforded to parties, and the procedures followed by the court, may be influenced by the overriding consideration of the best interests of the child, the parties must still be afforded procedural fairness. So it was that, in *T v T* (2008) 38 Fam LR 614, the Full Court of the Family Court of Australia held that trials conducted under the new less adversarial trial arrangements must conform to that requirement. Similarly, in *Re Timothy* (2010) 43 Fam LR 234 at [32], a magistrate of the Children’s Court of New South Wales was held to have breached the rules of natural justice by not disqualifying herself from making orders when she had followed a procedure, in the best interests of the child, which created a reasonable apprehension of bias.

[147] The principle of the best interests of the child cannot override a legislative prohibition. For example, the principle cannot be employed to make admissible in evidence admissions made in a counselling session which is confidential under a specific legislative provision: *Centacare Central Queensland v G* (1998) 146 FLR 252, 264; approved *Northern Territory v GPAO* (1999) 196 CLR 553, 585 per Gleeson CJ and Gummow J.”

In endorsing the decision of the Children’s Court Magistrate to revoke the custody to Secretary orders without hearing evidence in the traditional way, his Honour concluded at [280]-[283]:

[280] “[T]he information [before the magistrate] was sufficiently reliable and probative to form a proper basis for the magistrate’s decision.

[281] The *Children, Youth and Families Act 2005* requires the court to have regard to the best interests of the child as the paramount consideration. In my view, that consideration not only governs the orders which the court can make in the Family Division. It also governs the procedures which should be followed in protection proceedings in that division, which must also be fair to all of the parties.”

[282] The legislation gives the court a wide discretion as to the procedure which can be adopted in protection proceedings. The court is required to conduct such proceedings in an informal manner and is permitted to inform itself as it sees fit, despite any rules of evidence to the contrary. These procedural powers enable the court, in its discretion, to conduct protection proceedings in a flexible manner, without legal forms and in the best interest of the child. In appropriate cases, including in revocation proceedings, conducting a submissions contest hearing which is fair to all of the parties falls within the zone of that discretion.

[283] The procedural powers of the court are not absolute. The court must observe the rules of natural justice and act compatibly with the human right of children, parents and potentially others to a fair hearing under s.24(1) of the *Charter of Human Rights and Responsibilities Act 2006*. It must respect the important function of the Secretary under the Children, Youth and Families Act, including her role as a protective intervener, and her position as a statutory party. In the present case, adopting the submissions contest procedure was open to the court in the best interests of the children and did not breach the procedural rights of the Secretary or any other party.”

However, in *DOHS v Children’s Court of Victoria & Ors* [2012] VSC 422 a magistrate had varied a custody to Secretary order by adding conditions for contact by a cousin and a grandmother after a submissions hearing. Counsel for DOHS had forcefully opposed this course, noting that she had two witnesses in court who could give relevant evidence. The pressure of other court business did not permit this case to be heard by evidence that day or indeed for some months. In allowing the Department’s application for judicial review, Dixon J distinguished *Sanding’s Case*, holding that the Department had been denied procedural fairness and adding that there “was clearly a significant risk for the child’s welfare through destabilization of his placement with a long term carer through extended [contact with] different family members other than in accordance with a properly considered approach”.

### **4.8.5 Findings on balance of probabilities**

Section 215A of the CYFA – which replaced s.215(1)(c) in 2013 – provides that the “standard of proof of any fact in an application under [the CYFA] in the Family Division is the balance of probabilities.” For a discussion of some of the caselaw on “balance of probabilities” see **subsections 3.5.3.8 & 3.5.6.1**.

Applications under the Family Violence Protection Act 2008 (Vic) and the Personal Safety Intervention Orders Act 2010 (Vic) [excluding contravention applications] are also heard in the Family Division. Although s.215A of the CYFA does not in its terms apply to them, the balance of probabilities test is enshrined in all of the substantive provisions relating to the making or extension of intervention orders: see, for example, ss.53(1)(a), 74(1), 76(1)(b), 77(2) & 106(2) of the FVPA and ss.35(1)(a), 61(1) & 83(2) of the PSIA.

It is said that the purpose of the introduction of s.215A is to remove any suggestion that dicta from *Briginshaw v Briginshaw* (1938) 60 CLR 336 requires a higher standard of proof to be applied in certain child protection cases, especially cases in which it is alleged that a child has suffered actual physical and/or sexual harm at the hands of some person. At p.362 Dixon J (as he then was) said-

"The seriousness of an allegation made, the inherent unlikeliness of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect references."

And at p.343 Latham CJ said-

"No Court should act upon mere suspicion, surmise or guesswork in any case. In a civil case fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue.”

But the writer firmly believes that the *Briginshaw* dicta is not and never has been authority for the proposition that there is some intermediate standard of proof between the civil standard of “balance of probabilities” and the criminal standard of “beyond reasonable doubt”. A number of superior courts have made it abundantly clear that in civil litigation the balance of probabilities remains the standard of proof even where serious or criminal allegations are made: see the judgement of the Court of Appeal in *Dr Selwyn Leeks v XY* [2008] VSCA 21 at [9] citing *Jones v Dunkel* (1959) 101 CLR 298, 304-5; *G v H* (1994) 181 CLR 387 & *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170. In the last mentioned case Mason CJ, Brennan, Deane & Gaudron JJ said at 170-171:

“The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. The strength of evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to be proved. Thus authoritative statements have often been made to the effect that **clear** [*Briginshaw v Briginshaw* (1938) 60 CLR 336, 362; *Helton v Allen* (1940) 63 CLR 691, 701; *Hocking v Bell* (1944) 44 SR (NSW) 468, 477 {affirmed in (1945) 71 CLR 430, 464, 500};  *Rejfek v McElroy* (1965) 112 CLR 517, 521; *Wentworth v Rogers (No.5)* (1986) 6 NSWLR 534, 539] **or cogent** [*Rejfek v McElroy* (1965) 112 CLR 517, 521] **or strict** [*Jonesco v Beard* (1930) AC 298, 300; *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362; *Helton v Allen* (1940) 63 CLR 691, 711; *Hocking v Bell* (1944) 44 SR (NSW) 468, 478 {affirmed in (1945) 71 CLR 430, 464, 500}; *Wentworth v Rogers* *(No.5)* (1986) 6 NSWLR 534, 538] proof is necessary ‘where so serious a matter as fraud is to be found’ [*Rejfek v McElroy* (1965) 112 CLR 517, 521]. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct [see e.g. *Motchall v Massoud* (1926) VLR 273, 276] and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.”

There is nothing in Part 4.1 of the Evidence Act 2008 (Vic) which leads to a different view. Section 140(1) unambiguously defines the standard of proof in civil proceedings as “the balance of probabilities”. Section 140(2) might be seen as reflecting the *Briginshaw* dicta but it does not alter the standard defined in s.140(1). It follows that the *Briginshaw* dicta does not give rise to a third standard of proof. It simply stands for the proposition that where a civil case involves allegations of criminal conduct, fraud or moral wrongdoing which may lead to grave consequences for the impugned party, the judicial approach should be a closer scrutiny of the evidence. McHugh J put it pithily in an exchange with the NSW Solicitor-General during argument in *Witham v Holloway* (1995) 183 CLR 525 [Transcript of proceedings 10/02/1995]:

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

In *Douglass v The Queen* [2012] HCA 34 the High Court of Australia highlighted the great difference between making a finding on the balance of probabilities and making a finding beyond reasonable doubt. In that case, the accused was convicted of the aggravated indecent assault of his 3 year old granddaughter CD. The only evidence of the offence came from CD and was to the effect that her grandfather had persuaded her to hold his penis while he was urinating on an occasion when the two were alone in a shed. She had given inconsistent accounts as to the shed in which she said the offence occurred. The accused gave evidence of his contact with CD on the day of the alleged offence. He denied that they had been inside a shed or that she had touched his penis. The trial was before a judge alone. He found the offence proved and sentenced the accused to 3 years’ imprisonment with a non-parole period of 18 months. The Court of Criminal Appeal of South Australia dismissed the accused’s appeal against his conviction. The High Court allowed the appeal, quashed the conviction and sentence and ordered a verdict of acquittal. At [48] of their joint judgment French CJ, Hayne, Crennan, Kiefel & Bell JJ said:

“The criminal standard of proof is a designedly exacting standard. A different, lesser, standard is applied by courts dealing with contested issues involving the care and protection of children. The civil standard of proof on the balance of probabilities applies to proceedings under Pt VII Div 13A of the *Family Law Act* 1975 (Cth) [and the] *Children, Youth and Families Act* 2005 (Vic), ss.215, 551…. And see discussion in *M v M* (1988) 166 CLR 69 at 77; [1988] HCA 68; *Re W (Sex Abuse: Standard of Proof)* (2004) FLC ¶93-192. This was not such a proceeding. In the circumstances of this trial, it was an error for the Court of Criminal Appeal to hold that it had been open to the trial judge to be satisfied of the *reliability* of CD's statements in the interview and to reason from that, despite the appellant's denials, to a conclusion that his guilt had been proved beyond reasonable doubt.”

In *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 a Full Court of the Family Court of Australia, comprising Kay, Holden & O'Ryan JJ, set out in detail some principles applicable to sexual abuse allegations in civil proceedings. At [13]-[16] the Full Court said:

"[13] [W]e believe it helpful to now briefly examine the principles applicable in cases involving difficult questions of sexual abuse where the only witnesses to the alleged abuse are the alleged perpetrator and the alleged victim. This is particularly difficult where the victim is of tender years and does not give any direct testimony that can be the subject of forensic testing.

[14] In *M and M* (1988) FLC 91-979; (1988) 12 Fam LR 606; (1988) 166 CLR 69 and *B and B* (1988) FLC 91-978; (1988) 12 Fam LR 61 the High Court considered the circumstances in which a trial judge should make a finding of sexual abuse when considering children's issues under Part VII of the Family Law Act. The Court at FLC p.77,080-1, Fam LR p.610-1 said (citations omitted):

'But it is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for the criminal offence. Proceedings for custody or access are not disputes *inter partes* in the ordinary sense of that expression: *Reynolds v Reynolds*; *Mc Kee v McKee*. In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the best interests of the child. In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is *prima facie* in a child's interests to maintain the filial relationship with both parents: cf. *J v Lieschke*.

Viewed in this setting, the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child. The Family Court's consideration of the paramount issue which it is enjoined to decide cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation of sexual abuse. The Family Court's wide ranging-discretion to decide what is in the child's best interests cannot be qualified by requiring the court to try the case as if it were no more than a contest between the parents to be decided solely by reference to the acceptance or rejection of the allegation of sexual abuse on the balance of probabilities.

In considering an allegation of sexual abuse, the court should not make a positive finding that the allegation is true unless the court is so satisfied according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw v Briginshaw.* There Dixon J said:

'The seriousness of an allegation made, the inherent unlikeliness of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect references.'

His Honour's comments have a direct application to an allegation that a parent has sexually abused a child, an allegation which is often easy to make, but difficult to refute. It does not follow that if an allegation of sexual abuse has not been made out, according to the civil onus as stated in *Briginshaw*, that conclusion determines the wider issue which confronts the court when it is called upon to decide what is in the best interests of the child.

No doubt there will be some cases in which the Court is able to come to a positive finding that the allegation is well-founded. In all but the most extraordinary cases, that finding will have a decisive impact on the order to be made respecting custody and access. There will be cases also in which the Court has no hesitation in rejecting the allegation as groundless. Again, in the nature of things there will be very many cases, such as the present case, in which the Court cannot confidently make a finding that sexual abuse has taken place. And there are strong practical family reasons why the Court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.'

[15] In *WK v SR* (1997) FLC 92-787; 22 Fam LR 592 the Full Court (Baker, Kay and Morgan JJ) examined the application of the principles set out in *M and M* to a situation where the trial judge had found that the father had sexually molested both his step-daughter and his own daughter…

[16] Although this case was argued that irrespective of the finding of sexual abuse there should have been supervised contact, given his Honour's refusal to allow any supervised contact was clearly dependent upon his positive finding of sexual abuse, if that finding is unsafe then in our view we have no other option but to remit the question of supervised contact back to a Judge at first instance."

Section 215A of the CYFA provides that the standard of proof **“of any fact”** in an application under the CYFA in the Family Division is the balance of probabilities. By this is meant any **past** fact. It is clear from the above extract from *Re W (Sex Abuse: Standard of Proof)* and from the cases discussed in **section 5.10.4** that there is a strong distinction to be drawn between a finding that abuse has occurred in the **past** and a finding that there is an unacceptable risk of it occurring in the **future**. That is also clear from s.162(3) of the CYFA which provides:

“(3) For the purposes of ss.(1)(c), (d), (e) and (f)-

1. the Court may find that a future state of affairs is likely even if the Court is not satisfied that the future state of affairs is more likely than not to happen;
2. the Court may find that a future state of affairs is unlikely even if the Court is not satisfied that the future state of affairs is more unlikely than not to happen.”

So the balance of probabilities test in s.215A does **not** apply to the determination of the likelihood or unlikelihood of the occurrence of a **future** event for the purposes of proof of a protection application. For its part, s.162(3) leaves alive the less stringent common law test of whether or not a child is **likely** to suffer harm in the future, a test enunciated by Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord Mustill agreed) in *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at 585 in relation to English legislation in similar terms to s.162(1) of the CYFA:

"Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not…[L]ikely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

However, it is also important to note that Lord Nicholls stressed at p.590:

“A decision by the Court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom….[A] court's conclusion that the threshold conditions are satisfied must have a factual base, and…an alleged but unproved fact, serious or trivial, is not a fact for this purpose. Nor is judicial suspicion, because that is no more than a judicial state of uncertainty about whether or not an event happened."

It is also important to note that in weighing the evidence of witnesses, a judicial officer is not required to accept a witness’ evidence *in toto* or reject it *in toto*. It is open to a judicial officer in an appropriate case to accept part of a witness’ evidence and reject another part as Beach J noted in *Helou v Shaya* [2013] VSC 297 at [22]:

“A magistrate (like any other trier of fact) is entitled to accept the evidence of a witness on one point and not accept the evidence of the same witness on another point. Further, to the extent that the appellant’s arguments in this appeal was premised on the proposition that the non-acceptance of the respondent’s evidence on a particular topic, or actual evidence given by the respondent inconsistent with the Court’s findings, mandated as a matter of law, a conclusion in favour of the defendant, those arguments must be rejected: See generally, *Krum v Malaysian Airline Systems Berhad* [2004] VSC 185; *Malaysian Airline Systems Berhad v Krum* [2005] VSCA 232; *Husson v Keppel Prince Engineering Pty Ltd* [2006] VSC 412; *Alcoa Portland Aluminium Pty Ltd v Husson & Anor* (2007) 18 VR 112. See further, *Transport Accident Commission v O’Reilly* [1999] 2 VR 436, 460 [58] (Callaway JA); *Thales Australia Ltd v The Coroners Court & Ors* [2011] VSC 133 [60].”

### **4.8.6 Attendance of child at Court**

Prior to 01/12/2013 the CYFA had required children to attend or be brought to Court for the majority of child protection proceedings, although they were rarely actually present in the courtroom. The attendance of children at Court was commented on adversely in the Cummins report. New s.216A of the CYFA provides that in any proceeding before the Family Division under the CYFA a child is not required to attend or be brought to Court unless-

1. the child expresses a wish to attend; or
2. the Court orders that the child attend; or
3. the CYFA requires that the child attend.

Section 216A is broad enough to include intervention order proceedings. This new section and the large number of associated amendments have resulted in changes to many prescribed forms: see ***Children, Youth and Families (Children’s Court Family Division) Rules 2017*** [S.R. No.20/2017].

The only applications for which the amended CYFA requires that the child attend Court are-

* ***CYFA*-s.228**: Application for Temporary Assessment Order by notice;
* ***CYFA*-s.246**: Application for Therapeutic Treatment Order;
* ***CYFA*-ss.268, 270**: Application to Vary an Interim Accommodation Order or for a New Order where the IAO was made under ***CYFA*-s.262(1)(c)** on a Therapeutic Treatment Order application.
* ***CYFA*-s.269**: Application for Breach of an Interim Accommodation Order where the IAO was made under ***CYFA*-s.262(1)(c)** on a Therapeutic Treatment Order application.

Unless a child wishes to attend or the Court orders that a child attend Court, the child is no longer required to attend or be brought before the Court for the hearing of any other child protection applications. These include-

* ***CYFA*-s.235**: Application to Vary or Revoke a Temporary Assessment Order;
* ***CYFA*-ss.240(1), 240(3), 243**: Protection Application;
* ***CYFA*-s.252**: Application for a Therapeutic Treatment (Placement) Order;
* ***CYFA*-s.255**: Application for Extension of Therapeutic Treatment Order or Therapeutic Treatment (Placement) Order;
* ***CYFA*-ss.257-258**: Application to Vary or Revoke a Therapeutic Treatment Order or Therapeutic Treatment (Placement) Order;
* ***CYFA*-ss.259-260**: Irreconcilable Differences Application;
* ***CYFA*-ss.268, 270**: Application to Vary an Interim Accommodation Order or for a New Order [except where the IAO was made under ***CYFA*-s.262(1)(c)** on a Therapeutic Treatment Order application].
* ***CYFA*-s.269**: Application for Breach of an Interim Accommodation Order [except where the IAO was made under ***CYFA*-s.262(1)(c)** on a Therapeutic Treatment Order application].
* ***CYFA*-ss.273, 279**: Application to Vary or Revoke an Undertaking;
* **CYFA-ss.289(1A), 290(1A)**: Applications for care by Sec Order/Long-term care Order
* ***CYFA*-ss.293, 294**: Application for Extension of a Protection Order;
* ***CYFA*-ss.300, 304**: Application to Vary or Revoke a Protection Order;
* ***CYFA*-s.305**: Application to Revoke a care by Secretary Order;
* ***CYFA*-s.306**: Application to Revoke a long-term Care Order;
* ***CYFA*-s.312**: Application for Breach of Protection Order;
* ***CYFA*-s.320**: Application for a Permanent Care Order;
* ***CYFA*-s.326**: Application to Vary or Revoke a Permanent Care Order;

However, ss.243(3), 261(1), 268(5), 269(3), 270(5), 291(4) & 313 empower the Court to issue a search warrant for the purpose of having a child apprehended and placed in emergency care in certain circumstances if the Court has ordered that the child appear before the Court for the hearing of the relevant application and the child does not appear.

## **4.9 Family Division Court hearings**

The processing of each of the Family Division applications {other than applications for intervention orders, temporary assessment orders, therapeutic treatment orders & therapeutic treatment (placement) orders} involves one or more court hearings as this chart shows. The Management of Child Protection proceedings is governed by Practice Direction 1 of 2023.

**THE REST OF THIS PAGE IS BLANK**

**IAO**

**CONTEST**

**EVIDENCE**

**APPLICATION PROVED –**

**PROTECTION ORDER**

THE FAMILY DIVISION - PROTECTION & IRD HEARINGS

**BAIL JUSTICE**

**☹ EMERGENCY CARE**

**STRUCK OUT**

**or DISMISSED**

**or NO ORDER**

**EMERG. CARE**

**WARRANT**

**BREACH, VARIATION, REVOCATION, EXTENSION OF ORDER**

**STARTS AT EITHER POINT MARKED ☹**

➌**ADR [CC, JRC]**

➋ **MENTION HEARING**

➍ **READINESS HEARING**

➎ **CONTESTED HEARING**

**Preceded by DIRECTIONS HEARING**

**☹ APPLICATION BY NOTICE**

**APPLICATION BY EMERGENCY CARE**

➊ **HEARING AFTER EMERG. CARE**

**[By submissions if applicable]**

2%

The Secretary or his or her delegate, in the capacity of being a party to any proceeding in the Family Division, whether as a protective intervener or otherwise, may appear-

(a) personally; or

(b) by a legal practitioner; or

(c) by an authorized employee (whether or not a legal practitioner).

See ss.215(3)-(6) of the CYFA. The Department of Families, Fairness and Housing has set up a “Child Protection Litigation Office”, comprised of legal practitioners and authorized employees, to represent and to co-ordinate the representation of the Secretary and his or her delegates in proceedings in the Family Division of the Melbourne, Broadmeadows and Moorabbin Children's Courts.

### **4.9.1 Apprehension – Hearing after child placed in emergency care**

If a proceeding in the Family Division is commenced by the apprehension of the child with or without a warrant, he or she must be placed in emergency care until the Court or a bail justice hears an application for an interim accommodation order: ss.241-242 & 247A of the CYFA.

“Emergency care” means placement of a child in accordance with s.242(5) or s.247A(4) of the CYFA, namely-

(a) in an out of home care service;

(b) if there is a substantial and immediate risk of harm to the child, in a secure welfare service; or

(c) in other accommodation approved by the Secretary in accordance with the prescribed criteria (if any); this could include leaving the child in parental care.

Section 242(2) provides that if a child has been placed in emergency care under s.241, the Court must hear an application for an interim accommodation order in respect of the child as soon as practicable and in any event within one working day after the child was placed in emergency care. Section 242(3) provides that unless the Court hears an application for an interim accommodation order within 24 hours after the child was placed in emergency care, a bail justice must hear an application for an interim accommodation order in respect of the child as soon as possible within that period of 24 hours.

If there is any dispute at Court between the parties as to the placement of a child on an appropriate interim order or as to a condition which is centrally relevant to placement, a contest by submissions will be held forthwith (or at least as soon as possible), this being authorised by a number of Supreme Court judgments, including those of Beach J in *G v H [No 2]* [Supreme Court of Victoria, unreported, 10/08/1994], Elliott J in *DOHS v DR* [2013] VSC 579 at [57]-[58], Ashley J in *The Secretary DOHS v R & Anor* [2003] VSC 172 at [11] and Gillard J in *P v RM & Ors* [2004] VSC 14. In the latter case Gillard J, while agreeing with Ashley J that the procedure was "unusual", said at [19]: "I do not for one minute criticize it as being an inappropriate procedure." At [33] His Honour elaborated:

"The procedure that is adopted in the Children's Court is for evidence to be adduced by assertions from counsel for the parties and the parties themselves, and the same procedure appears to be followed in this Court. That procedure has been followed for many years and although it is unusual it is no doubt a procedure adopted because of the urgency of an application and the interests of a child who may be subjected to some form of harmful conduct. Accordingly, I will consider the affidavit of the appellant and the various exhibits which contain a lot of material which is hearsay, untested and also contested, the assertions made by counsel and also in this case the assertions made by the father."

If any party is aggrieved by the outcome of a contest by submissions, the case is adjourned for an IAO contest by evidence on a convenient date if the aggrieved party so wishes. Otherwise the case will usually be adjourned to a date about 3 weeks hence for "mention".

### **4.9.2 Mention**

If a proceeding in the Family Division is commenced by notice, it will usually be listed for "mention" on a date about 3 weeks after the date of filing. Witnesses are not called at a mention. A significant proportion of cases are completed at the first or a further mention hearing by the parties consenting to or not opposing Court orders.

### **4.9.3 Conciliation**

If a Family Division application is unable to be resolved at a "mention" hearing, it is generally adjourned and referred to Court ordered conciliation under s.217 of the CYFA. [These were formerly called “dispute resolution conferences”.] Very occasionally, a case is adjourned for a judicial resolution conference under s.527A of the CYFA, inserted by the Courts Legislation Amendment (Judicial Resolution Conference) Act 2009 (Vic).

It is fairly rare for the Court to bypass the conciliation stage in a contested case. This is omitted only if the Court considers that conciliation is most unlikely to resolve or narrow the issues in the case, so that the time involved in an appropriate conference is not justified.

|  |  |  |  |
| --- | --- | --- | --- |
| **STATE-WIDE CONCILIATION CONFERENCES** | | | |
|  | **Conferences conducted** | **Conferences achieving full settlement** | **Full settlement rate** |
| 2020/21 | 2988 | 1190 | 40% |
| 2021/22 | 3170 | 1332 | 42% |
| 2022/23 | 2798 | 1175 | 42% |

A convenor has no power to make Family Division orders. Whether or not the case is resolved, it is returned to court at the end of the conference for a judicial officer to make appropriate orders in a post-conciliation mention. If a case does not resolve at the conciliation stage, it is usually adjourned for a “Readiness hearing” conducted by a judicial officer. Occasionally a case which does not resolve will be adjourned for a further conciliation conference or for further "mention".

### **4.9.4 Readiness Hearing**

A new type of hearing – known as a **Readiness hearing** – was introduced as and from 16/06/2000 by Practice Direction No.6 of 2020. It was originally conceived as a temporary measure necessitated by the COVID-19 pandemic for the management of child protection proceedings in the Family Division.

A Readiness hearing aims to explore the possible resolution of a matter by incorporating the features of a judicially led dispute resolution process and – in the event the matter remains unresolved – a Directions hearing as well, exploring whether it is feasible to hear a contested IAO or final hearing (facilitated through audio visual link or otherwise) in a manner that meets the requirements of fairness and justice and is also consistent with the safety advice of the Chief Health Officer.

The effectiveness of Readiness hearings is clear from the statistics below. As a consequence Readiness hearings are no longer a temporary measure. They have been expanded state‑wide and apply to any Family Division child protection proceeding. They are now governed by paragraphs 36-43 of Practice Direction No.1 of 2023.

In the period between 1 July & 30 November 2021 a total of 655 Readiness hearings were held. Final orders were made in 376 (57%) of these.

A secondary benefit of Readiness hearings is a large reduction in the percentage of contested hearings which were adjourned between 1 July & 10 December 2021 compared with the percentage which were adjourned in the 2018-19 financial year (before the introduction of Readiness hearings).

|  |  |  |
| --- | --- | --- |
| **CONTESTED HEARINGS** | **2018-19 FY** | **1 July- 10 December 2021** |
| Proceeded | 20% | 46% |
| Adjourned | 51% | 18% |
| Resolved | 29% | 37% |

A total of 90 hearing days of listed contests were adjourned between July and December 2021. If the percentage recorded in 18/19 applied, this would equate to 280 hearing days.

### **4.9.5 Directions hearing preceding a contest**

If a case does not resolve at the Readiness hearing stage, it is usually adjourned for a contest, sometimes preceded by a Directions hearing. There are three purposes of such a Directions hearing:

1. to give the parties a further opportunity to negotiate a resolution of the case without the need for a fully contested hearing;
2. to enable an informal conciliation to be conducted by a judicial officer with the aim of enabling the case to be resolved without a fully contested hearing; if the judicial officer conducting this Directions hearing is also listed to hear the contest, this process will usually not be as rigorous as that in a Readiness hearing;
3. in the event that the case cannot be resolved, to attempt to narrow the issues between the parties and to settle the mechanics of the case (e.g. appropriate length of time reserved for the number of witnesses who are to be called, whether an interpreter is required, whether proof of the application is conceded etc.).

### **4.9.6 Contested hearing**

A contested hearing generally involves the calling of *viva voce* evidence and the tendering of professional reports, although on occasion the hearing may be restricted, almost always with the consent of the parties, to legal submissions based on a statement of facts. As the data in **section 4.9.7** demonstrates only a very small percentage of initiated protection and secondary applications reach a final contested hearing. The vast majority of cases are resolved at one of the preceding steps in the process, the majority at the mention stage.

**TIPS FOR ADULTS REPRESENTING THEMSELVES AT A FINAL HEARING IN A CONTESTED FAMILY DIVISION CASE IN THE CHILDREN’S COURT**

1. Most cases in Victorian Courts are conducted on an ‘adversarial’ basis where the parties present their cases and the judge or magistrate [JO-judicial officer] acts as an umpire. However, in Children’s Court Family Division cases JOs often ask more questions of witnesses and legal representatives than in other types of cases. This is because the JO has an obligation – independent of the parties – to have regard to ‘best interests’ provisions in making any order or taking any action under the *Children, Youth and Families Act 2005* [CYFA].
2. In the Family Division of the Children’s Court child protection or intervention order hearings are generally conducted in a more informal manner than in criminal courts and the JO can inform herself or himself as she or he thinks fit despite any rules of evidence to the contrary. It is very rare for the Children’s Court to allow a child to be called as a witness in a Family Division case.
3. **PREPARATION**:

* As long as possible before the hearing date you should ask a court registrar-
* to issue subpoenas for the attendance of any persons whom you wish to call to give evidence and/or produce documents and who will not attend court voluntarily; and
* to arrange an interpreter for any of your witnesses who requires one.
* Make sure you know what court orders you would like the JO to make at the end of the hearing. If you are unsure the legal representative for any party who wants the same outcome as you may be prepared to help you.
* To assist you in the hearing you should make-
* a list of what you see as the issues in the case; this might include for example issues about family violence, child abuse or education;
* a summary of any evidence that you want to use (including evidence from other witnesses); and
* a list of any documents that you want to access.
* You should also bring to Court-
* any reports/documents which have been given to you earlier;
* any notes you have made about your contact with Child Protection (CP);
* any documents that show things you have been doing to address the concerns CP has, such as letters from a counsellor or drug screen results;
* any other Court orders you have, such as Family Law orders or intervention orders.
* As part of your preparation you should read every report/document and be prepared to cross-examine the writer about anything you disagree with. This includes any documents you were given at a Readiness Hearing (if there was one), e.g. a Readiness Certificate (Form 6C) completed by the legal representative for CP. The Readiness Certificate contains much important information about the forthcoming hearing including:
* what issues remain in dispute between the parties;
* the dispositions (orders) sought by all of the parties; and
* the names of all proposed witnesses, whether the witness is required for cross-examination and whether the witness requires an interpreter.

1. **HOW TO BEHAVE IN COURT**:

* Look neat and tidy.
* Bow to the JO when you enter the court room.
* Stand when the JO talks to you or when you talk to the JO.
* Refer to the JO as ‘Your Honour’.
* Sit down and do not talk when someone else is talking at the bar table.
* Turn your mobile phone off.
* Do not wear a hat or sunglasses on your head and do not eat or chew gum.
* If you have any questions about the court procedure, do not hesitate to ask the JO or a member of the court staff. However, please bear in mind that the JO cannot run the case on your behalf or on behalf of any other party.
* It is rarely effective and usually counter-productive to question a witness or speak to the JO in an aggressive, rude, sarcastic or disrespectful way. Politeness and good manners will serve you much better in the eyes of the JO.

1. **WHAT HAPPENS IN A FINAL HEARING OF A FAMILY DIVISION CASE**:

Although the JO can vary the procedure in the interests of justice, a final hearing will usually proceed in the following order:

1. The JO will **ask each party** or the party’s legal representative **what orders he or she is seeking** in the case.
2. The CP/applicant gives **evidence in chief** by calling their first witness.
3. Each of the other parties then has the opportunity to **cross-examine** the witness. Parties who dispute any aspect of the evidence of a witness should put their version to the witness for him or her to comment on. Because cross-examination is usually more difficult than it looks, the JO will often allow any legal representative who is seeking the same orders as an unrepresented party to cross-examine the witness first.
4. The CP/applicant gets the chance to **re-examine** the witness briefly to clarify any evidence that is unclear or incomplete.
5. The CP/applicant calls their next witness if they have one. This witness gives evidence in chief, is cross-examined and re-examined if necessary. This process is repeated until all of the witnesses called by DFFH have given evidence.
6. Each of the other parties then have the opportunity to call witnesses who give **evidence in chief** and are then cross-examined and re-examined like the witnesses called by CP/applicant.
7. Finally, if the JO permits, each of the parties are given an opportunity to make **closing submissions**. These focus on-
8. the disposition that the parties are seeking; and
9. the relevant legal principles in the CYFA, any other relevant Act and the case law derived from specific cases that have gone before a court.
10. The JO will then announce his or her decision. Sometimes this will happen on the same day, especially in intervention order cases. In CP cases it is more usual for the decision to be handed down on a later day after the JO has had a chance to review the evidence and the submissions and prepare a judgment.
11. **WHERE TO FIND THE LAW THAT APPLIES IN CHILDREN’S COURT CASES**:

* The following Acts can be downloaded from <https://www.legislation.vic.gov.au>:
* **For all cases**: *Children, Youth and Families Act 2005*.
* **For intervention order cases**: *Family Violence Protection Act 2008* or *Personal Safety Intervention Orders Act 2010*.
* Information about the Children’s Court and about the law (including case law deriving from other cases) can be downloaded from <https://www.childrenscourt.vic.gov.au>.

1. **ADDITIONAL INFORMATION**:

See “**Information for parents and primary carers with a child protection court case**” which can be downloaded from <https://www.legalaid.vic.gov.au/sites/default/files/2022-02/vla-resource-information-parents-primary-carers-child-protection-court-case.docx>.

### **4.9.7 Throughput of applications in the Family Division child protection jurisdiction**

As stated in **Part 4.2** above, the Family Division of the Children’s Court becomes involved in the life of a child when a protective intervener invokes the Court’s jurisdiction. The intervener may do this in one of two ways-

* by filing an application which involves a notice of a future hearing; or
* by placing the child into emergency care and filing an application seeking immediate orders from the Court in relation to the child’s placement.

Details of the possible types of application are set out in **Part 5.3** of these Research Materials.

In the period from **01/06/2019 to 31/05/2021** a total of **34,846** applications were initiated statewide in the child protection [CP] jurisdiction of the Family Division. Of these, **16,241** applications [46.6%] were initiated by placing the child in emergency care and **18,605** [53.4%] were initiated by notice. All of the emergency care applications were filed by a protective intervener. The majority of the applications by notice were also filed by a protective intervener although some were filed by other parties.

In the same period a total of **34,495** applications were finalised. It is noteworthy that in this 2‑year period, the greater part of which was affected by the COVID‑19 pandemic, the finalisation figure for Child Protection cases in the Family Division was 99% of the initiation figure. The chart below shows the time lapse between the initiation and the finalisation of 32,346 of these 34,495 applications.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 0-3 months | 3-6 months | 6-12 months | 12-18 months | 18-24 months | 24+ months |
| 17,393 | 7,279 | 4,136 | 2,321 | 720 | 497 |
| 50.4% | 21.1% | 12.0% | 6.7% | 2.1% | 1.4% |

In the period from **01/07/2021 to 30/06/2022** a total of **16,677** applications were initiated statewide in the CP jurisdiction of the Family Division and **17,675** applications were finalised. Of these **551** [3.1% of the total number of applications] were finalised at the final hearing stage and **17** [0.1% of the total] were finalised at an evidence-based IAO contest. The total number of court listings in 2021/22 was **50,137**, an average of 2.8 listings per finalisation.

Although the above statistics are accurate they do not paint the whole picture and care needs to be taken in interpreting them. They relate to **applications**, not to **cases**. In some cases there may be only one application, for example a protection application. But in others a **case** may consist of multiple applications, for example-

* a protection application, an application to vary an IAO and an application to breach an IAO; or
* an application to extend a family reunification order, a later application to revoke it and an application for a care by Secretary order; or
* an application to extend a family preservation order, an application to breach an IAO and an application to revoke the family preservation order.

Where there are multiple applications in a particular case, it is not uncommon for one or more of the applications to be determined before the whole case is ultimately finalised. This means that the previously published figures showing that 22,792 **applications** finalised at mention in the period from 01/06/2019 to 31/05/2021 have the potential to be misleading in the absence of a further figure which details how many were substantive applications which resulted in the finalisation of the whole **case**. It is hoped that this latter figure may become available in due course.

There is, however, one conclusion one can confidently draw from the 2019/21 statistics that show that **720** **applications** were resolved at final evidence-based contest [2.1% of the total] and 86 applications [0.2% of the total] were resolved at an evidence-based IAO contest. That conclusion is that more than 97.7% of the **cases** were resolved without an evidence-based contest. A similar conclusion follows from the 2021/22 statistics.

In fact the vast majority of **cases** in both periods were resolved – without the need for a final contest – by agreement between the parties and the satisfaction of the Court that the resolution was in the best interests of the subject child or children. Such resolution often occurred as a result of a conciliation conference conducted by a Court-appointed convenor or a judicial resolution process conducted by a judicial officer or both.

### **4.9.8 Marram-Ngala Ganbu Program**

Under s.3(1) of the CYFA “Aboriginal person” means a person who:

1. is descended from an Aboriginal person or Torres Strait Islander; and
2. identifies as an Aboriginal person or Torres Strait Islander; and
3. is accepted as an Aboriginal person or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

“Most Victorian Aboriginal children are cared for in loving families, where they are cherished, protected and nurtured, where their connection to community and culture is strong, their Koori identity is affirmed and they are thriving, empowered and safe”: see *Always Was, Always Will be Koori Children*, Report of Taskforce 1000 (October 2016). The term *Koori* is used throughout this section to describe the traditional inhabitants of Victoria and is intended to be inclusive of all Aboriginal and/or Torres Strait Islander people.

Developed over a 6 month period, the Marram-Ngala Ganbu Program was launched in August 2016 at the Broadmeadows Children’s Court as an acknowledgement of the above fact and as an innovative response to the over-representation of Aboriginal children and families in the child protection system in Victoria. Marram-Ngala Ganbu means “We are one” in the Woiwurrung language. The material in this section is taken from the very positive *Evaluation of Marram-Ngala Ganbu* (November 2019).

The following statistics are taken from SNAICC (2019) *The Family Matters* Report and from A Morris & K Macpherson, 2017, *‘Marram-Ngala Ganbu: We are one’* in AIJA Proceedings of the NAJ 2017 Conference: Non-adversarial Justice, Indigenous Justice, Melbourne. In March 2019, although the majority of Aboriginal children in Victoria were living with their families and were not in contact with the child protection system, 19.1% were involved with child protection compared with 1.4% of non-Aboriginal children. Aboriginal children in Victoria were 16.4 times more likely to be removed from their families than non-Aboriginal children, the second highest over-representation of any state of Australia. Unborn children were also susceptible, with 21% of child protection reports for unborn Aboriginal children in Victoria progressing to out-of-home care placements within 12 months of birth, compared with 13% for non-Aboriginal children. Victoria and the ACT exhibit the largest percentage increase of Aboriginal children in out-of-home care, with the number more than doubling between 2011 & 2018. In Victoria, the percentage increase is almost double that of the percentage increase in the Aboriginal general population. Despite the Aboriginal Child Placement Principles set out in ss.12-14 of the CYFA, more than 60% of Aboriginal children removed from their families were placed with a non-Aboriginal carer and over 40% of Aboriginal children with siblings were placed separately from their siblings. Aboriginal children in Victoria are also more likely to stay removed from their parents, being over-represented on permanent care orders at rates significantly higher than the national average.

The aim of the Marram-Ngala Ganbu Program is to improve outcomes for Koori children and families involved in child protection proceedings. It seeks to do this by providing a more effective, culturally appropriate and just response for Koori families through a culturally appropriate court process that involves greater participation by family members and culturally-informed decision-making. The Program is based on a therapeutic justice model that is less adversarial than the traditional model. Its key features are:

* **A case management approach** in which the Koori Services Coordinator, the Koori Family Support Officer and DFFH’s (Child Protection) Practice Leader M-NG oversee each court case to ensure it continues to progress.
* **The emotional and practical support provided to families** by these three Court officers is of central importance to the Program and ensures that families are supported at each step of the process. Such support includes home visits when required, support to access services and comply with court orders (for example, helping parents enrol children in school) and encouragement to parents to attend court.
* **The informal nature of the hearings** – with everyone sitting at the bar table in an adapted court setting – encourages all the participants – parents, children, extended family members, child protection practitioners, family support services and lawyers – to speak freely with the judicial officer in a conversational manner. The judicial officer adopts an encouraging and empathetic approach to the conduct of hearings and to communication with families.
* **Fewer cases** (typically 10-12) are listed on a Marram-Ngala Ganbu court day than in a mainstream mention court (typically 30-50), allowing more time for each case, giving all participants a better opportunity to be heard and enabling hearings to be conducted in a way that is less adversarial and more collaborative. The hearings focus on finding mutually agreeable solutions and place high value on decisions reached in Aboriginal Family-Led Decision Making meetings and conciliation conferences.
* There is a strong emphasis on ensuring that families’ needs and protective concerns are identified early and that referrals are made to appropriate Aboriginal-controlled services. Services working with families are also invited to participate in hearings and provide input about families’ progress and needs.

Following an independent evaluation of Marram-Ngala Ganbu in 2019, the Koori Family Hearing day was expanded to the Shepparton Children’s Court in February 2021. The Marram-Ngala Ganbu Court sits weekly at Broadmeadows and on one day every 3 weeks at Shepparton. Save that it does not hear contested cases, every family with a Koori child whose case is listed at Broadmeadows or Shepparton Children’s Courts is heard at MNG unless the family wishes to opt out.

The Koori Services Coordinator (KSC) is responsible for co-ordination of the Koori Family Hearing Day. The KSC is the contact point for Koori children and their families and will provide information and referrals to relevant services in collaboration with child protection, including culturally appropriate support programs and legal services. The KSC aims to assist Koori children and families to participate fully in culturally appropriate court processes.

Subject to the direction of the presiding judicial officer:

* proceedings in the Koori Family Hearing Day are conducted at the bar table where all participants are seated; however, due to COVID-19 restrictions some or all the parties and service providers may be required to appear by audio visual link;
* participants in the Koori Family Hearing Day will include the parties and their legal representatives, the case worker, a Lakidjeka/ACSASS4 worker and, where appropriate, the KSC and representatives from service providers utilised by the child or family; the Lakidjeka Aboriginal Child Specialist Advice and Support Service (ACSASS) program provides culturally appropriate advice and consultation on decisions that determine the future of at-risk Aboriginal children.

Where practicable, child protection applications heard in the Koori Family Hearing Day are listed before the one judicial officer. Where a child protection application is referred for a conciliation conference under s217 of the Act, a conciliation conference is conducted, where practicable, by a Koori convener appointed under s227 of the Act on a Koori Family Hearing Day.

Between its launch on 25 August 2016 and 25 July 2019 the Marram-Ngala Ganbu Court dealt with 380 cases, comprising 16½% of all Family Division cases listed at Broadmeadows Children’s Court in that period. The MNG statistics since 2019/20 are set out below. \*Multiple children in the one family are counted as one family hearing.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **BROADMEADOWS** | | | **SHEPPARTON** | | |
| Year | Number of sittings | Number of family hearings\* | Year | Number of sittings | Number of family hearings\* |
| 2019/20 | 50 | 502 | 2019/20 | - | - |
| 2020/21 | 49 | 451 | 2020/21 | 8 | 87 |
| 2021/22 | 48 | 437 | 2021/22 | 23 | 263 |
| 2022/23 | 49 | 407 | 2022/23 | 25 | 226 |

For further information see paragraphs 52-58 of Practice Direction No.3 of 2023 – Marram-Ngala Ganbu (Koori Family Hearing Day).

In its second interim report – [Report into Victoria’s Child Protection and Criminal Justice Systems](https://yoorrookforjustice.org.au/wp-content/uploads/2023/08/Yoorrook-for-justice-report.pdf) – tabled on 04/09/2023, the Yoorrook Justice Commission recommended: “19. The Victorian Government must as soon as possible expand and sufficiently resource the Marram-Ngala Ganbu (Koori Family Hearing Day) state-wide.” The reasons for this recommendation together with the reasons for recommendation 18 – that specialist Children’s Court judicial officers should determine child protection matters state-wide – are detailed on pages 163-167 of the report.

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## **4.10 Alternative Dispute Resolution**

There are presently two different types of Alternative Dispute Resolution used in the Family Division. These are:

* a Conciliation Conference [‘CC’]; and
* a Judicial Resolution Conference [‘JRC’].

The Court has a strong commitment to the on-going development and strengthening of its ADR processes.

### **4.10.1 Conciliation Conferences**

Sections 217-218 & 220-227 of the CYFA form the statutory basis for CCs. These are court ordered conciliations presided over by one or two convenors appointed by the President of the Children’s Court.

A “conciliation conference” – first introduced in 1993 under the name “pre-hearing conference” and subsequently under the names “dispute resolution conference” & “new model conference” – provides a means of dispute resolution alternative to that provided by a traditional formal court hearing. In particular, it gives participants a greater opportunity to be heard and to speak for themselves than do traditional court proceedings in the adversarial environment of the courtroom.

Adapted from a model developed by the Harvard Law School, the Court’s current model for its conciliation conferences:

* makes more time available for discussion in an appropriate environment;
* supports convenors to exercise appropriate authority;
* requires mandatory training and accreditation of convenors;
* requires pre-conference preparation by convenors and parties (including requiring information exchange by the parties prior to the conference);
* ensures that participants are better prepared for conferences;
* requires appropriate behaviour by all participants (including legal practitioners);
* requires that DFFH has a decision-maker in attendance;
* reduces the time spent by families in adversarial court proceedings and by child protection practitioners in attending at Court; and
* reduces Court delay.

In addition, the CC model is *strength-based.*  By allowing family strengths to be identified early in the conference, it creates a less adversarial dynamic.

The development and introduction of this CC model was a collaborative effort involving the Court, DFFH and Victoria Legal Aid (VLA). Cross-agency training of private solicitors and barristers, VLA solicitors and DFFH child protection practitioners and lawyers has been – and will continue to be – conducted.

In June 2013 the Court introduced Koori Conciliation Conferences for Melbourne matters involving children of Aboriginal or Torres Strait Islander heritage. These conferences involve a Koori convenor whose role is to provide appropriate cultural support and input to the process.

### **4.10.2 Jurisdiction & Purpose of CC**

Under s.217(1) of the CYFA the Family Division may, on the application of a party or on its own motion, order that any application made to the Family Division under the CYFA be referred for a conciliation conference to one or two convenors appointed under s.227.

Under the CYPA the Court had no power to order what was then called a “pre-hearing conference” in relation to any application other than a protection application. There was no bar to a pre-hearing conference being held in respect of any other application {e.g. breach, variation or extension} if all parties consented and this was usually what happened in practice. Under the CYFA the Court may refer any application under the CYFA to a CC. This is clearly broad enough to include irreconcilable difference applications and applications for permanent care orders as well as secondary applications such as breaches, variations or extensions of existing protection orders.

Section 217(2) of the CYFA provides that the purpose of a CC is to give the parties to the application an opportunity to agree or advise on the action that should be taken in the best interests of the child. Section 218 provides that the purpose of a CC is to enable the parties with the assistance of the convenor(s)-

(a) to identify the issues in dispute; and

(b) to consider alternatives; and

(c) to try to reach an agreement as to the action to be taken in the best interests of the child.

A CC is an exercise in negotiation and joint problem solving. It establishes a process that parties to an application (and other approved persons) meet together in an environment controlled by an independent convenor. Through the CC process the participants, with the assistance of the convenor(s), attempt to-

* identify and clarify disputed issues;
* identify and clarify areas of agreement;
* develop options and consider alternatives;
* enhance communication; and
* reach agreement on issues of dispute between the parties in order to avoid – or limit the scope of – a hearing.

**4.10.3 Convenor**

Under ss.227(1) & 227(2) of the CYPA a convenor is appointed by the President of the Children’s Court on the terms and conditions set out in the instrument of appointment. Under s.227(3), the President must not recommend a person for appointment as a convenor unless satisfied that the person is of good character and has appropriate qualifications and experience. Under s.227(4) the President may remove a convenor from office at any time.

Section 227(5) provides that a convenor is not, in respect of the office of convenor, subject to the Public Administration Act 2004 (Vic).

Section 218(2) provides that the role of the convenor(s) at a CC is-

(a) to chair the conference; and

(b) to advise on and determine the process to be followed for the conference; and

(c) to provide to the Court a written report of the conclusions reached at the conference.

### **4.10.4 Repeal of advisory conference provisions**

Prior to 01/12/2013, s.217(3) of the CYFA had allowed the convenor to determine whether a conference was to be:

* “a facilitative conference” whose primary purpose was to try to reach an agreement as to the action to be taken in the best interests of the child [s.218(1)(c)]; or
* “an advisory conference” whose primary purpose was to provide to the Court a written report as to the facts of the dispute and the possible outcomes of the dispute and how these outcomes might be achieved [s.219(2)(c)].

In practice there had been very few advisory conferences. On 01/12/2013 the “advisory conference” provisions in ss.217(3), 219 & 223(2) were repealed and the word “facilitative” was replaced by the word “conciliation” in ss.218 & 223(1).

### **4.10.5 Attendance at CC**

A conciliation conference is attended by the child's parents and a nominee of the Secretary: s.222(1).

In the past the Secretary had generally not been legally represented, though that was a decision of the Secretary, not a legislative bar or something desired by the Court. The guidelines for the current model of conference state [at p.8]: “DHS at [a conference] must be legally represented or have legal representation during the final phase of the conference to assist with negotiation and drafting of minutes. In all circumstances DHS must have a person present at [a conference] with the necessary authority to negotiate a range of possible outcomes and make decisions that may lead to settlement.”

A legal representative of the parent may attend: s.222(3). If the child is mature enough to give instructions, a separate legal representative of the child may attend: s.222(4). If, in exceptional circumstances, the Court determines that it is in the best interests of a child who, in the opinion of the Court is not mature enough to give instructions, for the child to be legally represented at a conference, such legal representative may attend: s.222(5).

In addition, under s.222(2), the Court may order the attendance of-

* the child;
* his or her relative(s);
* in the case of an Aboriginal child, a member of the child’s Aboriginal community as agreed to by the child;
* if the child’s parent is an Aboriginal person, a member of the parent’s Aboriginal community as agreed to by the parent;
* in the case of a child from an ethnic background, a member of the appropriate ethnic community who is chosen or agreed to by the child or by his or her parent;
* if the child has a disability, an advocate for the child;
* if the parent has a disability, an advocate for the parent;
* any other support person for the child requested by the child.

Section 226(7) of the CYFA gives the convenor(s) of a CC power to-

(a) permit any other person to attend the conference;

(b) specify whether, or in what manner, the person may participate in the conference;

(c) require the person to leave the conference at any time; and

(d) require that any other specified person not attend the conference.

### **4.10.6 Guidelines & procedure**

Section 220 of the CYFA requires a conciliation conference to be conducted in accordance with any guidelines issued from time to time by the Court. The [**GUIDELINES FOR CONCILIATION CONFERENCES**](https://www.childrenscourt.vic.gov.au/sites/default/files/2020-07/Guidelines%20for%20Conciliation%20Conferences%20-%201%20March%202016_0.pdf) issued by the Court and effective from 01/03/2016 can be downloaded from the Court’s website by clicking on the above link. The guidelines are structured in the following way:

1. **INTRODUCTION AND PURPOSE**

A CC is intended to facilitate the early resolution of applications through a non-adversarial process.

1. **PROCEDURAL MATTERS**
   1. ***When a case will be listed for CC***

The Court will not order a CC in a case that appears likely to resolve expeditiously. As a general principle, a CC should be held as early as possible in the proceedings in order to facilitate the early resolution of applications.

* 1. ***Preliminary process and the role of the Conference Intake Officer***
  2. ***Risk Assessment***
  3. ***Information Exchange***
  4. ***Some general matters***

1. **ROLE OF CONVENOR**

The convenor is an independent chairperson acting with the authority of the Court and is responsible for controlling the proceedings and ensuring that each participant has the opportunity to participate fully.

1. **RESPONSIBILIES OF ALL PARTICIPANTS**

All participants must-

* respect the authority of the convenor;
* respect the roles and responsibilities of all other participants;
* consider the options for resolving the protective concerns.

1. **RESPONSIBILIES OF LAWYERS**

In a CC lawyers adopt a non-adversarial role by representing a client in facilitated negotiations that take place in a problem-solving environment.

In addition to the responsibilities listed in section 4 of these Guidelines, a lawyer must-

* have regard to these Guidelines;
* be available for the CC at the time arranged and for the whole of the conference;
* encourage the client to participate directly and contribute to the process;
* endeavour to manage the behaviour of the client if required;
* reality test any proposals and provide realistic advice on settlement options.

1. **ROLE OF CHILD PROTECTION PRACTITIONERS & RESPONSIBILITIES OF DFFH**

In a CC child protection practitioners adopt a non-adversarial role which is to promote the child’s safety and best interests through facilitate negotiations that take place in a problem-solving environment.

In addition to the responsibilities listed in section 4 of these Guidelines, a child protection practitioner must-

* have regard to these Guidelines;
* attend the CC well prepared and clear about the matters that need to be discussed;
* maintain flexibility in decision-making in response to proposals put by or on behalf of family members.

DFFH must-

* be represented by a lawyer or a person authorised in writing by the President to appear on behalf of DFFH;
* have a person present at the CC who has personal knowledge of the matter, has met family members prior to the CC and has the necessary authority to negotiate a range of possible outcomes and make decisions that may lead to settlement.

1. **ROLE OF FAMILY AND COMMUNITY MEMBERS**

At the discretion of the convenor, family or community members may contribute to the resolution of protective concerns or act as a support to the family. However, they are not permitted to act as an advocate for one party against another.

1. **CC REPORT**

The convenor will provide to the Court a written report of the conclusion reached at the CC together with the minutes of any proposed orders agreed to by the parties.

Annexed to these guidelines are the following proforma documents:

1. CC Addendum report (in a short form) to be completed by DFFH
2. Information Exchange Document to be completed by lawyers representing children, parents and other joined parties
3. Information Exchange Document to be completed by best interests lawyers appointed under s.524(4) CYFA
4. Information Exchange Document to be completed by self-represented parties.

### **4.10.7 Reports & Confidentiality**

Section 223 of the CYFA provides that a written report made by a convenor under either s.218 or s.219 is admissible in the proceedings of the Family Division in respect of the child who is the subject of the CC. Section 224 empowers the Court to consider such report in determining what order or finding to make in respect of the application.

Save for the report provided by the convenor(s), the proceedings of a CC are confidential. Evidence of anything said or done or admissions made at a CC is only admissible in court proceedings if the court grants leave or all the parties to the CC consent: s.226(1). A court may only grant such leave if satisfied that it is necessary to do so to ensure the safety and well-being of the child: s.226(2). This rarely happens.

### **4.10.8 Court orders**

A convenor has no power to make Family Division orders. At the end of the conference the case is returned to court and a judicial officer makes the appropriate orders. These will usually, though not always, be the orders to which all of the parties at the conference have agreed – or at least have agreed not to oppose. Sometimes, but rarely, the Court is not prepared to endorse the parties' agreement. Occasionally this is because the Court considers it has no power in law to make the orders sought or because the Court considers that the orders sought are not in the best interests of an absent party, usually a child.

### **4.10.9 Statistics**

Between 1999-2000 & 2009-2010 the settlement rate for conferences based on earlier models had varied between 28% & 36%. There appears to have been little difference between the settlement rates in Melbourne and in country regions.

The current conciliation conference model project was subject to evaluation for the first 18 months. Feedback from family members and professional participants was extremely positive. The first CC involving the current model was conducted on 24/08/2010 and 6804 CCs have been conducted state-wide up to 15/02/2016. Between 01/11/2013 & 31/01/2016 a total of 4774 CCs have been run state-wide. Of these:

* 46% have resulted in full settlement;
* 36% have been partially settled and have resulted in interim protection orders, further CCs or mentions; and
* 18% have been adjourned for first directions hearing or directions hearing & contest.

The CC statistics for the past 3 years are in the following tables. The METROPOLITAN figures are from Melbourne, Moorabbin & Broadmeadows Children’s Courts.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2018/19** | **CCs CONDUCTED** | **SETTLEMENTS** | **PARTIAL SETTLEMENTS** | **CCs LEADING TO DIRECTIONS HEARINGS** |
| **METROPOLITAN** | 1826 | 612 | 655 | 559 |
| **REGIONAL** | 1449 | 674 | 536 | 239 |
| **TOTAL** | **3275** | **1286** | **1191** | **798** |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2019/20** | **CCs CONDUCTED** | **SETTLEMENTS** | **PARTIAL SETTLEMENTS** | **CCs LEADING TO DIRECTIONS HEARINGS** |
| **METROPOLITAN** | 1826 | 617 | 617 | 582 |
| **REGIONAL** | 1444 | 659 | 515 | 270 |
| **TOTAL** | **3260** | **1276** | **1132** | **852** |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2020/21** | **CCs CONDUCTED** | **SETTLEMENTS** | **PARTIAL SETTLEMENTS** | **CCs LEADING TO READINESS HEARINGS** |
| **METROPOLITAN** | 1628 | 537 | 554 | 537 |
| **REGIONAL** | 1360 | 653 | 394 | 313 |
| **TOTAL** | **2988** | **1190** | **948** | **850** |

State-wide conciliation conferences outcomes are as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **CONFERENCES CONDUCTED** | **FULL SETTLEMENT**  **ACHIEVED** | **SETTLEMENT RATE** |
| **2019/20** | 3260 | 1276 | 39% |
| **2020/21** | 2988 | 1190 | 40% |
| All CCs in this reporting period were conducted online with families being supported by the Court to participate using online hearing software. Over 20,000 people participated in 2,988 CCs state-wide. | | |
| **2021/22** | 3170 | 1332 | 42% |
| Over 21,000 people participated in 3,170 CCs state-wide. On average, 7 people participated in each conference. | | |

### **4.10.10 Judicial Resolution Conferences**

The Courts Legislation Amendment (Judicial Resolution Conference) Act 2009 (Vic) [No.50/2009] came into operation on 14/09/2009. That Act amended the CYFA by adding sections-

* to make provision for the conduct of judicial resolution conferences in the Family Division of the Children’s Court by the President and magistrates; and
* to clarify that judicial immunity applies to the President and magistrates when carrying out judicial resolution conferences.

Under s.3(1) of the CYFA [as amended] “judicial resolution conference” [hereinafter ‘JRC’] means a resolution process in the Family Division of the Court (other than a conciliation conference under s.217) which is presided over by the President or a magistrate for the purposes of negotiating a settlement of a dispute including, but not limited to-

(i) mediation; or

(ii) early neutral evaluation; or

(iii) settlement conference; or

(iv) conciliation.

Section 527A(1) of the CYFA provides that no evidence is admissible at the hearing of any proceeding in the Family Division of anything said or done by any person in the course of the conduct of a JRC unless the court otherwise orders, having regard to the interests of justice and fairness. However, it is noteworthy that s.527A(1) does not provide any bar to the admissibility in any other court process of anything said or done by a person in the course of a JRC. So, for instance, an admission made at a JRC by a parent of the use of drugs would not be privileged in a criminal prosecution in another court. Section 527A(2) provides that the President or a magistrate is not compellable to give evidence in any proceeding of anything said or done or arising from the conduct of a JRC. Section 527B gives the President or a magistrate conducting a JRC the same protection and immunity as a justice of the Supreme Court.

Section 588(1)(b) of the CYFA empowers the President, together with two or more magistrates for the Court, jointly to make rules for or with respect to judicial resolution conferences, including but not limited to the practice and procedure of the Court in relation to judicial resolution conferences. As yet no such rules have been made.

There is no reason why a JRC could not be conducted at any time between the commencement and the final determination of a case in the Family Division of the Court. The President has not yet issued any formal guidelines as to the preferred position of a JRC in the flow-chart of hearing types. However it should be noted that for many years the Court has conducted Directions Hearings & Readiness Hearings which are sometimes in the nature of a mini-JRC.

## **4.11 Children's Court & Family Court compared & contrasted**

### **4.11.1 Public law versus private law**

Proceedings in the Family Division of the Children's Court are essentially **public law** proceedings. Except at the commencement of an IRD application, the State, in the form of the Department of Families, Fairness and Housing, is always a party. The primary purpose of the Court is to provide for the protection of children.

By contrast, proceedings in the Family Court of Australia and the Federal Magistrates' Service are essentially **private law** proceedings, the primary purpose of which is to resolve intra-familial disputes. The State, in the form of the Department, may intervene in a case if there are protective concerns, but this is comparatively uncommon.

### **4.11.2 Responsibilities and obligations of the Family Court to children**

Nevertheless, the Family Court's responsibilities and obligations to children within its purview are generally the same as those of the Children's Court, namely to treat the best interests of the child as paramount. The Family Court’s responsibilities and obligations were previously set out in ss.68F & 68L(1) of the Family Law Act 1975 (Cth) and were summarized in *B and B* (1993) FLC 92-271 as follows:

* to protect the rights of children and promote their welfare;
* to regard the welfare of the child as the paramount consideration;
* to protect the child from abuse, ill-treatment or exposure or subjection to behaviour which psychologically harms the child;
* to notify the relevant child welfare authorities of any abuse or ill-treatment, or exposure to behaviour which may psychologically harm the child, or of any suspicion that this has occurred or may occur, and the basis for that suspicion.

See now, *inter alia*, ss.60B, s.60CA, 60CB, 60CC, 60G(2), 63F(2), 63F(6), 68R of the FLA as amended by Act No.46 of 2006.

In *B and B*, the Family Court also recognised the obligation placed on Australia, by its accession to the *United Nations Convention on the Rights of the Child*, to

"take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child." Article 19.1

### **4.11.3 Notification by the Family Court to State welfare authorities**

Where it is alleged by one or more parties with proceedings before the Family Court that a child is being abused or is at risk of being abused, the Family Court must notify the State welfare authorities of the allegation. Members of the Court who suspect abuse must also report their suspicions to the relevant State welfare authorities.

### **4.11.4 Representation of children**

See [4.7 Representation of children in the Family Division of the Court](#_4.7_Representation_of)

and in particular [4.7.6 Child representation in Children’s Court and Family Court compared](#_4.7.6_Child_representation).

See also the website of the Family Court of Australia <http://www.familycourt.gov.au>.

### **4.11.5 Priority of orders**

In the writer's opinion it is tolerably clear that a protection order takes precedence over a conflicting order under the Family Law Act 1975 (Cth) [as amended] ('the FLA') whichever order was made first. The situation in Victoria is now regulated by s.69ZK of the FLA rather than its predecessor s.60H [but see pp.1682-1701 of CCH Australian Family Law Court Handbook]. In any event, although there are some differences between the old provisions and the new, each expressly provide for the continued operation of certain State orders and each has two basic limbs:

1. **State jurisdiction not fettered [s.69ZK(2)]**: Nothing in the FLA affects:

* the jurisdiction of a court, or the power of an authority, under a child welfare law to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under a child welfare law; or
* any such order made or action taken; or
* the operation of a child welfare law in relation to a child.

1. **Federal jurisdiction subject to State jurisdiction [s.69ZK(1)]**: Subject to some minor exceptions, a court exercising jurisdiction under the FLA must not make an order under that Act in relation to a child who is under the care (however described) of a person under a child welfare law unless:

* the order is expressed to come into effect when the child ceases to be under that care; or
* the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.

In its Final Report on Family Law and Child Protection (September 2002) the Family Law Council raised the issue of potential inconsistency if an order of a State court was inconsistent with a prior order under the FLA: see pp.83-84. Though it did not express a concluded opinion on the issue, the Family Law Council made the following recommendation in order to "avoid any residual doubt on the constitutionality of such provisions" as s.69ZK:

"**Recommendation 11**

Section 69ZK [of the FLA] should be amended to make clear beyond doubt that residence and contact orders made pursuant to child welfare legislation as an outcome of proceedings brought by a child protection authority for the protection of a child are not inconsistent with the FLA."

### **4.11.6 Sharing of materials between Children’s Court & Family Court**

There are two separate processes in place for information-sharing between the Children’s Court of Victoria [‘ChCV’] and the Federal Circuit and Family Court of Australia [‘FCA’] or vice versa:

1. A broad informal information-sharing process has been in place for some years. Underpinning it is what is now rule 6.27 of the *Federal Circuit and Family Court of Australia (Family Court) Rules 2021* which provides that a party or an independent children’s lawyer [ICL] must not issue a subpoena without the permission of the FCA. For its part, the FCA does not issue subpoenas for the production of files or other materials from the ChCV. What happens instead is:
2. A judge in the FCA orders a registrar of the FCA to request the ChCV for a specified file and/or other document(s) or order(s).
3. The FCA registrar makes the request of the ChCV.
4. A ChCV registrar puts the requested material together and submits it to the President or a magistrate of the ChCV for his or her authority to provide the material to the FCA.
5. If authorised the material is forwarded by a ChCV registrar to the FCA registry.

This information-sharing process also works the same way in the other direction when the ChCV requests material from the FCA.

1. Independently of the above – but partly overlapping with it – are two much more recent protocols, the Family Violence Information Sharing Scheme [FVISS] and the Child Information Sharing Scheme [CISS]. This discussion is confined to the former. The FVISS is grounded in amendments made to the *Family Violence Protection Act 2008* [FVPA] which are described in **Part 6FV.15** of the Research Materials.

The FVISS is applicable in the case of any “Family Violence Related Proceedings”. This means it overlaps significantly with the broad informal information-sharing process described above in any child protection case in which there is an element of family violence. In the writer’s experience that means a significant proportion of them.

To assist with the operation of the FVISS protocol, guidelines are in place for information-sharing between the Magistrates’ Court of Victoria [‘MCV’], the ChCV and the FCA. In particular:

* section 7.1 sets out a process for the sharing of information between registry officers without requiring judicial approval; and
* section 7.2 sets out a process for sharing of information requested by a judicial officer.

A number of people are employed within the Family Violence Unit of the MCV who deal with FVISS requests for information broadly relating to family violence on behalf of both the MCV and the ChCV.

## **4.12 Relationship between attachment and child's emotional wellbeing**

In cases in the Family Division of the Court there is often an issue as to whether or not a child has developed an appropriately secure attachment. A clinical psychologist, Dr R, said in February 2003:

"Development is such a complex process that one can never be sure of long-term outcomes, but it seems to me that attachment theory, if well understood, has much potential for decision making, although the area remains controversial and there are diverse points of view."

In *DOHS v Mr M & Ms H* [Children’s Court of Victoria-Power M, 11/05/2009] the central issue was whether the 2y5m old child – who had been in the care of non-kith and kin foster carers aged 56 & 60 since discharge from hospital at the age of 6 weeks – should be planned for reunification with the child’s parents with whom he had had consistent contact although for only one hour each week. The child had been born four weeks premature and prenatally drug affected. However, it was conceded by DOHS that there were no current protective concerns in relation to the parents who were recovering heroin addicts.

Much of the evidence in the contested hearing – which ran for 13 days – was to do with the child’s attachment to the carers and the parents. At p.80 the Court accepted the expert evidence of an infant mental health professional Ms J, outlining four different attachment styles which she labelled (1) secure; (2) anxious; (3) avoidant and (4) disorganized and which she described in the following way:

**Secure**: The child safely explores and is able to explore outside the immediate contact of the mother and father safe in the knowledge she can return in any way and the caregiver will be available for her. The child is able to accept messages that it is safe to explore her world.

**Anxious**: The child exhibits distress moving away in a myriad of ways. Not healthy distress. It might be that when an attachment figure moves away from close proximity an anxious child might throw something at her and be annoyed. Excessive anxiety is part of the ‘anxious’ classification.

**Avoidant**: An infant with an ‘avoidant’ style does not appear to need the attachment figure very clearly, often exhibits little distress at reunion or reunification and exhibits a self-reliant style. The infant does not exhibit signals of her own distress and it is often misunderstood by even a sensitive caregiver that the child is thought to be not in need.…

**Disorganized**: This style is more commonly seen in a traumatized or abused infant. In the attachment figure’s presence the child might freeze or show signs of difficult physical distress, e.g. curl up in a ball. Children with disorganized attachment are often seen as children who are naughty, poorly compliant, ‘all over the place’. They do not have a way to attach to a caregiver. The aetiology is of a traumatized infant who does not exhibit strategies of reunion and exploration.

During the contested hearing Magistrate Power provided Ms J with a copy of the following material written by a clinical psychologist Dr R in Court reports dated April 2002 & September 2003:

**1. The significance of secure attachment for psychological wellbeing**

It is critical to children's emotional wellbeing that they have the opportunity to experience at least one (and preferably more than one) secure attachment relationship during the early years. Secure attachment relationships provide the essential underpinning of healthy emotional, social and intellectual development and are the foundation for lifetime self-esteem and psychological wellbeing. A detailed explanation of this process is presented in Howe (1995). In this section, the process is briefly outlined, along with the empirical support for it.

Attachment refers to the strong tie or bond of affection that develops between children and those people who care for them. In normal circumstances, this bond begins to develop at birth or soon after, once the so-called 'pre-attachment phase' ends at about 6 weeks. Through repeated experiences of having his or her needs met consistently and sensitively, a clear-cut secure attachment is evident in the child's behaviour to the adult carer(s) sometime in the second half of the first year. This grows and develops during the early childhood period.

The nature of the attachment relationship is of major significance for a child's psychological wellbeing. This is because the view that children develop of themselves as psychological entities (their core concept of 'self') reflects primarily the interactions they have with their attachment figures, particularly in the early years. This is referred to as their 'inner working model' of themselves and their relationship to the world of people around them (Bowlby, 1969; Main, Kaplan & Cassidy, 1985). Children with secure attachment histories develop a view of themselves as worthy and lovable and the world as a place to be trusted, since their history of intimate interactions has been generally characterised by love, care, consistency and sensitivity (Howe, 1995; Sroufe, 1988, 1989). They have a strong sense of 'felt security'.

However, if a child's needs are not met consistently and/or sensitively by their caregiver(s), an insecure attachment is likely to develop. Children with insecure attachment relationships have to develop strategies to cope with the insensitivity and/or inconsistency of their attachment figure(s), and hence may come to view themselves as less worthy and lovable and the world as a place that may not be trusted. At the extreme, children with histories of abuse and/or neglect or who have severe disruptions to their primary attachment relationships (which are inevitably interpreted by the young child as rejection and abandonment) may experience themselves as unworthy and unlovable and eventually may view the world as a hostile place where they are most likely to be rejected (Carlson, 1998; Main & Solomon, 1990; Howe, 1995).

Important differences emerge when the psychological competence of children with different attachment histories are compared over time. In one of the most extensive longitudinal studies of this kind, Sroufe and his colleagues (e.g. Elicker, Englund & Sroufe, 1992; Shulman, Elicker & Sroufe, 1994) followed the development of a large sample of infants through to age 11 years. They found that preschoolers who were securely attached as infants showed more make believe play and greater enthusiasm, flexibility and persistence in problem solving by age two years. At age 4, such children were rated by their preschool teachers, under a blind testing procedure, as higher in self esteem, social competence, cooperation, popularity and empathy. In contrast, insecurely attached infants were viewed as more isolated, disruptive or difficult in the preschool setting. By age 11 years, children with secure histories had better quality peer relationships, closer friendships and better social skills as well as being cognitively more advanced. Important in the [instant] case is the finding that 'continuity of caregiving' (Lamb et al, 1985) determines whether early attachment security is linked to later development. This aspect is discussed further below.

**2. The immediate, short and longer-term impact of removal of a young child from his attachment figure(s)**

2.1 The significance of removal of a young child from her attachment figure(s)

Disruption of primary attachment relationships, particularly in the early years, has a profound impact on both current and future psychological health insofar as it impacts in a negative way on the development of the core of the personality via the 'emergent self'. That is, the child's sense of self fundamentally emerging via relationships with primary attachment figures. Removal of the child from the attachment figures is inevitably interpreted by the child as rejection and abandonment (e.g. Cummings and Cicchetti, 1990) and risks significant damage to the child's core concept of self as lovable and worthy with subsequent negative impacts on his developing psyche and self esteem. As Fahlberg (1991) describes it, disruption to the attachment relationship is not simply a loss but a threat to the integrity of the self' (Howe, 1995, p.57). According to Fahlberg (1991) 'when that bond is broken, the very structure of the personality is endangered' (p.143).

Other evidence that disruptions to primary attachments are associated with a range of indices of both short and long-term psychological damage in the emotional, social and intellectual domains are considered in the following sections (2.2 & 2.3).

2.2 Immediate and short-term response to removal

The response of the young child to loss of the attachment figure was extensively studied by Bowlby and his colleague, James Robertson. In discussing this extensive research, Howe (1995) summarises why the loss of the attachment figure is so traumatic for the young child. This is because the loss is a 'double blow' (p.57). As Howe describes it, having lost the figure(s) of attachment, the child feels insecure and anxious. Feeling this way strongly activates the attachment system. The child experiences an overwhelming need to return to the security afforded by the attachment figure, but this figure is now not available. The child responds with intense anxiety and is likely to feel angry, sad, rejected and helpless.

All those who suffer the loss of a loved one experience grief reactions. The feelings include shock, yearning, searching, sadness, anger, hopelessness, helplessness, abandonment, rejection, and guilt (self-blame). For the young child, the extent of their dependency means that the loss of the attachment figure is particularly frightening. Cognitive immaturity and limited information processing skills put the younger child particularly at risk due to unresolved grief. If unresolved, ongoing grief puts the psychological health of a person (whether child or adult) at risk for depression and despair.

In recognition of the traumatic nature of removal of a child from his family, section 87 of the Victorian Children and Young Persons Act 1989 states that this course of action should only occur 'if there is unacceptable risk of harm to the child' if he is not so removed.

2.3 Longer-term impacts of removal

The path of psychological development throughout the lifespan is extremely complex, and precise pathways are impossible to predict. That is because development reflects the intricate dynamics between people's relationship history, their personality and the character of their current environment, both social and material' (Howe, 1995. p.223). How a child develops in later life will reflect the ongoing experiences the child has, and these can never be known completely beforehand.

In the view of some, if a child's separation anxiety (resulting from removal from the attachment figures) is well handled, it is unlikely that any long term difficulties would result. It is true that the way others react to those who have experienced a loss is important to the success of the grieving process. Research supports the position that sensitive caregiving after removal facilitates (but cannot guarantee) recovery from the trauma. Importantly, however, the trauma itself cannot be avoided, even with the most sensitive and careful handling. Recent brain research by Bruce Perry and his colleagues (e.g. Perry, Pollard, Blakely, Baker and Vigilante, 1995) indicates that traumatic experiences pose particularly difficult challenges to the developing brain. His work indicates that early childhood trauma, including parental loss, may lead to a compromised neural network since infancy and early childhood are critical periods for the organisation of brain systems.

**3. The formation of new attachments following separation from primary attachment figures**

In determining the likely impact on a child of removal, an important consideration is the likelihood of the child being able to reform new attachments, and the likely quality of these attachments.

When a young child is removed from parental care, the child will usually develop a primary attachment relationship to the foster carer(s) if the placement is sustained. If removal occurs in the pre-attachment stage and placement is immediate or almost immediate and sustained, attachment formation may well proceed as if no disruption had occurred. Even if removal occurs after the primary attachment has formed, a new attachment can form. Indeed, almost every young child will form an attachment to the caregiver who is most available to them, as this is the essence of the basic attachment bond, i.e. to maximise the likelihood of survival through the presence of someone who can meet survival needs.

However, of critical importance is the quality of the new attachment relationship(s) that will form. Research indicates that children with secure attachment histories are more likely to form secure relationships later in life. This is because the child's sense of trust in the world enables them to approach new relationships with more confidence than if they had not experienced any secure relationship in the past. However, if secure attachment(s) are broken, there is no guarantee that future attachments will necessarily be secure. Recent longitudinal research of infants and young children in new placements (Dozier, Stovall and Albus, 2000) has established that the formation of secure attachments in a new placement is very difficult, especially for children placed past infancy. Dozier's research indicates this is so even when the new caregivers are highly sensitive and responsive to the child's needs.

In essence, when the primary attachment is broken by removal of the child from his primary attachment figures, a very complex psychological process ensues. The new relationship is being built from an initial position on the part of the child of distress, hurt, perceived rejection, and abandonment (see section 2 above). In order to cope with feelings of rejection and abandonment, the child develops psychological defences. While these may be helpful in easing immediate pain, if prolonged they are unhelpful to the emergence of new relationships. It is these psychological defences which appear to mitigate against security in the new placement. Furthermore, it is impossible to predict how long it would take to form new attachments, whether secure or insecure in nature. In any event, the ability to re-attach is not the essential consideration. Rather, it is the likelihood of secure attachments forming in the new placement that is the critical consideration.

**4. Considerations in regard to preserving and strengthening the child's relationships with the birth family**

An ongoing, positive relationship with the birth family is pivotal to the psychological health of the child, especially in the longer term. Failure to maintain a relationship with the biological family may lead to preoccupation in adolescence with a fantasised or idealised image and searching behaviour which can be deleterious to psychological development into adulthood. Although current practice does not always allow for this, it is in a child's best interests that permanent placement be planned in such a way to maximise the chances of the child's ongoing relationship with their biological family (mother, father, siblings and extended family) being maintained as far as possible.

Whilst placement of biological siblings together is thus an important guiding principle in child protection decisions, it, along with any other guiding principle, must be considered in relation to the particular circumstances of each case.

After reading this material Ms J said (at p.78):

“I have no protest or concern about the material. The main thing is how succinctly Dr R has summarized what is extremely important evidence for Dr D’s and my report. She, like we did, takes a very strong infant perspective and attempts to outline the impact on an infant of [the infant’s] significant attachment figures and the importance for the infant’s mental health if he or she has an accessible and available sensitive caregiver. So Dr R outlines that extremely well and goes on to talk about the impacts of removal central to the dilemma in this case for [the child B]. It is enormously important here.”

Another witness, family therapist Dr D, had also been provided with the above material. While pointing out that the literature in Dr R’s bibliography was “the best part of a decade ago” Dr D conceded at p.78: “I’m generally in agreement with much of what is written there.”

At p.80 Power M concluded:

“Just as I agree with Dr R’s opinions, I agree with [Dr D’s & Ms J’s] opinions set out at p.26 of their assessment report on the importance of secure attachment as the foundation for appropriate development:

‘The importance of secure attachment for infants and children is now well recognised. Increasingly attachment theories are used to provide a conceptual foundation for assessment and decision-making. In Victoria concepts related to attachment inform the Best interests case practice framework (DOHS, 2008). Secure attachment is associated with better interpersonal functioning including problem solving, confidence and interactions with peers…Establishing of secure attachment is now recognised as a foundational building block for the development of infants and children (Dozier *et al.*, 2001).’”

However, although accepting Ms J’s theoretical evidence, Power M did not accept her ultimate opinion that the infant in question had an “avoidant attachment style”, saying at p.88:

“The vast bulk of the evidence of observations of [the child] both by professionals and by his carers during a period of over 2 years do not support [Ms J’s] proposition that [the child] is displaying an insecure style of attachment to his carers. Nor do the expert opinions of [two other professionals] support that proposition…

I do not accept on the balance of probabilities that [the child] has an attachment disorder or a disordered attachment style of any sort. To do so would be to accept the sort of ‘mere suspicion, surmise or guesswork’ castigated by Latham CJ in *Briginshaw v Briginshaw*. On the contrary, I am satisfied on balancing all of the evidence…that [the child] has a strong, secure and healthy attachment to his primary attachment figures”.

That finding, read in conjunction with the opinion of Dr R on the “transfer” of attachment, led the Court to find at p.122 that:

“Paradoxically perhaps, the fact that [the child] has a secure attachment to his carers – his current primary attachment figures – is likely to make the transfer of that attachment to his parents a less traumatic experience for him.”

Ultimately the Court held at p.134:

“The evidence supports a case plan of gradual reunification of [the child] with his parents – while remaining during the transition period in the primary care of [the carers] if they are prepared to remain in that role until reunification is fully achieved. It therefore supports an extension and interim variation of the custody to Secretary order. While I cannot order the carers to remain involved in [the child’s] life, their continued involvement – both during the transition period and afterwards – is very important for [the child’s] emotional wellbeing. The reunification process should proceed in a sensitive, planned and child-focused way over a number of months and should involve largely unmonitored access of [the child] with his parents, increasing in frequency and duration until it is appropriate for overnight access to be implemented and eventually for [the child] to be returned to his parents’ full-time care.”

## **4.13 Shared care of a young child**

In a case in which the Court received a report from a clinical psychologist, Dr R, in April 2002, care of a 3 year old child, C, had been extensively shared between four main caregivers: the mother, the father and the grandparents, particularly the grandmother. This arrangement was instituted within the first weeks after birth so from early infancy C had experienced a small number of carers within the biological family and regular contact with all these people on an ongoing basis. Dr R concluded that:

* the availability of C's grandparents at times of parental crisis had been "a critical 'protective' factor in [C's] life, enhancing his resilience in the face of ongoing exposure to the risk factor of parental domestic violence";
* the "shared and flexible arrangements" regarding C's care within his family had also "protected him from major disruptions to his relationship with his parents, as, for example, would be the case if foster care placements had occurred"; and
* "the case history is consistent with [C] forming attachments to the four caregiving figures available to him".

Although writing in a carefully qualified way, Dr R generally saw no threat to a child's emotional wellbeing from shared care between a small number of attachment figures provided that the child had developed a secure attachment, the transitions were appropriately managed and there was no psychological tug-of-war between the sharers:

"Generally speaking, shared care between a small number of attachment figures does not pose a threat to the child's emotional wellbeing (Goldberg, S. (2000) *Attachment and development.* London: Arnold). Indeed, as Goldberg notes, 'many infants have multiple figures to whom they can form attachments' (p.106). Nonetheless, she also presents evidence that most infants and young children form a preference hierarchy, with the attachment figure most preferred not necessarily the mother or even the person who spends most time with the child. The most likely factor influencing the formation of the child's preferences is the quality of the caregiving provided. Sensitivity, consistency, responsiveness and loving nurture and the feelings of safety and security that flow from these are likely implicated in who the child most prefers under shared care arrangements.

Finally, two further factors will likely impact on how shared care affects children in general, and [this child] in particular. One relates to the circumstances associated with the transitions between various caregiving figures. In [this] case, it appears there have been transitions from [C's] parents' care to his grandparents' care that have been associated with high level domestic violence. Secondly, shared care can be highly detrimental to a child if it is accompanied by a psychological tug-of-war between the various adult carers. The experiences of divided loyalties to which this exposes a child are highly damaging, both emotionally and psychologically, and are accompanied by distress and confusion in the child."

In a report to the Children's Court in May 2000 about a very different case a second clinical psychologist, Dr A, was strongly critical of the shared care arrangement in that case and was unenthusiastic about shared care arrangements in general. The child, X, was aged 3¼ years. She had initially resided with her parents until they separated - in a maelstrom of domestic violence and drug use - when she was 21 months old. She had then lived with her mother for the next 12 months until her mother's drug use got the better of her. She was then placed in fostercare for 3 weeks and with her father and paternal grandmother for the next 3 months. Then she was returned to her mother for 5 weeks. At the time of the assessment her care was being alternated weekly between her father (residing with the paternal grandmother) and her mother (residing with the maternal great grandparents). Dr A criticised this arrangement in trenchant terms:

"Both current psychological opinion rooted in extensive research findings and clinical experience, and common-sense understandings of child development, are generally agreed that small children can only tolerate brief separations from their primary attachment figure. It is highly unusual, if not unheard of, for a very young child like [X], to be involved in a week-about shared care arrangement, even in the most positive circumstances. A phone conversation with the Director of Counselling at the Family Court…confirmed that such shared care arrangements for very young children are almost never entered into because of the devastating impact on the child's sense of security. According to [the Director], in very rare instances where this would be considered two conditions would need to be fulfilled: (i) an extremely high level of cooperation between the parents; and (ii) the parents live in close geographical proximity. These conditions would minimise the emotional dislocation experienced by the child, because the child's expressed need for either parent at any time would take precedence over any other demands. The presence of an older sibling may also be a facilitating factor. Sadly, although in [X's] case the parents live in geographical proximity, other facilitating conditions are not present."

It needs to be emphasised that X's case involved a very different shared care arrangement from the case on which Dr R reported and it may be that any perceived difference in the psychologists' views simply reflects the difference between the respective cases, rather than any significant difference in philosophy.

In *DOHS v Mr M & Ms H* [Children’s Court of Victoria-Power M, 11/05/2009], the subject child – aged 2y5m – had been continuously in the care of non-kith and kin foster carers aged 56 & 60 since discharge from hospital at the age of 6 weeks. He had also had consistent contact with his parents although for only one hour each week. The child had been born four weeks premature and prenatally drug affected. However, it was conceded by DOHS that there were no current protective concerns in relation to the parents who were recovering heroin addicts. The Department had commissioned an assessment by an infant mental health specialist Ms J and a family therapist Dr D. The assessors postulated two options within the framework of Steinhauer’s “shared child” (1991):

1. Enhanced status quo: The child would stay with the current carers and have expanded contact with parents and extended family (if possible).
2. More equally shared care: A movement towards the child being formally shared between his current caregivers and his parents or extended family.

They ultimately recommended the first option but left the second option open as something that might be worked towards.

The Court rejected the assessors’ opinion that some form of “shared care” was “the least detrimental alternative” for the child. Power M said at p.115:

“Steinhauer outlined the following pre-requisites for his ‘shared child’ model to work:

* Foster parents and birth parents must not compete.
* Adults need to agree not to undermine the permanency of the placement.
* Adequate support must be provided to all parties.

[Steinhauer, P. 1991: *‘The Least Detrimental Alternative: A systemic guide to case planning and decision-making for children in care’*, Toronto: University of Toronto Press, pp.161-163 cited in the assessment report at p.44].

Effectively Steinhauer & [Dr R] are postulating the same pre-conditions for the ‘shared child’ model to be workable. They require commitment to the model from all four adults who must not engage in a psychological tug-of-war for the child.

This is the second major reason why I reject the assessors’ recommendations. Not only does the assessors’ option 2 require commitment from the four adults. So does option 1. Of course one must focus on the child but one can’t properly do this unless one focuses on the parents and carers in a realistic way as well. The reality is that there is no current heart-felt commitment from any of the four adults to the concept of ‘shared care’ whether in the skewed form of option 1 or the more equal form of option 2. Nor is true commitment to this proposed piece of social engineering likely to develop…

I am not nearly as sanguine as [the assessors] about the workability of the ‘shared child’ model. From my observations of the parents and carers in the witness-box and from what the evidence discloses of their personalities and their roles in [the child’s] life, I am not satisfied on the balance of probabilities that they – especially [the female carer] – will be able to avoid becoming embroiled in a psychological tug-of-war for the child if any sort of ‘shared child’ model is embraced…

There is no common ground between the lives and life experiences of carers on the one hand and the parents on the other except for [the child]. They come from parallel universes. Hence they are not very likely to ‘grow together’, to develop an abiding friendship, in the event that any sort of ‘shared child’ plan was to be implemented.

It is clear to me that – despite the undoubted love each of them has for [the child] – any form of ‘shared care’ was not a plan which either the parents or the carers wanted or felt comfortable with. Without heart-felt commitment from all four adults neither of the assessors’ options is workable. In my view their recommendations do not give sufficient weight to the views, wishes and inherent natures of the parents and the carers or to their readiness or capacity to ‘share’ [the child] in either of the ways envisaged.”

Ultimately the Court held at p.134 that the evidence supported a case plan of gradual reunification of the child with his parents while remaining during the transition period in the care of the current carers until reunification with the parents was fully achieved.

## **4.14 Frequency of contact between young child and parent**

In ‘Contact Irregular’: a qualitative analysis of the impact of visiting patterns of natural parents on foster placements *[(2002) Child and Family Social Work, 7, 35-45]*, D Browne & A Moloney said at p.36:

“The purpose of foster care is to provide a temporary safe home for a child because his or her parents are unable to do so, with the eventual aim of returning the child successfully to the family of origin. With this in mind it is important that the child continues to identify with his natural family.”

Section 10(3) of the CYFA sets out 18 matters to which the Court must have regard in determining whether a decision or action is in the best interests of a child. Section 10(3)(k) of the CYFA provides that in determining what decision to make or action to take in the best interests of a child, consideration must be given, where relevant, to “contact arrangements between the child and the child’s parents, siblings, family members and other persons significant to the child”. Section 10(3)(k) effectively provides a child with a *prima facie* right to contact and provides a parent and a sibling with a consequential right,

Further s.10(3)(b) provides that the best interests of the child require consideration to be given, where relevant, to “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”. Section 10(3)(i) requires that consideration be given, where relevant, to “the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent”.

Paragraphs (b), (i) & (k) of s.10(3) effectively incorporate into domestic Victorian law Article 9.3 in Part I of the United Nations Convention on the Rights of the Child to which Australia is a signatory. Article 9.3 provides:

“Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”

One of the most commonly disputed issues in Family Division cases is the frequency of contact between a non-custodial parent and a child. Such disputes are usually even more difficult to determine when the child is an infant, especially as there is a wide disparity of professional views – exemplified in the next two sections – about what frequency of contact is likely to be in a child’s best interests.

### **4.14.1 The Victorian case of *DOHS v Ms B & Mr G***

In *DOHS v Ms B & Mr G* [2008] VChC 1, a case involving 4 children two of whom were twins aged 10 months who had been out of parental care since birth, a central issue was the frequency and duration of contact between the twins and their parents. Initially the parents had had daily contact in the hospital’s special care nursery. When the twins were discharged at 4 weeks of age the Court heard a submissions contest and ordered supervised contact for 4 hours each day. When they were 11½ weeks old this regime was varied by consent – after the Court had heard *viva voce* evidence from Dr P, a highly respected consultant psychiatrist in the field of infant mental health – to 3½ hours on each of 5 days per week for the mother and 1 hour on each of 3 days per week for the father. When the twins were 6½ months old their mother’s contact was suspended as a consequence of serious threats made by her to a protective worker. Six weeks later her supervised contact was reinstated for 1 hour on 1 day per week. When the twins were 9½ months old the writer heard evidence from a number of expert witnesses, including Dr P and three highly regarded clinical psychologists, Dr M, Dr SM & Dr W. It is no criticism of these excellent witnesses to say that there were very significant differences between them as to the optimal frequency and duration of contact even though there was a high degree of unanimity on the underlying theory of infant development.

When the twins were 2 months old, Dr M had been asked by DOHS to provide an expert opinion as to whether contact between the twins and the parents for several hours each day was appropriate. However she had not been given an opportunity to observe either the twins or their parents. It was her view that daily contact was not appropriate and she recommended a reduction to once weekly for the following reasons:

“Daily contact between infant and parents is something clinically advisable when there is a very clear reunification plan and clear evidence around the capacity of the parents to care and lay down foundations for secure attachment. I was concerned because there certainly hadn’t been a thorough assessment of the capacity of the parents to do that with these infants. What inadvertently happens with these very frequent contact schedules is that infants are denied the opportunity to form security with anyone and particularly with the foster parents… It doesn’t have anything to do with the supervision of the access. It’s got to do with the disruption of the infants’ schedule and the absence of the infants from their primary carer, in this case the foster parents. This is the sort of regime which when ongoing for several weeks or months can cause disorganized attachment in infants…One of the core truths about attachment security is in the critical period from 0-18 months it requires the regular, consistent, predictable, reliable and most importantly the responsive presence of the primary caregiver…There is no research I am satisfied with methodologically that shows us increased access from a visiting parent adds to attachment security. Research shows a nominal difference between infants who have access once per week and those who have access several times per week.”

Dr M went on to identify three levels of contact for a non-custodial parent:

1. Attachment-based contact: Where reunification is being pursued – up to 4 days per week leading to overnight.

2. Relationship-based contact: Where reunification is not on the cards but the parents have been assessed as able to contribute to the emotional development of the child – more like monthly.

3. Identity-based contact: Where reunification is not being pursued and the parents have a history of traumatized care – something of the order of 4 times per year or less.

At about the same time Dr P had also been asked by DOHS to provide an expert opinion on the optimal frequency of the twins’ contact with parents who had a strong desire to assume their roles as parents but who were considered at that stage unable to provide the level of emotional consistency and absence of disruption and trauma necessary for optimal development. He too had not seen either the twins or their parents. His reported opinion about the then daily contact regime was that it was potentially disruptive of the twins’ development:

“The fields of early childhood development and infant mental health have provided an increasing amount of powerful evidence that the very early experiences of infants and young children can have profound effects upon their emotional, social and cognitive development. The very young infant from the moment of birth is alert and attuned to his environment. Necessarily, those people caring for the infant constitute his world. The very young infant is able to hear, see, feel and perceive with all senses the quality of care provided them by their immediate carers. The nature of this care provides the basis for the development of a stable sense of self and of attachment relationships. Babies are able to remember in their nonverbal memory (procedural memory) the things that happen to them, and the emotional context. The attuned and emotionally available caregiver helps the baby manage the ordinary ups and downs of life. Extreme disruption in the availability of a consistent and predictable caregiver may constitute a significant trauma in itself: see Schuder M & Lyons-Ruth K, “Hidden Trauma in Infancy, Attachment, Fearful Arousal and Early Dysfunction of the Stress Response System” in “Young Children and Trauma”, ed. Osofsky J, NY, Guildford Press.

Babies in the first months of life have as their primary task the development of control of their own body, and self regulatory systems. Again, this task is facilitated by the presence of a consistent, emotionally available caregiver, who can read the baby’s psychological and emotional signals regarding hunger, tiredness, needs to play and engage and needs to rest and settle. It is likely that being removed from their primary foster carer every day for a period of over four hours, by being taken by a worker and transported to and from their primary environment, constitutes a significant disruption or trauma in the process of establishing their own sense of self and self regulation. It may be that this also makes them less available to develop a relationship of attachment with their parents. It may be that the baby’s parents will be able to engage and interact with them in a more productive and fruitful way, when they are consistently cared for with the minimum of disruption to their care by their foster carer. The babies when physiologically and emotionally contained and settled may be more available for sensitive and playful interaction with their parents, even if they have not been the primary moment to moment carers.

In a situation such as that described above, I would recommend that the frequency of and the amount of time that the babies have been away from the primary foster carer be reviewed such that their day-to-day experience with their primary carer becomes more predictable and contained. I believe that adequately meeting the emotional and developmental needs of infants in the first months of life is significantly important in the development of their current and later mental state.”

When he first gave evidence about a month later – at which time the twins were 11½ weeks old - Dr P repeated the concerns he had earlier reported about disruption to the twins’ routines:

“For young children as they are developing particularly in the first year of life the need for a stable consistent carer to provide regulation of their own environment is an important and critical thing and the scenario that was put before me [viz. daily contact] suggested that it would not be the ideal set-up for a young child to have so much disruption in their day to day routine, particularly when they are already beginning life premature with additional needs to get their regulation organised. Fifteen minutes each way from the carers to the place where the visit with their parents is going to occur and it’s difficult to organise that each day in a way that meets the psychological and routine needs of each of the boys at the same time. So presumably there will be times when they would need to be woken, they might be hungry longer than they might otherwise have been if they were in the one constant situation.

The very young infant comes into the world with a lot of skills but they are dependent upon their primary carer for things like regulation of sleep, crying, level of activity, interest in the world and the primary carer is a critical person helping the baby develop a sense of time, of things evolving from one part of the day to the next, one day to the next, because that’s not sort of built into the baby at the very beginning. And if there are major disruptions to the baby’s daily routine and the baby’s experience of themselves and the world around them that can provide a disrupted or fractured sense of continuity in their own being, continuity in terms of what they are to expect in the next half hour, in the next two hours, how they manage their own hunger, distress, those sort of things depend on a predictability and a continuity in the care-giving environment for them.

There is no sort of standard rule about what’s a reasonable disruption in routine that a baby can tolerate and that another baby can’t tolerate. I think it is so much a thing that depends on the individual infant and caregiver. But in my experience it seemed that a period of four hours every day of the week would be a significant disruption to the sense of continuity that a baby might have in an otherwise primary care situation. So that there will be a range – from the baby’s point of view – of different people responding when they are hungry, when they are distressed, when they want to play, when they want to smile and engage, and four hours out of the day plus travelling and plus handling by the strangers that inevitably would be involved in the transporting, I understand, would be enough to disrupt a baby’s sense of self and continuity at this stage…

I don’t know what literature there is on family care for infants in the first months of life. I don’t think there is extensive literature, but there is quite a bit about infants who go out of home, out of family care, and certainly even at older ages you can demonstrate similar things to what I was mentioning about infants who have much more profound disruptions to their care, that there is a difference in the way their stress response works when they are cared for by a number of other people who aren’t family who are closely involved in their day to day care. So there certainly is evidence that a prolonged period out of the care of your primary carer in the first months of life can be quite disruptive to your sense of self-organisation. If you had a situation where there was close family communicating, working closely together and usually in the same house…would that have a serious deleterious effect on the infant’s development? I don’t know. I think probably not if all things were working well, but it requires a lot of coordination from the two lots of carers to really know what’s happening with the baby.”

At the end of a series of questions by the Court seeking to convert Dr P’s opinions about infant development into a concrete opinion about contact frequency and duration Dr P was asked: “So would five days a week be appropriate?” Dr P replied: “From first principles I would think that’s possibly – that that would be reasonable. And then you’d test it, you’d see how that went. If that went well, that would be good. If the babies were more disrupted by that, then you would reconsider it. But I’d give it a period of trial.” Giving evidence before the writer on a later occasion Dr P appeared regretful that he had been “pinned down” to his earlier answer, noting that he had been giving evidence in a factual vacuum and that his opinion had assumed an ideal context, namely that the parents & carers were attuned to the babies’ needs, that travelling was not an issue and that the babies were not being exposed to a whole heap of strangers.

When the twins were about 8 months old – Dr P had briefly observed the interactions between them and their parents and between them and their carers. He said of this:

“There are different types of attachment relationships – broadly secure and insecure – and these attachment relationships apply to a specific dyad rather than just the child in all circumstances. I don’t have sufficient data to say whether attachment relationships between the boys and the carers and between the boys and the parents are secure or insecure. I know there is a relationship but I don’t know the precise quality. There is a particular set of procedures which one follows: the behaviour of the infant on reunion with the person after separation. This is the main piece of data one uses to see the quality of attachment. It is true to say I didn’t see with the twins – with parents or carers – evidence of a severely disordered attachment relationship.”

Giving evidence when the twins were 9½ months old, Dr P was advocating a much less frequent contact regime if the plan was for non-reunification. However, he also believed that it would be of benefit to each of the twins and their parents if contact was restructured “to provide **less frequent but longer periods of contact** for [the twins] in an environment which is as much like a family setting as is possible. A longer period of visiting would allow for the experience to be more positive and less disruptive for each of [the twins] and their parents.” [emphasis added] Asked about the optimal duration of each of these longer contact visits Dr P said:

“It is a difficult question to answer in that there is not a lot of research in this area but my premise in making that point is for the parents to be actively engaged in the care of their infants and not just briefly visiting them for a period of 1 hour. The babies and parents would get to know each other better if it was a longer period: feeding, settling, responding to the infants’ distress, things like changing nappies and feeding. My estimate is that 3 hours would be a reasonable period in the course of an infant’s day where some of those things could be attended to. It is likely to be a better experience than a briefer period of about 1 hour. In the Infant Mental Health literature we talk of the importance of ‘good enough parenting’ which means in episodes of ordinary disruption to the infant’s state - e.g. crying, being unsettled, being hungry, toddler crawling around who falls over and hurts himself - the parent responds and settles the toddler or [twin 1] crawls over [twin 2] and scratches him and [twin 2] is upset and the parents step in to provide some sense of repair and containment. The repair of those periods of distress is as important in developing a relationship as the time when things are going well…

I don’t have incontrovertible evidence about optimal arrangements in any particular situation but looking at it in the longer term I’d have thought twice per week has the potential to be disruptive for the 18 months’, 2-3 year olds’ routine more so than once per fortnight and also has the potential to lead to confusion about where the primary caregiving response would come from, which is not to say that the child won’t have a clear set of attachment relationships with the carers and the parents as well…Each child is different but I imagine from the perspective of the 18 months to 2 year old they would ask themselves ‘*Who are my parents? Who are the primary persons responsible for me? Why am I not with them? Why am I with fostercarers?*’ As a child gets more cognitively developed, the more likely the child is to ask.”

However Dr P made it clear that in recommending 3 hours per fortnight – which he subsequently changed to 3-4 hours per fortnight - he was giving significant weight to the adverse history of the parents in this particular case. Hypothetically - in relation to children generally - he would have been looking at 3-4 hours per week.

Dr P also pointed out the importance of considering the impact of any contact regime on the children, the parents and the caregivers:

“I think one of the likely impacts, for example, of an increased frequency of access, where it is reduced and then increased again, is to build up an expectation for both parents and children this is going to lead to parents resuming full care and custody of children. If that were the decision, that is how one would approach the frequency of contact. Conversely if there is to be no reunification it is unfair to each of the parties – parents and children – to maintain access at that sort of level…

[Another factor] is the impact on foster carers..., their feeling of continuity and stability as well. For an infant to have a foster carer who feels no predictability from one day to the next is unfortunate for the child as well. That’s another component to build into the process of deciding what is an optimal arrangement for a particular child. If the child is operating from a sense of secure emotional base and out of the care of their own parents, I think that gives them a stronger position to develop a fruitful relationship with their own parents than if they are in a situation where they are feeling insecure and anxious. If it is possible to provide some sense of consistency and predictability about a child’s longer term care arrangements then that’s in the interests of the child as well.”

By contrast, Dr W did not see any particular reason to change the *status quo* for contact between the twins and their parents. Ultimately – balancing the large amount of evidence elicited in the case – the writer ordered that each parent have supervised contact with the twins once per week for a minimum of 3 hours. He also set a condition providing for increased contact for the mother after 4 months if the mother demonstrated a commitment to live separately and apart from the father.

Notwithstanding Dr M’s opinion that there has been much greater precision on the issue of optimal contact frequency in the last 5‑7 years, the writer believes that contact frequency remains a very inexact science. For example, Dr M was advocating contact once per week at the same time as Dr P was advocating 5 times per week. To her credit Dr M smilingly conceded that Dr P “would have advocated more” than she did, a clear acknowledgment of the subjective nature of their respective opinions. Dr P conceded that “in some scenarios 7 days would be right, in others 1 day would be right.” He also acknowledged the lack of research in this area and often prefaced his answers with a comment that it was a difficult question to answer. For example, in answer to the question “Joint parental access for how many hours per week in the initial stages?” Dr P replied:

“You are pushing me to specifics. It’s a hard question. We have a group putting forward a research proposal to see what works best for children of particular developmental ages because the scientific literature is fairly silent. What is best for the children is not well supported by facts. I’d be going from first principles in working with very young children and families.”

### **4.14.2 American judicial guidelines 2009**

It is clear from the quite diverse expert opinions expressed in the above extracts from *DOHS v Ms B & Mr G* [2008] VChC 1 that there was no clear unanimity of expert view in Victoria in 2008 about the optimal frequency of contact between an infant and the non-custodial parents. In stark contrast, a team of six professionals drawn from–

* + - * 1. the American Bar Association Center on Children and the Law;
        2. the National Council of Juvenile and Family Court Judges; and
        3. the Zero to Three National Policy Center–

have expressed a much more unanimous view in “[**Healthy Beginnings, Healthy Futures: A Judge’s Guide**](https://www.americanbar.org/content/dam/aba/administrative/child_law/healthy_beginnings.authcheckdam.pdf)”. Compiled in 2009, this publication consists of 150 pages organized into five chapters:

1. Meeting the Needs of Very Young Children in Dependency Court
2. Promoting Physical Health
3. Addressing Early Mental Health and Developmental Needs
4. Achieving Permanency
5. A Call to Action: Improving the Court’s Reponse.

In Chapter 3 at pp.72-73 the authors (Eva J Klain JD, Lisa Pilnik JD MS, Erin Talati JD MD, Candice L Maze JD, Kimberley Diamond-Berry PhD & Lucy Hudson MS) outline their philosophy on child contact:

**Ensure frequent parent-child contact** (This section includes excerpts from Smariga M, *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know*. Washington DC: American Bar Association Center on Children and the Law & Zero to Three Policy Center, 2007)

Professionals working with very young children in foster care often do not understand the extent of the child’s distress over being removed from the parent and placed in a strange environment. Remember that very young children grieve the loss of a relationship. Even though the parent has maltreated the child, she or he is the only parent the child has known, and separation evokes strong and painful emotional reactions (Goldsmith, D.F., D. Oppenheim and J. Wanlass. “Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care”. *Juvenile and Family Court Journal* 55(2), 2004, 1-13). The younger the child and the longer the period of uncertainty and separation from the primary caregiver, the greater the risk of harm to the child (American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care. “Developmental Issues for Young Children in Foster Care.” *Pediatrics* 105(5), 2000, 1146). Maintaining consistent contact between the child and his or her parents and siblings is critical unless visits would harm the child (American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care. “Developmental Issues for Young Children in Foster Care.” {Policy Statement} *Pediatrics* 106(5), 2000, 1145-1150). In fact, parent-child contact is the number one indicator of reunification (Ginther, N.M. and J.D. Ginther, “Family Interaction: The Expressway to Permanency – Facilitating Successful Visitation” Presentation prepared for Western Training Partnership at the University of Wisconsin River Falls, 2005, 12-13). Family contact and interaction is important and the relationship between the foster family and biological family can be crucial.

Because physical proximity with the caregiver is central to the attachment process for infants and toddlers (Ohio Caseload Analysis Initiative, *Visitation/Family Access Guide: A Best Practice Model for Social Workers and Agencies*, 2005, 14), **an infant should ideally spend time with the parent(s) daily, and a toddler should see the parent(s) at least every two to three days** (Ginther and Ginther, 2005, 10, 21). [Emphasis added]. To reduce the trauma of sudden separation, the first parent-child visit should occur as soon as possible and no later than 48 hours after the child is removed from the home (Wright, Lois E. *Toolbox No. 1: Using Visitation to Support Permanency*. Washington DC: CWLA Press, 2001; Ohio Caseload Analysis Initiative, 2005, 16).

Visits should promote parent-child attachment and be an opportunity to model good parenting skills. The length and frequency of visits should reflect the child’s developmental stages and gradually increase as the parent shows she is able to respond to her child’s cues in consistent and nurturing ways, soothe her child, and attend to her child’s needs. During the initial phase, limiting visits to one-to-two hours allows the parent to experience small successes without becoming overwhelmed. By the transition phase, as the family approaches reunification, unsupervised, all-day, overnight and weekend visits should be completed (Wright 2001; Ohio Caseload Initiative Analysis, 2005).

A young child’s emotional dysregulation following a visit does not necessarily mean the parent did something harmful during the visit (Goldsmith *et al.*, 2004, 2; Wright, 2001, 28-32). Visitation can be extremely upsetting for children, and it is important to understand the developmental context of their feelings and behaviors. Very young children cannot understand the separation, and they tend to respond with bewilderment, sadness and grief. During visits, they may cling or cry, act out, or withdraw from their parent. At the end of a visit, when another separation is imminent, they may become confused, sad or angry. Following visits, infants and toddlers may show regressive behaviors, depression, physical symptoms, or behavioral problems. Foster caregivers may need information to help them understand and support young children who are distressed after a visit.

Parents also find visits to be a time of emotional upheaval, particularly during the first phase of placement. Parents often experience pain and sadness resulting from the separation. They may feel shame, guilt, depression, denial that there is a problem. Anger and/or worry about the child. During the first visits, the parent is likely to be awkward, tense, and uncertain. Visit coaches, caseworkers, and foster parents should help the parent process her emotions and help her interact with her child (Wright 2001, 23-28; Haight, W.L. *et al*. “Making Visits Better: The Perspectives of Parents, Foster Parents and Child Welfare Workers” *Child Welfare* 81(2), 2002, 173-202).

**Ensure frequent sibling contact**

The Fostering Connections to Success and Increasing Adoptions Act of 2008 addresses many issues that promote permanency and affect the health and wellbeing of very young children in foster care, including placing greater priority on keeping siblings together. While placements that can accommodate a very young child’s siblings should be sought, it may be necessary to separate siblings due to the special needs or circumstances of the very young child. When siblings are not placed together, the importance of siblings to the young child should not be minimized, especially if there is an established bond. Ensure frequent sibling visits and opportunities to maintain the sibling bond, especially for toddlers and preschools who may perceive their older siblings as caregivers.

These guidelines were prepared by a team of lawyers and social scientists. The project was overseen by an Advisory Committee consisting of some of the most respected American social scientists and judicial officers. These include Dr Joy D. Osofsky (Professor of Public Health, Psychiatry & Paediatrics at Louisiana State University Health Sciences Center), Dr Sheri L Hill (Early Childhood Policy Specialist Seattle, WA), Dr Brenda Jones Harden (Institute for Child Study, University of Maryland, College Park, MD), The Honorable Pamela L Abernethy (Marion County Circuit Court Salem, OR) and The Honorable Katherine Lucero (Superior Court, Santa Clara County, San Jose, CA). They are intended for application in the whole of the U.S.A. As Judge Abernethy said: “This guide helps to ensure that **as a nation**, we equip the bench to do better by babies every day.” [emphasis added]

## **4.15 Cumulative harm**

Section 162(1) of the CYFA sets out six types of harm, any one of which is sufficient to justify a finding that a child is in need of protection. These grounds, which are in identical terms to those which were in s.63 of the CYPA, may be summarized as follows:

(a) abandonment;

(b) death or incapacity of parent;

(c) physical abuse;

(d) sexual abuse;

(e) emotional/psychological abuse; and

(f) neglect.

Grounds (c), (d), (e) & (f) may be proved on the basis of actual harm or likelihood of future harm or both.

Section 162(2) of the CYFA, which had no equivalent in the CYPA, provides that for the purposes of grounds (c), (d), (e) & (f) the harm may be constituted by a single act, omission or circumstance or accumulate through a series of continuing acts, omissions or circumstances. Although this statutory enactment of the principle of “cumulative harm” dates only from 23/04/2007, the concept of “cumulative harm” is not new. It has long been accepted and applied both by the Court and by DFFH.

The Department’s Victorian Risk Framework, which had been the risk assessment tool used by DFFH since 1999, had a section labelled “Pattern and history of harm” which is part of every intake investigation. Commencing on 20/11/2021 its successor, the SAFER children framework guide, states at p.34: “You can only complete a good-quality, thorough and holistic assessment of safety and risk in child protection with sufficient information. We always need to think about the information we have (including pattern and history to identify cumulative harm) and whether it is sufficient to make decisions.” For many years, the Department’s court reports have included a section listing the details of any earlier involvement which the Department had had with the subject child & family.

For its part, the Court has regularly taken into account the notions of cumulative harm and cumulative risk of harm, applying where appropriate dicta of Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord Mustill agreed) in *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at p.591:

“The range of facts which may properly be taken into account [in determining whether a child is in need of protection] is infinite. Facts include the history of members of the family, the state of relationships within a family, proposed changes within the membership of a family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child…**And facts which are minor or even trivial if considered in isolation, when taken together, may suffice to satisfy the court of the likelihood of future harm.**” [emphasis by the writer]

Why, then, was it deemed necessary to include a specific statutory provision to deal with the issue of cumulative harm? The explanation given by Ms Robyn Miller at p.11 of her paper “Cumulative Harm: A Conceptual Overview” dated December 2006 is as follows:

“The intention of the previous Act was to respond to vulnerable children and families in respectful, appropriate ways using the minimum intervention required. One of the **unintended** consequences of the practice, which developed from the *Children and Young Persons Act 1989*, is that intake and initial investigations were increasingly based on episodic assessments, which were focused on immediate risk and safety, and less focussed on the developmental wellbeing of children, and patterns of abuse and neglect over time.”

It is not the experience of former Magistrate Power that in Court cases the Department’s focus was so restricted but it must be remembered that only a comparatively small percentage of reports of child abuse eventually find their way to a Court case and an even smaller percentage find their way to a contested Court hearing.

In her paper Ms Robyn Miller defines cumulative harm as “the effects of patterns of circumstances in a child’s life, which diminish a child’s sense of safety, stability and wellbeing” resulting from “compounded experiences of multiple episodes of abuse or ‘layers’ of neglect”. She goes on to discuss various manifestations of cumulative harm and provides a conceptual overview of the issue. The historical context is discussed, the theoretical underpinnings are explored and a range of relevant paradigms and research is presented under various headings, including:

* Culture
* The impact of cumulative harm on early brain development
* Cumulative harm and childhood trauma
* The impact of nurture on nature
* Cumulative harm and neglect
* The cumulative impact of family violence on development
* Early childhood development and cumulative harm
* Broad practice implications

While the paper presents an academic discussion of the issues relating to cumulative harm, its aim is to engage workers in the field with the experience of children and young people whose lives are dynamic, evolving and vulnerable to cumulative harm, particularly at the hands of those who are meant to care for and protect them.

In *DOHS v Mr D & Ms W* [2009] VChC 1 at pp.94-95, Power M discussed what he termed “The Misunderstood Concept of ‘Cumulative Harm’”:

“In their reports [the protective workers] have cut and pasted part of Robyn Miller’s paper ‘Cumulative Harm: A Conceptual Overview’, December 2006, p.3:

*‘Cumulative harm refers to the effects of patterns of circumstances and events in a child’s life which diminishes a child’s sense of safety, stability and wellbeing. Cumulative harm is the existence of compounded experiences of multiple episodes of abuse or layers of neglect. The unremitting daily impact on the child can be profound and exponential, covering multiple dimensions of the child’s life. Cumulative harm is experienced by a child as a result of a pattern of harmful events and experiences that may be historical, or ongoing with the strong possibility of the risk factors being multiple, interrelated and co-existing over critical developmental periods’ [emphasis by Power M]*

They have also urged that the protection application be proved on [what was said to be] the ground set out in s.162(2) of the CYFA which provides:

*‘For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.’*

The concept expressed in s.162(2) is neither new nor revolutionary. For as long as I can remember this Court has regularly taken into account the notion of cumulative risk of harm, applying where appropriate dicta of Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord Mustill agreed) in *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563,591:

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

And, of course, the less minor and less trivial the multiple facts, the more likely it is that their accumulation will suffice to satisfy the court to the requisite level.

But s.162(2) of the *CYFA* does not set out a separate ground for proof of a protection application. It is clear from its wording that it is no more than an evidentiary provision which may, in appropriate circumstances, make it easier for DOHS to prove one or more of the grounds set out in subsections (1)(c) to (1)(f).

Further, there is one thing in the above extract from Robyn Miller’s fine paper with which I disagree. That is the underlined word ‘*is*’. In my view it should read ‘*may be*’. To say that harm *is* experienced by a child as a result of harmful events and experiences ignores the reality of resilience and treats a child as a automaton. Some children may be harmed by exposure to relatively minor events. Other children may not be harmed by exposure to relatively traumatic events. It all depends on the resilience of the child. There is no evidence in this case that [any of the three children] have actually been physically harmed or psychologically harmed as yet by exposure to life events. This suggests to me that they are probably rather robust, resilient children since their life experiences to date could fairly be described as somewhat chaotic. If they have not yet suffered harm, it makes no sense to speak of them having suffered cumulative harm. In algebraic terms 0x = 0. The relevance of Robyn Miller’s thesis to the present case is in relation to cumulative risk of harm, not to cumulative harm *per se*.”

## **4.16 Family Drug Treatment Court**

The Family Drug Treatment Court [‘FDTC’] was launched by the Children’s Court of Victoria in May 2014. It is based on a paper prepared by Magistrate Greg Levine OAM for the purposes of his Churchill Fellowship which details observations made by His Honour of similar ‘problem-solving courts’ operating in U.S.A. & England.

The FDTC is a program operating within the Family Division of the Children’s Court. It engages parents whose drug and/or alcohol misuse/dependence has played a significant part in their removal of their child/children from their care. Utilising intensive case coordination and therapeutic intervention to address issues of substance misuse/dependence, mental health, housing and deficits in parenting and financial management, amongst other things, the FDTC aims to achieve permanent, sustainable family reunification of children with their parents.

The FDTC comprises a dedicated multi-disciplinary team of professionals across a variety of government agencies and non-government organisations, led by a dedicated Children’s Court judicial officer. By combining such a diverse range of professionals, the underpinning philosophy of collaborative practice is maintained and positive outcomes are more likely to be achieved.

Once a referral to the program has been made, the parent must undergo an eligibility screening conducted by the Court. This is followed by a clinical assessment to determine the parent’s suitability and identify issues of substance misuse, mental and physical health and a variety of other factors that may have led to the removal of the parent’s child/children. This assessment forms the basis for the parent’s individual treatment plan whilst on the program.

Once an individual treatment plan has been formulated and treatment begins the parent is required to participate fully in the activities he/she has agreed to as part of his/her rehabilitation. These may include-

* regular court appearances to facilitate monitoring of progress by the FDTC judicial officer;
* participating in regular tests for the use of non-prescribed substances; and
* attending a range of treatment and case management services as well as parenting support programs.

Once a parent has achieved significant progress in his/her recovery, the FDTC team will work with that parent to prepare for incremental reunification of the children with the parent. Parents fully graduate from the program once unconditional reunification of the family has been achieved. This process is generally expected to take approximately 12 months.

Parents who are unable to achieve unconditional family reunification at the end of their involvement in the FDTC program may have their children placed permanently in out of home care and any further court involvement with the family’s case will be heard in the mainstream Family Division of the Children’s Court.

In 2019 the FDTC received the Robin Clark ‘Making a Difference’ award at the Victorian Protecting Children Awards ceremony. The award recognises an individual, team or group within the child and family service sector that has made an exceptional contribution to directly improve the lives of children, young people and families in Victoria. It is the first time this kind of award has been conferred on a court-based program.

The FDTC operates only in respect of cases involving DFFH’s Preston & Shepparton offices. It originally sat in Melbourne but since November 2015 it has sat at the new Broadmeadows Children’s Court. It now also sits at Shepparton Children’s Court.

In the Children’s Court of Victoria 2018/19 Annual Report the following information is provided about the FDTC:

“Throughout 2018-19, the FDTC program received 65 referrals and worked with 56 parents of 85 children across Broadmeadows and Shepparton. It is too early into the program for meaningful outcome data from Shepparton but in the 2018-19 period 52% of the parents on the program achieved reunification with their children. A total of 80% of program participants who maintained engagement for at least 9 months of the 12 month program have achieved reunification with their children.”

In the Children’s Court of Victoria 2019/20 Annual Report the following information is provided about the FDTC:

“During the reporting period, the FDTC program received referrals for 62 parents of 118 children across both the Broadmeadows and Shepparton program locations, leading to the induction into the program of 30 parents of 59 children. Of the total number of FDTC participants (inclusive of those inducted prior to the commencement of the 2019-20 year) 57% achieved reunification with their children. There is a notable difference in the reunification rate between participants in Broadmeadows (71% reunification rate) and Shepparton (36%). The reunification gap can be attributed to the Broadmeadows FDTC program being delivered within a specialist Children’s Court context, whereas the Shepparton FDTC program operates with more limited capacity.

Since the FDTC program moved online from March 2020, limited access to technology, and generally poorer internet connectivity compared with metropolitan Melbourne may also have reduced program efficacy in Shepparton.”

The Children’s Court of Victoria 2020/21 Annual Report contains the following information about the FDTC:

“Despite the challenges of online operations in response to COVID-19, the FDTC has continued to achieve great success in assisting participants to achieve a level of recovery that has enhanced rates of sustainable reunification of parents to children. Inductions into the FDTC grew over the reporting period with 19 parents of 38 children inducted at Broadmeadows and 17 parents of 34 children inducted at Shepparton.

Reunification rates amongst FDTC participants continue to exceed the rate of reunification for children removed from parental care due to drug and alcohol use whose cases are heard in mainstream courts (estimated at 43% through a matched sample). Reunification rates increase significantly the longer parents engage with the FDTC program, with 59% of participants who engaged for over 6 months achieving reunification in the reporting period.”

The Children’s Court of Victoria 2021/22 Annual Report contains the following information about the FDTC:

“Throughout 2021/22, the FDTC has supported 64 parents in working to address their drug and alcohol use with a view to achieving safe and sustainable reunification with their children. To date, greater than 80% of all participants who completed the 12-month FDTC program have achieved reunification with their children. Overall, 94% of program graduates have achieved reunification. In each of Broadmeadows and Shepparton 23 parents were newly inducted in the FDTC during 2021/22.”

The Children’s Court of Victoria 2022/23 Annual Report notes that during 2022/23:

* “the FDTC has supported 76 parents to address their drug and alcohol use with a view to achieving safe and sustainable reunification with their children”; and
* the FDTC program received referrals for 84 parents, leading to 40 inductions as follows: **Broadmeadows**: 48 referrals/17 inductions – **Shepparton** 36 referrals/23 inductions.

