5 [old]. FAMILY DIVISION - CHILD PROTECTION

THIS CHAPTER ONLY APPLIES UP TO 29/02/2016. SEE THE NEW CHAPTER 5 FOR CHILD PROTECTION LAW FROM 01/03/2016 & SUBSEQUENTLY.

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5.1 Child abuse

Central to the work of the Family Division of the Children's Court is the need to protect children from harm that has been caused or is likely to be caused by being subjected or exposed to abuse, ill-treatment, violence or other inappropriate behaviour from which their parents have not protected them or are unlikely to protect them.

Child abuse is the non-accidental misuse of power by adults over children involving an act or a failure to act which has endangered or impaired or is likely to endanger or impair a child's physical or emotional health and development [see the Department of Health & Human Services' website www.dhs.vic.gov.au]. Child abuse is generally regarded as falling into 4 overlapping categories:

(i) physical abuse;
(ii) sexual abuse;
(iii) emotional/psychological abuse;
(iv) neglect.

In what follows greater emphasis has been placed on category (iii) because it is the most difficult form of abuse to define and diagnose.

5.2 Emotional/psychological abuse

"I've met so many kids dying of malnutrition of the soul."
Senior Constable Nick Tuitasi (Programme Director Community Approach - New Zealand)

A major part of the work of the Family Division of the Children's Court involves the issue of emotional/psychological abuse of children, especially that constituted by exposure of children to domestic violence between adults. In recent years over half of the protection applications brought by the Department have involved domestic violence as a significant protective concern.

Much of the following is taken from a paper entitled "The Recognition and Management of Emotional Abuse in Children" presented by Dr Danya Glaser on 28 October 2002 at XVI World Congress of the International Association of Youth and Family Judges and Magistrates. Dr Glaser is a Consultant Child and Adolescent Psychiatrist at the Great Ormond Street Hospital for Children in London. See also Glaser, D. (2002), *"Emotional abuse & neglect (psychological maltreatment): a conceptual framework"* CAN: 26, 697-714.

Standing alone or in combination with other forms of abuse, emotional/psychological abuse is a common form of child maltreatment. Indeed, most residual harm from child abuse is psychological yet, paradoxically, professionals in the field continue to find difficulty in recognising and operationally defining psychological abuse. There are also difficult questions about appropriate intervention and therapy to protect a child from emotional abuse in the least detrimental manner.

Emotional abuse is defined as a child-carer relationship characterised by patterns of harmful interactions but requiring no physical contact with the child. Motivation to harm the child is not a necessary ingredient. Research, clinical experience and theoretical considerations have led Dr Glaser to the recognition and operational definition of 5 categories of emotionally abusive pervasive interactions between parent and child, categories involving both acts of omission and commission by the parent:

I. **Parental emotional unavailability, unresponsiveness and/or neglect of the child.** Possible causes include mental illness, health problems, post-natal depression, parental substance abuse {"Put simply, drug abuse and motherhood do not mix": *DOHS v BK* [CCV-Ehrlich M, 26/05/2008)}.

II. **Negative or mis-attributions to the child, leading to rejection and harsh punishment.** Examples include denigration, scapegoating, characterisations like 'bad chip off the old block'.

III. **Developmentally inappropriate or inconsistent expectations and/or impositions on the child.** Examples include:
- expectations which are significantly above or below a child's developmental capabilities;
- exposure to confusing or traumatic events and interactions (especially including domestic violence between adults).

IV. **Failure to recognise or acknowledge the child's individuality and psychological boundary. Using the child for the fulfilment of the parent's psychological needs.** These include a parent's inability or unwillingness to distinguish between a child's reality and an adult's needs and wishes. Using a child as a tool in a contact dispute with the other parent is a common example. The Munchausen by proxy syndrome is a high-water mark.

V. **Failure to promote the child's social adaptation.** Examples include:
   - actively promoting mis-socialisation (corrupting);
   - failing to promote a child's social adaptation (e.g. by isolating the child or by not ensuring the child attends school);
   - failing to provide adequate cognitive stimulation and opportunities for learning.

There is some significant recent research which suggests that ongoing exposure - especially in infancy and early & very early childhood - of a child to severe traumatic experiences including attachment disruption, maltreatment, emotional abuse and violent relationships may result in the physical development of the child's brain and nervous system being adversely affected. This has consequential implications for the child's development of a sense of self and, later, personality function. A leading figure in this research is Dr Bruce D Perry whose many papers include "*Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us about Nature and Nurture"* (2002) Brain and Mind 3: 79-100; "*Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children: The Neurosequential Model of Therapeutics"* (2006) Working with Traumatized Youth in Child Welfare (Ed. Nancy Boyd), Guilford Publications Inc., New York; "*Maltreatment and the Developing Child: How Early Childhood Experience Shapes Child and Culture"* (Inaugural Lecture – The Margaret McCain Lecture Series) and "*Neurosequential Model of Therapeutics – Protocol for Core Elements of the Therapeutic Program in the Pre-school Setting".*

Additional information can be found in the papers presented at XVI World Congress of the International Association of Youth and Family Judges and Magistrates by Dr Louise Newman (NSW Institute of Psychiatry) entitled "*Developmental Effects of Trauma - Child Abuse and the Brain*" and by Dr Sharon Goldfeld (Royal Children's Hospital-Victoria) entitled "*The Importance of Early Childhood*". See also *"From Neurons to Neighbourhoods"*, edited by Jack Shonkoff & Deborah Phillips, which presents state of the art literature related to trauma and brain development and www.zerotothree.org, the website developed by Zero to Three/National Center for Infants, Toddlers and Families.

In a paper entitled *"Child Abuse and Neglect and the Brain – A Review"* (2000) J Child Psychology Vol.41, No.1, pp.97-116 Dr Danya Glaser examined and discussed impairments of the developing brain attributable to, or caused by, abuse and neglect excluding nonaccidental injury that causes gross physical injury to the brain. Dr Glaser noted, *inter alia*:

- Over the last decade, evidence has continued to accumulate about the strong association between childhood maltreatment and social, emotional, behavioural, and cognitive adaptational failure as well as frank psychopathology, both in later childhood and adulthood (e.g. Ciccheiit & Toth, 1995; Post, Weiss & Leverich, 1994).
- The process of early brain development is constantly modified by environmental influences. Child abuse and neglect constitute one aspect of these environmental influences, which present the maturing child's brain with experiences that will crucially – and potentially adversely – affect the child's future development and functioning. The younger the infant, the more these environmental factors are mediated by the primary caregiver(s).
- It is possible that event-type abuse, which is more likely to be traumatic in nature, leads to different effects on the brain than do chronic emotional neglect and abuse.
- There is considerable evidence for changes in brain function in association with child abuse and neglect. The fact that many of these changes are related to aspects of the stress response is not surprising. The neurobiological findings go some considerable way towards explaining the emotional, psychological, and behavioural difficulties which are observed in abused and neglected children. Hyperarousal, aggressive responses, dissociative reactions, difficulties with aspects of executive functions, and educational underachievement begin to be better understood.
- The findings from neurobiological studies of brain development dealing with experience-expectant periods lead to an assumption of a deficit model, in which the lack of input to the developing child at certain critical stages of development will result in delay or absence of development of certain skills.
- Changes in the family's social context and in the child's immediate caregiving relationships, as well as the child's own adjustment, all influence the later outcome for the child's development.

- Since brain development is integrally related to environmental factors, active early intervention offers the greatest hope for children's future. The evidence on the protective effects of secure attachment in the face of stress clearly indicates a target for concern and treatment. In support of family preservation, there is a tendency to continue to attempt to bring about changes in parent-child interaction. When these are ultimately declared ineffective, adoption is contemplated. A good prognosis for a successful adoption is inversely related to the age of the child at adoption.
- A history of childhood maltreatment in a parent's own past is now recognized as one important risk factor in the abuse of children (e.g. Widom, 1989). This is, however, not an inevitable outcome (Langeland & Djikstra, 1995).

Dr Joy D. Osofsky (Professor of Public Health, Psychiatry & Paediatrics at Louisiana State University Health Sciences Center) has published two seminal articles on the impact of violence on children:

1. *"The Impact of Violence on Children"* (1999) which contains the following material:
   - An overview of the extent of children's exposure to various types of violence.
   - The effects of this exposure across the developmental continuum.
   - Key protective factors for children exposed to violence.
   - Research indicates that the most important resource protecting children from the negative effects of exposure to violence is a strong relationship with a competent, caring, positive adult, most often a parent; yet, when parents are themselves witnesses to or victims of violence, they may have difficulty fulfilling this role.
   - Directions for future research.
2. *"Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Prevention and Intervention"* (2003) which contains the following material:
   - A review of research on the prevalence of children's exposure to domestic violence;
   - A consideration of the available literature on the co-occurrence of domestic violence and child maltreatment; and
   - A discussion about the impact of such exposure on children.

In each article Dr Osofsky draws on an extensive library of reference material. She concludes the latter article with a bibliography of 57 references to the relevant literature. Dr Osofsky's website, www.futureunlimited.org contains a number of other relevant articles.

See also *Victorian Law Reform Commission Review of Family Violence Laws - Consultation Paper* (November 2004), especially at paragraphs 2.27-2.29, 4.45-4.57; 5.14-5.21; 10.46-10.49.

In a learned Court report written in April 2002, Dr Sharne A Rolfe, Developmental Psychologist (Senior Lecturer in the Department of Learning and Educational Development at the University of Melbourne & Principal Consultant, Sharne Rolfe and Associates, Consulting Psychologists), summarised some of the relevant literature relating to exposure of children to trauma:

> "There is a growing body of research indicating that exposure of children to domestic violence is a significant risk factor to their short and long-term psychological health. Domestic violence between parents in the presence of a child exposes the child to high level stress and trauma, elevated fear states and high arousal at a time when, by definition, the parents are unavailable to the child as figures of comfort, reassurance or emotional support.
>
> Recent research and scholarly analyses have presented compelling evidence linking early experience, brain organisation and social-emotional development. Joseph (1999), *Environmental influences on neural plasticity, the limbic system, emotional development and attachment: A review..* Child Psychiatry and Human Development, 29, 189-208) for example, describes research on the limbic system, located in the forebrain, which includes the hypothalamus, amygdala, and hippocampus. It serves the experience and expression of emotions and is associated with social-emotional development, including attachment. Research has shown that to develop normally, the nuclei of the limbic system require appropriate stimulation of a social, emotional, perceptual, and cognitive nature during the early months and years. If such experiences are not forthcoming, or if the environment is abnormal or repeatedly traumatic, the neurons and the connections between them are abnormal, or simply die in an accelerated fashion. According to Joseph, nuclei in certain areas of the limbic system are particularly vulnerable during the first three years. He states: 'If denied sufficient (emotional) stimulation these nuclei may atrophy, develop seizure-like activity or maintain or form abnormal synaptic interconnections, resulting in social withdrawal, pathological shyness, explosive and inappropriate emotionality, and an inability to form normal emotional attachments.' (p.189)

...In *Childhood trauma, the neurobiology of adaptation, and 'use-dependent' development of the brain: How 'states' become 'traits'* (1995) Infant Mental Health Journal, 16, 271-291, Perry *et al* describe a pathway linking neurodevelopment and traumatic experience. For example, if a child (or adult) is traumatised, the brain activates a hyperarousal (fight or flight) or dissociative (freeze and surrender) pattern. In young children, by virtue of their relative powerlessness, the latter response is more common. If the trauma is frequently repeated, particularly in the early years when the brain is most 'plastic' and vulnerable, so-called 'use-dependent' changes in brain functioning occur. Over time, the response of hyperarousal or dissociation becomes a trait in the child. In practical terms, what we observe is a child (and adult) who is chronically submissive or chronically aroused.

Summarising a large and complex literature, brain research has established that:

- Normal brain development is dependent on specific patterns of experience at specific times in development.
- Most of these 'critical periods' are in the early years.
- If the required experience is not forthcoming at the critical time, later experience may not be able to ameliorate negative effects on brain functioning.
- The way the brain becomes organised or 'wired' as well as the number of neurons and synapses that develop will depend on the nature of the experience it receives, particularly in the early years.
- Trauma and stress during childhood, particularly if sustained, can result in permanent changes to the organisation of the brain and hence the functional capabilities of children for the rest of their lives."

It is therefore not surprising that exposure of a child to trauma has been observed to have important ramifications for the child's development of a sense of self and, later, personality function.

A very powerful picture of the impact of domestic violence, seen through the eyes of the child, is painted by D.H. Lawrence in his novel *Sons and Lovers*, written in 1913. One wonders whether it was in any way autobiographical. It is the story of a Nottinghamshire coal-mining family, the Morels: father, mother and 4 sons. Paul was the oldest boy:

"The winter of their first year in the new house their father was very bad. The children played in the street, on the brim of the wide, dark valley until eight o'clock. Then they went to bed. Their mother sat sewing below. Having such a great space in front of the house gave the children a feeling of night, of vastness, and of terror. This terror came from the shrieking of the tree and the anguish of the home discord. Often Paul would wake up, after he had been asleep a long time, aware of thuds downstairs. Instantly he was wide awake. Then he heard the booming shouts of his father, come home nearly drunk, then the sharp replies of his mother, then the bang, bang of his father's fist on the table, and the nasty snarling shout as the man's voice got higher. And then the whole was drowned in a piercing medley of shrieks and cries from the great, windswept ash-tree. The children lay silent in suspense, waiting for a lull in the wind to hear what their father was doing. He might hit their mother again. There was a feeling of horror, a kind of bristling in the darkness, and a sense of blood. They lay with their hearts in the grip of an intense anguish. The wind came through the tree fiercer and fiercer. All of the cords of the great harp hummed, whistled, and shrieked. And then came the horror of the sudden silence, silence everywhere, outside and downstairs. What was it? Was it a silence of blood? What had he done?

The children lay and breathed the darkness. And then, at last, they heard their father throw down his boots and tramp upstairs in his stockinged feet. Still they listened. Then at last, if the wind allowed, they heard the water of the tap drumming into the kettle, which their mother was filling for morning, and they could go to sleep in peace.

So they were happy in the morning - happy, very happy playing, dancing at night round the lonely lamp-post in the midst of the darkness. But they had one tight place of anxiety in their hearts, one darkness in their eyes, which showed all their lives."

Emotional/psychological abuse has the potential to impair a child's development in all domains of the child's functioning:

	DOMAIN	SOME SYMPTOMS
1	**Emotional**	Child unhappy, frightened, distressed, anxious, traumatised or having low self-esteem.
2	**Behavioural**	Child is attention-seeking (insecure or indiscriminate attachment) or exhibits oppositional or conduct disorder, or age-inappropriate responses.
3	**Cognitive development and school adjustment**	Under-achievement, truancy, lateness.
4	**Peer relationships**	Child is withdrawn, isolated or aggressive.
5	**Physical health**	Non-organic pains & symptoms (including bed-wetting & soiling), poor growth, failure to thrive.

However, in the absence of observations of negative interactions between parent and child, diagnosis can be problematic because none of the above symptoms are specific to emotional abuse or neglect. The difficulty is compounded by the large number of variables in every case. The severity of emotional abuse is measured primarily by the effect of the abuse on the child. However, even intense chronic abuse may not necessarily cause significant emotional harm to a resilient child. Conversely, mild abuse may cause significant harm to another more fragile child. Relevant protective factors include:

- the child's temperament & innate resilience;
- resilience-promoting experiences of the child [e.g. educational attainment];
- brief duration of abuse [e.g. where there has been early intervention];
- the child has secure attachment and earlier good experiences;
- the child has other significant non-abusive relationships.

The difficult question for the Court is to determine at what point a parent's inability to respond to a child's needs and/or to maintain a child's emotional/psychological well-being crosses the ill-defined border of minimum standards and becomes abuse within the meaning of the CYFA.

5.3 Jurisdiction & Applications

Section 515(1) of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA') gives the Family Division jurisdiction to hear and determine each of the following applications relating to the protection of children.

5.3.1 Primary Applications

Proceedings involving the protection of a child are initiated in the Family Division of the Court by filing one of five primary applications on the relevant prescribed form with the appropriate registrar [s.214 of the CYFA]:

	PRIMARY APPLICATION	CYFA SECTIONS	FORM
1	**Application for temporary assessment order**	515(1)(g), 228-229	1
2	**Protection application**	515(1)(b), 162, 240-243	10
3	**Irreconcilable difference application**	515(1)(c) & 259-261	11
4	**Application for permanent care order**	515(1)(d) & 320	31
5	**Application for therapeutic treatment order**	515(1)(e) & 246	4

5.3.2 Secondary Applications

Once a proceeding has been initiated, there are nine types of secondary applications which can be made to the Family Division:

	SECONDARY APPLICATION	CYFA SECTIONS	FORM
1	**Application for an interim accommodation order**	515(1)(a) & 262	---
2	**Application to revoke:**		
	• a temporary assessment order	515(1)(h) & 235	3
	• an undertaking	273 & 279	19
	• a supervision order, custody to third party order, supervised custody order, custody to Secretary order or interim protection order	515(1)(j) & 304	28

	SECONDARY APPLICATION	CYFA SECTIONS	FORM
2	**Application to revoke:**		
	• a guardianship to Secretary order	515(1)(l) & 305	29
	• a long-term guardianship to Secretary order	515(1)(l) & 306	30
	• a permanent care order	515(1)(j) & 326	33
	• a therapeutic treatment/TT(placement) order	515(1)(h) & 235	8
3	**Application to vary:**		
	• a temporary assessment order	515(1)(h) & 235	3
	• an interim accommodation order	515(1)(i) & 268	15
	• an undertaking	273 & 279	19
	• a supervision order, custody to third party order, supervised custody order, custody to Secretary order or interim protection order	515(1)(j) & 300	28
	• a permanent care order	515(1)(j) & 326	33
	• a therapeutic treatment/TT(placement) order	515(1)(h) & 235	8
4	**Application to breach:**		
	• an interim accommodation order	515(1)(m) & 269	16
	• a supervision order, supervised custody order or interim protection order	515(1)(m) & 312-316	34
5	**Application for a new interim accommodation order**	515(1)(a) & 270	15
6	**Application to extend:**		
	• an interim accommodation order	515(1)(a) & 267	---
	• a supervision order, supervised custody order, custody to Secretary order or guardianship to Secretary order	515(1)(k) & 293	27
	• a therapeutic treatment order or therapeutic treatment (placement) order	255	9
7	**Application for an order regarding the exercise of any right, power or duty vested in a person as joint custodian or guardian of a child**	515(1)(n) & 283(3), 325	---
8	**Application for an order arising out of a child protection proceeding transferred to the Count under an interstate law**	515(1)(o) & Schedule 1	---
9	**Application for a therapeutic treatment (placement) order**	515(1)(f) & 252	6

5.4 Temporary assessment order

A temporary assessment order ['TAO'] enables the Secretary to gather certain specific information in relation to a child who is suspected to be, or to be likely to be, in need of protection prior to deciding whether or not to issue a protection application. The relevant statutory provisions are in ss.228-239 of the CYFA.

5.4.1 Application

The Secretary may apply to the Court for a temporary assessment order in respect of a child if the Secretary-

(a) has a reasonable suspicion that the child is, or is likely to be, in need of protection; and
(b) is of the opinion that further investigation and assessment of the matter is warranted; and
(c) is of the opinion that the investigation and assessment cannot properly proceed unless a TAO is made.

The application may be made upon notice to child and parents [s.228] or without notice if the Secretary is satisfied that the giving of notice is inappropriate in the circumstances [s.229]. Any such notice must be issued out of the Court by a registrar [s.228(4)(a)]. The Court may grant leave for the application to be dealt with without notice if satisfied that it is appropriate to do so [s.229(3)].

An application for a TAO cannot be made if a protection order is in force in respect of the child or an application for a protection order has been made but has not been determined [ss.228(3) & 229(2)].

5.4.2 Procedure for hearing of application

No procedure is set out in the CYFA or the regulations governing the hearing of an application for a TAO. It is the writer's view that the making of a TAO is a judicial, not an administrative, function and so the application must be heard in open Court. While ss.215(1)(b) & 215(1)(d) permit the Court to proceed without regard to legal forms and to dispense with the rules of evidence, the writer is of the view that the Court is likely to require an application for a TAO to be supported by evidence on oath or affidavit. If the latter, the deponent will almost certainly be required to attend at the hearing of the application to answer questions by the presiding judicial officer and, in the case of an application on notice, by the parent, carer and/or child or by their legal representatives.

5.4.3 Matters to be considered by the Court

Section 230 provides that in deciding whether or not to make a TAO, the Court must consider-

(a) whether there is information or evidence that would lead to a person having a reasonable suspicion that the child is, or is likely to be, in need of protection; and
(b) whether a further investigation and assessment of the matter is warranted; and
(c) whether the Court is satisfied that the investigation and assessment cannot properly proceed unless a TAO is made; and
(d) whether the proposed investigation or assessment is likely to provide relevant information that is unlikely to be obtained elsewhere; and
(e) whether any distress the investigation or assessment is likely to cause the child will be outweighed by the value of the information that might be obtained; and
(f) any other matter that the Court considers relevant.

5.4.4 Pre-conditions for making of TAO

The Court may only make a TAO if it is satisfied of the three matters set out in s.231-

(a) the making of the TAO is in the best interests of the child; and
(b) it is necessary for the Secretary to assess whether the child is in need of protection; and
(c) the Secretary cannot properly carry out the investigation or assessment unless the TAO is made.

5.4.5 What TAO may provide for

Section 232(1), read in conjunction with ss.233 & 234, permits a TAO to provide for any one or more of the following-

- **Entry to premises**: Authorise the Secretary to enter the premises where the child is living and/or require the parent or carer to permit the Secretary so to enter;
- **Interview**: Require the parent or carer of the child to permit the Secretary to interview the child and to take the child to a place determined by the Secretary for that interview and/or require the parent or carer to attend an interview with the Secretary and, subject to the privilege against self-incrimination and legal professional privilege, to answer any questions put in the interview;
- **Medical examination**: Authorise the examination of the child by a registered medical practitioner or registered psychologist unless the medical practitioner or psychologist is of the opinion that the child has sufficient understanding to give or refuse consent to the examination and the child refuses that consent; may also direct the parent or carer to permit the Secretary to take the child for that medical examination and authorise the results of the medical examination to be given to the Secretary;
- **Directions/Conditions**: Give any direction or impose any conditions that the Court considers to be in the best interests of the child.

5.4.6 Report

A TAO must direct the Secretary to provide a report about the outcome of the investigation or assessment by a date specified in the order [s.232(4)].

Section 238(2) requires the report to set out-

(a) details of any action taken by the Secretary under the order; and
(b) the results of the investigation and assessment; and
(c) any other information that the Secretary considers ought to be provided to the Court or that the Court directs to be included in the report.

Section 238(3) requires the Secretary, unless otherwise directed by the Court, to cause a copy of the report to be given to each of the following-

- the child the subject of the report and his/her legal representatives;
- the parent and his/her legal representatives; and
- any other person specified by the Court.

5.4.7 Duration

A TAO made on notice remains in force for a period not exceeding 21 days beginning on the date of the order that is specified in the order [s.236(1)].

A TAO made without notice remains in force for a period not exceeding 10 days beginning on the date of the order that is specified in the order [s.236(2)].

A TAO cannot be extended [s.236(3)] except in the special circumstances detailed in s.236(4).

5.4.8 Application for variation or revocation of an *ex parte* TAO

If a TAO has been made without notice to the child and the parent of the child, s.235(1) empowers the child or the parent to apply at any time to the Court for the variation or revocation of the TAO. The applicant must serve a copy of the application on the Secretary and each other party to the TAO a reasonable time before the hearing of the application [s.235(2)]. The Court must hear such application expeditiously [s.235(3)] and may vary the TAO, revoke it or dismiss the application [s.235(4)].

5.4.9 Appeal

If the Court makes an TAO or dismisses an application for an TAO in respect of a child-

(a) the child; or
(b) a parent of the child; or
(c) the Secretary-

may appeal to the Supreme Court against the order or the dismissal [s.239(1)].

If the Court makes an order dismissing an application by the Secretary for leave for the *ex parte* hearing of an application for a TAO, the Secretary may appeal to the Supreme Court against that dismissal [s.239(2)].

The powers of the Supreme Court on the appeal are set out in ss.239(3) & 239(4) of the CYFA.

5.4.10 Statistics

There have been very few applications for temporary assessment orders. From 01/10/2007 – when the order first became available – to 30/06/2013 there were 28 TAOs made.

5.5 Protection application

The principal way in which a case involving allegations of child abuse is commenced in the Court is by a protection application being filed with the Court by a protective intervener. Section 181 of the CYFA provides that the following persons are protective interveners:

- the Secretary to the Department of Health & Human Services or his or her nominee [see also s.17];
- all members of the police force.

Notwithstanding this provision and an identical provision in s.64(2) of the CYPA, a protocol has been in place since 1992 between the Department of Health & Human Services and Victoria Police, the effect of which is that only delegates of the Department act as protective interveners in Victoria.

Most protection applications are initiated by a protective intervener as a consequence of a report of suspected child abuse received by the Department. Very occasionally the trigger may be a referral from the Criminal Division of the Court under s.349(1) of the CYFA.

There are two alternate mechanisms for protective intervention, the choice depending on the surrounding circumstances, in particular the magnitude of the perceived risk, the parental attitude to voluntary compliance with DHHS and the nature of the alleged harm:

- **Notice**: A notice is served on the parent and, if the child is at least 12 years old, on the child stating that a protection application in respect of the child will be made to the Court [ss.240(1)(a) & 243].
- **Apprehension and placement in emergency care**: The child is placed in emergency care by the protective intervener, either with or without a warrant, pending the hearing of a protection

application [ss.240(1)(b) & 241-242]. In such a case the Court must hear an application for an interim accommodation order as soon as practicable and in any event within one working day after the child was placed in emergency care. Unless the Court hears such an application 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.

% EMERGENCY CARE	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
	51.8%	54.8%	62.7%	64.3%	66.7%	64.0%	67.6%	67.8%

If, other than under s.172(3), a child is placed in emergency care or apprehended without a warrant and an application is to be made to the Court in respect of the child, s.587 of the CYFA imposes an obligation on the person who placed the child in emergency care or apprehended the child to file with the appropriate registrar as soon as possible after doing so and before the application is made, a notice setting out the grounds for placing the child in emergency care or apprehending the child.

5.5.1 Grounds for initiating protection proceedings

A protection application [Form 10] is a notice alleging that a child is in need of protection on any one or more of the 6 grounds set out in s.162(1) of the CYFA. Since these grounds are in identical terms to those which were in s.63 of the CYPA, the case law on that section is equally relevant to its predecessor s.162(1) of the CYFA:

CYFA/s.162(1)		PRE-REQUISITES
(a)	**Abandonment**:	The child has been abandoned by his or her parents and after reasonable inquiries: (i) the parents cannot be found; and (ii) no other suitable person can be found who is willing and able to care for the child.
Note: All 3 pre-requisites must be made out before a finding can be made on this ground. It is not sufficient that the child has been abandoned if there is another suitable person willing and able to care for the child.		
(b)	**Death or Incapacity**:	The child's parents are dead or incapacitated and there is no other person willing and able to care for the child.
Note: Both pre-requisites must be made out before a finding can be made on this ground. Incapacity is frequently a consequence of the custodial parent being admitted to a psychiatric hospital as an inpatient or having a drug overdose.		
(c)	**Physical abuse**:	The child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.
(d)	**Sexual abuse**:	The child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.
See *M v M* (1988) 166 CLR 69 in relation to a finding of unacceptable risk of sexual abuse. See *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 and *Re W Abuse Allegations; Expert Evidence* (2001) FLC 93-085 in relation to proof of sexual abuse.		
(e)	**Emotional/ psychological abuse**:	The child has suffered, or is likely to suffer, significant emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.
(f)	**Neglect**:	The child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.
Note: Most cases involving a failure to provide basic care involve chronically filthy homes. Cases of failure to provide appropriate medical &c. care are fairly uncommon and sometimes involve a parent with a moral or religious objection to contemporary medical procedures.		

5.5.2 Actual or likely harm

Each of the grounds of physical abuse [s.162(1)(c)], sexual abuse [s.162(1)(d)], emotional/psychological abuse [s.162(1)(e)] and neglect [s.162(1)(f)] may be proved on the basis of:

- actual harm; and/or
- likelihood of harm.

New s.162(2) provides that for the purposes of ss.162(1)(c) to 162(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 rationale for this two-limbed system [i.e. (1) past or present harm or (2) likely future harm] is clear and was explained in the Second Reading Speech for the CYPA [08/12/1988, p.1152] as follows:

> "The proposed legislation introduces revised grounds for protection applications, similar to those proposed by the Carney report, but expanded to include the probability that a child will be harmed, so that protective intervention can be initiated, where appropriate, before a child has actually been harmed."

In providing protection for children from likely future abuse as well as in relation to past abuse, both the CYPA and the CYFA are similar to s.31 of the Children Act 1989 (Eng). A much greater proportion of protection applications in Victoria are based on allegations of likelihood of harm than of actual harm.

5.5.3 Proof of protection application

The question of whether any of the grounds under s.162(1) of the CYFA are established is to be determined objectively - as opposed to deciding whether such risk or harm was intended by the parent(s)' actions - and is to be determined as at the time when the protection application was made: see *MS & BS v DOHS* [County Court of Victoria, unreported, 18/10/2002] per Judge Cohen at p.18 {Application for judicial review pursuant to O.56 dismissed: *Mr & Mrs X v Secretary to DOHS* [2003] VSC 140 per Gillard J}.

New s.215A of the CYFA – which replaces s.215(1)(c) – 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 proof of any **past** fact.

5.5.4 Meaning of "likely to suffer harm" and "unlikely to protect"

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 clear from new s.162(3) of the CYFA which provides:

> "(3) For the purposes of ss.(1)(c), (d), (e) and (f)-
> (a) 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;
> (b) 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."

Hence 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.

In *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord Mustill agreed) held that in the similar provision in s.31(2)(a) of the Children Act 1989 (Eng):

> "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." [p.585]

His Lordship went on to provide guidance on the way in which likelihood of harm may be proved, noting that the section contains "the language of proof, not suspicion" [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." [pp.590-591]

"The range of facts which may properly be taken into account 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 unsatisfactory parental responses to complaints or allegations. 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." [p.591]

For its part, s.162(3) leaves alive the less stringent common law test enunciated by Lord Nicholls of whether or not a child is **likely** to suffer harm in the future. For more discussion of "likelihood" in this context, see paragraphs 4.8.4 & 5.10.4.

5.5.5 Meaning of "significant damage" & "significant harm"

In *Director-General of Community Services Victoria v Buckley & Others* [Supreme Court of Victoria, unreported, 11/12/1992], O'Bryan J. said:

"The word 'significant' means 'important', 'notable', 'of consequence'. Cf. *McVeigh v Willara Pty Ltd* (1984) 57 ALR 344; Oxford Dictionary. The word 'damage' means injury or harm that impairs value or usefulness. Had the legislature intended that to satisfy the requirements of ground (e) damage must be serious and permanent if untreated, it would have chosen the word 'serious' or the words 'serious and permanent'." [p.4]

"For damage to be 'significant' for the purposes of sub-clause (e) [of s.63 of the CYPA] it must be 'important', or 'of consequence', to the child's emotional or intellectual development and it is irrelevant that the evidence may not prove some lasting or permanent effect or that the condition could be treated." [p.5]

"One might observe that before a finding could be made that a child has suffered or is likely to suffer emotional or psychological harm to the degree required by sub-clause (e) consideration would need to be given to the expert evidence before the Court. It would be very difficult to make a finding in favour of the [Department] in the absence of credible expert evidence." [p.6]

A further application of this dicta that it would be very difficult to make a finding of actual emotional or psychological harm in the absence of credible expert evidence is to be found in *DOHS v Ms D & Mr K* [Children's Court of Victoria-Power M, 15/06/2009]. In that case the Department had sought to prove actual harm under s.162(1)(e) relying only on evidence of observations of a social worker that the child had been very difficult to settle during part of the time he was in the care of the first foster carer. Explaining why that evidence was insufficient to support the Department's conclusion, his Honour said at p.33:

"There are any number of reasons why this might have been the case other than the inference that [the child's] observed irritability was a symptom of psychological harm. It may have been simply a consequence of his removal from the care of the mother with whose body he had become familiar over the previous 9¾ months. It may have been an example of so-called '**PURPLE** crying'. The acronym '**PURPLE**' stands for **P** (peak pattern), **U** (unpredictable), **R** (resistant to soothing), **P** (pain-like look on face), **L** (long bouts of crying), **E** (evening crying). For further information about this phenomenon see, for example, the website of the Columbus Regional Hospital www.crh.org. The evidence that it peaked at the age of about 6 weeks is not inconsistent with the research into the phenomenon of '**PURPLE** crying', a phenomenon about which [the social worker] had never even heard. It may have had any number of other aetiologies. It is no disrespect to [the witnesses called] to say that they do not have the expertise to express an opinion about the cause of [the child's] irritability nor in fact did they purport to do so on their own behalf. Moreover, even if his irritability was evidence of psychological harm, there is no evidence that [the child's] emotional or intellectual development has been significantly damaged for the symptom disappeared after a few weeks."

5.5.6 Statistics

In 2000/01 3,081 protection applications were issued in the state. In 2001/02 2,527 protection applications were issued. This represented a decline of 18% state-wide although the number of protection applications issued at Melbourne Children's Court increased by 6%. In 2002/03 the number of protection applications issued state-wide declined by a further 8%. However, in 2003/04 it increased by 3.5% to 2,399. The figures shown for Broadmeadows derive from courts at Kyneton, Castlemaine & Seymour which from time to time have been serviced by magistrates from Broadmeadows. In 2005/06 the number of protection applications filed state-wide increased by 12% over the previous year, in 2006/07 there was an increase of 6% and in 2007/08 a further increase of 8%. The trend was reversed in 2008/09 with a decline of 9.5%, most of which was in Melbourne and Barwon SW. Since 2009/10 the figures for "Melbourne" include applications filed at Moorabbin Justice Centre. There was a very small overall decline in 2009/10 although there were significant changes in Grampians, Loddon Mallee, Barwon SW & Gippsland in that year. In 2010/11 there was a 9% increase, fuelled by Melbourne, Grampians & Gippsland. In 2011/12 there was a massive 18% increase, fuelled by a 39% increase in Loddon Mallee and a 23% increase in Melbourne (including Moorabbin). The trend was reversed in 2012/13 with a small 3% decrease.

COURT REGION	PROTECTION APPLICATIONS ISSUED								
	2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
Grampians	245	264	252	291	297	167	237	161	224
Loddon Mallee	214	225	270	242	253	360	283	393	367
Broadmeadows	7	14	19	10	4	0	0	0	0
Barwon SW	167	142	162	205	165	295	269	318	381
Melbourne	1,457	1,786	1,824	1,987	1,654	1,616	1,855	2,282	2,093
Gippsland	283	238	313	347	360	263	341	396	370
Hume	231	247	261	271	301	303	285	296	302
TOTAL	**2,604**	**2,916**	**3,101**	**3,353**	**3,034**	**3,004**	**3,270**	**3,846**	**3,737**

The majority of protection applications in Victoria are taken out on the grounds set out in ss.162(1)(c) & 162(1)(e) of the CYFA. A significant proportion of these have chronic domestic violence as an underlying cause: see p.10 of paper of Mr Peter Green entitled *"Towards Better Policing Responses in Child Protection"* presented at XVI World Congress of the International Association of Youth and Family Judges and Magistrates in October 2002.

Figures published by the Department of Human Services reveal that 98.2% of protection applications issued under the CYPA and finalised by the Court in 2001-2002 were found proved. The writer believes that this very high rate of proof has not significantly changed.

5.6 Irreconcilable difference application

A second mechanism for protecting a child from harm or abuse is provided by an irreconcilable difference application [Form 11]. If:

- a person who has custody of a child [s.259(1)]; or
- a child [s.259(2)]-

believes that there is a substantial and presently irreconcilable difference between themselves to such an extent that the care and control of the child is likely to be seriously disrupted, either may make an application to the Court for a finding that such a difference exists.

The Second Reading Speech for the CYPA [08/12/1988, p.1153] said of such application:

> "Considerable public attention has been focussed in recent years on a legislative provision of the various State child welfare systems whereby a court can make a finding that 'a substantial and presently irreconcilable difference' exists between a young person and his or her parents. Where such differences arise, the government believes greater emphasis must be placed on seeking to conciliate or mediate between family members with the aim of assisting parents and young people to reach agreement without recourse to the court, and adversary proceedings."

In order to maximise this aim of assisting parents and child to resolve their differences without resorting to court proceedings, s.260(1) of the CYFA makes it mandatory, before an irreconcilable difference application may be filed with the appropriate registrar by a person, that he or she:

- lodge with the Secretary to the Department of Health & Human Services an application for conciliation counselling; and
- produce to the appropriate registrar a certificate of conciliation counselling issued by the Secretary within the last 3 months.

The Secretary is not a party as of right but may participate fully in the hearing of the application with leave of the court: see s.259(5) of the CYFA.

In practice the irreconcilable difference provisions have not achieved the legislature's aim. Irreconcilable difference applications are very rare in the Court, less than 6 state-wide in each of the last few years. That is not to say there are so few cases each year in which parents and children are at loggerheads but - perhaps not always fairly to parents of out-of-control teenage children - such cases are more usually brought as protection applications under the emotional/psychological abuse ground of s.162(1)(e) of the CYFA.

5.7 Application for permanent care order

A third mechanism for protecting a child from harm or abuse is provided by an application for a permanent care order, an order which vests custody and guardianship of a child in a person other than the parents or the Secretary. A pre-requisite for the Court making such an order is that the child's surviving parents have not had care of the child for at least 6 months or for periods that total at least 6 of the last 12 months [s.319(1)(a)].

Under s.320(1) of the CYFA, an application for a permanent care order [Form 31] is made by the Secretary to the Department of Health & Human Services in relation to a person who is, or persons who are, approved by the Secretary as suitable to have custody and guardianship of the child in lieu of the parents.

Prior to 22/02/1993 an application for a permanent care order had to be made by the proposed permanent carer(s). Since that time a proposed permanent carer is not a party as of right but may participate fully in the hearing of the application with leave of the Court [s.320(2) of the CYFA replacing s.112(2A) & 112(2B) of the CYPA which had been inserted by s.14 of Act No.69/1992].

5.8 Applications for therapeutic treatment order & therapeutic treatment (placement) order

A therapeutic treatment order ['TTO'] and a therapeutic treatment (placement) order ['TTPO'] are orders of the Family Division of the Court which have been available since 01/10/2007.

A TTO requires a child aged 10-14 who has exhibited sexually abusive behaviours to participate in an appropriate therapeutic treatment program. The relevant statutory provisions are in ss.244-251, 255-258 & 349-355 of the CYFA.

A therapeutic treatment (placement) order grants sole custody to the Secretary of a child in respect of whom a TTO is in force. A TTPO does not affect the guardianship of the child. The relevant statutory provisions are in ss.252-258 of the CYFA.

5.8.1 Applications only by the Secretary

If the Secretary is satisfied on reasonable grounds that a child aged 10-14 is in need of therapeutic treatment for sexually abusive behaviours, the Secretary may by notice direct-
(a) the child to appear; and
(b) the parents to produce the child before the Court-
for the hearing of an application for a TTO [s.246(1)].

Since 01/12/2013 an application for a TTO remains one of the very few applications in which the CYFA requires the child to attend Court: see paragraph 4.8.6.

The Secretary may apply to the Court for a TTPO in respect of a child in relation to whom a TTO already exists or an application for a TTO has been made [s.252].

No person other than the Secretary has power to apply to the Court for either a TTO or TTPO. Nor does the Court have power to make a TTO or a TTPO on its own initiative.

5.8.2 Therapeutic Treatment Board

The Therapeutic Treatment Board ['TTB'], established under s.339 of the CYFA, has the following functions detailed in s.341:

(a) to evaluate and advise the Minister on services available for the treatment of children in need of therapeutic treatment who are aged 10-14 and who have exhibited sexually abusive behaviours; and

(b) to provide advice to the Secretary under ss.244-254 of the CYFA.

Provisions relating to the constitution, committees and procedure of the TTB are in ss.340 & 342-343. The TTB has no direct interface with the Children's Court.

In some instances it is mandatory for the Secretary to refer a case to the TTB for advice prior to an application for a TTO being made. In other instances it is discretionary. Under s.245, if the Secretary receives-

- a report from a member of the police force under s.185; or
- a referral from the Criminal Division of the Children's Court under s.349(2)-

about sexually abusive behaviours exhibited by a child aged 10-14, the Secretary must refer the matter to the TTB for advice, *inter alia* as to whether it is appropriate to seek a TTO in respect of the child. If the Secretary receives a report from any other person under s.185, the Secretary may refer the matter to the TTB for such advice. If a matter is to be referred to the TTB, s.245(5) requires it to be referred before the Secretary applies for a TTO.

If a matter is referred to it, s.245(6) requires the TTB to provide advice as to whether it is appropriate to seek a TTO in respect of the child. In a significant proportion of the cases referred to it, the TTB has advised the Secretary that it is not appropriate to make an application for a TTO. The writer understands that this is sometimes because the TTB believes that the parent will ensure the provision of appropriate treatment voluntarily and hence a TTO is not necessary to **ensure** the child's access to, or attendance at, an appropriate therapeutic treatment program. At one level it is difficult to criticize the TTB for this rationale. Section 248(b) makes it clear that one of the two pre-conditions for the Court to make a TTO is that "the order is necessary to ensure the child's…attendance". Further, in the Second Reading Speech in the Legislative Council on 15/11/2005 the Minister said of these new provisions:

> "This reform is intended to supplement, not replace, voluntary access to treatment. It will always be preferable for parents to connect a child exhibiting sexually abusive behaviour to treatment voluntarily and avoid exposing them to any court process."

But the difficulty with the narrow interpretation of "ensure" sometimes adopted by the TTB is that it sometimes leads to a gross injustice for a child with a good parent who is prepared to commit the child to treatment voluntarily. The reason is this. If the child has been charged with one or more criminal offences which have led the Court to refer the matter to the Secretary under s.349(2) and a TTO is subsequently made, the Court must stay the criminal proceedings (if not completed) for a period not less than the period of the TTO. Ultimately if the child has attended and participated in a therapeutic treatment program under the TTO, s.354(4) requires the Court to discharge the child without any further hearing of the related criminal proceedings. It follows that a TTO acts as a shield preventing a child from acquiring a criminal record for the related criminal offences. So, on the TTB's interpretation of the word "ensure", a child of a bad parent - who is not prepared to arrange treatment voluntarily - will have such a shield, whereas the child of a good parent is prevented from having a shield and hence may acquire a criminal record as well as the possibility of registration under the Sex Offenders Registration Act 2004. It is difficult for the writer to accept that this was the intention of Parliament.

It is not mandatory for the Secretary to follow the advice of the TTB. The Secretary is only required by s.245(7) to "consider any advice received from the TTB under s.245 before applying for a TTO". The writer is aware of a small number of cases in which the Secretary has applied for a TTO – and in each case the Court has made a TTO – notwithstanding the advice of the TTB to the contrary.

5.9 Service of applications

5.9.1 Service of document generally on parent, child or other person

Section 594 of the CYFA provides that if the CYFA requires a notice of an application or hearing to be served on a child or a parent of a child or other person in accordance with s.594, the notice may be served-

(a) by posting, not less than 14 days before the hearing date stated in the notice, a true copy of the notice addressed to the person at his or her last known place of residence or business; or
(b) by delivering, not less than 5 days before the hearing date stated in the notice, a true copy of the notice to the person; or
(c) by leaving, not less than 5 days before the hearing date stated in the notice, a true copy of the notice for the person at the last known place of residence or business of the person with a person who apparently resides or works there and who apparently is not less than 16 years of age.

Section 596 of the CYFA provides that if a person is required or permitted under the CYFA to serve a document, the person may serve the document by causing it to be served by another person.

5.9.2 Application for temporary assessment order on notice

Section 228(4)(b) of the CYFA provides that notice of an application for a TAO must be served, in accordance with s.594, on-
(a) the child's parent; and
(b) the child, if he or she is of or above the age of 12 years.
It is clear from ss.228(1) & 228(2) that it is the Secretary who is responsible for serving the notice.

5.9.3 Protection application

Sections 240(1)(a), 243(1) & 243(2)(c) of the CYFA make it clear that if a protective intervener decides to initiate a protection application by notice, he or she must serve the protection application on-
(a) the child's parent; and
(b) the child, if he or she is of or above the age of 12 years-
in accordance with s.594 of the CYFA.

5.9.4 Irreconcilable difference application

Sections 259(3) & 259(4)(c) of the CYFA require the applicant to cause a copy of the application to be served, in accordance with s.594, on all other parties and to the Secretary.

5.9.5 Permanent care application

Section 320(4) of the CYFA requires the Secretary to cause notice of the application to be served on-
(a) the child;
(b) the parents;
(c) the proposed permanent carer(s); and
(d) such other person as the Court directs.
The mode of service detailed in s.320(5) is identical to that in s.594.

5.9.6 Application for therapeutic treatment order or therapeutic treatment (placement) order

Sections 246(2)(c) & 252(3)(c) of the CYFA require notice of an application for a TTO or TTPO to be served, in accordance with s.594, on-
(a) the child's parent; and
(b) the child.
It is clear from ss.246(1) & 252(2) that it is the Secretary who is responsible for serving the notice. There is a potential conflict in the legislation as to the time frame in which service of application for a TTPO must be effected. Section 594 sets out specific time frames. By contrast, s.252(2) merely requires notice of the application for a TTPO to be served a reasonable time before the hearing of the application.

5.9.7 Secondary applications

Section 277 of the CYFA requires the applicant – no longer the appropriate registrar or the Secretary as was the case with s.88 of the CYPA – as soon as possible to cause a copy of any of the following secondary applications to be given or sent by post to any person by or on whose behalf such an application could have been made and, in the case of an application to extend, to the child and the parent of the child. The relevant secondary applications are-

- the variation of an undertaking or any conditions thereof or the revocation of an undertaking;
- the variation or revocation of a supervision order, custody to third party order, supervised custody order or custody to Secretary order;
- the revocation of a guardianship to Secretary order or a long-term guardianship to Secretary order;

- the extension of the period of a supervision order, supervised custody order, custody to Secretary order or guardianship to Secretary order;
- an order in respect of a failure to comply with a supervision order, a supervised custody order, an interim protection order or an interim accommodation order; or
- an order regarding the exercise of any right, power or duty vested in a person as joint custodian or guardian of a child.

5.9.8 Default service provisions

Section 593(1) of the CYFA provides that if under the CYFA a person is required to serve a document and no specific provision is made as to how the document is to be served, a true copy of the document must be served by personal service, by registered post or by leaving at the last or most usual place of residence or business with an appropriate person who apparently resides or works there and who apparently is not less than 16 years of age. Section 593(3) provides a mechanism for service upon a company or registered body.

5.9.9 Substituted service

Section 593(2) of the CYFA empowers the Court to make an order for substituted service if it appears, by evidence on oath or by affidavit, that service cannot be promptly effected.

5.9.10 Proof of service

Section 595 of the CYFA provides that:
(1) service of a document may be proved by evidence on oath, affidavit or declaration;
(2) evidence of service must identify the document served and state the time and manner of service;
(3) a document purporting to be an affidavit or declaration of service is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements in it.

5.9.11 Dispensation with service

Section 531(1) of the CYFA enables the Secretary to apply to the Family Division for an order dispensing with service on a specified individual of an application, document or order or all applications, documents or orders which would otherwise have been required to have been served on that person in respect of a specified child.

Section 531(2) empowers the Court to make the order sought dispensing with service if satisfied by oath or affidavit of the Secretary that-
(a) the specified individual cannot be located after the Secretary has made reasonable efforts to discover his or her location; or
(b) there are exceptional circumstances.

5.9.12 Consequence of failure to serve a relevant party

In *M v Director-General, Department of Health and Community Services (Victoria)* [Supreme Court of Victoria, unreported, 18/08/1993], Nathan J held that:
- the Department, itself a creature of statute, must comply with the statutes which delineate and enumerate its powers;
- the service provisions are unequivocal and mandatory in their terms and cannot be avoided by reliance on s.82 of the CYPA;
- the Department had failed to serve the protection application on the child's step-father in compliance with CYPA/s.70 and accordingly any subsequent order was improperly obtained.

It also appears from his Honour's judgment that in the absence of an order dispensing with service the terms of any order made by the Court do not run against any person who has not been properly served, i.e. that any condition imposed on a person who has not been served cannot be breached for lack of compliance.

In *Re Andrew (No.2)* 32 Fam LR 386; [2004] NSWSC 842, a decision of the Supreme Court of NSW - Common Law Division, Wood CJ at CL took the opposite view in relation to the service of an application to the Children's Court of NSW under the Children and Young Persons (Care and Protection) Act 1998 (NSW), legislation which in relation to this issue is not easy to distinguish from the Victorian Act. The issue for determination in this case was one of law confined to whether or not the Children's Court of NSW had a discretion to dispense with service upon a parent in care proceedings. His Honour quashed the decision of the Children's Court magistrate that he did not have the power under the NSW Act to authorise the applicant not to serve the father or to excuse or ignore

non-service and that the only permissible exception to service was if reasonable efforts to effect service had been made and had failed. At [54]-[56] Wood CJ at CL said:

> "[54] I have come to the conclusion that the Children's Court should be found to have an implied power to dispense with service of a care application upon a parent. In summary, that finding depends upon the following combination of circumstances:
>
> (a) the jurisdiction of the Children's Court to entertain a care application is conferred under a statute that has the objects and the guidelines as to its application which are spelled out in ss.8 and 9 [see ss.1 & 87(1)(h) of the CYPA], in which it is made clear that the interests of a parent are subservient to the interests attaching to the safety, welfare and well-being of the child;
>
> (b) the court has an implied jurisdiction that extends to those matters that are incidental to, or necessary for, the proper discharge of the jurisdiction which is imposed on it by statute;
>
> (c) the procedural requirements set out in s.64 [see ss.68(2) & 70(2) of the CYPA] are to be regarded as directory or regulatory rather than mandatory;
>
> (d) it is accepted that the rules of natural justice do need to give way where their application would frustrate the purpose or objects of the legislation by which jurisdiction is conferred;
>
> (e) the court is able to make such orders, including interlocutory orders as it thinks appropriate in relation to matters within its jurisdiction…
>
> [55] Of some assistance for my conclusion is the observation of Lord Evershed, in the decision in *Re K* cited by Brennan J in *Lieschke*, to the effect that the procedure and rules applicable to this area of jurisdiction 'should serve and not thwart its purpose'. Similarly, some support can be found in the decision of Stuart-White J in Re X [1996] FLR 186 where the court excused service of the notice of care proceedings upon a father because of the potentially catastrophic results, to the family and to the child, of his involvement, although this was a case where the Family Proceedings Rules (UK) conferred a discretion.
>
> [56] I am, however, satisfied that it is only in exceptional circumstances that the power to dispense with service could be exercised, that is, where service upon, or participation of, the parent in the proceedings, would unacceptably threaten the safety, welfare and well-being of the child. The power must be read in a way that reflects the need, in this context, to balance the interests of natural justice and those of the child. Moreover before it is exercised it would seem to be appropriate, if not essential, for a separate representative of the child to be appointed, who might place before the court any matter in opposition to the effective exclusion of the father from the proceedings."

5.10 Decision-making principles for Family Division matters

5.10.1 Principles governing the Court's decision-making

Section 8(1) of the CYFA requires the Court, where relevant, to have regard to the principles in-

- s.10 – the "best interests" principle; and
- ss.13-14 – additional decision-making principles for Aboriginal children-

in making any decision or taking any action under the CYFA. However, s.8(4) provides that s.8(1) 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.

These principles thus apply to the determination of all Family Division applications. For some examples of the application of the "best interests" principle to various factual situations, see the judgments in the following cases:

- *DOHS v Ms T & Mr M* [Children's Court of Victoria-Power M, 12/10/2009] at pp.18-20 & 93-96;
- *DOHS v Ms D & Mr K* [Children's Court of Victoria-Power M, 15/06/2009] at pp.19-20 & 37-46;
- *DOHS v Ms K & Mr L* [2009] VChC 3 per Power M at pp.13-16;
- *DOHS v Mr M & Ms H* [Children's Court of Victoria-Power M, 11/05/2009] at pp.32-34 & 121-125;
- *DOHS v Mr O & Ms B* [2009] VChC 2 per Power M at pp.39-40 & 44-45;
- *DOHS v Mr D & Ms W* [2009] VChC 1 per Power M at pp.90-91 & 97-98;
- *DOHS v Mr D & Ms B* [2008] VChC 2 per Power M at pp.51-52 & 100-106;
- *DOHS v Ms B & Mr G* [2008] VChC 1 per Power M at pp.28-29 & 117-119;
- *DOHS v Mr & Mrs B* [2007] VChC 1 per Power M at pp.19-20 & 41-47.
- *DOHS v The D Children* [Children's Court of Victoria-Power M, 11/01/2012] at pp.21-23, 48-49, 124,138, 148-149, 174 & 176.

5.10.2 Principles governing decision-making by the Secretary & a community service

Sections 8(2) of the CYFA requires the Secretary of DHHS, 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.

5.10.3 "Best interests" principle – "The paramountcy principle"

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). This is in very similar terms to the consideration in s.87(1)(aa) of the CYPA – described in s.87(1A) as the paramount consideration – that the Court must have regard to the need to protect children from harm and to protect their rights and to promote their welfare. Curiously, the matters in s.10(2) are not expressed to have priority over those in s.10(3).

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. They are not entirely easy to reconcile. Some of the matters are identical or in similar terms to the nine other matters previously contained in s.87(1) of the CYPA which although expressed to apply to a Court determining what finding or order to make on a protection application or irreconcilable difference application had in fact been given a wider interpretation: see e.g. the decision of Beach J in *F v C* [Supreme Court of Victoria, unreported, 28/01/1994] which held that s.87(1)(j) – in similar terms to s.10(3)(g) save that it spoke ambiguously of removal of the child from his or her "family" – was relevant to the determination of an IAO application.

Many of the matters in s.10(3) are family-oriented-

(a)	**Minimum intervention**	The need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child.
(b)	**Promote family relationships**	The need to strengthen, preserve and promote positive relationships between child and the child's parent, family members and persons significant to the child.
(g)	**Pre-condition to removal**	The need to ensure that 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. For a discussion of the law on this central consideration, see paragraph 5.10.4.
(h)	**Placement within extended family**	If a child is to be removed from the care of his or her parent, consideration is to be given first to the child being placed with an appropriate family member or other appropriate person significant to the child before any other placement option is considered.
(i)	**Reunification**	The desirability, when the child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent.
(j)	**Parent, relative, carer capacity**	The capacity of each parent or other adult relative or potential caregiver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan.
(k)	**Family contact**	Contact arrangements between the child and the child's parents, siblings, family members and other persons significant to the child.
(q)	**Sibling togetherness**	The desirability of siblings being placed together when they are placed in out of home care.

The other matters in s.10(3) are as follows-

(c)	**Aboriginal culture**	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.
(d)	**Child's views & wishes**	The child's views and wishes, if they can be reasonably ascertained, should be given such weight as is appropriate in the circumstances.
(e)	**Cumulative harm**	The effects of cumulative patterns of harm on a child's safety and development.
(f)	**Stability of care**	The desirability of continuity and stability in the child's care.
(l)	**Child's individuality**	The child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity
(m)	**Culture generally**	Where a child with a particular cultural identity is placed in out of home care with a care giver who is not a member of that cultural community, the desirability of the child retaining a connection with their culture.
(n)	**Support for child**	The desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities.
(o)	**Uninterrupted education, employment**	The desirability of allowing the education, training or employment of the child to continue without interruption or disturbance.
(p)	**Delay**	Possible harmful effects of delay in making the decision or taking the action.
(r)	**Anything else**	Any other relevant consideration.

In *DOHS v Sanding* [2011] VSC 42 at [11]-[15] Bell J traced the aetiology of the "best interests" principle – labelled by him the "paramountcy principle" – and discussed its relationship with the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the United Nations Convention on the Rights of the Child:

> [11] "Children are ends in themselves and not the means of others. They form part of the family, the fundamental group unit of society. Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in relation to matters affecting them. Children are especially entitled to protection from harm, and to human development. Those values are inherent in the best interests of the child which is the foundational principle of the *Children, Youth & Families Act*. That principle is the cardinal consideration in protection proceedings in the court, including the making and revoking of custody to secretary orders. The legislation contains a detailed scheme for identifying and protecting the child's best interests which it is the responsibility of the secretary to administer and the jurisdiction of the court to enforce.
>
> [12] The best interests of the child is a long-standing principle of the *parens patriae* jurisdiction of the courts. The history of that jurisdiction was examined extensively by Lord Guest in *J v C* [1970] AC 668, 692-700, which concerned 1925 guardianship legislation. His Lordship said (at p.697) the 'dominant consideration has always been the welfare of the child' and (at p.700) cited with approval this statement by Danckwerts LJ in the case of *In re Adoption Application 41/16* [1963] Ch 315, 329: 'there can only be only one "first and paramount consideration", and other considerations must be subordinate.'
>
> [13] The High Court of Australia has described the origin of the principle of the best interest of the child in the same way. For example, in *ZP v PS* (1994) 181 CLR 639, 647 Mason CJ, Toohey and McHugh JJ said that, in the *parens patriae* jurisdiction, the 'Court of Chancery has always been guided by the principle that the welfare of the minor is the first and paramount consideration'. In *Northern Territory v GPAO* (1999) 196 CLR 553, 584 Gleeson CJ and Gummow J said the best interests of the child was an 'important and salutary principle of substantive law, adopted by courts exercising parens patriae jurisdiction for more than a century'.
>
> [14] The paramountcy principle is now specified as a human right in s 17(2) of the *Charter of Human Rights and Responsibilities Act 2006*, which provides that every child has the right 'to such protection as is in his or her best interests and is needed by him or her by

reason of being a child'. In s 17(2), the Charter also specifies the human right to protection of the family.

[15] Lastly, the paramountcy principle is expressed in international declarations and conventions to which Australia has subscribed, including the *International Covenant on Civil and Political Rights* [Opened for signature 16 December 1966, 999 UNITS 171 – entered into force 23 March 1976] (see articles 23(3) and 24(1)) and the *Convention on the Rights of the Child* [Opened for signature 20 November 1989 – entered into force 2 September 1990]. The convention specifies the basic human rights that children everywhere have without discrimination, including the right to survival, to development of their full human potential, to protection from harm, abuse and exploitation and to participate fully in family, cultural and social life. In reference to the best interests of the child, this is art 3:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

In *DOHS and K siblings* [2013] VChC 1 at pp.15-21, Wallington M discussed the operation of ss.10(3)(c), 10(3)(d), 10(3)(f) & 10(3)(q) in the context of a case involving long-term permanency planning for five very young Aboriginal children who had been out of parental care for 3 years.

In *DOHS v The D Children* [Children's Court of Victoria, 11/01/2012] at p.189 Magistrate Power said: "The 'best interests principles do not create jurisdiction. They merely dictate how conferred jurisdiction is to be exercised."

5.10.4 Section 10(3)(g)–Child not to be removed from parent unless unacceptable risk of harm

Section 10(3)(g) of the CYFA – in apparently mandatory terms – provides that 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. Although it is hidden away as the seventh in a list of 18 considerations in s.10(3), it appears to the writer to be the central consideration in most, if not all, cases.

Clearly the legislature did not intend that any **possibility** of harm to a child, however remote, was sufficient to justify removing a child from his or her family pursuant to s.10(3)(g) of the CYFA. For had it so intended, it would not have used the term "**unacceptable** risk". When does a risk of harm to a child become an **unacceptable** risk? The writer has long taken the view that the test of "unacceptable risk" in the context of an application for bail is equally relevant to the test in the Family Division of unacceptable risk of harm under s.10(3)(g).

In *DPP v Haidy* [2004] VSC 247 Redlich J had formulated such a test. At [15] His Honour noted that "a tenuous suspicion or fear of the worst possibility if the offender is released will not be sufficient". At [16] His Honour said:

> "It is not necessary that the prosecution establish that the occurrence of the event constituting the risk is more probable than not. There are recognised conceptual difficulties associated with applying the civil standard of proof to future events. *Davies v Taylor* [1974] AC 207 at 212; *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325 per Gleeson CJ. To require that the risk be proved to a particular standard would deprive the test of its necessary flexibility. *What must be established is that there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable.*" [emphasis mine]

In *DPP v Stewart* [2004] VSC 405, in granting bail to an 18 year old charged with two counts of armed robbery, Morris J said at [11]-

"What is an unacceptable risk must be considered in the context of the conditions to which bail will be subject if bail is granted. In this case the conditions I propose will require a great deal of support from other people, which will be freely given. I think with that support there is a sufficient prospect of reducing the risk to one that is acceptable rather than unacceptable."

In *DOHS v SM* [2006] VSC 129 Hansen J applied similar reasoning in approving a Magistrate's decision to place a 1 month old breastfed infant on an IAO in the care of the parents. At [28] his Honour said: "Clearly there is a risk, but [the Magistrate] assessed it as one that could be taken in the framework provided." This framework was one in which "the situation [was] to be rigorously overseen by DOHS, both by visits and by application of the conditions".

In *DOHS v DR* [2013] VSC 579 at [59]-[63] Elliott J performed a thorough analysis of s.10(3)(g) in the course of an IAO appeal. At [60] His Honour referred with approval to the aforementioned dicta of Redlich J in *DPP v Haidy* [2004] VSC 247, emphasising by italics the last sentence in paragraph [16]: *"What must be established is that there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable."* His Honour continued:

[61] "That case was recently referred to by the Court of Appeal with approval in a case dealing with s.9(5) of the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic): *Nigro v Secretary to the Department of Justice* [2013] VSCA 213, [119]-[120] (Redlich, Osborn and Priest JJA). Having set out the passage I have just referred to, the Court of Appeal continued at [120]:

> 'Such an approach is consonant with the view expressed in a number of the authorities in respect of not dissimilar legislation that the question is whether on the evidence before it the court is satisfied that there is a real likelihood, though not necessarily more likely than not, that the offender will commit an offence whilst on bail'.

Another passage earlier in the judgment at [111] is also of some assistance:

> 'An unacceptable risk thus requires consideration of the likelihood of offending and, if it eventuates, what the consequences of such offending are likely to be. Whether a risk is unacceptable will depend not only upon the likelihood of it becoming a reality but also on the seriousness of the consequences if it does.'

See also [112]-[113] and the cases there cited. From the language of the Act, assisted by these passages, it is plain that, for the purposes of s.10(3)(g), the court is required to assess, in the particular circumstances of the case, the likelihood of the conduct in question occurring in the future, together with the nature and extent of any risks of harm to the child associated with the conduct in the event it were to occur.

[62] It was put on behalf of the Parents that the allegations being made are very serious and in those circumstances the court needs to be satisfied on the balance of probabilities with due regard to the factors mentioned in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.2. In this context reference was made to the provisions of s.162 of the Act concerning what is necessary to establish when a child is in need of protection. It was submitted a court would need the benefit of a contested trial before it could properly assess the cumulative effect of the evidence now before the court: see s.162(2).

[63] Whilst the seriousness of some of the allegations of RA is beyond question, on an appeal such as this it is not necessary for the Department to actually prove the allegations are true. In addition to what I have referred to in relation to the proper construction of the phrase 'unacceptable risk', it is sufficient to repeat what the High Court said in *M v M* (1988) 166 CLR 69 [a case which has been referred to with approval by the High Court in subsequent cases, e.g. *Northern Territory of Australia v GPAO* (1999) 196 CLR 553, 583-584, 608, 642, 645 and, most recently, *Douglass v R* (2012) 290 ALR 699, 711] at 77.3:

> '[The trial judge]'s remarks [concerning the applicability of the approach in *Briginshaw*] 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 stated in *Briginshaw*, that the 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.' "

In *Secretary to DOHS v Children's Court of Victoria & Ors* [2014] VSC 609 Macaulay J allowed a DOHS appeal against an IAO placing 4 children in the care of their mother on stringent conditions and placed the children on an IAO in out of home care. At [31] his Honour said:

> "In view of the nature of the allegations concerning physical and emotional abuse of the children by [the mother] and other members of the household, the history of domestic violence within a household, and [the mother's] pattern of substance abuse, the paramount interests of the children call for a demonstrable level of willingness on the part of [the mother] to engage with department support, particularly when required by court order, to ameliorate the risk of harm to acceptable levels. Sadly such willingness to cooperate is lacking. Merely pointing to some incidents o'clock cooperation on her part is not sufficient to allay my concerns about the ongoing risk of harm to the children if left in [the mother's] care."

5.10.5 "Aboriginal Child Placement Principle"

Under s.3 of the CYFA, 'Aboriginal person' means a person who:
(a) is descended from an Aborigine or Torres Strait Islander; and
(b) identifies as an Aborigine or Torres Strait Islander; and
(c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

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.

The criteria in s.13(2) are-
(a) as a priority, wherever possible, the child must be placed within the Aboriginal extended family or relatives and where this is not possible other extended family or relatives;
(b) if, after consultation with the relevant Aboriginal agency, placement with extended family or relatives is not feasible or possible, the child may be placed with-
    (i) an Aboriginal family from the local community and within close geographical proximity to the child's natural family;
    (ii) an Aboriginal family from another Aboriginal community;
    (iii) as a last resort, a non-Aboriginal family living in close proximity to the child's natural family;
(c) any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community.

The principles in s.14 deal with-
1. Self-identification and expressed wishes of the child as to Aboriginality.
2. Child with parents from different Aboriginal communities.
3. Child with one Aboriginal parent and one non-Aboriginal parent.
4. Placement of child in care of a non-Aboriginal person.

In the Second reading Speech for the CYFA the then Minister described these provisions as "A new approach to maintaining Aboriginal children's connection to their family and culture."

The above principles were discussed by Bell J in *DOHS v Sanding* [2011] VSC 42 at [22]-[23], [79] & [110] and ultimately applied at [249]. The Aboriginal Placement Principles were also discussed under the heading "Why have it? What does it mean?" in the fine judgment of Wallington M in *DOHS and K siblings* [2013] VChC 1 at pp.6-15.

5.10.6 Additional decision-making principles for the Secretary & a community service

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-

- parents should be assisted and supported in reaching decisions and taking actions to promote the child's safety and wellbeing;
- out of home carers should be consulted and given an opportunity to contribute to the decision-making process;

- the decision-making process should be fair and transparent, the views of all persons directly involved in the decision should be taken into account and decisions are to be reached by collaboration and consensus, wherever practicable;
- the child and all relevant family members (unless their participation would be detrimental to the safety or wellbeing of the child) should be encouraged and given adequate opportunity to participate fully in the decision-making process;
- persons involved in the decision-making process should be provided with sufficient information, in a language and by a method they can understand, to allow them to participate fully in the process, given a copy of any proposed caseplan, given sufficient notice of any meeting proposed to be held and given an opportunity to involve other persons to assist them to participate fully in the process;
- if the child has a particular cultural identity, a member of the appropriate cultural community chosen or agreed to by the child should be permitted to attend meetings held as part of the decision-making process;
- in the case of an Aboriginal child:
  (i) opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views;
  (ii) a meeting should be held convened by an Aboriginal convenor approved by an Aboriginal agency and attended by child, parent, extended family and other appropriate members of the Aboriginal community as determined by the parent; and
  (iii) in making a decision to place the child in out of home care, an Aboriginal agency must first be consulted and the Aboriginal Child Placement Principle must be applied.

5.10.7 The United Nations Convention on the Rights of the Child

The above decision-making principles are squarely based on the Convention on the Rights of the Child which sets out the undertakings of the international community in recognizing children as independent persons with their own integrity and human rights. The Convention 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. Of all the United Nations' Human Rights instruments, the Convention on the Rights of the Child is the most widely ratified, having been accepted by 197 state parties. The only notable exception is the United States of America. Australia became a signatory on 22/08/1990. For further information, see "Myths & Facts Concerning the Convention on the Rights of the Child in Australia" by Ms Melinda Jones: www.aifs.gov.au/institute/afrc6papers/jones.html. See also www.earlychildhoodaustralia.org.au.

The Convention refers to the best interests of the child being the primary consideration when government intervenes in family life and to the government respecting and providing support for the responsibilities, rights and duties of parents, extended family or, where applicable, the community.

The Convention also states, *inter alia*, that:
- children have a right to an identity;
- Indigenous children should not be denied the right, in community with other members of the group, to enjoy their own culture;
- attention shall be paid to the cultural background of children in out-of-home care; and
- young people who are capable should be able to speak for themselves in matters that affect them.

The last-mentioned point is contained in Article 12 of the Convention which 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 was referred to in general terms by Bell J in *DOHS v Sanding* [2011] VSC 42 at [15]. Article 12 in particular was discussed at [209] where His Honour commented:

> "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."

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. In the course of the hearing, reliance was placed on Article 12 of the Convention, an article which was not wholly consistent with Victorian law in operation in 2000 and which remains not wholly consistent with s.524 of the CYFA. Magistrate Power held that the children should not be legally represented, and refused to exercise a discretion based on the Convention which was not in accordance with domestic Victorian law. At p.13 he said:

> "I cannot lawfully exercise a discretion in reliance on an International Convention – even one as powerful as the United Nations Convention on the Rights of the Child – in order to achieve a result which is contrary to, or is inconsistent with, the domestic law of this State. It is a matter for the Victorian parliament, not for me, whether or not the Convention should be adopted in this State. In the course of exercising a discretion, a judicial officer cannot lawfully usurp the role of Parliament. Properly understood, nothing in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273 provides to the contrary."

Child representation is an exception. By and large the Convention has effectively been incorporated into domestic Victorian law, especially in s.10 of the CYFA. Two Convention provisions of central importance are Articles 7 & 9.3 in Part I of the Convention. The latter part of Article 7 states:

> "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:

> "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."

The goal of these two Articles can be seen enshrined in paragraphs (a), (b), (g), (h), (i), (j) & (k) of s.10(3) of the CYFA. For further discussion see:

- *DOHS v Ms T & Mr M* [Children's Court of Victoria-Power M, 12/10/2009] at p.20;
- *DOHS v Ms D & Mr K* [Children's Court of Victoria-Power M, 15/06/2009] at p.34;
- *DOHS v Mr M & Ms H* [Children's Court of Victoria-Power M, 11/05/2009] at pp.34 & 123-124.

5.11 Interim accommodation order

An interim accommodation order ['IAO'] is an order which controls where a child lives pending the final determination by the Court of an application in the Family Division.

An IAO usually allows the Department of Health & Human Services to have non-voluntary involvement with a child. While the vast majority of applications for an IAO are made by protective interveners, applications may also be made by a child or a parent [s.262(2)(a)]. The prescribed forms for an IAO is in Form 12. An IAO is generally made in a case initiated by apprehension of the child and his or her placement in emergency care. It is comparatively uncommon for an IAO to be made in a case which is initiated by notice.

5.11.1 Power of the Court to make an IAO

The Court may make an IAO if any of the pre-conditions in s.262(1) of the CYFA are satisfied-

(a) the child has been placed in emergency care by a protective intervener;
(b) a protection application has been filed with the Court;
(c) the child has been placed in emergency care on a warrant issued under s.247 for failing to appear for the hearing of a therapeutic treatment application;
(d) an irreconcilable difference application has been filed with the Court;
(e) an application for conciliation counselling has been lodged with the Secretary under s.260;
(f) the hearing by the Children's Court of a proceeding in the Family Division is adjourned;
(g) an application for an extension or further extension of an IAO has been made to the Court;
(h) an IAO or any condition thereof has not been complied with;
(i) an application for a new IAO has been made to the Court under s.270(1);
(j) the child is placed in emergency care on a warrant issued under Chapter 4 of the CYFA;
(k) an appeal has been instituted to the Supreme Court or the County Court against an order made by the Children's Court under Chapter 4 of the CYFA; or
(l) a question of law has been reserved under s.533 for the opinion of the Supreme Court.

See *P v RM & Ors* [2004] VSC 14 at [16] per Gillard J and *DOHS v W* [Children's Court of Victoria, unreported, 20/04/2004] at p.2 per Judge Coate on the predecessor s.73(1) of the CYPA, which was in largely similar terms.

Section 262(3) of the CYFA empowers the Supreme Court or the County Court to make an IAO in respect of a child if the hearing by it of an appeal against an order made by the Children's Court under Chapter 4 of the CYFA is adjourned.

Section 262(6) of the CYFA prohibits an IAO being made in respect of a child in relation to whom a custody to Secretary order, a guardianship to Secretary order or a long-term guardianship to Secretary order is in force.

5.11.2 Power of a Bail justice to make an IAO

Section 262(4) of the CYFA provides that without limiting any other power to make an IAO expressly conferred on a bail justice by ss.262-271, a bail justice may make an IAO in respect of a child if-

(a) the child has been placed in emergency care by a protective intervener;
(c) the child has been placed in emergency care on a warrant issued under s.247 for failing to appear for the hearing of a therapeutic treatment application;
(h) an IAO or any condition thereof has not been complied with;
(i) an application for a new IAO has been made to the Court under s.270(1);
(j) the child is placed in emergency care on a warrant issued under Chapter 4 of the CYFA.

It is clear from s.264(3) of the CYFA that a bail justice may also make an IAO in respect of a child if-

(d) an irreconcilable difference application has been filed with the Court;
(e) an application for conciliation counselling has been lodged with the Secretary under s.260.

The most usual circumstance in which a bail justice will be asked to make an IAO is that set out in s.262(1)(a), namely that the child has been placed in emergency care by a protective intervener.

5.11.3 Placement of child under an IAO

Section 263(1) of the CYFA defines seven different IAO types:

(a) **Child release**: The release of the child pending the hearing on the adjourned date.

> Note: This type is rare and is clearly only appropriate for an older adolescent child.

(b) **Parent**: The release of the child into the care of a parent until the adjourned date.

> Note: If placement with a parent does not put a child at unacceptable risk of harm, the child is generally placed with the parent rather than out of home: see s.10(3)(g) of the CYFA.

(c) **Suitable person**: The release of the child into the care of one or more suitable persons until the adjourned date.

> Note: A child cannot be placed with a suitable person unless the Court or bail justice has had a report (oral or written) from the Department on that person's suitability. The most usual suitable persons are extended family members (e.g. grandparents, aunts, uncles). In preparing a report as to suitability the Secretary must have regard to the criteria prescribed in reg.16 of the Children, Youth and Families Regulations 2007: see s.263(6) of the CYFA.

(d) **Out of home care**: Placement of a child in an out of home care service until the adjourned date.

> Note: Out of home care service placements are operated either by the Department or by agencies under the auspices of the Department (e.g. Anglicare, Ozchild, Salvation Army, McKillop Family Services, Gordon Care). Sometimes the placement is with a foster family, sometimes in a group home or an adolescent community placement. Under s.266(1) of the CYFA, the Secretary may from time to time, if he or she believes it to be advisable in the interests of the child, transfer the child from one out of home care service to another.

(e) **Secure welfare**: Placement of the child in a secure welfare service until the adjourned date if there is a substantial and immediate risk of harm to the child.

> Note: The fact that a child does not have adequate accommodation is not by itself a sufficient reason to place a child in a secure welfare service [s.263(5)]. There are two secure welfare services in Victoria, both operated by the Department: a 10 bed facility for boys at 259 Ascot Vale Rd, Ascot Vale and a 10 bed facility for girls at 26-32 Bloomfield Ave, Maribyrnong. A secure welfare placement is usually only ordered in a case where a child has a serious psychiatric/psychological condition or a serious drug dependence which places him or her at substantial and immediate risk of harm.

(f) **Declared hospital**: Placement of the child in a declared hospital until the adjourned date upon the provision of a statement in the prescribed form [Form 13] by or on behalf of the chief executive of the hospital that a bed is available for the child at the hospital.

(g) **Declared parent and baby unit**: Placement of the child in a declared parent and baby unit until the adjourned date upon the provision of a statement in the prescribed form [Form 13] by or on behalf of the chief executive of the unit that a place is available for the child at the parent and baby unit.

Under s.263(9) of the CYFA the Governor in Council may by Order published in the Government Gazette declare hospitals and parent and baby units for the purposes of s.263(1)(f) & 263(1)(g).

5.11.4 Parent versus stranger

In *F v C* [Supreme Court of Victoria, unreported, 28/01/1994] the Court had placed a 6 year old child on an IAO in the care of his father, who had been the non-custodial parent. The Department had raised no protective concerns in relation to the father. It had been conceded by the mother than she was not fit, because of her continuing history of alcohol abuse, to have the child placed in her care on an IAO at that time. However, she sought unsuccessfully that the child remain in the care of foster parents with whom he had been living for 21 days because of the disruption she said would be caused to the child if he was now taken from their custody and placed with his father. On appeal, Beach J found no error in the magistrate's decision nor in his reliance on s.87(1)(j) of the CYPA [in similar terms to s.10(3)(g) of the CYFA]. His Honour disagreed with dicta of the Family Court in *R v M* (1993) FLC-80233 that "the fact of parenthood does not establish a presumption in favour of the natural parent nor generate a preferential position in favour of that parent from which the Court commences its decision-making process." His Honour preferred and approved the following dicta of Latham CJ in *Storie v Storie* (1945) 80 CLR 597 at 603:

> "Prima facie the welfare of a young child demands that a parent who is in a position, not only to exercise parental rights, but also to perform parental duties, should have the custody of the child as against any stranger. The fact that a stranger can also provide a good (or even, I should say, a better) home is in such circumstances an element of only slight, if any, weight."

5.11.5 When placement may be undisclosed

A parent is entitled to be given details of a child's whereabouts under an IAO unless the Court or bail justice making the order directs that those details be withheld [s.265(1)]. Section 265(2) provides that such direction may only be given if the Court or bail justice is of the opinion that the direction is in the best interests of the child.

While it is understandable that a fostercare agency may prefer that the addresses of their fostercarers are never disclosed, that is not the law. A judicial officer cannot order that details of a child's placement be withheld from the parents unless he or she is satisfied that it is the best interests of the child, not the best interests of the carer or agency, to do so.

5.11.6 Matters to which the Court must have regard in determining IAO applications

In determining IAO applications the Court must have regard, where relevant, to the principles in-

- s.10 – the “best interests” principle; and
- ss.13-14 – additional decision-making principles for Aboriginal children.

To the extent that the principles in s.10 of the CYFA are identical or similar to those in s.87(1) of the CYPA, the previous case law remains relevant.

The case of *JP v Department of Human Services* [Supreme Court of Victoria, unreported, 27/02/1997] is an illustration of the judicial balancing of risks and rights which is so often required in IAO decisions. Within hours of being born by caesarean section the child was removed from her mother's care and placed at another hospital after a bedside interim accommodation order hearing. The relationship between the mother, whose 2 younger children had been removed shortly after birth, and the Department was a difficult one. Cummins J. categorized the "critical question" as "risk to the child" [p.4]. The Department's case was that there was "a real and present risk to the child if there [was] any physical contact" with the mother. In allowing the appeal and making a new IAO, his Honour granted the mother contact to the child “for breastfeeding and incidental purposes in the immediate presence of a nurse or other professional of the hospital" [p.6], unless the professional "considered it inappropriate at the time" [p.7]. Underpinning the decision was the following dicta:

> "[I]t is a profoundly important right of a mother to be with a new born child and if the child's safety, which is the paramount concern, is satisfactorily cared for, that profound right should not be denied. Further, there are significant physical, biological and emotional considerations which go to the benefit of both mother and child by such [contact]." [p.8]

On the first page of his order in the "Children of God" case, *JA v MM* [Supreme Court of Victoria, unreported, 21/05/1992], Gray J. described the fundamental test for determining placement on an IAO as "the question of whether the risks to the children's welfare outweighed the obvious *prima facie* desirability that they should remain at liberty and in the custody of their parents."

In *P v RM & Ors* [2004] VSC 14 a protective intervener - concerned about the risk to the physical and mental wellbeing of girls aged 8 & 6 following a number of potentially traumatic events which had occurred in their presence, including "a nasty physical confrontation" between the girls' mother and the police and "a screaming match" between the mother, her partner and neighbours in which a number of threats were made by the mother, including threats to use firearms - had apprehended the girls and sought an interim accommodation order to a community service placement. A bail justice had refused the application and ordered that the children be returned to their mother overnight. In a submissions contest at the Children's Court at Melbourne on the next day Heffey M also made an IAO to the mother. On appeal to the Supreme Court Gillard J was satisfied that "a different interim order should not be made". In so determining, His Honour expressed the appropriate test at [32] in a clear and simple form focussing on the interests of the child (emphasis added) and hence applying the test which has subsequently been enshrined in the CYFA:

> "Whether or not a court should make an [interim accommodation] order is a question of discretion. The statutory provisions are silent as to the relevant matters that should be taken into account and do not state any test that must be satisfied. In my opinion, when one considers the provisions of the Act and its purposes, **a suitable test is that an interim accommodation order should be granted where it is in the interests of the child to make such an order**. It is wide and flexible. It ensures the interests of the child are protected and it also permits the making of an order which is appropriate in all the circumstances. Of course, risk of harm is relevant to consider and determine. But in my view it is not a question of saying that the order can only be made if there is an unacceptable risk of harm to the child. All the circumstances must be looked at. An order must be made if it is in the interests of the child, and the form of order should give effect to those interests. In determining the type of order that should be made the Court is obliged to consider the provisions of s.74 [of the CYPA]."

It is clear from his reasons at [36] that in determining the interests of the children, His Honour engaged in a judicial balancing process and gave significant weight to the protection inherent in the setting of appropriate conditions:

> "In my opinion, it is in the interests of the children to remain with the mother. I do not accept they are in any danger. To remove them from their mother would be extremely upsetting to them. In reaching that conclusion, I gain considerable comfort from the imposition of conditions upon the mother. I emphasise that if she was to breach any of these conditions, the probabilities are indeed extremely high that the children will be taken from her."

In *DOHS v W* [Children's Court of Victoria, unreported, 20/04/2004], Judge Coate noted at p.3 that in the first of the above quotations from *P v RM & Ors* [2004] VSC 14, Gillard J was "largely referring to the consideration of the criteria for the **making** of an IAO". Her Honour continued at pp.3-5 [emphasis added]:

> "However, at the point in that passage at which His Honour refers to the **form** of the order he states that the order should **give effect to the interests of the child**. At [17] His Honour states:
>
> > 'In deciding what to do on an application for an interim accommodation order, the **well being of the child** and **any risk to the physical or mental well being of the child** are matters of substance which must be carefully considered and determined. It is the immediacy and gravity of any risk of harm which is important on such an application. Is there an unacceptable risk if the children are left with the mother? Is there the likelihood of some harm?' [Bold emphasis added].'"

In *DOHS v W* her Honour added at p.5 that if s.87(1)(j) of the CYPA does apply at the IAO stage, the assessment of unacceptable risk of harm is to be made at the time at which the question is before the court for consideration, not at the time DOHS made its decision to commence proceedings or at the commencement of the proceedings. And at p.6 Her Honour, while noting that "family" is not defined in the CYPA, saw no reason to read down "family" in such a way as to exclude a non-custodial parent. Both of these issues have been clarified by s.10(3)(g) of the CYFA.

See paragraph 5.10.4 for other cases involving the test for determining whether a child is at "unacceptable risk of harm" in the care of a parent, in particular the detailed analysis of s.10(3)(g) in the judgment of Elliott J in *DOHS v DR* [2013] VSC 579 at [59]-[63].

5.11.7 Conditions

An IAO may include any conditions, including conditions relating to the contact of a parent or other person to the child, that the Court or bail justice considers should be included in the interests of the child: ss.263(7) & 263(8). Many of the Family Division standard conditions will also be relevant to interim accommodation orders, at least to such orders made by the Court. See *DOHS v Ms H* [ChCV, 25/06/2009] where in making a condition that if the mother did not maintain the home at an acceptable standard of cleanliness DOHS was to assist her in doing so, Ehrlich M. discussed the limitations on the Court's power to impose conditions on IAOs and distinguished the case of *Dr John Patterson v KS & A Magistrate of the Children's Court* [Supreme Court of Victoria-Harper J, unreported, 29/06/1993].

5.11.8 Duration

- An IAO made by a bail justice only remains in force until the application is heard by the Court on the next working day, i.e. the next day on which the offices of the Court are open [ss.3 & 264(3)].
- There is no limit to the duration of an IAO made by the Court which is of type (a) {child release}, (b) {placement with parent}, (c) {suitable person} or (d) {out of home care} [s.264(1)].
- An IAO made by the Court which is of type (e) {secure welfare}, (f) {declared hospital} or (g) {declared parent and baby unit} remains in force for a period of not more than 21 days beginning on the day on which the order is made [s.264(2)]. The use of the words "beginning on the day on which the order is made" – read in conjunction with s.44(1) of the Interpretation of Legislation Act 1984 (Vic) [No.10096] – means that in the calculation of the 21 day period the first day of the IAO is not counted even though the IAO commences on that day.
- Despite the above, an IAO made by the Court in a case where an application for conciliation counselling is lodged with the Secretary only remains in force until an irreconcilable difference application has been made to the Court or for 21 days (beginning on the day on which the order is made), whichever is the shorter [s.264(4)].

Note: In the unlikely event that-

- a child is placed on an IAO of type (e) {secure welfare}, (f) {declared hospital} or (g) {declared parent and baby unit} or is placed on an IAO of any type in a case where an application for conciliation counselling is lodged with the Secretary [s.262(1)(e)]; and
- the parties agree on an adjournment for more than 21 days-

the case will be re-listed on 22nd day for what is colloquially described as a 'rollover', i.e. a mention in which the IAO is extended to a further date with only a Department representative present.

5.11.9 Extension

Sections 267(1) & 267(2) of the CYFA provide that on application by a protective intervener the Court may extend the order-

- in the case of an IAO of type (a) or type (b), for a further period of any length if satisfied that it is in the best interests of the child to do so;
- in the case of an IAO of type (c), (d), (f) or (g), for a further period of up to 21 days beginning on the day on which the IAO is extended if satisfied that it is in the best interests of the child to do so;
- in the case of an IAO of type (e) which has not previously been extended, for one further period of up to 21 days beginning on the day on which the original IAO is extended if satisfied that exceptional circumstances exist which justify the extension.

5.11.10 Statistics

IAOs are very common orders. Recent state-wide statistics are as follows:

	2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
IAOs MADE	4147	4507	4880	5820	5691	5494	5405	6478	6632
IAOs EXTENDED	8659	10218	12293	14039	13820	14371	12117	11314	11149

Until 31/12/2010 there was a legislative prohibition on making an IAO whose duration was greater than 21 days in any case in which a child was placed out of parental care. This, in turn, led to a large number of extensions of IAOs in 'rollover' hearings. The removal of the 21 day maximum for most IAOs has subsequently led to a large reduction in the number of IAO extensions.

5.11.11 Hearings

Most initial applications for IAOs occur in circumstances where a child has been apprehended and placed in emergency care by a protective intervener either with or without a warrant issued under Chapter 4 of the CYFA. An application for an IAO in relation to an apprehended child must be made:

- as soon as practicable to the Court and in any event within one working day after the child was placed into emergency care[s.242(2)]; but
- unless the child is brought before the Court within 24 hours after being placed in emergency care, as soon as possible within that period of 24 hours to a bail justice [s.242(3)].

Whether or not an application for an IAO has already been heard by a bail justice, if an application for an IAO is made to the Court at a time when the Court is able to deal with it, the Court will hear the application on the same day. The cut-off time for arrival at the registry of Melbourne Children's Court and Moorabbin Justice Centre is 1.00pm on any working day with the exception of secure welfare related placements which may be filed up until 2pm. Lest this be the source of ill-informed criticism, it is important to understand that the reason for fixing 1.00pm is that experience shows that the parties in such cases are unlikely to be ready to commence within two hours of the application being made to the registry and thus it is not uncommon for IAO contests to finish after 6.00pm. If all of the parties do not agree with the Department's proposal for an IAO and/or associated conditions, the Court will hear an IAO contest forthwith. Usually this is by submissions from the parties or their legal representatives rather than by the hearing of evidence. The lawful justification for a submissions contest in such circumstances appears from the following dicta of Beach J in *G v H [No 2]* [Supreme Court of Victoria, unreported, 10/08/1994]:

> "[I]f a magistrate had a Protection Application before him which he was then unable to hear because of the unavailability of sufficient court time, or other sound reason, and it was necessary in the interests of children the subject of the application that he make an Interim Accommodation Order as a matter of urgency, that order to run for a short period of time until the magistrate could hear the protection application or a full contested Interim Accommodation Application, then it was no denial of natural justice to the parties to make an Interim Accommodation Order which could, perhaps, be described as a holding order, without hearing evidence in relation to the matter, but simply relying on the submissions of practitioners for the parties". [p.9]
>
> "If a magistrate makes as a matter of some urgency an Interim Accommodation Order in what is clearly a contested case, it is not essential the matter come back for a full hearing within a matter of hours of the making of the original order, but it should come back before the magistrate or some other magistrate within a reasonable time to enable the matter to be fully investigated." [p.10]

Consistent with his Honour's dicta, the practice at Melbourne Children's Court and Moorabbin Justice Centre is for time to be reserved on a later date for an IAO contest by evidence if any of the parties so requests. Though expressing substantial reservations about some aspects of submissions contents, Ashley J has reluctantly approved it in urgent circumstances: see *The Secretary DOHS v R & Anor* [2003] VSC 172 at [11]:

> "It could not be thought, in my opinion, that it was desirable for the learned Magistrate to determine the application simply in reliance upon unrecorded submissions from the Bar table. That is so despite s.82(1) of the [CYPA, now s.215 of the CYFA]. Nonetheless, it must be recognised that in urgent circumstances a course may be followed which is far from

ideal; though having said that, the problems when an appeal is brought from an Order made in such circumstances become very considerable."

In light of this dicta all submissions contests at Melbourne Children's Court are now recorded. In *P v RM & Ors* [2004] VSC 14 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." See also *CJ v Department of Human Services* [2004] VSC 317 at [10]-[11] per Habersberger J; *DOHS v SM* [2006] VSC 129 at [4] per Hansen J; *DOHS v Sanding* [2011] VSC 42 at [119]-[126] per Bell J; *DOHS v Children's Court of Victoria & Ors* [2012] VSC 422 at [22]-[27] per Dixon J.

In *DOHS v W* [Children's Court of Victoria, unreported, 20/04/2004], Judge Coate made it clear at p.1 that an order made after a submissions contest is not to be treated as establishing a status quo in favour of the successful party:

> "'Submissions contests' are held in circumstances where a protection application by apprehension comes before the court without notice and a decision must be made about the urgent interim placement of a child pending the opportunity for a proper hearing. The unsatisfactory nature of judicial decision making is legendary in these 'submissions contests' held in urgent circumstances invariably late in the day and sometimes into the evening without any evidence to assist one but rather only assertion and counter-assertion from the bar table. For this reason, it is accepted that any decision of a previous court in such circumstances will not be relied upon to bolster a party's position during a proper hearing on the evidence."

5.11.12 Variation of IAO

Section 268 of the CYFA gives the Court power to vary the conditions attached to an interim accommodation order upon application [Form 15]:

- by a child or parent who was not legally represented at the hearing of the application for the current IAO; or
- where new facts or circumstances have arisen since the making of the current IAO:
  - by a child or parent; or
  - by a protective intervener.

5.11.13 Breach of IAO

If a protective intervener is satisfied on reasonable grounds that there has been a failure to comply with an interim accommodation order or any condition attached to it, he or she may initiate breach proceedings [Form 16]: see ss.269(1) to 269(4) of the CYFA. Such proceedings - which are not uncommon - may be initiated either by notice or by apprehension of the child, the same two mechanisms as for initiation of protection applications.

On the hearing of a breach application, s.269(7) empowers the Court or bail justice to do one of three things:

(a) **revoke the IAO** and make another IAO;
(b) **refuse to revoke the IAO**; or
(c) if the original IAO has expired, **make another IAO**.

A new IAO made on breach is no longer restricted to the end date of the breached IAO: s.269 of the CYFA contains no equivalent of s.80(6) of the CYPA.

New s.269(8) provides that if the child is not required to appear before the Court on the hearing of a breach application – and the child will only be required to appear if the Court has ordered him or her to appear under s.216A or if the IAO is made on a therapeutic treatment application – the Court may hear and determine the application in the absence of the child.

5.11.14 New IAO

Section 270 of the CYFA gives the Court or a bail justice power to make a new IAO upon application [Form 15]:

- by a child or parent if:
  - he or she was not legally represented at the hearing of the application for the original IAO; or
  - new facts and circumstances have arisen since the making of the IAO; or
- by a protective intervener if:
  - new facts and circumstances have arisen since the making of the IAO; or

- the protective intervener is satisfied on reasonable grounds that the child is living in conditions which are unsatisfactory in terms of the safety and wellbeing of the child.

5.11.15 Additional statutory consequences of an IAO

- **Breach of SPO or SCO** If an IAO is made as a result of an alleged breach of a supervision order or a supervised custody order, that order is suspended on the making of the IAO and remains suspended for the period of operation of the IAO but the period of the supervision order or supervised custody order is not extended by the suspension [s.262(7)].
- **Breach of IPO** If an IAO is made as a result of an alleged breach of an interim protection order, the interim protection order expires on the making of the IAO [s.317(1)].

5.11.16 Appeal

If the Court makes an IAO or dismisses an application for an IAO in respect of a child:
(a) the child; or
(b) a parent of the child; or
(c) a protective intervener-
may appeal to the Supreme Court against the order or dismissal: s.271(1) of the CYFA.

There is one significant difference between the new s.271(1) and its predecessor s.80B(1). Under the former appeal provisions the right of appeal was not vested in a protective intervener but in "the Secretary by his or her delegate" and in "a member of the police force". As it happened, very few child protection officers have been delegated by the Secretary to initiate an IAO appeal and a number of appeals came to grief as a consequence: see for example *E v W* [2001] VSC 132 and *DOHS v SM* [2006] VSC 129 at [8]. These delegation issues no longer bedevil appeals under s.271.

Sections 271(2) & 271(3) of the CYFA empower the Supreme Court to make any order which it thinks ought to have been made or dismiss the appeal. But s.271 – like s.80B of the CYPA - does not, itself, describe the nature of the appeal which it authorises. Is it a hearing *de novo* or an appeal *stricto sensu*?

In *T v Secretary of Department of Human Services* [1999] VSC 42 Beach J appeared to prefer the latter view when he said at [21]:

> "The Children's Court is a specialist court presided over by Magistrates experienced in matters affecting young children and with ready access to experts in the field of child care. It is beyond doubt that Magistrates at the Court become very skilled in dealing with children and assessing the veracity of evidence given by them in courts and of the complaints they make particularly complaints of sexual abuse. Th[e Supreme] Court should be reluctant to interfere with orders of the Court made in such matters, particularly interim orders which are still subject to further review by the Children's Court itself and should only do so where it is abundantly clear that some significant error has been made."

However, in *The Secretary DOHS v R & Anor* [2003] VSC 172 at [16]-[18] Ashley J adopted an intermediate position:

> [16] "It seems to me, considering [ss.116 + 117] as well as s.80B [of the CYPA], that what the latter contemplates is an appeal which should ordinarily be conducted upon material adduced before the Children's Court, but with an opportunity of adducing additional material in particular, if not necessarily special, circumstances. Concerning what was then s.79 of the [CYPA], Eames J said this is in *M v The Secretary* [Supreme Court of Victoria, unreported, 28/10/1994]:
>
> > 'In my view, the breadth of the power given to the Supreme Court under s.79, and the nature of the proceedings, being concerned with the protection of children, are such that if the Court, in an appropriate case, thought that, although there was no apparent error of law in the conduct of the hearing before the Magistrate, the Order which was made was inappropriate, then it might interfere and substitute such order as it saw fit, and may do so either on the material provided to the Magistrate or on such information as was provided to the Court by way of affidavit. Furthermore, it does not seem to me that the Court would be precluded from hearing oral evidence, if thought appropriate. But it would, in my view, be exceptional for the Court to do so.'"

Ashley J continued:

> [17] "As I see it, his Honour took a view to the ambit of what is now s.80B which is compatible with my perception of its intended operation. Probably his Honour's approach would lead to the receipt of material not before the Children's Court more readily than I would contemplate; but having regard to the importance of the welfare of the child in a case such as this, some lenience may be thought reasonable.
>
> [18] All in all, it seems to me that if an appeal is brought on swiftly from the Children's Court, and if the material placed before that Court is capable of being reduced to a form upon which this Court can rely, then the appeal ought be dealt with upon that material and not otherwise. But if the material before the Children's Court is incapable of being reduced to a form upon which the Court can rely (though that should not be the case), or if between the order being made and the appeal coming on new circumstances have developed, or perhaps if important circumstances were not brought to the attention of the Children's Court, this Court should not be left uninformed when dealing with a s.80B appeal."

In *P v RM & Ors* [2004] VSC 14 Gillard J said at [22]: "I respectfully agree with much of what Eames and Ashley JJ have said but I would not confine the material to what was heard and produced before the Magistrate. The subject matter of any appeal concerning an interim accommodation order is too important to be subject to any strict rules." At [23] His Honour, drawing an analogy with bail applications and sentencing hearings, considered that he was entitled to accept "all material evidence" placed before him on the appeal "whatever be the form". At [25] His Honour made it clear that he considered an appeal under s.80B of the CYPA to be essentially a hearing *de novo*:

> "The paramount consideration must be the welfare of the child. Given the purpose and nature of an interim accommodation order in circumstances where a protection application has been made, the Court on an appeal under s.80B must consider all relevant material placed before it and is not confined to the material before the magistrate. In my opinion, the appeal is a re-hearing on the material before the magistrate and any other material which is relevant and which is placed before this Court. In this regard I agree with the views expressed by Eames J. If the Court considers another order should have been made then it is bound to set aside the order."

At [33] His Honour said: "I have no record of what took place before the magistrate other than a very brief summary in the affidavit of the appellant. More importantly, I do not have the reasons of the learned magistrate. One cannot have an appeal in the strict sense, namely an appeal on the material before the learned Magistrate and a consideration of her reasons. The exigency of the circumstances demands flexibility in relation to the appeal." And at [28], after referring to the above dicta of Beach J in *T v Secretary of Department of Human Services* [1999] VSC 42 at [21], Gillard J said: "I would not raise the hurdle as high as that…Speaking for myself I take the view that weight should be accorded to decisions made by Magistrates experienced in this area." In *DOHS v SM* [2006] VSC 129 at [13] Hansen J expressed a similar view:

> "[T]he decision of an experienced Magistrate in a specialist court is to be afforded respect and weight in consequence that it is such a decision, but doing so, in the end the decision must nevertheless be regarded in the context of all the relevant facts and circumstances of the case."

In *DOHS v DR* [2013] VSC 579 Elliott J held unequivocally that the appeal before him was a hearing *de novo* while acknowledging that the Children's Court is a specialist court. His Honour took into account new evidence, including the results of drug testing done by both parents during a one week adjournment which he ordered, a change in position by one of the children and fresh evidence of an unacceptable level of hygiene in the bathroom in the parents' home. At [64]-[65] his Honour said:

> "[64] This court has repeatedly recognised that the Children's Court is a specialist court: *Hien Tu v DOHS* (Supreme Court of Victoria, unreported, 23/02/1999, Beach J) at [21]; *P v RM* [2004] VSC 14 at [27] (Gillard J); *CJ v DOHS* [2004] VSC 317 at [21]-[22] (Habersberger J); *DOHS v Sanding* [2011] VSC 42 at [28] (Bell J); cf. *DOHS v Children's Court of Victoria* [2012] VSC 422 at [32] (Dixon J). Magistrates are only assigned to the Children's Court after regard has been had to the experience of the magistrate (or reserve magistrate) in matters relating to child welfare: s.507(2) of the CYFA.
>
> [65] In those circumstances due weight should be given to decisions made in the Children's Court, mindful of the processes imposed under the [CYFA] as to the manner in which proceedings are required to be conducted: see ss.215(1), 522, 530(8)-(11). With respect I agree with the comments of Gillard J in *P v RM* [2004] VSC 14 at [28] to the effect that it is not necessary for an appellant to establish that 'it is abundantly clear that some significant

error has been made' before an appeal is allowed: Contra *Hien Tu v DOHS* (Supreme Court of Victoria, unreported, 23/02/1999, Beach J) at [21]. To impose such a threshold would be to act contrary to the obligations imposed on this court pursuant to s.271 of the [CYFA]. This must be particularly so in an appeal such as this where significant fresh evidence is before the court."

In *Secretary to DOHS v Children's Court of Victoria & Ors* [2014] VSC 609 Macaulay J took a similar view to Elliott J & Gillard J and drew an analogy with hearings for interlocutory injunctions. At [24] his Honour summarised the principles as follows:

- "[A]n appeal under s.271 (like its predecessor) is in the nature of a re-hearing on the material before the magistrate and any on any other relevant material placed before the court hearing the appeal: *P v RM & Ors* [2004] VSC 14 at [25];
- for an appeal to succeed, it is not necessary for the Supreme Court to identify any *error* in the decision made by the magistrate – that is, a view may be taken that the decision of the magistrate was open, but nonetheless the Supreme Court thinks that a different order should have been made: *DOHS v SM* [2006] VSC 129 at [30];
- although the view of an experienced Children's Court magistrate should be afforded respect, and weight given to it, nevertheless it is ultimately the appellant court's responsibility to form its view on all the relevant facts and circumstances: *P v RM & Ors* [2004] VSC 14 at [28]; *DOHS v SM* [2006] VSC 129 at [14];
- although a child is only to be removed from the care of a parent if there is an unacceptable risk of harm, the existence of an unacceptable risk of harm is not the only matter to be considered – all the circumstances relevant to the paramount interests of the child must be considered: *P v RM & Ors* [2004] VSC 14 at [32];
- when considering, on an appeal concerning an IAO, whether there is an unacceptable risk of harm, it is neither necessary nor usually appropriate for a court to attempt to make findings of fact about events of past alleged harm; and
- analogously to hearings for interlocutory injunctions, the court is to weigh the evidence concerning the conduct in question, consider the likelihood of it occurring in the future, consider the nature and extent of the risk of harm to the child associated with the conduct were it to occur or re-occur, and consider whether that risk is unacceptable having regard to the paramount interests of the child: *P v RM & Ors* [2004] VSC 14 at [31]; *DOHS v DR* [2013] VSC 579 at [61]."

See also *CJ v DOHS* [2004] VSC 317 at [21]-[23] per Habersberger J; *R v DOHS* [Supreme Court of Victoria, unreported, 16/07/2008] at p.5 per Hansen J.

5.12 Findings leading to a protection order

Unlike the categorisation under s.85 of the CYPA, it is clear from s.275(1)(h) of the CYFA that an interim protection order is classified as a protection order.

5.12.1 Conditions precedent to making a protection order

Under s.274 of the CYFA, if the Court finds-

- that a child is in need of protection; or
- that there is a substantial and irreconcilable difference between a child and custodian-

the Court may make one of the 8 protection orders listed in s.275(1). The Court has no power to make a protection order in the absence of such a finding.

Subject to s.557(2) of the CYFA, s.276(1) prohibits the Court from making a protection order unless-

(a) it has received and considered a disposition report; and
(b) it is satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary to ensure the safety and well-being of the child.

In *DOHS v Sanding* [2011] VSC 42 at [40] Bell J noted that "this requirement does not expressly apply when the court revokes a custody to Secretary order".

5.12.2 Restrictions on removing parental custodial rights

Section 276(2) of the CYFA prohibits the Court from making a protection order that has the effect of removing a child from the custody of his or her parent unless:

(a) the Court has considered and rejected as being contrary to the best interests of the child, an order allowing the child to remain in the custody of his or her parent; and
(b) the Court is satisfied by a statement contained in a disposition report in accordance with s.558(c) that all reasonable steps have been taken by the Secretary to provide the services necessary to enable the child to remain in the custody of his or her parent; and
(c) the Court considers that the making of the order is in the best interests of the child.

See *DOHS v Sanding* [2011] VSC 42 at [41].

The fact that the child does not have adequate accommodation is not by itself a sufficient reason for the making of an order removing a child from the custody of his or her parent [s.276(3)].

Section 276 is in very similar terms to s.86(2) of the CYPA save that s.276(2)(a) refers to "the best interests of the child" rather than "the safety and well-being of the child". Though s.276(2)(b) is not entirely clear, it is the writer's experience that it is rarely raised in Children's Court hearings. It was discussed in the County Court in the case of *MS & BS v DOHS* [County Court of Victoria, unreported, 18/10/2002, AP-02-0415+0416]. In this case the disposition report had not specified any steps taken to provide services to enable the children to remain in the custody of their mother or under the guardianship of their parents. At pp.35-36 Judge Cohen interpreted s.86(2)(b) of the CYPA as follows:

> "The subsection is on its face prescriptive, and prevents the Court from making an order that removes children from a parent's custody unless the disposition report has addressed the issue and the court is satisfied that all such reasonable steps have been taken. However, the wording of the provision read this way assumes that there will always be services that exist which are capable of enabling children to stay with their parents. This assumes that the perceived risk to a child's welfare can be averted by provision of services, whereas it is not hard to postulate examples of where this will not be so. [Counsel for the father] conceded that there will not always be such services, but submitted that that impossibility should be overcome by a disposition report that states that consideration has been given to whether there are any such services and sets out the reason why none would avert the risk to the child. The problem with that argument is that if read strictly the words of the sub-section would still not permit an order removing the child from the parents even in the most dire circumstances. In my view it is also possible to interpret the section as if after the words 'provide the service' there were inserted '(if any exist)'.
>
> I consider that it is appropriate in approaching the interpretation of this provision, to prefer an interpretation that promotes the purpose and object of the Act (or of the Family provisions of it) to one that does not [Interpretation of Legislation Act 1984 s 35(a) and (b)(i)] and I take into account that one of the purposes of the Act is to provide for the protection of children and young persons [s.1(b)].
>
> The purpose of the protection provisions is to enable the Court to make orders to protect children from the risks set out in the grounds under s 63, and in my view it would be out of keeping with the whole tenor of these provisions and of the paramount considerations to which regard must be had under s 87(1A), that a child cannot be removed from a parent's custody because no services exist capable of averting or minimising the risk of harm to the child."

Judge Cohen was critical (at p.37) of the laguna in the disposition report but would have been prepared to allow the Department to re-open its case to enable that to be rectified. However, given that the appeal had run for 19 days and that the evidence, in her view, disclosed that there were no services which could reasonably be provided by the Department to enable the child to remain in the custody of a parent, Her Honour saw little point in allowing the case to be re-opened. Accordingly her Honour, implying the qualifying words "(if any exist)" in s.86(2)(b), placed the two children on guardianship to Secretary orders notwithstanding the laguna in the disposition report. An application for judicial review pursuant to O.56 was dismissed by Gillard J: "[I]n my opinion, it is clear beyond doubt that [Judge Cohen] did consider s.86(2) and was satisfied that the matters required by s.86(2) were complied with." See *Mr & Mrs X v Secretary to DOHS* [2003] VSC 140 at [105]-[107]. Judge Cohen's reasoning was followed by Blashki M in the case of the *H Children* [Children's Court of Victoria, unreported, 19/12/2007] at pp.51-53.

Section 86(2)(b) of the CYPA was also discussed in the Children's Court in the case of *DC* [unreported, 18/03/1999, case PA860/98]. This was a very different case from that dealt with by Judge Cohen for - far from there being protective concerns about a parent which no services could rectify - there were indeed no protective concerns about the father at all. In *DC* the 3½ year old boy had been found to be in need of protection, partly as a result of multiple bruising to his face and body

while in the care of his mother and her former boy-friend. The father and mother had separated when the boy was 5½ months old. Thereafter the mother had been the primary caregiver until 7 months before the hearing when the boy had been placed with his paternal grandmother, with whom the father resided. DOHS, while acknowledging that it held no protective concerns about the father, was seeking a custody to Secretary order as a vehicle for a staged reunification of the boy with his mother. In its disposition report the Department did not comply with s.49(c). Indeed it could not have complied, given its view that no services were necessary in relation to the father. It was argued on behalf of the Department that s.86(2) did not apply because 'custody' in s.86(2)(b) meant care and control: the father had not had the care and control of the boy for years and the mother lost the right of care and control either under the IAO made by a bail justice or the IAO made and extended by the Court. It was argued on behalf of the father that 'custody' in s.86(2) had the same meaning as 'custody' in s.5 and while both parents had lost *de facto* care and control of the boy, their right to have daily care and control of him had never been removed. Mr Power, M held-

> "It seems inherently improbable that the legislature would have intended the significant restrictions on the Court's jurisdiction inherent in s.86(2) to be defeated by as simple and common an occurrence as an interim accommodation order (whether made by a Bail Justice or a Court) made, as is so often the case, at a time when alleged protective concerns are still under investigation and not yet definitely substantiated. Yet that is the bottom line of [the Department's] restrictive interpretation of s.86(2). In my view both the mother and the father continue to have legal custody of [the boy]. Although their legal right to have daily care and control may have been suspended from time to time by various interim orders made by this Court, it has never been removed. On the other hand, the custody to Secretary order urged by the Department and the mother would remove from the father the custodial rights defined in s.5 of the CYPA and invest them in the Secretary [see s.99(1)(a)]. As s.86(2)(b) of the Act has not been complied with - indeed could not be complied with since 'the father doesn't need support services' - this Court has no jurisdiction to make a custody to Secretary order." [p.32]

In the case of *DOHS v BK* [Children's Court of Victoria, unreported, 26/05/2008] Magistrate Ehrlich made supervised custody orders placing children aged 7 & 6 in the care of their maternal grandmother. The mother had been the custodial parent at the time the protection application was issued. The protective concerns in relation to her were her drug abuse and domestic violence perpetrated on her by her current partner. The children's father was a recovering drug addict with whom the children had had comparatively limited contact. Her Honour found that the children's "primary attachment figures are their mother and maternal grandmother and to disrupt that attachment would be extremely traumatic". After referring to s.35 of the *Interpretation of Legislation Act* 1984 and ss.10(3)(f), 10(3)(g) & 10(3)(i) of the CYFA, her Honour rejected an argument by counsel for the non-custodial father that s.276(2)(b) of the CYFA prevented her from making an order removing the children from the custody of the father:

> "It is clear that as far as abused children are concerned, the aim of the CYFA is to attempt to address the issues underlying the abuse in such a way as to cause the least possible disruption to a child's life. It would therefore make little sense to interpret s.276(2)(b) as referring to a non-custodial parent. 'Custody' as used in s.276(2)(b) means the parent with primary care of the child at the point the Secretary intervenes. This interpretation is only enhanced by the use of the word 'remain' in the sub-section. Section 276(2)(b) only operates in a situation where the Court is considering making a protection order removing a child from his or her primary carer. If this is not proposed the section does not apply."

5.12.3 Matters to be considered in determining Family Division applications generally

The Court's decision-making powers are not exercised in a vacuum. In determining what finding or order to make on any application in the Family Division, including a protection application or an irreconcilable difference application, the Court must have regard (where relevant) to-

- s.10 – the "best interests" principle; and
- ss.13-14 – additional decision-making principles for Aboriginal children.

To the extent that the principles in s.10 of the CYFA are identical or similar to those in s.87(1) of the CYPA, the previous case law remains relevant.

Though generally the proceedings of a conciliation conference held under ss.217-227 of the CYFA are confidential [s.226], the Court may consider the written report of the convenor(s) in determining what finding or order to make in respect of a Family Division application: see s.224.

5.13 Protection order

Listed in s.275(1) of the CYFA are the eight protection orders defined in s.3. The table below shows each order, the section in the CYFA which now defines it, the relevant prescribed form under the new rules and the numbers of each order made state-wide from 2004/05 to 2012/13.

	PROTECTION ORDER	CYFA	FORM	2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
(i)	Undertaking	s.278	18	134	170	149	128	175	127	140	130	219
(ii)	Supervision order	s.280	20	1454	1421	1766	1895	1859	1747	1906	2016	2296
(iii)	Custody to third party order	s.283	21	9	8	9	8	12	4	4	7	8
(iv)	Supervised custody order	s.284	22	3	2	29	151	202	233	289	330	453
(v)	Custody to Secretary order	s.287	23	1155	1096	1133	1272	1288	1353	1227	1332	1412
(vi)	Guardianship to Secretary order	s.289	24	263	292	302	258	260	225	273	288	239
(vii)	Long term guardianship to Secretary order	s.290	25	NO SUCH ORDER		7	61	43	49	47	45	53
(viii)	Interim protection order	s.291	26	943	997	973	891	893	795	871	881	920
TOTALS				**3961**	**3986**	**4368**	**4664**	**4732**	**4533**	**4757**	**5029**	**5600**

The total number of protection orders increased significantly from 2006/07 to 2008/09, declined in 2009/10 but came back to 2008/09 levels in 2010/11 and then substantially increased in 2011/12 and 2012/13. The number of custody to third party orders remains insignificantly small. The number of supervised custody orders has increased as a result of amendments introduced by the CYFA, significantly so in the last six years. Over the last seven years there has been a significant increase in the number of supervision orders.

Section 275(2) of the CYFA provides that a protection order may continue in force after a child attains the age of 17 years but ceases to be in force when the child attains the age of 18 years.

It appears that *habeas corpus* might be available to facilitate a challenge to an invalid custody to Secretary order or guardianship to Secretary order if the evidence demonstrates that such a remedy is appropriate: see *PR v DOHS* [2007] VSC 338 at [8]-[9] per Osborn J.

The only protection orders which could be extended under the CYPA are custody to Secretary orders and guardianship to Secretary orders. Under the CYFA supervision orders and supervised custody orders are now also able to be extended. The table below shows the number of orders extended state-wide from 2003/04 to 2011/12. There was a steady increase in the number of orders extended until 2006/07, a small decrease in 2007/08, small increases in 2008/09, 2009/10 and much larger increases in 2010/11 & 2011/12.

PROTECTION ORDERS EXTENDED										
	PROTECTION ORDER	2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
(ii)	Supervision order	NO POWER TO EXTEND		18	211	286	303	293	375	457
(iv)	Supervised custody order	NO POWER TO EXTEND		0	6	52	72	87	107	126
(v)	Custody to Secretary order	1172	1314	1348	1212	1201	1326	1335	1401	1430
(vi)	Guardianship to Secretary order	582	620	578	464	423	374	366	356	362
	TOTALS	**1754**	**1934**	**1944**	**1893**	**1962**	**2075**	**2081**	**2239**	**2375**

5.14 Undertaking

5.14.1 Undertaking – protection order under s.278(1) of the CYFA

As a protection order, the Court may make an order requiring:
(a) the child; or
(b) the child's parent(s); or
(c) the person with whom the child is living-
to enter into an undertaking in writing [Form 18] to do or refrain from doing the thing(s) specified in the undertaking for a period of up to 6 months or, if there are special circumstances, up to 12 months. What constitutes 'special circumstances' is not defined. Row (i) in the first table in paragraph 5.13 lists the numbers of such undertakings ordered from 2003/04 to 2011/12.

5.14.2 Undertaking under s.272(1) of the CYFA – "common law" undertaking

In a case involving a protection application or an irreconcilable difference application, without finding the application proved, the Court may make an order requiring:
(a) the child; or
(b) the child's parent(s); or
(c) the person with whom the child is living-
to enter into an undertaking in writing [Form 17] to do or refrain from doing the thing(s) specified in the undertaking for a period of up to 6 months or, if there are special circumstances, up to 12 months. What constitutes 'special circumstances' is not defined.

Sometimes, the Court is asked to take what is described as a 'common law undertaking' from a parent, child or other person that he or she will do or refrain from doing the things specified in the undertaking. In applications under the CYPA, such a request was often made when the parties, including the Department, had agreed that the initiating application should not be found proved and should simply be struck out of the court list. There is no legislative basis for a 'common law undertaking' and its precise standing in law is unclear.

The following table shows the numbers of common law undertakings involving cases which were either struck out or dismissed or in which the court refused to make a protection order upon expiration of an interim protection order plus the number of undertakings under s.272(1):

	2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
COMMON LAW PLUS S.272 UNDERTAKINGS	166	130	193	230	199	159	196	327	252

The power to order an undertaking under s.272(1) is clearly intended to cover the field of so-called 'common law undertakings' in protection and IRD applications. However, if a 'common law undertaking' is a creature known to the law generally, the writer believes that ss.272-273 do not oust the jurisdiction of the Family Division to make an order requiring a person to enter into a 'common law undertaking' in relation to any other applications, e.g. applications to revoke or breach a protection order.

5.14.3 Conditions

An undertaking may contain any conditions that the Court considers to be in the best interests of the child: ss.272(4) & 278(3).

5.14.4 Consent mandatory

The Court may only make an order requiring a person to enter into an undertaking under s.272(1) or 278(1) if the person consents: ss.272(5) & 278(4).

5.14.5 Departmental withdrawal

Once an undertaking is given the Department of Health & Human Services has no further involvement with the child or family. It follows that the Court is unlikely to require an undertaking as a protection order unless the Court is satisfied that the concerns which led to a finding that the child was in need of protection or that there were irreconcilable differences have either fully or substantially abated and that ongoing involvement by DHHS is not required to ensure the safety or welfare of the child.

5.14.6 Variation/Revocation of undertaking

On application [Form 19] by:
(a) the child; or
(b) the child's parent(s); or
(c) the person with whom the child is living-
the Court may vary the undertaking or any of its conditions [ss.273(3)(a) & 279(2)(a)] or may revoke the undertaking [ss.273(3)(b) & 279(2)(b)]. The legislature has given the Secretary no standing to make an application to vary or revoke an undertaking made either under s.272(1) or s.278(1) of the CYFA.

5.14.7 Breach

There are no legislative provisions relating to breach of an undertaking.

5.15 Supervision order

5.15.1 Sections 280-281 of the CYFA

A supervision order [Form 20] was the most common protection order made in each year between 2003/04 & 2011/12. It gives the Secretary to the Department of Health & Human Services responsibility for the supervision of the child but does not affect the guardianship or custody of the child.

Section 280(1)(c) of the CYFA states that a supervision order provides for the child to be placed in the day to day care of one or both of the child's parents. It is to be noted that "parent" under the CYFA has the expanded meaning defined in s.3 of the CYFA and includes not just birth parents but spouses or domestic partners of birth parents as well as persons who otherwise have custody of the child. It does not however include an ex domestic partner of a birth parent. This new section corrects the ambiguity which previously arose from s.91(2) of the CYPA.

Under a supervision order the child remains in the care of his or her legal custodian. It is clear from s.281(2)(b) of the CYFA that a supervision order may permit a "shared care" arrangement in which a child lives "as far as possible for an equal amount of time with each parent if the parents do not live in the same household".

The maximum period of a supervision order is 12 months, or if there are special circumstances, 2 years [s.280(2)]. What constitutes 'special circumstances' is not defined.

5.15.2 Supervision order longer than 12 months

If the order is longer than 12 months, the Court is required by s.280(3) to direct the Secretary:
- to review the operation of the order before the end of the first 12 months; and
- to notify the Court, the child, the parent and such other persons as the Court directs before the end of that period if the Secretary considers that it is in the best interests of the child for the order to continue for the duration specified.

Failure to notify results in the order ceasing to be in force at the end of the first 12 months [s.280(4)].

5.15.3 Conditions

Under s.281(1), a supervision order may contain conditions that the Court considers to be in the best interests of the child to be observed by:
(a) the child; or
(b) the child's parent(s).

However, under s.281(2) a supervision order must not include any condition as to where the child lives, unless the condition relates to-
(a) the child living with a specified parent; or
(b) the child living as far as possible for an equal amount of time with each parent if the parents do not live in the same household.

There is no superior court authority on the question whether, notwithstanding s.281(2), a supervision order may contain a condition allowing for the child to be in unspecific respite care from time to time even if the periods of respite are not so great as to constitute an effective change in the child's

custody. The issue arose in a very limited way in *DOHS v Mr O & Ms B* [2009] VChC 2. In that case the mother had twice returned from Tasmania with her young child (born in September 2007) to live with the child's father and paternal grandmother in Melbourne. Her first return was contrary to an undertaking which the mother had given under s.272 of the CYFA that she would not have any contact or allow the child to have any contact with the child's father. The Court was satisfied to the requisite level that:

- the child would be at unacceptable risk of harm from sexual abuse if her father was to have unsupervised contact with her [this was based both on his conviction for possession of child pornography and on evidence from the mother that he had expressed a sexual interest in her 13 year old daughter and had also said that he would have sex with a 10 year old or younger if he could get away with it]; and
- the child was not at risk if placed in her mother's care in Tasmania.

The child had been in out of home care on an interim accommodation order since 12/12/2008. During that time the mother and father had both been living at the paternal grandmother's home in suburban Melbourne. The mother had nowhere else to live in Victoria but had booked a flight to return to Tasmania four days after judgment was handed down. Although the Court was not prepared to allow the child to live with the mother in Victoria, it was of the view that it was in the child's best interests to live with the mother in Tasmania. The question was whether a supervision order could be made notwithstanding the intervening four days in which the child would remain out of the mother's care. At p.46 of his judgment the writer said:

> "Counsel for DOHS made a submission – from which counsel for the parents did not demur – that there were two alternative mechanisms open in law:
>
> > 'A respite condition as specific as identifying the time or event at which a child would then go back into the care of the mother would fall foul of the provision in s.281(2). It might be that the Court could make a general condition for respite as agreed between the parties with some sort of notation to the effect that it has been agreed between the parties that respite occur until [the mother] leaves the jurisdiction. However, in a situation such as this where DOHS maintains its application for a custody to Secretary order, that option becomes even more difficult to achieve. If the Court was minded to make an order in the terms canvassed, the Court could extend the interim accommodation order and recall the matter for a mention at the time a supervision order can be made that would allow [the child] to be in her mother's care from that time forwards.'
>
> …Given that it is only the space of a long weekend that [the child] needs to remain out of her mother's care and given the additional costs of legal representation which would be incurred by Victoria Legal Aid and possibly by the Department in listing a mention for next Tuesday morning, I preferred to adopt the first alternative. However, had there been any significantly greater delay in [the mother] returning to Tasmania, I would have adopted the second alternative."

Accordingly the writer made a supervision order on 20/02/2009 and placed on it a condition: "Child may have respite as agreed between the parties." But given the limited purpose for which this condition was ordered, this case ought not be regarded as authority for the question.

The issue arose in a more central way in *DOHS v Ms T & Mr M* [Children's Court of Victoria-Power M, 12/10/2009]. In that case a Children's Court Clinician had recommended that a 1 year old infant be placed on a supervision order in the case of her mother but that for 3 days per week the infant should be in respite care with the mother's cousin and his wife, Mr & Mrs T. The Department's primary position was that the infant should be placed on a custody to Secretary order. In that event the Department intended to place the infant, at least initially, in the full-time care of Mr & Mrs T. The Clinician's "shared care" recommendation ultimately became the Department's fall-back position. The mother sought that the child be placed on a supervision order in her full-time care with a condition allowing the infant to be placed in respite care with persons other that Mr & Mrs T in the event that she required respite (primarily if there was a temporary deterioration in her mental health). Ultimately, the writer placed the infant on a supervision order in the care of the mother with an unspecific respite condition. At p.105 of his judgment the writer said:

> "[S]ection 281(2) would either prevent me from making a shared care type condition on a supervision order at all unless the shared carers were parents or at the very least would prevent me from making a condition on the supervision order that [the infant] live with Mr & Mrs T for 3 days per week. [Counsel for DOHS] submitted [in effect] that I could get around s.281(2) by placing [a contact] condition on the order giving Mr & Mrs T 3 days [contact] per week. In s.3 of the CYFA 'contact' is defined as:

> 'the contact of a child with a person who does not have custody 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.'
>
> What is a child's 'usual place of residence' if the child spends 4 days per week with one person and 3 days per week with the other? In my opinion [the Clinician's] recommendation does not fit within the definition of [contact] and to try to make it fit would simply be a device to get around the intent of s.281(2)."

At p.109 of his judgment the write concluded:

> "Because of s.281(2) of the CYFA, I doubt that I could include a respite condition on a supervision order which nominates a specific person other than a parent to be the respite carer. I have therefore included a general respite condition which does not name any particular person as respite carer but makes the choice of carer the subject of agreement between the mother and DOHS:
>
> > 'If requested by the mother for reasons associated with her physical or mental health or for any other reason approved by DOHS, the child may have respite as agreed between the mother and DOHS.'"

For a discussion of some aspects of the predecessor s.92 of the CYPA see the judgment of Judge Cohen in *MS & BS v DOHS* [County Court of Victoria, unreported, 18/10/2002] at p.38, approved on appeal by Gillard J in *Mr & Mrs X v Secretary to DOHS* [2003] VSC 140 at [100]-[104].

5.15.4 Powers of Secretary

Under s.282 the Secretary has power under a supervision order:

- to visit the child at the child's place of residence and carry out the duties of the Secretary under the order; and
- to give, by notice in the prescribed form, any reasonable and lawful direction that the Secretary considers to be in the best interests of the child.

The prescribed form of notice of direction is Form 6 in Schedule 2 of the Children, Youth and Families Regulations 2007 [S.R. No.21/2007].

5.15.5 Extension of supervision order

Under the CYPA a supervision order could not be extended. However, the CYFA provides in ss.293, 294, 296(1) & 298 a procedure which enables a supervision order to be extended from time to time by up to 2 years after the extension or additional extension is granted. A direction under s.298 must be given if the extension is for more than 12 months.

An application for extension must be made to the Court while the order is still in force: see s.293(2). The application [Form 27] is made to the Court when it is filed with the appropriate registrar: see s.214 of the CYFA [formerly s.81 of the CYPA] and the judgment of Beach J. in *Secretary to the Department of Health and Community Services v VPP & BC* [Supreme Court of Victoria, unreported, 24/01/1994].

The initiation of extension proceedings keeps the supervision order in force until the application is determined by the Court [s.293(3)]. If the extension application is granted, the Court is not required to backdate the extended order to commence on the day after the previous order would have expired had it not been kept alive by operation of law.

Section 294 empowers the Court to extend a supervision order if it is satisfied that this is in the best interests of the child.

5.15.6 Variation/Revocation of supervision order

On application [Form 28] by:
(a) the child; or
(b) a parent; or
(c) the Secretary-
the Court may-

- **vary**, add or substitute any condition(s) of a supervision order but must not extend the period of the order [ss.300 & 301(a)]; or
- **revoke** the order [ss.303, 304(2)(b) & 307].

It is important to note that upon revocation the Court has no power to replace the revoked order with any other protection order.

5.15.7 Breach of supervision order

If at any time while a supervision order is in force the Secretary is satisfied on reasonable grounds that-

- there has been a failure to comply with any condition of the order; or
- there has been a failure to comply with a direction given by the Secretary under s.282(2); or
- the child is living in conditions which are unsatisfactory in terms of his or her safety and wellbeing-

the Secretary may initiate breach proceedings [Form 34]: see ss.312-314 of the CYFA.

Breach proceedings - which are not uncommon - may be initiated either by notice or by apprehension of the child, the same two mechanisms as for initiation of protection applications. The initiation of breach proceedings keeps the supervision order in force until the matter is determined by the Court: see s.316 & 317(1). However, if an IAO is made as a result of an alleged breach of a supervision order, that order is suspended on the making of the IAO and remains suspended for the period of operation of the IAO but the period of the supervision order is not extended by the suspension [s.262(7)].

Upon finding the breach proved, s.318 of the CYFA empowers the Court to do one of 3 things-

(a) **confirm** the original order;
(b) **vary**, add or substitute any condition(s) but not extend the period of the order; or
(c) **revoke** the order and, if satisfied that the grounds for a finding under s.274 still exist, make a further protection order in respect of the child.

If a breach of supervision order was found proved under s.95(5) of the CYPA and the supervision order was revoked, the Court was not empowered to make an interim protection order: see ss.3 & 85(1)(a) of the CYPA and the judgment of Byrne J. in *Secretary to the Department of Human Services v The Children's Court at Melbourne & Others* [Supreme Court of Victoria, unreported, 11/11/1997]. That is no longer the case under the CYFA because an interim protection order is included as a protection order under s.275(1)(h). Further, under the CYFA [unlike the CYPA], the only restriction on the length of any new supervision order made in breach proceedings is the same as that in s.280(2) for the original supervision order, namely 12 months or in special circumstances 2 years.

5.16 Custody to third party order & Supervised custody order

5.16.1 Sections 283-284 of the CYFA

A custody to third party order [Form 21] and a supervised custody order [Form 22] each grant sole or joint custody of a child to a person who is not:

- the Secretary of the Department of Health & Human Services in his or her official capacity; or
- a person employed by a community service in his or her official capacity; or
- a parent of the child.

They do not affect the guardianship of the child.

The maximum period of a custody to third party order is 12 months [s.283(1)(d)].
The maximum initial period of a supervised custody order is 12 months [s.284(1)(d)].

Sections 283(2) & 284(2) of the CYFA prohibit the Court from making either order unless it-

(a) has considered the effect of the order on the likelihood of the reunification of the child with his or her family; and
(b) is satisfied that, so far as practicable, the wishes and feelings of the child have been ascertained and due consideration given to tem, having regard to the age and understanding of the child.

5.16.2 Reunification is the ultimate objective of a supervised custody order

Section 284(4) of the CYFA requires the Court, in making a supervised custody order, to have regard to the fact that the ultimate objective is the reunification of the child with his or her parent and must by the order direct the parties to it to take all appropriate steps to enable the reunification of the child with his or her parent before the end of the period for which the order remains in force. In *DOHS v Ms D &*

Mr K [Children's Court of Victoria, 15/06/2009], Power M considered it was too early to make a finding that reunification was a viable option and hence was not able to make the supervised custody order sought as a fall-back position by two of the parties.

5.16.3 Administrative reunification with parent during period of supervised custody order

Section 284(1)(f) of the CYFA requires a supervised custody order to provide that if, while the order is in force, the Secretary is satisfied that it is in the child's best interests, the Secretary may in writing direct that the child return to the sole or joint custody of a parent or the parents of the child.

Section 286(1) of the CYFA makes a supervised custody order a much more flexible order than was the case under the CYPA for it empowers the Secretary to effect an administrative reunification of a child with a parent during the period of the order. If the Secretary directs that a child on a supervised custody order is to return to the sole or joint custody of a parent or parents, then on and from the date that the direction takes effect-

(a) the child ceases to be in the custody of the person in whom custody is vested under the supervised custody order; and
(b) the child is deemed to be in the sole or joint custody of the parent or parents as specified in the direction; and
(c) the supervised custody order is deemed to be a supervision order giving the Secretary responsibility for the supervision of the child and placing the child in the day to day care of the parents who have sole or joint custody of the child; and
(d) Division 3 of Part 4.9 of the CYFA applies to the order; and
(e) the order ceases to be a supervised custody order for the purposes of the CYFA.

5.16.4 Conditions

Under ss.283(1)(e) & 284(1)(e) of the CYFA, each order may include any conditions that the Court considers to be in the best interests of the child, including-

(i) a condition concerning contact by a parent or other person; and
(ii) in the case of an Aboriginal child, a condition incorporating a cultural plan for the child.

A custody to third party order must not include any condition that gives powers or duties to, or otherwise involves the Secretary: s.283(1)(f).

5.16.5 The orders contrasted

Perhaps the most significant difference between the 2 orders is that-

- under a custody to third party order the Department of Health & Human Services has no further involvement with the child or family [see s.283(1)(f)]; while
- under a supervised custody order the Department of Health & Human Services continues involvement with the child, parent and custodian in reliance on powers contained in s.285.

Other significant differences are that-

- a custody to third party order cannot be extended; and
- reunification with a parent during the period of a custody to third party order is not possible unless the order is revoked by the Court.

5.16.6 Powers of Secretary

The Secretary has no powers in relation to a custody to third party order.

Section 285 of the CYFA gives the Secretary the same powers under a supervised custody order as s.282 gives under a supervision order, namely:

- to visit the child at the child's place of residence and carry out the duties of the Secretary under the order; and
- to give, by notice in the prescribed form, any reasonable and lawful direction that the Secretary considers to be in the best interests of the child.

The prescribed form of notice of direction is Form 6 in Schedule 2 of the Children, Youth and Families Regulations 2007 [S.R. No.21/2007].

5.16.7 No extension of custody to third party order

There are no provisions in the CYFA enabling a custody to third party order to be extended.

5.16.8 Extension of supervised custody order

Under the CYPA a supervised custody order could not be extended. However, the CYFA provides in ss.293, 294, 295(1), 296(1) & 298 a procedure which enables a supervised custody order to be extended from time to time by up to 2 years after the extension or additional extension is granted. A direction under s.298 must be given if the extension is for more than 12 months.

An application for extension must be made to the Court while the order is still in force: see s.293(2). The application [Form 27] is made to the Court when it is filed with the appropriate registrar: see s.214 of the CYFA [formerly s.81 of the CYPA] and the judgment of Beach J. in *Secretary to the Department of Health and Community Services v VPP & BC* [Supreme Court of Victoria, unreported, 24/01/1994].

The initiation of extension proceedings keeps the supervised custody order in force until the application is determined by the Court [s.293(3)]. If the extension application is granted, the Court is not required to backdate the extended order to commence on the day after the previous order would have expired had it not been kept alive by operation of law.

Section 294 empowers the Court to extend a supervised custody order if it is satisfied that this is in the best interests of the child. Section 295(1) prohibits the Court from extending a supervised custody order unless it is satisfied that the ultimate objective of reunification of the child with his or her parent is still achievable.

5.16.9 Variation/Revocation of custody to third party order or supervised custody order

On application [Form 28] by:
(a) the child; or
(b) a parent; or
(c) the Secretary [in the case of a supervised custody order only]; or
(d) a person who has been granted custody of the child-
the Court may:

- **vary**, add or substitute any condition(s) of the order but must not make any change in the custody of the child or extend the period of the order [ss.300-301]; or
- **revoke** the order and, if satisfied that the grounds for a finding under s.274 still exist, make any other protection order in respect of the child [ss.304, 307(1) & 310(1)].

The Secretary has no standing to apply to vary or revoke a custody to third party order.

5.16.10 No breach of custody to third party order

There are no provisions in the CYFA relating to breach of a custody to third party order.

5.16.11 Breach of supervised custody order

If at any time while a supervised custody order is in force the Secretary is satisfied on reasonable grounds that-

- there has been a failure to comply with any condition of the order; or
- there has been a failure to comply with a direction given by the Secretary under s.285(2); or
- the child is living in conditions which are unsatisfactory in terms of his or her safety and wellbeing-

the Secretary may initiate breach proceedings [Form 34]: see ss.312(1) & 314(1) of the CYFA.

Breach proceedings may be initiated either by notice or by apprehension of the child, the same two mechanisms as for initiation of protection applications. The initiation of breach proceedings keeps the supervised custody order in force until the matter is determined by the Court: see s.316 & 317(1). However, if an IAO is made as a result of an alleged breach of a supervised custody order, that order is suspended on the making of the IAO and remains suspended for the period of operation of the IAO but the period of the supervised custody order is not extended by the suspension [s.262(7)].

Upon finding the breach proved, s.318 of the CYFA empowers the Court to do one of 3 things-
(a) **confirm** the original order;
(b) **vary**, add or substitute any condition(s) but not extend the period of the order; or
(c) **revoke** the order and, if satisfied that the grounds for a finding under s.274 still exist, make a further protection order in respect of the child.

If a breach of a supervised custody order was found proved under ss.95(5) & 98(4) of the CYPA and the supervision order was revoked, the Court was not empowered to make an interim protection order:

see ss.3 & 85(1)(a) of the CYPA and the judgment of Byrne J. in *Secretary to the Department of Human Services v The Children's Court at Melbourne & Others* [Supreme Court of Victoria, unreported, 11/11/1997]. That is no longer the case under the CYFA because an interim protection order is included as a protection order under s.275(1)(h). Further, under the CYFA [unlike the CYPA], the only restriction on the length of any new supervised custody order made in breach proceedings is the same as that in s.284(1)(d) for the original supervised custody order, namely 12 months.

5.16.12 Statistics

Under the CYPA these 2 orders were very uncommon. They accounted for 0.92% of protection orders made in 2000/01 and about 0.33% in 2005/06. Under the CYFA custody to third party orders have remained rare but there has been a very substantial increase in the numbers of supervised custody orders, probably because of the flexibility introduced by the CYFA. However, the number of supervised custody orders still remains relatively small in comparison with the number of custody to Secretary orders.

5.17 Custody to Secretary order

5.17.1 Section 287 of the CYFA

A custody to Secretary order [Form 23] was the second most common protection order made in each year between 2001/02 & 2011/12. It grants sole custody of a child to the Secretary to the Department of Health & Human Services but does not affect the guardianship of the child: see s.287(1) of the CYFA. This means that under a custody to Secretary order, the Secretary has:

- sole right and responsibility to make decisions about the daily care and control of a child, including a decision as to where the child resides from time to time during the currency of the order; and
- the rights, powers, duties, obligations and liabilities set out in ss.172-176 of the CYFA.

A custody to Secretary order is usually made where-

- there is presently an unacceptable risk of harm to the child if placed in the family home; or
- neither parent is presently willing or able to have the child in the home-

but where there are prospects for reunification of a child with a parent in the future.

The maximum initial period of a custody to Secretary order is 12 months [s.287(1)(c)].

For a discussion of some of the principles relevant to the making of a custody to Secretary order see *DOHS v Sanding* [2011] VSC 42 at [37]-[44] per Bell J. The circumstances leading to the making of custody to Secretary orders in that case are detailed at [51]-[83].

5.17.2 Conditions

Under s.287(1)(d) of the CYFA, a custody to Secretary order may include any conditions that the Court considers to be in the best interests of the child, including-

(i) a condition concerning contact by a parent or other person; and
(ii) in the case of an Aboriginal child, a condition incorporating a cultural plan for the child.

In *SJF v DOHS* [2001] VSC 252R a condition had been included in a custody to Secretary order that "The child is to reside as directed by DOHS." The Department made an administrative decision to move the child to live with his paternal grandmother in Queensland. The mother made an application to vary the condition to read "The child is to reside as directed by DOHS but not outside the state of Victoria." The magistrate refused her application. On an originating motion Ashley J refused to grant the relief sought by the mother. By way of dicta, after hearing submissions on the law relating to custody to Secretary orders and variations thereof, his Honour said at [35]-[37] & [40]:

> "[35] [T]he matter having been debated, I will indicate my provisional view. It is, first, that the condition to which the application to vary was directed was not a condition which the Magistrate either needed or had any jurisdiction to impose.
>
> [36] It will be recalled that the condition was in terms that the child reside as directed by [DOHS]. It is I think perfectly clear from the definition of 'custody' in s.5 of the Act [identical to s.5 of the CYFA] – the meaning of which term is given context by s.124(1) [effectively identical to s.173 of the CYFA], bear in mind also the impact of s.99(1)(a) [identical to s.287(1)(a)] – that there was simply no occasion to impose the condition in respect of which variation was sought. That being so, it is doubtful indeed that his Worship should have contemplated varying a condition which ought never to have been imposed in the first place.

[37] Beyond that, there is a question whether the power of variation conferred by s.104(2) [effectively identical to s.301 of the CYFA] can be exercised in a way that impinges upon the statutory power of the Secretary conferred by s.124 [s.173 of the CYFA] to place a child. It is true that the power conferred upon the Children's Court by s.99(1)(d) [effectively identical to s.287(1)(d) of the CYFA] is wide. It may be that a condition can be imposed consistent with that provision which defacto has an impact upon the Secretary's power of placement under s.124(1). But what was sought here was, at least arguably, a variation which ran directly counter to the Secretary's right or power of placement, a variation which infringed the inhibition on variation imposed by s.104(2) [effectively identical to s.301(b) of the CYFA]…

[40]. There is no doubt that, according to the order made in September 1999, and having regard to s.124 of the Act [s.173 of the CYFA], the Secretary had power to make the administrative decision he did. It was not argued that he lacked the statutory power to make a placement outside Victoria."

In a reserved ruling in the cases of *DOHS v B siblings; DOHS v H siblings* [2009] VChC 4 Judge Grant held that the Children's Court does not have power to make it a condition of a custody to Secretary order that siblings be placed together. At [14]-[16] his Honour said:

[14] "Upon the making of a custody to Secretary order ['CTSO'], the Secretary becomes the sole custodian of the child [s 172(2)(a)]. By virtue of s 5, the Secretary has the sole right and responsibility to make decisions about the daily care and control of the child. This includes making decisions as to where a child resides, from time to time, during the operation of the order. Under s 173(2), the Secretary is given the widest possible powers in relation to placement of a child on a CTSO, including permitting placement in any 'suitable situation as circumstances require.' Section 174 provides clear direction to the Secretary in dealing with a child under s 173. The effect of these provisions is to provide the Secretary with the sole right to determine placement of a child on a CTSO. The court cannot limit that right by requiring the Secretary to place siblings together. A condition directing the Secretary to place siblings together directly affects the placement decision. As would, for example, a condition that a child only be placed with a member of his or her own ethnic community. A purported condition that relates to where or how a child is to be placed is different from a permissible condition that does not seek to direct the Secretary in any way on this issue. To impose a condition directing siblings be placed together fetters the decision-making powers of the Secretary in a way that the legislation does not permit.

[15] To interpret the legislation in this way does not mean that the Secretary has an unfettered power in relation to the placement decision. Under section 174(1)(a) any decision of the Secretary must have regard to the best interests of the child as the first and paramount consideration. In determining what decision or action to take in a child's best interests, the Secretary must consider the matters listed in sections 10(2) and 10(3) of the Act (s 9). **One** of the 18 considerations listed in s 10(3) of the Act, is 'the desirability of siblings being placed together when they are placed in out of home care' [s 10(3)(q)]. The secretary is also required to consider other matters such as the child's views and wishes [s 10(3)(d)] , the desirability of continuity and stability in the child's care [s 10(3)(f)] and any other relevant considerations [s 10(3)(r)]. Sometimes these considerations are in conflict and it is not always in a child's best interests to be placed with a sibling.

[16] Finally, in relation to Aboriginal children (the H children), the Secretary, in making a placement decision, is also required to consider the need to protect and promote the cultural and spiritual identity and development of Aboriginal children by, wherever possible, maintaining and building their connections to their Aboriginal family and community [(s 10(3)(c)]. When making a decision for the placement of Aboriginal children in out of home care, the Secretary (or a community service) must consult an Aboriginal agency and the Aboriginal Child Placement Principle must be applied [s 12(1)(c)]. The Principles for placement of an Aboriginal child in out of home care are specifically detailed in sections 13 and14 of the Act. In making such a placement, the Secretary must have regard to the advice of a relevant Aboriginal agency, the criteria in s 13(2) and the principles in s 14. Clearly, these sections recognise that the placement decision for an Aboriginal child in out of home care is always one for the Secretary. The two sections provide detailed guidance as to how the Secretary must exercise that power. This acknowledges the role of the Secretary as custodian of the child. The court does not have, for example, the power to make it a condition of a CTSO that an Aboriginal child be placed with an Aboriginal family. In the case of an Aboriginal child on a CTSO, the decision as to placement is for the Secretary alone to

determine in accordance with the relevant legislative principles. In making the placement decision for an Aboriginal child, the Secretary is bound by best interest principles – including the need to consider the desirability of placing siblings together – and must apply the Aboriginal Placement Principles in s 13 and 14 of the Act. Again, these principles may be in conflict and the Secretary cannot be limited in the application of the Aboriginal Placement Principles by a condition requiring siblings to be placed together. If it is correct that the court is unable to order Aboriginal children be placed with an Aboriginal family as a condition of a CTSO, it must also be the case that the court cannot order siblings be placed together as a condition of a CTSO. It would be a strange result if it were permissible in one case (siblings) and not in the other."

5.17.3 Reunification

It appears that generally, although not inevitably, the ultimate objective of a custody to Secretary order is reunification of the child with a parent. However, for no clear reason, there is no specific provision in relation to custody to Secretary orders which replicates the reunification direction [s.284(4)] of the supervised custody order provisions.

The case plan which the Secretary is required by s.167(1)(c) to prepare within 6 weeks after the making of a custody to Secretary order more often than not contemplates ultimate reunification of the child with a parent.

5.17.4 Advice from the Secretary as to whether custody to Secretary order is workable

Section 99(2) of the CYPA appeared to give the Secretary a veto over the Court's otherwise general power in s.85(1)(a)(v) to make a custody to Secretary order:

> "99(2) The Court may only make a custody to Secretary order if the Secretary is satisfied that the making of such an order is a workable option."

This very unusual provision purported to make the exercise of judicial power subservient to an administrative decision, indeed a decision of one of the parties to the proceeding. "Workable option" is not defined. It is an interesting moot point whether this sub-section was constitutionally valid or whether it involved "a usurpation of or interference with judicial power, or an impermissible interference with the exercise of judicial power" [*H A Bachrach Pty Ltd v The State of Queensland & Others* (1998) 195 CLR 547 at 562-3; see also *Liyanage v The Queen* [1967] 1 AC 259; *Nicholas v The Queen* (1998) 193 CLR 173; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51]. There is no case law directly on s.99(2) from any source. There have previously been several cases in Melbourne Children's Court in which it appeared as if the validity of s.99(2) might be in issue, but ultimately each such case was determined without the need for analysis of the sub-section.

Section 287(2) of the CYFA replaces s.99(2) and is in quite a different form:

> "287(2) In determining whether or not to make a custody to Secretary order, the Court must have regard to advice from the Secretary as to whether or not the Secretary is satisfied that the making of the order is a workable option."

This amendment removes the impediment to the exercise of judicial power which s.99(2) appeared to create and is clearly constitutionally valid.

5.17.5 Extension of custody to Secretary order

The CYFA provides in ss.293, 294, 295(2), 295(3), 296(2), 297 & 298 a procedure which enables a custody to Secretary order to be extended from time to time by up to 2 years after the extension or additional extension is granted. A direction under s.298 must be given if the extension is for more than 12 months.

An application for extension must be made to the Court while the order is still in force: see s.293(2). The application [Form 27] is made to the Court when it is filed with the appropriate registrar: see s.214 of the CYFA [formerly s.81 of the CYPA] and the judgment of Beach J. in *Secretary to the Department of Health and Community Services v VPP & BC* [Supreme Court of Victoria, unreported, 24/01/1994].

The initiation of extension proceedings keeps the custody to Secretary order in force until the application is determined by the Court [s.293(3)].

If the extension application was granted under the CYPA, the Children's Court as a matter of practice backdated the extended order to commence on the day after the previous order would have expired had it not been kept alive by operation of law. However, in the appeal of *M v H* [County Court of Victoria, unreported, 1716/1998], Judge Harbison decided that the legislation did not require her to backdate the extended order. The position has been clarified in the CYFA where it is clear from the wording of s.296(1) that the Court is no longer required to backdate the extended order to commence on the day after the previous order would have expired had it not been kept alive by operation of law.

Section 294 empowers the Court to extend a custody to Secretary order if it is satisfied that this is in the best interests of the child.

In determining an extension application-

- s.295(2) requires the Court to give due consideration to the following matters in the following order-
  (a) the appropriateness of making a permanent care order in respect of the child;
  (b) the benefits of the child remaining in the custody of the Secretary;
- s.295(3) requires the Court to take into account-
  (a) the nature of the relationship of the child with his or her parent, including the nature of the contact between the child and the parent during the period of the order;
  (b) the capacity of the parent to fulfil the responsibilities and duties of parenthood, including the capacity to provide adequately for the emotional, intellectual, educational and other needs of the child;
  (c) any action taken by the parent to give effect to the goals set out in the case plan;
  (d) the effects on the child of continued separation from the parent; and
  (e) any other fact or circumstance that, in the opinion of the Court, should be taken into account in the best interests of the child.

Section 296(2) of the CYFA provides that the maximum period of extension is-

(a) 12 months if the custody to Secretary order had been in force for less than 12 months at the time the extension is granted;
(b) 2 years if the custody to Secretary order had been in force for 12 months or more at the time the extension is granted.

However the 2 year maximum period provided by s.296(2)(b) is reduced to 12 months if the circumstances in s.297(1) prevail, namely if-

(b) the custody to Secretary order had been in force for more than 12 months; and
(c) the Court is satisfied that it would not be in the best interests of the child to be returned to the custody of his or her parent; and
(d) the Court is satisfied that a permanent care order or similar order made by another court would be in the best interests of the child and that there is no likelihood of reunification of the child with his or her parent.

In such a case the Court may-

(e) extend the order for a maximum period of 12 months after the extension is granted; and
(f) direct the Secretary to take steps to ensure that at the end of the period of the order a person other than the child's parent applies to a court for an order relating to the custody/guardianship of the child.

If the Court makes such a direction, no further application for extension may be made: see s.297(2).

For judicial discussion of s.297(1) – and in particular s.297(1)(f) – see *DOHS v The D Children* [Children's Court of Victoria-Power M, 11/01/2012] which is summarized below under the heading "Extension of guardianship to Secretary order".

5.17.6 Suspension/Lapse

Section 288(1) of the CYFA provides that a custody to Secretary order:

- is suspended on the making, with the prior consent of the Secretary, of an application under the Family Law Act 1975 (Cth) by a person who is not the parent of the child, seeking an order with respect to the custody/guardianship of the child on the terms of which the parties to the application have agreed; and
- ceases to be in force on the making of such order.

5.17.7 Variation & interim variation of custody to Secretary order

On application [Form 28] by-
(a) the child; or
(b) a parent; or
(c) the Secretary-
the Court may **vary**, add or substitute any condition(s) of a custody to Secretary order but must not make any change in the custody of the child or extend the period of the order [s.300].

On an application under s.300 to vary a custody to Secretary order, the Court may in exceptional circumstances vary, add or substitute any condition(s) but must not make any change in the custody of the child or extend the period of the order [s.302]. Any such variations have effect until the final determination of the appeal [s.302(3)].

5.17.8 Revocation of custody to Secretary order

On application [Form 28] by-
(a) the child; or
(b) a parent; or
(c) the Secretary-
s.308 of the CYFA provides that the Court-

- must revoke the order if it is satisfied that the Secretary, the child and the child's parent have agreed to the revocation and the revocation is in the best interests of the child; or
- in any other case, may revoke the order if satisfied that it is in the best interests of the child to do so.

For a discussion of some of the principles relevant to the revocation of a custody to Secretary order see *DOHS v Sanding* [2011] VSC 42 at [45]-[50] per Bell J. The circumstances leading to the revocation of the custody to Secretary orders in that case are detailed at [85]-[112].

Section 310 of the CYFA provides that if the Court revokes a custody to Secretary order under s.308, it may, if satisfied that the grounds for a finding under s.274 still exist-

- order an undertaking or make a supervision order; or
- if satisfied that changed circumstances justify it in doing so, make a guardianship to Secretary order or a long-term guardianship to Secretary order-

in respect of the child.

If the Court revokes an order under s.308(a) – namely where the Secretary, the child and the parent have agreed to the revocation – s.310(4) prohibits the Court from making a guardianship to Secretary order or long-term guardianship to Secretary order in lieu unless the application for revocation was made by the Secretary.

Under s.105(3) of the CYPA, any protection order made in lieu of a revoked custody to Secretary order only remained in force for the unexpired portion of the revoked order. There is no such provision in the CYFA.

An application by the Secretary to revoke a custody to Secretary order and replace it with a guardianship to Secretary order is relatively common. It is usually made in tandem with an application for extension in circumstances where the child has been out of the parents' care for a significant time and the Secretary considers that there is no reasonable likelihood of reunification. In-

- *DOHS v Mr & Mrs B* [2007] VChC 1 per Power M at p.43; and
- *DOHS v Ms B & Mr G* [2008] VChC 1 per Power M at pp.29-30-

Magistrate Power enunciated a four-pronged test to be applied in such cases to determine whether the custody to Secretary order should be replaced with a guardianship to Secretary order. The test is detailed in section 5.18.1.

5.17.9 No breach of custody to Secretary order

There are no provisions relating to breach of a custody to Secretary order. A consequence of a breach by a parent or child of conditions or case plan may sometimes be an application by the Secretary to revoke the order and replace it with a guardianship to Secretary order.

5.18 Guardianship to Secretary order

5.18.1 Section 289 of the CYFA

A guardianship to Secretary order [Form 24] grants custody and guardianship of a child to the Secretary to the Department of Health & Human Services to the exclusion of all other persons: s.289(1)(a). This means that under a guardianship to Secretary order, the Secretary has-

- sole right and responsibility to make all decisions about the care, control and welfare of a child; and
- the rights, powers, duties, obligations and liabilities set out in ss.172-177 of the CYFA.

This order most closely resembles the old "wardship" order under the legislation repealed in 1991. Section 10(3)(a) of the CYFA requires the Court to ensure that intervention into the relationship between parent and child is limited to that necessary to secure the safety and wellbeing of the child. Accordingly, a guardianship to Secretary order is an order of last resort, usually confined to cases where parents are unlikely to be able or available to make guardianship decisions for a child and/or the prospects of reunification are zero or slight. In the writer's view the appropriate test for determining whether a guardianship to Secretary order is in the best interests of a child is the four-pronged test which he enunciated in *DOHS v Mr & Mrs B* [2007] VChC 1 at p.43. A guardianship to Secretary order will be in the best interests of a child if:

(i) both parents are unavailable or unwilling to make or had failed to make appropriate guardianship decisions; or
(ii) both parents are incapable of making such decisions; or
(iii) in the past both parents had made one or more significantly inappropriate guardianship decisions; or
(iv) a permanent care case plan was in the best interests of the child but this plan could not be properly advanced unless the child was on a guardianship to Secretary order.

See also *DOHS v Ms B & Mr G* [2008] VChC 1 per Power M at pp.29-30.

The maximum initial period of a guardianship to Secretary order is 2 years [s.289(1)(b)].

5.18.2 Guardianship to Secretary order longer than 12 months

If the order is longer than 12 months, the Court is required by s.289(2) to direct the Secretary-

- to review the operation of the order before the end of the first 12 months; and
- to notify the Court, the child, the parent and such other persons as the Court directs before the end of that period if the Secretary considers that it is in the best interests of the child for the order to continue for the duration specified.

Failure to notify results in the order ceasing to be in force at the end of the first 12 months: see s.289(3).

The CYPA did not make it clear whether this direction is also required if a guardianship to Secretary order is extended for a period of more than 12 months. It is now clear from s.298 of the CYFA that a direction in the same terms is required when a guardianship to Secretary order is extended for a period of more than 12 months.

5.18.3 No conditions

There was no provision in the CYPA authorizing conditions on a guardianship to Secretary order. This may be compared with the 5 other protection orders where specific provision is made for conditions [ss.89(2), 92, 96(1)(e), 98(1) & 99(1)(d)]. Hence it is believed that the Court has no power to place conditions on a guardianship to Secretary order. In *MS & BS v DOHS* [County Court of Victoria, unreported, 18/10/2002] at p.40, Judge Cohen described this as "regrettable", a sentiment with which the writer entirely concurs. This remains the case under the CYFA, where specific provision is made for conditions on the six other protection orders [ss.278(3), 281, 283(1)(e), 284(1)(e), 287(1)(d) & 291(3)(f)] and on a permanent care order [s.321(1)] but not on guardianship to Secretary or long-term guardianship to Secretary orders.

5.18.4 Reunification rare

The case plan which the Secretary is required by s.167(1)(d) to prepare within 6 weeks after the making of a guardianship to Secretary order rarely contemplates reunification of the child with a parent.

5.18.5 Extension of guardianship to Secretary order

The CYFA provides in ss.293, 294, 295(2), 295(3), 296(2), 297 & 298 a procedure which enables a guardianship to Secretary order to be extended from time to time by up to 2 years after the extension or additional extension is granted. A direction under s.298 must be given if the extension is for more than 12 months.

An application for extension must be made to the Court while the order is still in force: see s.293(2). The application [Form 27] is made to the Court when it is filed with the appropriate registrar: see s.214 of the CYFA [formerly s.81 of the CYPA] and the judgment of Beach J. in *Secretary to the Department of Health and Community Services v VPP & BC* [Supreme Court of Victoria, unreported, 24/01/1994].

The initiation of extension proceedings keeps the guardianship to Secretary order in force until the application is determined by the Court [s.293(3)].

If the extension application was granted under the CYPA, the Children's Court as a matter of practice backdated the extended order to commence on the day after the previous order would have expired had it not been kept alive by operation of law. However, in the appeal of *M v H* [County Court of Victoria, unreported, 1716/1998], Judge Harbison decided that the legislation did not require her to backdate the extended order. The position has been clarified in the CYFA where it is clear from the wording of s.296(1) that the Court is no longer required to backdate the extended order to commence on the day after the previous order would have expired had it not been kept alive by operation of law.

Section 294 empowers the Court to extend a guardianship to Secretary order if it is satisfied that this is in the best interests of the child.

If the pre-conditions in s.290(1)(a) & 290(2) are met, a long-term guardianship to Secretary order may be made instead of extending a guardianship to Secretary order [s.290(1)(d)].

In determining an extension application-

- s.295(2) requires the Court to give due consideration to the following matters in the following order-
  (a) the appropriateness of making a permanent care order in respect of the child;
  (b) the benefits of the child remaining in the custody of the Secretary;
- s.295(3) requires the Court to take into account-
  (a) the nature of the relationship of the child with his or her parent, including the nature of the contact between the child and the parent during the period of the order;
  (b) the capacity of the parent to fulfil the responsibilities and duties of parenthood, including the capacity to provide adequately for the emotional, intellectual, educational and other needs of the child;
  (c) any action taken by the parent to give effect to the goals set out in the case plan;
  (d) the effects on the child of continued separation from the parent; and
  (e) any other fact or circumstance that, in the opinion of the Court, should be taken into account in the best interests of the child.

Section 296(2) of the CYFA provides that the maximum period of extension is-

(b) 12 months if the guardianship to Secretary order had been in force for less than 12 months at the time the extension is granted;
(c) 2 years if the guardianship to Secretary order had been in force for 12 months or more at the time the extension is granted.

However the 2 year maximum period provided by s.296(2)(b) is reduced to 12 months if the circumstances in s.297(1) prevail, namely if-

(b) the guardianship to Secretary order had been in force for more than 12 months; and
(c) the Court is satisfied that it would not be in the best interests of the child to be returned to the custody of his or her parent; and
(d) the Court is satisfied that a permanent care order or similar order made by another court would be in the best interests of the child and that there is no likelihood of reunification of the child with his or her parent.

In such a case the Court may-

(e) extend the order for a maximum period of 12 months after the extension is granted; and

(f) direct the Secretary to take steps to ensure that at the end of the period of the order a person other than the child's parent applies to a court for an order relating to the custody/guardianship of the child.

If the Court makes such a direction, no further application for extension may be made: see s.297(2).

In *DOHS v The D Children* [Children's Court of Victoria-Power M, 11/01/2012] [2012] VChC1 the four children (aged 10, 9, 7 & 6) had been on guardianship to Secretary orders since 09/12/2009. Prior to that they had been on custody to Secretary orders. Pursuant to these orders, they had lived with a non-related carer, Ms F, since 2007. On 16/03/2011 DOHS – exercising its rights as the children's custodian and guardian – removed them from Ms F's care and placed them in a residential unit operated by a contracted agency. The trigger for the removal was a dispute between Ms F and DOHS as to whether or not the oldest and youngest of the children should be enrolled in a Special School for the 2011 school year. The children filed applications to revoke the guardianship to Secretary orders. The Department filed applications to extend them. The children's applications were supported by their mother and by Ms F. After a 12 day contested hearing, Magistrate Power on 11/01/2012 dismissed the revocation applications. He extended the guardianship to Secretary orders until 13/02/2012 and directed pursuant to s.297(1)(f) of the *CYFA* that DOHS take steps to ensure that at the end of the period of the extended order a person other than the child's parent was to apply to a court for an order that the custody and guardianship of the child be granted to Ms F to the exclusion of all other persons. Central to his Honour's decision was the proper interpretation of s.297(1)(f). In a joint submission counsel for Ms F, the children and the mother had urged that a s.297(1)(f) direction be given naming Ms F as the person in whose favour an application for a permanent care or like order was to be made. Counsel for DOHS had submitted that there is no legislative warrant for s.297(1)(f) being construed as enabling the Court to dictate whom the Secretary must nominate as carer. At p.196 Magistrate Power preferred the joint submission:

> "In my view the joint submission is correct in asserting that the Court could not make a s.297 direction in a factual vacuum. Before the Court could consider giving a s.297 direction it must have received relevant evidence upon which it is able to base a decision that it was in the best interests of the subject child for X to be his or her permanent carer. It could not be satisfied that it was in the best interests of a child to be placed in the permanent care of a Mr or Ms Nobody. If, on the basis of a properly evidence-based decision, the Court then exercises a judicial power to extend a guardianship to Secretary order with an associated s.297 direction, is it likely that the legislature would have contemplated that the Department – one of the parties to the litigation – could subsequently be able to substitute Y as permanent carer, thereby overriding the Court's finding on which the extension order was at least partly based that it was in the best interests of the subject child to be placed permanently with X? I think not."

The above dicta was approved but not formally applied by Wallington M in *DOHS and K siblings* [2013] VChC 1 at pp.34-39.

The case of *NM, DOHS and BS* [2004] VChC 1 involved applications to extend and to revoke a guardianship to Secretary order in respect of a 4 year old child BS. A Children's Court Clinic report had been prepared in which the clinician had performed an assessment of the current carers which was not favourable to the DOHS' case. In the course of the hearing counsel for DOHS strenuously submitted that the placement of a child on a guardianship to Secretary order was an administrative decision by the Secretary subject to review only by the Victorian Civil and Administrative Tribunal (VCAT) pursuant to s.122 of the CYPA. Accordingly, he submitted, this conferred an exclusive jurisdiction on VCAT and so the Children's Court of Victoria could not hear any evidence about the carers or about the DOHS' decision to place the child with those carers as this was an administrative decision. At pp.15-17 Judge Coate firmly rejected this submission:

> "Section 122 of the CYPA confers jurisdiction on VCAT for the review of administrative decisions of DOHS if a party chooses to use that forum for such a review. The review jurisdiction of the Tribunal is contained in s.48 of the Victorian Civil and Administrative Tribunal Act (Vic). Section 52 of that Act purports to limit the jurisdiction of the Supreme Court and Magistrates' Courts in relation to the exercise of powers under planning legislation in certain circumstances. No like provision has been made with respect to the jurisdiction of the Children's Court in its Family Division.
>
> That VCAT has jurisdiction to review a decision of the Secretary of DOHS is no basis to assert that has any impact whatsoever on the Children Court of Victoria's power and obligations to exercise its complete statutory jurisdiction under the Children and Young Persons Act. There is no basis to assert that the capacity to review an administrative

decision by the Secretary ousts the jurisdiction or curtails the jurisdiction in the Children's Court in the exercise of its statutory functions. The logical conclusion of such an assertion is that the court would be bound by every case planning decision of DOHS.

In the event that DOHS brings an application to extend the order of the court, as in this application for extension, the court is required by the CYPA in mandatory terms to consider both the likelihood of reunification of the child with the parent and the benefits of the child remaining in the custody and guardianship of the secretary with consideration of reunification to take priority.

The application to extend the order is not a review of the decision made by the Secretary to place the child in any particular circumstances but rather the exercise by the court of its statutory responsibility to consider the criteria set out in s.107 and indeed in this case in s.109. Both applications compel the court to assess the welfare and interests of the child in the detail set out in all of the statutory criteria.

In this case, an assessment of the potential and actual benefits to the child of a placement which the Secretary proposes is to become permanent is a relevant consideration of the assessments required in satisfaction of both s.107 and s.109. The decisions of the Secretary neither restrict the court's obligations to consider evidence which is relevant nor relieve the court of its obligations to do so."

5.18.6 Suspension/Lapse

Section 288(1) of the CYFA, in conjunction with s.289(3), provides that a guardianship to Secretary order-

- is suspended on the making, with the prior consent of the Secretary, of an application under the Family Law Act 1975 (Cth) by a person who is not the parent of the child, seeking an order with respect to the custody/guardianship of the child on the terms of which the parties to the application have agreed; and
- ceases to be in force on the making of such order.

Section 289(1)(c) of the CYFA provides that a guardianship to Secretary order also ceases to be in force-

- when the child turns 18; or
- when the child marries-

whichever happens first.

5.18.7 Revocation

Section 305 provides that an application for revocation of a guardianship to Secretary order [Form 29] may be made to the Court by-

(a) the Secretary; or
(b) the child or parent but only if-
  - circumstances have changed since the making of the guardianship to Secretary order and the person has asked the Secretary to review the case plan and the Secretary has either refused to review the case plan or has reviewed it in a way that the person finds unsatisfactory; or
  - the Secretary makes a notification in accordance with s.289(2) in respect of the order.

Noting in *NM, DOHS and BS* [2004] VChC 1 that there was no statutory or common law definition of the phrase "circumstances have changed" in the predecessor s.109(2)(a) of the CYPA, Judge Coate said at p.70:

> "[T]he proper test to glean from these words is: Have the circumstances of the child or an applicant parent changed sufficiently since the making of the guardianship order to raise a *prima facie* case that a judicial reassessment of the child's circumstances is warranted?"

On an application for revocation, s.308 provides that the Court-

- must revoke the order if it is satisfied that the Secretary, the child and the child's parent have agreed to the revocation and the revocation is in the best interests of the child; or
- in any other case, may revoke the order if satisfied that it is in the best interests of the child to do so.

Section 310(5) of the CYFA provides that if the Court revokes a guardianship to Secretary order under s.308, it may, if satisfied that the grounds for a finding under s.274 still exist, order an undertaking or make a supervision order in respect of the child.

Under s.109(4) of the CYPA, any protection order made in lieu of a revoked guardianship to Secretary order only remained in force for the unexpired portion of the revoked order. There is no such provision in the CYFA.

An application by a parent to revoke a guardianship to Secretary order and replace it with a supervision order is not uncommon. It is usually made in tandem with an application by the Secretary for extension of the order.

5.18.8 No variation or breach of guardianship to Secretary order

Since there is no power to place conditions on a guardianship to Secretary, no application is possible to vary such an order.

There are no provisions in the CYFA relating to breach of a guardianship to Secretary order.

5.19 Long-term guardianship to Secretary order

5.19.1 Section 290(1) of the CYFA

A long-term guardianship to Secretary order [Form 25] grants custody and guardianship of a child of or over the age of 12 years to the Secretary to the Department of Health & Human Services to the exclusion of all other persons: ss.290(1)(a) & 290(1)(b). A long-term guardianship to Secretary order may be made as a protection order in its own right or may be made instead of extending a guardianship to Secretary order [s.290(1)(d)].

5.19.2 Pre-conditions for making of long-term guardianship to Secretary order

Section 290(2) of the CYFA prohibits the Court from making a long-term guardianship to Secretary order unless-

- there is a person or persons available with whom the child will continue to live for the duration of the order; and
- the child and the Secretary consent to the making of the order; and
- the making of the order is in the best interests of the child.

5.19.3 Secretary must review operation of order annually

The Court is required by s.290(3) to direct to the Secretary-

- to review the operation of the order before the end of each period of 12 months after the making of the order; and
- to notify the Court, the child, the parent and such other persons as the Court directs before the end of that period if the Secretary considers that it is in the best interests of the child for the order to continue for a further period of 12 months.

Failure to notify results in the order ceasing to be in force at the end of the period of 12 months to which the review applies: see s.290(4).

5.19.4 Suspension/Lapse

Section 288(1) of the CYFA, in conjunction with s.290(4), provides that a long-term guardianship to Secretary order-

- is suspended on the making, with the prior consent of the Secretary, of an application under the Family Law Act 1975 (Cth) by a person who is not the parent of the child, seeking an order with respect to the custody/guardianship of the child on the terms of which the parties to the application have agreed; and
- ceases to be in force on the making of such order.

Section 290(1)(c) of the CYFA provides that a long-term guardianship to Secretary order also ceases to be in force-

- when the child turns 18; or
- when the child marries-

whichever happens first.

5.19.5 Revocation

Sections 306(1) & 306(3) of the CYFA provide that an application for revocation of a long-term guardianship to Secretary order [Form 30] may be made to the Court by-
(a) the Secretary; or
(b) the child; or
(c) the parent but if the order has been in force for 12 months only with the leave of the Court.

Section 306(2) of the CYFA obliges the Secretary to apply for revocation if the Secretary has become aware that-
(a) the child or carer(s) has withdrawn consent to the continuation of the order; or
(b) the relationship between child and carer(s) has irretrievably broken down; or
(c) the child has not lived with the carer(s) for 3 months and it seems unlikely that the child will be able to return to live with the carer(s) in the foreseeable future.

On an application for revocation, the Court may revoke the order if it is satisfied that it is in the best interests of the child to do so [s.309].

Section 310(6) of the CYFA provides that if the Court revokes a long-term guardianship to Secretary order under s.309, it may, if satisfied that the grounds for a finding under s.274 still exist, order an undertaking or make a supervision order or guardianship to Secretary order in respect of the child.

5.19.6 No variation or breach of long-term guardianship to Secretary order

There is no power under the CYFA to place conditions on a long-term guardianship to Secretary. Accordingly, no application is possible to vary such an order.

There are no provisions in the CYFA relating to breach of a long-term guardianship to Secretary order.

5.20 Interim Protection order

5.20.1 Section 291 of the CYFA

Under s.291(1) of the CYFA, the Court may make an interim protection order ['IPO'] if it is satisfied that:
(a) a child is in need of protection or irreconcilable differences exist; and
(b) it is desirable, before making a protection order, to test the appropriateness of a particular course of action.

In *DOHS v Ms D & Mr K* [Children's Court of Victoria, 15/06/2009], Power M considered at pp.39-40 that it was premature to make either a supervised custody order or a custody to Secretary order and that it was in the infant's best interests to test his mother's commitment to reunification more fully before a precipitous decision was made about the infant's future. Hence the Court made an IPO with conditions which required the mother to demonstrate her *bona fides* to do what was necessary to justify the planning and facilitation of a reunification.

The maximum period of an IPO is 3 months: s.291(3)(e).

The Secretary is accountable to the Court for the implementation of an IPO [s.291(3)(a)] and usually has responsibility under the order for the supervision of the child [s.291(3)(b)].

5.20.2 Conditions

Under s.291(3)(f), an IPO may contain conditions that the Court considers to be in the best interests of the child to be observed by-
(a) the child; or
(b) the parent; or
(c) the person with whom the child is living.

Many of the Family Division standard conditions will be relevant to interim protection orders. The appropriate conditions will usually be directed at the identified issues such as maintaining participation in drug treatment regimes or attending counselling or behaviour modification programs. They often include conditions as to where the child lives and/or concerning contact by a parent or other person.

5.20.3 Variation/Revocation of IPO

On application [Form 28] by:
(a) the Secretary; or
(b) the child; or
(c) a parent or other person with whom the child is living-
the Court may-

- **vary**, add or substitute any condition(s) of an IPO but must not extend the period of the order [s.301]; or
- **revoke** the IPO and, if satisfied that the grounds for a finding under s.274 still exist make a protection order in respect of a child but must not make another IPO [s.307(1) & 310 (2)].

5.20.4 Breach of IPO

If at any time while an IPO is in force the Secretary is satisfied on reasonable grounds that:

- there has been a failure to comply with any conditions of the order; or
- the child is living in conditions which are unsatisfactory in terms of his or her safety and wellbeing-

the Secretary may initiate breach proceedings [Form 34]: see ss.312-314 of the CYFA.

Breach proceedings may be initiated either by notice or by apprehension of the child, the same two mechanisms as for initiation of protection applications. The initiation of breach proceedings keeps the IPO in force until the matter is determined by the Court unless an IAO is made, in which case the IPO expires on the making of the IAO: see ss.316 & 317(1). It is moot whether the IPO is automatically reinstated should the subsequent IAO be terminated but the writer considers it is probably not. However, the writer sees no reason why the breach outcomes listed in s.318(2) should be limited by s.317(1).

Upon finding the breach proved, s.318(2) of the CYFA empowers the Court to do one of 3 things-
(a) **confirm** the original order;
(b) **vary**, add or substitute any condition(s) but not extend the period of the order; or
(c) **revoke** the order and, if satisfied that the grounds for a finding under s.274 still exist, make a protection order (but not a further IPO) in respect of the child.

5.20.5 Return of IPO

At the end of an IPO, or before the end if the Court so directs by order or notice, the case returns to Court with a report from DHHS as to the progress of the case and recommendations about what form of order, if any, is now appropriate.

Section 291(3)(d) provides that the Court must require the child and his or her parent or other person with whom the child is living to appear before the Court at the time specified in the IPO or in any notice caused by the Court to be served on the child (if of or above the age of 12) and the parent/person with whom the child is living.

However, s.291(3)(d) is modified as from 01/12/2013 by s.291(3A) which provides that an IPO must not require a child to appear before the Court unless the Court considers it necessary for the child to appear.

Upon return, the Court has the following three options but must not extend the IPO-

- adjourn the initiating application with or without an interim accommodation order [ss.530(1), 262(1)(f)]; or
- make a protection order (but not an IPO) [s.291(6)]; or
- refuse to make a protection order [s.291(6)].

New s.291(7) empowers the Court to make such orders in the absence of the child if the child has not been required to appear before the Court.

If an IPO expires and the Court adjourns the proceedings, the Court may make an IAO preserving the status quo [i.e. including the same conditions and providing for the child to live with the same person] unless the parties agree to different living arrangements or different conditions or the Court is satisfied that the circumstances have changed. See s.292 of the CYFA which appears to have been enacted as a legislative response to the problem in which McDonald J preserved the status quo in *BS v DOHS* [2001] VSC 130.

If the Court refuses to make a protection order on expiry of an IPO, the Department has no further involvement with the child or family. It follows that the Court is unlikely to do this unless it is satisfied that the concerns which led to a finding that the child was in need of protection or that there were irreconcilable differences have either fully or substantially abated. Occasionally when the Court refuses to make a protection order, it will take an undertaking from a parent, child or other person that he or she will do or refrain from doing the things specified in the undertaking.

5.20.6 Statistics

Interim protection orders are relatively common, a short testing period often being useful in cases where a child is found to be in need of protection. The vast majority of interim protection orders are for the maximum period of 3 months' duration. The numbers of IPOs made and the numbers of cases in which the Court refused to make a protection order on expiry of an IPO are as follows:

	2004 /05	**2005 /06**	**2006 /07**	**2007 /08**	**2008 /09**	**2009 /10**	**2010 /11**	**2011 /12**	**2012 /13**
IPOs MADE	943	997	973	891	893	795	871	881	920
REFUSAL TO MAKE PROTECTION ORDER ON EXPIRY OF IPO	157	155	118	77	98	74	87	65	88

5.21 Consent orders

Generally the fact that all of the parties consent to the making of a particular order will be a matter of great weight for the Court. Indeed, in relation to applications for revocation of custody to Secretary orders and guardianship to Secretary orders under s.308(a) of the CYFA, the Court must revoke the relevant order if the Secretary, the child and the child's parent have agreed to the extension provided that the revocation of the order is in the best interests of the child.

However, consent of the parties is not binding on the Court in any case, for the Court cannot make any order which it considers is not in the best interests of the child: see the case of *DOHS v Ms B & Mr G* [2008] VChC 1 at pp.29-30 per Magistrate Power. The Family Court case of *T v N* [2004] 31 Fam LR 257 illustrates the truly independent role of a judicial officer dealing with cases involving the welfare and rights of children. The issue in that case was contact by a father with his children in circumstances where there was a great deal of evidence before the court about the father's history of violence and drug use. Both the mother and the father were legally represented and the children were separately represented. Counsel tendered minutes of proposed consent orders signed by all parties. Moore J refused to make the orders on the basis that she had a primary obligation to consider the best interests of the parties irrespective of any agreement reached by the parties. Her Honour held that the untested affidavits established a *prima facie* risk to the children if the proposed orders were made and that the magnitude of such risk was unacceptable.

5.22 Permanent care order

The Second Reading Speech for the CYPA [08/12/1988, p.1153] said of permanent care orders:

> "The [CYPA] provides for the Family Division of the Court to make a permanent care order in respect of certain children, such orders vesting guardianship and custody of a child in a new set of care givers or 'parents'. These provisions have been included as a means of providing children with another family when their own family is unable to provide for their long-term care - while enabling children to maintain maximum contact and involvement with members of their natural family. Permanent care orders also provide a means of dealing with 'welfare drift'. This problem, which arises when a child is temporarily taken into care by the State, has troubled child welfare authorities the world over. Child welfare systems do not generally make good 'parents'. As a result, some children drift on and become 'lost' in the system, in some cases losing contact with their family altogether. Permanent care orders will enable these children to be cared for within a 'permanent' family."

In the Second Reading Speech for the CYFA [27/10/2005], the Minister, in emphasising that a critical theme of the CYFA was to improve the stability of care of children and young people, foreshadowed

less attempts at reunification of children with parents and hence a greater emphasis on stability of out of home care placements and on permanent care orders:

> "An absolutely critical theme of the Act is to improve stability of care of vulnerable children and young people. We now know more about the lasting impact of early experiences on the development of young children's brains. Children who do not experience stable relationships in early childhood are at greater risk of significant developmental delay, learning difficulties, behavioural problems and difficulties in forming meaningful relationships throughout their lives.
>
> Time frames for the preparation of stability plans will therefore create a lever to ensure that child protection assesses whether continued attempts at reunification are in the best interests of the child. Our reforms will therefore help to prevent the additional harm that is caused by multiple failed attempts at reunification."

5.22.1 Effect of order

Section 319 of the CYFA empowers the Court to make a permanent care order, an order which has substantially the same effect as an adoption order. A permanent care order [Form 31]-

i. grants custody and guardianship of a child to person(s) other than the parent or the Secretary to the exclusion of all other persons [s.321(1)(a)]; or
ii. in special circumstances grants custody of a child to person(s) other than the parent or the Secretary and grants joint guardianship to the child's parent and person(s) other than the parent or the Secretary [s.321(1)(b)].

It is very unusual for the Court to make a permanent care order of type (ii), granting parents joint guardianship with carers. The vast majority of orders leave the birth parents with no residual parental rights save, in most cases, a right to very limited contact, generally 4-6 visits per year in a case where the carer is not a blood relative of the child.

Section 321(3)(c) provides that a permanent care order may continue in force after the child turns 17 but ceases to be in force-

- when the child turns 18; or
- when the child marries-

whichever happens first.

On the making of a permanent care order, any protection order then in force in respect of the child ceases: s.321(2).

5.22.2 Pre-conditions

Sections 319(1) & 322(1) of the CYFA set out eight pre-conditions, all of which must be satisfied before the Court can make a permanent care order-

(a) the child's parent or, if the child's parent has died, the child's surviving parent has not had care of the child for a period of at least 6 months or for periods that total at least 6 of the last 12 months; and

(b) the Court is satisfied that-
   i. the parent is unable or unwilling to resume custody and guardianship of the child; or
   ii. it would not be in the best interests of the child for the parent to resume custody and guardianship of the child; and

(c) the Court is satisfied that the proposed permanent carer(s) is/are suitable having regard to the matters contained in reg.18 of the Children, Youth and Families Regulations 2007 [S.R. No.21/2007] and any wishes expressed by the parent in relation to those matters; and

(d) the Court is satisfied that the proposed permanent carer(s) is/are willing and able to assume responsibility for the permanent care of the child by having custody and guardianship of the child; and

(e) the Court is satisfied that, so far as practicable, the wishes and feelings of the child have been ascertained and due consideration has been given to them, having regard to the age and understanding of the child; and

(f) the Court is satisfied that the best interests of the child will be promoted by the making of the order; and

(g) the Court has received and considered a disposition report; and

(h) a stability plan has been prepared.

Section 323 sets out further pre-conditions before the Court can make a permanent care order placing an Aboriginal child solely with a non-Aboriginal person or persons. Such an order cannot be made unless-

(a) the disposition report states that-
    i. no suitable placement can be found with an Aboriginal person; and
    ii. the decision to seek the order has been made in consultation with the child, where appropriate; and
    iii. the Secretary is satisfied that the order sought will accord with the Aboriginal Child Placement Principle; and
(b) the Court has received a report from an Aboriginal agency that recommends the making of the order; and
(c) if the Court so requires, a cultural plan has been prepared for the child.

For the purposes of s.319(1)(c)(i) of the CYFA the matters prescribed in reg.18 of the Children, Youth and Families Regulations 2007 [S.R. No.21/2007] in relation to each proposed carer are as follows-

(a) health, including the medical and psychiatric health;
(b) skills and experience;
(c) capacity to provide stability for the child for the duration of the permanent care order;
(d) capacity to promote and protect a child's safety, wellbeing and development for the duration of the permanent care order;
(e) capacity to provide appropriate support to the maintenance of a child's cultural identity and religious faith (if any);
(f) appreciation of the importance of-
    i. contact with a child's birth parent and family; and
    ii. exchange of information about the child with the child's birth parent and family; and
(g) general character, including any criminal history; and
(h) relationship with other household and family members and the criminal records and history of the household members (if any).

In the case of *JS* [Melbourne Children's Court, unreported, 30/10/2003, case 3102/2002], a child aged 11 had been abandoned by his mother on 08/10/2002. She had left him a letter saying that she would not be returning home. She later gave her consent for the child to live with his godparents. She died of a drug overdose on 16/05/2003. The identity of the child's biological father was not known and the child had never been in his care. There was no other person who was a "parent" within the meaning of s.3 of the CYPA. All of the child's extended family lived in New Zealand. On 30/10/2003 Power M. made a permanent care order granting guardianship and custody of JS to his godparents to the exclusion of all other persons. His Worship was persuaded to make this order notwithstanding that JS had not been out of the care of his deceased mother for a period of at least 2 years or for periods that totalled at least 2 of the last 3 years. His Worship accepted a submission by counsel for the Department that the pre-condition in s.112(1)(a) of the CYPA ought properly to be read as imposing a requirement that the **surviving** parent has not had care of the child for a period of at least 2 years or for periods that total at least 2 of the last 3 years. To remove any ambiguity which might prevent an order being made in such circumstances, the word "**surviving**" has now been added to s.319(1)(a) of the CYFA.

The case of *NM, DOHS and BS* [2004] VChC 1 involved applications to extend and to revoke a guardianship to Secretary order in circumstances where the 4 year old child BS was living with long-term carers subject to a permanent care caseplan. Judge Coate was advised that DOHS had a policy position that permanent carers were not to attend Court to give evidence and be subjected to cross-examination. It was put very strongly to Her Honour that for a court to require permanent carers to do so would put in peril the permanent care program in Victoria as permanent carers would not want to expose themselves to such assessments and potential questioning in the court room. It was also submitted that any proposed permanent carer has already gone through a rigorous process of selection and the inference from that is that the court's examination would be burdensome and superfluous. Finally it was submitted that the permanent carers had been advised that they would not have to attend court and any advice to the contrary may cause the placement to break down at great detriment to the child BS. At pp.17-18 Judge Coate firmly rejected these submissions:

"If this is correct advice to the Court, it is clearly incorrect advice to permanent carers.

A court is required pursuant to s.112 of the CYPA in considering the appropriateness of an order for permanent care to be satisfied that the permanent carers are suitable to have custody and guardianship of the child having regard to any prescribed matters. Those matters include the personality, emotional maturity, general stability of character of the proposed carers and capacity to provide a secure and beneficial emotional environment for the child. This inquiry is the responsibility of the court. It is not sufficient that the court accept the assurance of the Secretary that the carers are assessed by the Secretary or its nominee as appropriate. It is an issue for determination of the court in the circumstances of each application on evidence properly admissible in the proceedings.

Whilst it is not difficult to understand why there may be good reasons in some cases why DOHS may not seek to call the proposed permanent carers to give evidence, there are many cases where not to do so may cause there to be such a gap in the evidence that a court cannot satisfy itself that the placement is suitable and benefits the child.

Like all inflexible positions, they do not adapt well to proper exercises of discretion or indeed the complexities of human behaviour. Decision-making by bureaucracy rather than on a case by case basis is a dangerous way to proceed and it may well be time to rethink such an approach if this is an accurate description of current decision making."

5.22.3 Bar on making order

Section 322(3) & 322(4) prevent the Court from making a permanent care order if-

(a) a protection order is in force in respect of the child but an application to the Court to revoke it has been made but not yet determined; or
(b) there is a current proceeding under the Family Law Act 1975 (Cth) seeking an order (on the terms of which the parties have agreed) with respect to the custody and guardianship of the child, being a proceeding commenced by a person who is not a parent of the child.

5.22.4 Conditions

Under s.321(1) of the CYFA a permanent care order-

- must include conditions that the Court considers to be in the best interests of the child concerning contact by the child's parent;
- may include conditions that the Court considers to be in the best interests of the child concerning contact by the child's siblings and other persons significant to the child;
- in the case of an Aboriginal child, may include a condition incorporating a cultural plan for the child.

Most non "kith-and-kin" permanent care orders made by the Court contain a condition that entitles the child to have 4-6 contact visits per year with a birth parent, the visits sometimes being arranged and supervised by a private fostercare agency. A "kith-and-kin" order, where the permanent carer is a blood relative of the child, often contains a condition providing for a greater amount of contact.

In the case of the *B-J Children* [Children's Court of Victoria-Power M, unreported, 06/06/2007] the writer had raised with counsel whether the 'best interests' principles in s.10 of the CYFA could empower the Court to impose obligations on DOHS if it made a permanent care order, specifically whether the Court could require DOHS to facilitate parental and/or sibling contact if conditions were imposed pursuant to ss.321(1)(d) & 321(1)(e). A number of counsel provided the Court with detailed written submissions. Counsel for DOHS submitted that "the Secretary does not have any right to or responsibility for the supervision, monitoring or provision of services for a child who is the subject of a permanent care order". Some counsel did not take issue with this. Other counsel argued against it. The writer preferred the submissions of counsel for DOHS, stating at pp.90-91:

"I am satisfied that neither the CYFA nor the predecessor, the CYPA, empower the Court to require DOHS to supervise, monitor or provide services for a child who is the subject of a permanent care order. Under s.321(1)(a) of the CYFA a permanent care order grants custody and, subject to s.321(1)(b), guardianship of the child to the carers to the exclusion of all other persons. Under s.321(2) any protection order in respect of a child ceases to be in force on the making of a permanent care order. Neither the CYFA nor the CYPA give DOHS any express rights, duties, powers or responsibilities in respect of a child on a permanent care order. This is in stark contrast to the rights, duties, powers and responsibilities of DOHS in respect of all protection orders other than an undertaking and a custody to third party order. {See for instance the responsibilities of DOHS under a supervision order [ss.280(1)(a) & 282], a supervised custody order [ss.284(1)(f), 284(4), 285

& 286], a custody to Secretary order [ss.287(1)(a)], a guardianship to Secretary order [s.289(1)(a)], a long-term guardianship to Secretary order [s.290(1)(b)] and an interim protection order [s.291(3)(a)].} It might be thought that the lacuna is unfortunate because there are many children who might otherwise be the subject of permanent care orders but who require the provision of ongoing, sometimes intensive, services of one form or another. However, I am satisfied that the lacuna is deliberate. I agree with counsel for DOHS that "Parliament clearly intended and the effect of both the CYPA and the CYFA is that permanent care orders are in substance similar to adoption orders". It is true that DOHS is the only body which has standing to apply for a permanent care order {See s.320(1) of the CYFA. This was in identical terms to s.112(2) of the CYPA which had been amended in 1992 by s.14(6) of Act No.69/1992. Prior to 1992 only proposed carers had standing under s.112(2) of the CYPA to apply for a permanent care order.} Along with child, parents & carers it also has standing to apply for the variation or revocation of a permanent care order {s.326(1) of the CYFA}. However, in my view, the power to make an application does not enable me to infer an obligation on DOHS to do anything once the application is granted where such an obligation is inconsistent with the purpose and features of a permanent care order or with the clear intention of Parliament. The detailed contrary submissions of counsel for [two of the children] are highly relevant to the question of whether or not the Court should exercise its discretion to make a permanent care order but do not persuade me of the existence of a power to impose an obligation on DOHS to have any form of ongoing connection with a child who is the subject of a permanent care order."

5.22.5 Lapse

Section 324 of the CYFA provides that a permanent care order-

- is suspended on the making, with the prior consent of the Secretary, of an application under the Family Law Act 1975 (Cth) by a person who is not the parent of the child, seeking an order with respect to the custody/guardianship of the child on the terms of which the parties to the application have agreed; and
- ceases to be in force on the making of such order.

5.22.6 Variation/Revocation/Breach of permanent care order

On application [Form 33] by:
(a) the child; or
(b) a parent; or
(c) a permanent carer; or
(d) the Secretary-
the Court may, if satisfied it is in the best interests of the child to do so:

- **vary**, add or substitute any condition(s) of a permanent care order but must not make any change in the custody or guardianship of the child [s.327(a)]; or
- **revoke** the order in whole or in part [s.327(b)].

Variation or revocation of a permanent care order is rare. However in one case the Melbourne Children's Court has revoked a permanent care order in part by removing from the order one of two permanent carers after he had been found to have sexually abused the child.

There are no legislative provisions relating to breach of a permanent care order.

5.22.7 Statistics

The numbers of permanent care orders made state-wide are as follows:

2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012/ /13
215	173	213	277	233	223	202	250	292

5.23 Therapeutic treatment & therapeutic treatment (placement) orders

A therapeutic treatment order ['TTO'] requires a child aged 10-14 who has exhibited sexually abusive behaviours to participate in an appropriate therapeutic treatment program ['TTP'].

A therapeutic treatment (placement) order ['TTPO'] grants sole custody to the Secretary of a child in respect of whom a TTO is in force. A TTPO does not affect the guardianship of the child.

5.23.1 Rationale

In the Second Reading Speech in the Legislative Council on 15/11/2005 the Minister for Aged Care, Mr Gavin Jennings, explained the rationale for what he described as "a new response to children aged 10-14 exhibiting sexually abusive behaviour":

> "[T]he bill provides a new basis for intervening earlier with young people who exhibit sexually abusive behaviour to help prevent ongoing and more serious sexual offences. For children aged 10-14, the criminal justice system does not provide a reliable pathway into treatment.
>
> For this age group, it is often difficult to prove the necessary mental intent to secure a conviction.
>
> The bill therefore provides two new Children's Court orders…The court will be able to order a child into therapeutic treatment and, where necessary for that treatment, to place the child in out-of-home care. This is an important early intervention if we are to stop these children from becoming adult offenders. This reform is intended to supplement, not replace, voluntary access to treatment. It will always be preferable for parents to connect a child exhibiting sexually abusive behaviour to treatment voluntarily and avoid exposing them to any court process."

5.23.2 Power of the Court to make a TTO

Sections 244 & 246 of the CYFA empower the Secretary, if satisfied on reasonable grounds that a child of or above the aged of 10 years and under the age of 15 years is in need of therapeutic treatment to apply [Form 4] for a TTO. This is one of the very few applications in which the CYFA requires the child to attend Court.

Under s.248 of the CYFA the Court may make a TTO in respect of a child of or over the age of 10 years and under the age of 15 years if the Court is satisfied-

(a) that the child has exhibited sexually abusive behaviours; and
(b) that the order is necessary to ensure the child's access to, or attendance at, a TTP.

Section 249(1) of the CYFA provides that a TTO must require the child to participate in a TTP.

Section 249(2) empowers the Court to include on a TTO-

(a) a condition directing the parent of the child or any person who has care of the child to take any necessary steps to enable the child to participate in a TTP; and
(b) a condition directing the child to permit reports or his or her progress and attendance at the TTP to be given to the Secretary; and
(c) any other conditions that the Court considers appropriate.

Under s.250 a TTO remains in force for a period not exceeding 12 months.

It is not entirely clear from the legislation whether the 10-14 age limits set out in ss.244(a) & 248 of the CYFA apply to the child at the time the application is made or at the time a TTO is made or both. So, for instance, if a child is 14 at the time the application for a TTO is made but turns 15 prior to the application being determined by the Court, does the Court have power to make a TTO? In the writer's view it is probable that these age limits must be satisfied both at the time the application is made and the time at which the TTO is made.

5.23.3 The meaning of "sexually abusive behaviours"

'Sexually abusive behaviours' is not defined in the CYFA or in any other legislation. The Therapeutic Treatment Board has adopted the following working definition:

> "A child has exhibited sexually abusive behaviours when they have used their power, authority or status to engage another party in sexual activity that is either unwanted or where, due to the nature of the situation, the other party is not capable of giving consent (for example, animals or children who are younger or who have a cognitive impairment)."

In *DoHHS v J* [2015] VChC 1 the Department had applied for a therapeutic treatment order in respect of Jonathon [a pseudonym], a 10 year old boy who was living in a residential unit. The application was contested by Jonathon. In granting the application, Magistrate Gibson did not accept that the above working definition was a complete description of "sexually abusive behaviours".

At [5] her Honour was satisfied on the balance of probabilities that:

- Jonathon and two female co-residents (A who was 7 years old and B who was 9 years old) engaged in acts of fellatio whereby A and B performed oral sex on Jonathon on numerous occasions.
- These activities of oral sex performed by A and/or B on Jonathon often occurred in the presence of the other girl and in the presence of male co-residents (C and/or D who were both 9 years old).
- Jonathon and D engaged in an act of simulated anal sex whereby Jonathon acted out the motions of anal sex with D while both boys were fully clothed.
- Jonathon and D attempted to engage in an act of anal sex whereby D attempted to insert his penis into Jonathon's anus.

The children in the Unit, of whom Jonathon was the oldest albeit by only 5 months, had all experienced trauma and neglect and had extremely difficult and troubling behaviours. In particular A, B & D had all experienced and/or been exposed to sexual abuse. However, at the time Jonathon came to live with his co-residents he had no history of sexual abuse or sexualised behaviours. At [11]-[13] Magistrate Gibson said:

> [11] "On balance, the evidence suggests that it is likely that Jonathon himself was exposed to the sexualised behaviours of one or more of the other children in the Unit, and then became involved in a culture or secret game of collusion in which they all participated. I accept that on a number of occasions Jonathon sought out the sexual activity, however the evidence does not support a positive finding that he used bullying behaviour, power or control to enable it to occur. Only D made this specific allegation, and it is equally likely that D said this in an attempt to understand his own behaviours in the Unit. In all the circumstances, to classify Jonathon as the sexually dominant child, the controller of sexual activity, or the aggressor, is to demonise him and fails to acknowledge the dynamics that existed between the children in the Unit.
>
> [12] As the only child of the age of criminal responsibility, Jonathon has been charged with criminal offences and treated as an offender. It is my firm view that he should have been regarded (and treated) as much as a victim as the other children in this very disturbing series of events.
>
> [13] The acts of fellatio and attempted anal sex engaged in by the children were types of sexualised behaviours that went well beyond the bounds of normal sexual development for them, and had great potential to place all the children at risk of harm, including harm of a cumulative nature. It is imperative that Jonathon and his co-residents are given the opportunity to process what occurred for them in the Unit and to learn from it so that, individually, they can go on to have sexually appropriate relationships in the future. The issue for the Court is whether a TTO should be made to achieve this therapeutic outcome for Jonathon."

In defining "sexually abusive behaviours" more broadly than in the TTB's working definition, Magistrate Gibson said at [18]-[20]:

> [18] "If this working definition were adopted by the Court as a complete description of the phrase, Jonathon would not be found to have exhibited sexually abusive behaviours, as he has not used his power, authority or status. I would be surprised and troubled by such an outcome, given the views I have expressed in paragraph [12] herein, and consider it would be contrary to the expressed purpose for which the Court was given power to make TTOs.
>
> [19] In her evidence, Ms W from the Australian Childhood Foundation (the agency responsible for providing counselling services to children on TTOs in the region closest to Jonathon's home) said that she understood the word 'abusive' in the phrase described the harmful effect of the behaviours on the young person and/or others rather than a description of the young person exhibiting the behaviour. She also explained that the context in which the sexual behaviours took place was vital in determining whether fell within the ambit of the phrase. I found her evidence of great assistance.
>
> [20] I am satisfied that Jonathon has exhibited sexually abusive behaviours. This is not because he has used any power, authority or status to engage the others in the Unit in sexual activity. Nor is it because I view him as an abuser. It is because I consider that the behaviours he engaged in with his co-residents were abusive to himself and to the others, and he would benefit by engaging in therapeutic treatment. I would have also found that the other children in the Unit (perhaps with the exception of C) had exhibited sexually abusive behaviours, however only Jonathon was of an age that beings him within the ambit of such a finding for the purposes of a TTO."

5.23.4 Power of the Court to make a TTPO

Under s.252(1) of the CYFA the Court, on the application of the Secretary [Form 6], may make a TTPO in respect of a child if-
(a) the Court makes or has made a TTO in respect of the child; and
(b) the Court is satisfied that the TTPO is necessary for the treatment of the child.

Under s.253 of the CYFA a TTPO-
(a) grants sole custody of the child to the Secretary; and
(b) does not affect the guardianship of the child; and
(c) may include any conditions that the Court considers to be in the best interests of the child, including a condition concerning contact by a parent or other person and, in the case of an Aboriginal child, a condition incorporating a cultural plan for the child.

Under s.254 of the CYFA a TTPO remains in force for the period (not exceeding the period of the TTO to which it relates) specified in the order.

5.23.5 Variation/revocation of TTO/TTPO

On application [Form 8] by:
(a) the Secretary; or
(b) the child; or
(c) a parent of the child-
the Court may-

- **vary**, add or substitute any condition(s) of a TTO but must not make a change in the requirement to attend a TTP and must not extend the period of the order [s.257];
- **vary**, add or substitute any condition(s) of a TTPO but must not make any change in the custody of the child and must not extend the period of the order [s.257];
- **revoke** the TTO or TTPO [s.258]. Under s.258(8) a TTPO is revoked when the TTO to which it relates is revoked.

Under s.258(2) of the CYFA, if criminal proceedings against a child have been adjourned pending the completion by the child of a TTP under a TTO, the Secretary must seek the advice of the Therapeutic Treatment Board before applying to the Court to revoke the TTO.

5.23.6 Extension of TTO/TTPO

The CYFA provides in ss.255-256 a procedure which enables <u>one</u> extension of the period of a TTO and/or TTPO to be made upon application by the Secretary.

An application for extension must be made to the Court while the order is still in force: see ss.255(2) & 255(3). The application [Form 9] is made to the Court when it is filed with the appropriate registrar: see s.214 of the CYFA.

The initiation of extension proceedings keeps the TTO/TTPO in force until the application is determined by the Court [s.255(4)].

Section 256(1) empowers the Court to extend a TTO for a period not exceeding 12 months if it is satisfied that the child is still in need of therapeutic treatment.

Section 256(2) empowers the Court to extend a TTPO for a period not exceeding the period of the TTO to which it relates if it is satisfied that the TTPO is still necessary for the therapeutic treatment of the child.

5.23.7 Effect of TTO on associated criminal proceedings

Under s.352 of the CYFA, if the Secretary reports to the Criminal Division of the Court that a TTO has been made in respect of a child and the Court has not yet made a finding in related criminal proceedings in which the child is a defendant, the Court must adjourn the criminal proceedings for a period not less than the period of the TTO.

Under s.354(4) of the CYFA, if the Criminal Division of the Court is satisfied that a child defendant has attended and participated in a TTP under a TTO, it must discharge the child without any further hearing of the related criminal proceedings. In *Victoria Police v HW* [2010] VChC 1 the child the

subject of a TTO had earlier been charged with very serious sexual offending which occurred when he was 13 years of age. The child had been attending and participating in the TTP under a TTO. However, as the therapeutic treatment had not been completed by the end of the TTO the Department of Health & Human Services had filed an application to extend the TTO and – with the consent of the child – the TTO had been extended. Counsel for the child submitted that s.354(4) is clear and that once a child has attended and participated in the TTP under the TTO it must discharge the child even though there was an application for extension before the Family Division. The police prosecutor submitted that the Court must look at the rationale for TTO's and that given that the child is still in need of therapeutic treatment the criminal proceedings ought be adjourned until the period of the extended TTO is completed and the Court is advised of the child's compliance with the TTO. At [17]-[18] Judge Grant preferred the police submission:

> "Given the purpose of a TTO, parliament would not have intended that a child be discharged on serious criminal offences in circumstances where the child was considered to require on-going treatment by way of an extension of the TTO…
>
> The only way of interpreting s.354(4), consistent with the clear purpose of the Act, is to recognise that the words 'attend and participate in the therapeutic treatment program', mean attend and participate in the program until the TTP is completed. If, as in this case, the TTO has been extended for a period, the appropriate order on the associated criminal proceedings is to adjourn those proceedings for a period that is not less than the period of extension of the order."

5.23.8 Statistics

The TTO provisions commenced operation on 01/10/2007. Given-

- data from Victoria Police that in 2004-2005 & 2005-2006 police dealt with 218 & 258 alleged offenders of whom respectively 123 & 144 were summonsed to appear in the Criminal Division of the Children's Court; and
- research findings of Bourke & Donohue (1999), Ertl & McNamara (1997), Ryan & Lane (1997) and Snyder & Sickmund (1999) that-
  (i) 20-30% of all sex offences against children are committed by juveniles;
  (ii) 50% of all adult offenders start offending in adolescence;
  (iii) 57% of offences against male children are committed by teenagers;
  (iv) 15-25% of offences against female children are committed by teenagers; and
  (v) 8% of all males have been sexually abused by a teenager-

it was expected that there would be a significant number of applications for TTOs. In fact there have been fewer than expected.

Up to and including 09/07/2008 the Therapeutic Treatment Board had processed 16 referrals and in 6 of those it had advised that an application for a TTO should not be made. Some of the TTOs which the Court has made have involved cases in which DHHS had chosen not to accept advice by the Therapeutic Treatment Board that no application should be made. The statistics are as follows:

	2007 /08	**2008 /09**	**2009 /10**	**2010 11**	**2011 /12**			
TTO	3	14	30	28	32			
TTPO	0	2	4	2	2			

5.23.9 Therapeutic treatment service providers

As at July 2008 the following organizations have been appointed as TT service providers:

BARWON SOUTH WEST	Barwon CASA {5222 4318}		
GIPPSLAND	Gippsland CASA {5134 3922}		
GRAMPIANS	Wimmera CASA {5381 9272}		
HUME	GV CASA {5831 2343}	UmCASA {5722 2203}	Berry St {5822 8100}
LODDON MALLEE	Mallee Sexual Assault {5025 5400}	CASA Campaspe {5441 0430}	
MELBOURNE EASTERN	Australian Childhood Foundation {9874 3922}		
MELBOURNE NORTH WEST	Gatehouse {9345 6391}	CPS {9450 0900}	
MELBOURNE SOUTHERN	AWARE (SE CASA) {9928 8741}		

5.24 Reports to the Court

In the processing of Family Division cases, written reports have a position of central importance. Some practices had developed in the preparation & distribution of reports which were not strictly in accordance with the CYPA. The amendments introduced by the CYFA reflect some aspects of current practice.

The types of Family Division reports governed by Part 7.8 of the CYFA are-
(a) protection reports;
(b) disposition reports;
(c) additional reports, including Children's Court Clinic reports;
(d) therapeutic treatment application reports; and
(e) therapeutic treatment (placement) reports.

5.24.1 Protection report

If the Family Division requires further information to enable it to determine a protection application, it may order the Secretary to submit to the Court a protection report concerning the subject child: s.553 of the CYFA. Such report must only deal with matters that are relevant to the question of whether the child is in need of protection: s.555.

5.24.2 Access to protection report

If the Court orders the Secretary to prepare a protection report, s.556(1) of the CYFA requires the Secretary – subject to the restriction provisions in s.556(2) – to cause a copy of the protection report to be given before the hearing of the proceeding to each of the following-
(a) the subject child;
(b) the parent(s);
(c) the legal practitioners representing the child;
(d) the legal practitioners representing the parent(s);
(e) the protective intervener who made the protection application, if the protective intervener is not the Secretary;
(f) a party to the proceeding; and
(g) any other person specified by the Court.

Fortunately, it has become standard practice for the Department, in relation to every protection application brought by it, to prepare a protection report and to give a copy to all of the other parties without specific Court order. It usually calls this an "application report".

5.24.3 Disposition report

Subject to the minor limitations in s.557(2), section 557(1) of the CYFA requires the Secretary to prepare and submit to the Family Division a disposition report if-
(a) the Court becomes satisfied that-
    (i) a child is in need of protection; or
    (ii) irreconcilable differences exist; or
    (iii) there has been a breach of a supervision order, a supervised custody order or an interim protection order; or
(b) the Secretary applies for a permanent care order; or
(c) the Secretary applies, or is notified that a person has applied-
    (i) for the variation or revocation of a supervision order, a custody to third party order, a supervised custody order, a custody to Secretary order, an interim protection order or a permanent care order; or
    (ii) for the extension of a supervision order, a supervised custody order, a custody to Secretary order or a guardianship to Secretary order; or
    (iii) for the revocation of a guardianship to Secretary order or a long-term guardianship to Secretary order; or
(d) an interim protection order has expired or is about to expire; or
(e) the Court orders the Secretary to do so.

Read literally, s.557(1)(a) might be interpreted as not requiring the Secretary to file and serve a disposition report until after the Court has found a protection, IRD or breach application proved. But it would unreasonably restrict the conduct of the case at every stage of the hearing if there was no report setting out the Department's recommended disposition. To split any Family Division case into

pre-proof and post-proof stages is artificial and it is unhelpful to use a Criminal Division contest/plea dichotomy as an analogy. Fortunately, it has become standard practice for the Department to prepare and distribute a disposition report at a pre-proof stage in every case.

Section 558 requires a disposition report to include the following:
(a) the draft case plan, if any, prepared for the child;
(b) recommendations, where appropriate, concerning the order which the Secretary believes the Court ought to make and concerning the provision of services to the child and the child's family;
(c) if the report recommends that the child be removed from the custody or guardianship of his or her parent, a statement setting out the steps taken by the Secretary to provide the services necessary to enable the child to remain in the custody or under the guardianship of the parent [see also s.276(2)(b)]; and
(d) any other information that the Court directs or the regulations require to be included.

5.24.4 Access to disposition report

If a disposition report is required under s.557 or if the Court orders a disposition report, s.559(1) of the CYFA requires the Secretary – subject to the restriction provisions in s.559(2) – to cause a copy of the disposition report to be given before the hearing of the proceeding to each of the following-
(a) the subject child;
(b) the parent(s);
(c) the legal practitioners representing the child;
(d) the legal practitioners representing the parent(s);
(e) the protective intervener who made the protection application, if the protective intervener is not the Secretary;
(f) a party to the proceeding; and
(g) any other person specified by the Court.

The predecessor s.51(1) of the CYPA required the author of a disposition or additional report to forward the report to the proper venue of the Court within 21 days and not less than 3 working days before the hearing. The time-lines were rarely met and have been removed in s.559(1) of the CYFA.

5.24.5 Additional report – Children's Court Clinic report

If in any proceeding in which a disposition report is required under s.557(1), the Family Division is of the opinion that an additional report is necessary to enable it to determine the proceeding, s.560 empowers the Court to order the preparation and submission to the Court of an additional report by-
(a) the Secretary; or
(b) the Children's Court Clinic; or
(c) another person specified by the Court.
This is the statutory provision which empowers the Court to order reports from the Clinic.

Section 560 is potentially ambiguous, as was its predecessor, s.50 of the CYPA. Section 560 is often read - in conjunction with s.557(1)(a) - as limited to 'post-proof' reports but, as stated above, this is an artificial restriction. There is no obvious reason why it could not be read - in conjunction with s.557(1)(e) - as also applying to 'pre-proof' reports. But however s.560 is read, there would seem to be no bar to the Court ordering a pre-proof additional report if all parties consent. In practice it is not uncommon for this to happen.

5.24.6 Whether Court has power to compel DHHS to provide an "external" additional report

It is clear from the judgment of Harper J in *Dr John Patterson v KS & A Magistrate of the Children's Court* [Supreme Court of Victoria, unreported, 29/06/1993] that the Court could not compel the Department to prepare an additional report under s.50 of the CYPA if the Department is not in a position to prepare the report from the resources directly within its command and where the additional report would need to be contracted out to some appropriate person with the necessary expertise. In that case a Children's Court magistrate had ordered the Department to prepare an additional report, including a report as to the paternity of the child by use of blood samples, the Department to pay the costs of such testing if necessary. Holding that s.50 of the CYPA "should be construed strictly", Harper J found that the magistrate's order was *ultra vires* s.50:

> "Section 50 in its terms gives the court power to order 'another person' as specified by the court to provide an 'additional report'. It is entirely silent upon the question of the cost of preparation of any report thus ordered. It seems to me that in those circumstances the provisions included within s.50 should be construed strictly.

> The provision of reports pursuant to the Children and Young Persons Act 1989 may in certain circumstances be an onerous task. That task is undoubtedly one which in the particular circumstances ought to be carried out by the Department. But where the resources of the Department are clearly not sufficient to generate from within the Department material which is sought to be included in a report prepared pursuant to Subdivision 3 of Division 8 of Part 2 of the Act, then it seems to me that the court should either make an order directly upon the appropriate person requiring that person to prepare the report or should make no order at all.
>
> It may well be that before making an order pursuant to s.50(c) the court should receive undertakings as to the meeting of the cost of preparation of that report by, for example, one of the parties then before the court. It may be that other steps can be taken to ensure that the costs are met by the appropriate person. But in any event, given the limited nature of the jurisdiction of the Children's Court, it seems to me that a provision such as s.50 should be read so as to limit the court's jurisdiction where, without such limits, the court would be empowered to impose upon persons not directly before the court the obligation to provide and pay for reports pursuant to the Act; or, alternatively, to require a body such as the department to provide and pay for, directly or indirectly, reports which the Department cannot prepare and provide from its own resources."

See also *George v Children's Court of NSW & Ors* (2003) 31 Fam LR 218; [2003] NSWCA 389 where the Supreme Court of NSW (Court of Appeal) held that the NSW Children's Court did not have power, either express or implied, to order the NSW child protection authority to pay rail/bus fares and reasonable accommodation expenses in order to facilitate period contact between a child who had been placed on a wardship order and his parents.

However, the writer doubts whether either of the above cases is still good law in Victoria given the "best interests" principles now contained in s.10 of the CYFA which require both the Court [s.8(1)] and the Secretary [s.8(2)] to treat the best interests of the child as paramount. There were no such principles set out in the CYPA except in ss.87(1) & 87(1A) which were expressed to be limited to findings or orders made on a protection application or an irreconcilable difference application.

5.24.7 Access to additional report not prepared by Children's Court Clinic

If the Court orders an additional report from a person or organization other than the Children's Court Clinic, s.561(1) of the CYFA requires the author of the report – subject to the restriction provisions in s.561(2) – within 21 days and not less than 3 working days before the hearing to forward the report to the proper venue of the Court and a copy to each of the following-

(a) the subject child;
(b) the parent(s);
(c) the legal practitioners representing the child;
(d) the legal practitioners representing the parent(s);
(e) the protective intervener who made the protection application, if the protective intervener is not the Secretary;
(f) a party to the proceeding; and
(g) any other person specified by the Court.

5.24.8 Access to Children's Court Clinic report

If the Court orders an report from the Children's Court Clinic, s.562(1) of the CYFA requires the Clinic within 21 days and not less than 3 working days before the hearing to forward the report to the proper venue of the Court.

Subject to the restriction provisions in s.562(4), the Court must release a copy of the report to each of the following-

(a) the subject child;
(b) the parent(s);
(c) the Secretary;
(d) the legal practitioners representing the child;
(e) the legal practitioners representing the parent(s);
(f) the legal representative of the Secretary or an employee authorized by the Secretary to appear in proceedings before the Family Division;
(g) a party to the proceeding; and
(h) any other person specified by the Court.

The predecessor s.51(1) of the CYPA required the Clinic to forward the report to the Court and a copy direct to various of the parties and/or legal representatives. However, the Clinic's practice has long been to forward copies of its reports only to the Court and allow the Court to distribute the reports. By making the Court responsible for distribution of Clinic reports, s.562 of the CYFA reflects some – but by no means all - aspects of the de facto distribution procedure which has operated for many years. But by making it mandatory for the Court to provide a copy of the report to the Secretary – in addition to the Secretary's legal representative – except in the circumstances set out in s.562(4), the CYFA has made a substantial change on the distribution procedure previously governed by s.51(1) of the CYPA.

Section 562(5) of the CYFA empowers the Court to impose conditions in respect of the release of a Children's Court Clinic report. However, it is the writer's view that s.562(5) does not impose an unfettered power on the Court which would enable it to impose conditions which are contrary to the general release provisions in s.562(3)(c), read in conjunction with s.562(4).

5.24.9 Therapeutic treatment application & therapeutic treatment (placement) reports

If the Family Division requires further information to enable it to determine an application for a TTO or TTPO or a variation, revocation or extension thereof, ss.563 & 567 respectively empower the Court to order the Secretary to submit to the court a TT or TTP application report concerning the subject child.

The content of such reports is detailed in ss.564 & 568 respectively.

Under ss.565 & 569 the Secretary must submit any such report to the Court within 21 days and not less than 3 working days before the hearing.

5.24.10 Access to therapeutic treatment application & therapeutic treatment (placement) reports

Subject to the restriction provisions in ss.566(2) & 570(2) respectively, the Court must release a copy of the report to each of the following-
(a) the subject child;
(b) the parent(s);
(c) the legal practitioners representing the child;
(d) the legal practitioners representing the parent(s);
(e) a party to the proceeding; and
(f) any other person specified by the Court.

5.24.11 Restriction on access to reports

It is only very rarely that the Department seeks to restrict access to the whole or any part of one of its reports. However, although still uncommon it is not as rare for the author of a Clinic report to make a disclaimer pursuant to s.51(2)(a) of the CYPA [now s.562(2) of the CYFA]. This requires the Court to engage in a difficult balancing exercise. Which of these 2 competing principles should be given the greater weight: the professional principle of client-practitioner confidentiality or the legal principle of natural justice? Usually the Court gave greater weight to the principles of natural justice and released a copy of the Clinic report notwithstanding the disclaimer. However, in the past the Court frequently did not release a copy of the report directly to the Secretary but only to the Secretary's legal representative. Section 562 of the CYFA is clearly intended to change that practice in the vast majority of cases.

The Court may restrict access by certain persons to the whole, or a specified part, of each of the following types of Family Division reports in the circumstances detailed below-

PROTECTION REPORT [ss.556(2)-556(5)] & DISPOSITION REPORT [ss.559(2)-559(5)]

On application by-
(a) the Secretary;
(b) any person mentioned in s.556(1); or
(c) with the leave of the Court, any other person-
the Court may by order restrict access by the child, parent, party or other person specified by the Court if it is satisfied that information in the report, or part thereof, may be prejudicial to the physical or mental health of the child or a parent of the child.

ADDITIONAL REPORT (not by Clinic) [ss.561(2)-561(4)]

The author is not required to forward copies of the report, or part thereof, to child, parent, party (other than the Secretary) or other person specified by the Court if-

(a) he or she is of the opinion that information in the report, or part thereof, may be prejudicial to the physical or mental health of the child or a parent of the child; or
(b) the child or a parent of the child or another party to the proceeding notifies the author of his or her objection to the forwarding of copies of the report.

If the author withholds copies of the report, or part thereof, he or she must inform the appropriate registrar of that fact. The Court may endorse the author's action or may by order direct the appropriate registrar to forward a copy of the report, or part thereof, as soon as possible to the person to whom access had been denied.

CHILDREN'S COURT CLINC REPORT [ss.562(2) & 562(4)]

If the Clinic is of the opinion that information contained in a Clinic report will be or may be prejudicial to the physical or mental health of a child or a parent of the child, the Clinic may forward a statement to the Court to that effect with the report [s.562(2)].

After having regard to the views of the parties and any statement from the Clinic under s.562(2)-

(a) in the case of release of the report to the Secretary: the Court may, if satisfied that the release of the report, or a particular part thereof, may cause significant psychological harm to the child-
    (i) refuse to release the report, or part thereof, to the Secretary; or
    (ii) determine a later time for the release of the report, or part thereof, to the Secretary; or
    (iii) release the report to the Secretary.

(b) in the case of release of the report to any other person: the Court may, if satisfied that the release of the report, or a particular part thereof, to the person will be prejudicial to the development or mental health of the child, the physical or mental health of the parent, of that person, or of any other party-
    (i) refuse to release the report, or part thereof, to the person; or
    (ii) determine a later time for the release of the report, or part thereof, to the person; or
    (iii) release the report to the person.

5.24.12 Confidentiality of contents of reports

Subject to any contrary direction by the Court, a person who prepares or receives or otherwise is given access to any Family Division report, or part report, must not, without the consent of the child or parent, disclose any information contained in that report, or part report, to any person not entitled to receive or have access to the report or part. The prohibition in s.552(1) also applies to a copy of such report. Breach of this confidentiality provision is subject to a penalty of 10 penalty units [just over $1000].

The confidentiality provisions do not prevent-

- the Secretary or his or her employee or legal representative; or
- an honorary youth justice officer or an honorary parole officer to the extent necessary to exercise his or her powers or perform his or her duties-

from being given or having access to a report to which Part 7.8 of the CYFA applies.

5.24.13 Admissibility & relevance of prior reports

The case of *DOHS v Ms B & Mr G* [2008] VChC 1 involved applications by DOHS to extend and vary custody to Secretary orders made in earlier proceedings. In that case counsel for DOHS had made an application, said to have been based on the principle of issue estoppel, for an order that the Secretary be permitted to tender absolutely 19 protection and disposition reports prepared by DOHS for earlier proceedings in 1998-2000 and 2005-2006 without making the authors of the reports available for cross-examination. Three of these reports related to two of the children the subject of the current proceedings. The remaining 16 related to their 4 half-siblings. The application was contested by the other counsel. The writer refused the application, giving the following *extempore* reasons which were later reproduced at pp.23-26 of the judgment:

> "This case is limited to the question of the appropriate level of [contact] between the children and their parents. In order to determine that, the Court will probably – albeit not necessarily - have to consider whether or not a permanent care caseplan for the children

is appropriate or alternatively whether planning should be engaged in for the children's return to their parents. Hence, some of the history of the parents and their children will no doubt be relevant to the issue of the appropriate level of [contact].

The Department says that the 19 reports which it lists in paragraph 15 of counsel's written submissions can be admitted by the Court without a requirement that the authors of the reports be made available for cross-examination and that the appropriate way for the Court to determine the issues contained in the previous reports is to allow counsel to make submissions on the weight that should be given to each of the reports.

The Department relies on the doctrine of issue estoppel to support that submission. In my view the Department's submission is not correct. The governing principles of issue estoppel were stated by the High Court in *Blair v Curran* (1939) 62 CLR 464, a case that was involved with the determination of a will although that is no reason why the principles are not equally applicable in proceedings in this Court. The leading judgment to which I have been referred is that of Dixon J who said:

> 'A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion…Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.' {At pp.531-532. The emphasis is mine.}

Counsel for DOHS took me through the provisions in ss.274-276 of the *CYFA* which provide for the Court making a finding that a child is in need of protection and the making of a protection order. These are in largely identical terms to those in the *CYPA* which applied at the time the reports in question were provided to the Court and the Court made its orders.

It appears that the Court has never previously been asked to determine the issues between these parties in a contested hearing. I don't have the files in relation to [the 4 older half-siblings] nor do I have the earliest parts of the files relating to [K & T, the 2 children the subject of this case]. I don't know whether the parties consented to the orders or whether the orders were uncontested but nothing much turns on the difference. What the principle of issue estoppel means as applied to the circumstances of this case is that no party would be entitled to lead evidence in an attempt to show that the respective children were not in need of protection on the dates this Court has previously found that they were. Nor would any party be entitled to lead evidence to demonstrate that the protection orders made by the Court in relation to the other 4 children ought not to have been made at the time at which they were made. Counsel for the parents & K do not seek to do that. They simply say that it would deny them procedural fairness not to be able to cross-examine the writers of reports on factual matters contained in the reports insofar as any of those matters are relevant to the current contest. Counsel for K raised an interesting point that the Department, by seeking to tender these reports, was trying to raise the same issues again with the same parties. On reflection all I think the Department is trying to do is to provide to the Court the material which it says justified the making of the orders in the first place in order to provide a factual foundation for the orders it is now seeking.

I have sat in this Court for about 13 years over a 15 year period dealing with thousands of cases involving Departmental reports. Sometimes I make a decision without accepting all of the material that is contained in the Department's reports. Sometimes it appears wrong or irrelevant. Sometimes it is obviously wrong, as in the case of the most recent report dated 01/04/2008 which refers to the applications before the Court as including breach of custody to Secretary orders and applications for guardianship orders, neither of which are known to the law. Sometimes not all of the contents of reports are accepted by the Court because objectively they seem improbable but there is frequently still enough material which is accepted to enable the Court to make the order that the Department is seeking or that the parties have agreed should be made. Sometimes – quite often in contested hearings – I have made findings of fact that certain material in the Department's reports is simply wrong. It is not uncommon for Departmental reports to be written to achieve an outcome and for material which does not support that outcome to be

> omitted from the reports. I could give dozens of examples of that over the past 5 years. The Department's submission, if it is adopted, would require me to accept as 'gospel truth' and as the last word everything which is contained in the 19 reports which it seeks to tender without calling the respective writers. But I don't know what factual material in those reports each of the judicial officers who made the orders has relied on - or not relied on - in making the orders. Hence the relevance to this case of the limitation put by Dixon J in *Blair v Curran*: 'The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion…Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded.'
>
> In this case what is closed or concluded is any suggestion by any party that the findings or orders made by the Court on previous occasions were not appropriate orders and can be the subject of challenge in this hearing. I don't understand that anyone is seeking to do that anyway but taking it to its logical conclusion DOHS' submission is that everything contained in its reports must be regarded by the Court on any later occasion as being 'gospel truth'. If I was to make that finding, which in my view is not supported by the law, it would bring the mention court of this Court to its knees. There is likely to be a much smaller number of cases which would be dealt with either by consent or uncontested. However, the basis of my decision is not the damage that this issue would do to the processes of the Court. It is the fact that in my view it is not supported by law."

Subsequently the Department called two protective workers who had been involved in the writing of 11 of the 19 reports and those 11 reports were tendered into evidence. The writer later commented at p.26:

> "It seemed to me that - at least partly as a consequence of very good cross-examination by counsel for [the mother] - their evidence was relatively favourable to [her]. This confirmed my view that it would have been quite unjust to the parents and to K to allow admission of these reports without affording them procedural fairness in the form of an ability to cross-examine witnesses upon whose reports DOHS sought to rely."

The case of *DOHS v Mr D & Ms B* [2008] VChC 2 also involved applications by DOHS to extend and vary custody to Secretary orders made in earlier proceedings as well as applications by the parents to revoke those orders. Additionally it involved a protection application for a young baby in which the protective concerns were said to have been based on likelihood of harm arising from the history of the other 3 children. Counsel for the parents made a broad submission that save for material in the reports detailing services provided by the Department the reports prepared for the case which culminated in the original custody to Secretary orders were not admissible in the current case. In particular counsel argued that the other issues detailed in those reports had already been judicially decided and had effectively merged in the orders made. The writer rejected counsel's submission and admitted the reports in their entirety, giving *ex tempore* reasons (which have not been transcribed) which were based on most of the matters which he had earlier addressed in the case of *DOHS v Ms B & Mr G*.

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5.25 Summary of Family Division orders

5.25.1 Blue form

The following 2-sheet blue document is used in the Family Division to provide minutes of proposed orders under the CYFA. It contains most possible order types and for each enables input of the variables required for each prescribed form.

MINUTES OF PROPOSED FAMILY DIVISION ORDERS

*CHILD(REN)*_____ *DATE*_____/_____/_____

☐ _____ ***CONDITIONS*** _____

☐ ***REGISTRAR'S LETTER(S)*** ☐ RE ORDER IN ABSENCE ☐ RE WARRANT ☐ RE BOTH

1. _____ of _____
2. _____ of _____

☐ ***REPORTS REQUIRED*** ☐ CLINIC ☐ DHHS ☐ OTHER_____

FINDING/OUTCOME OF APPLICATION OR BREACH NOTICE

☐ P.A. PROVED S.162(1) ☐a ☐b ☐c ☐d ☐e ☐f ☐ SUBSTANTIAL & IRRECONCILABLE DIFFERENCE

☐ PROTECTION APPLICATION ☐ DISMISSED ☐ STRUCK OUT ☐ NOT PROVED ON GROUND(S) _____

☐ REFUSAL TO MAKE PROTECTION ORDER [after IPO]

☐ _____ APPLICATION _____ ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ _____ APPL'N TO EXTEND_____ ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ _____ APPL'N TO VARY_____ ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ _____ APPL'N TO REVOKE _____ ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ BREACH OF _____ ☐ PROVED ☐ NOT PROVED ☐ STRUCK OUT

☐ CUSTODY TO SECRETARY ORDER DATED____/____/____ IS VARIED ON AN INTERIM BASIS [S.302]

☐ _____ ORDER DATED____/____/____ IS ☐ VARIED ☐ REVOKED ☐ CONFIRMED

DETAILS OF VARIATION _____

☐ INTERIM ACCOMMODATION ORDER DATED____/____/____ IS ABRIDGED FROM _____/_____/_____ & REVOKED

☐ ALL APPLICATIONS NOT YET FINALISED (OTHER THAN PROTECTION APPLICATION/S) ARE STRUCK OUT

ORDER

☐ RESERVED SUBMISSIONS ☐ PART HEARD

☐ ***ADJOURNED*** TO _____/_____/_____ AT _____ AM/PM AT ☐ MELB ☐ MOOR'N ☐ _____

FOR R'OVER | MENTION | CC | JRC | 1st DIR HRG | DIR HRG | CONTEST | IAO CONTEST [___ DAYS ☐ STANDBY]

FURTHER LISTING _____/_____/_____ AT _____ AM/PM AT ☐ MELB ☐ MOOR'N ☐ _____

FOR | MENTION | CC | JRC | 1st DIR HRG | DIR HRG | CONTEST | IAO CONTEST [___ DAYS ☐ STANDBY]

☐ ***THE CHILD IS TO ATTEND COURT ON THE ADJOURNED DATE*** [S.216A]

☐ ***INTERIM ACCOMMODATION ORDER*** (must include adjournment order) GROUNDS – S.262(1) ☐f ☐_____

☐ CHILD RELEASED [S.263(1)(a)] ☐ UNDISCLOSED PLACEMENT

☐ PARENT ☐ SUITABLE PERSON(S) ☐ OUT OF HOME CARE ☐ SECURE WELFARE

☐ DECLARED HOSPITAL ☐ DECLARED PARENT AND BABY UNIT

_____

of _____

☐ ***EXTENSION OF IAO*** IAO MADE/LAST EXTENDED ON ____/____/____

☐ ***INTERIM PROTECTION ORDER*** (must include adjournment order) ☐ TO BE SUPERVISED BY _____ (if not DHHS)

☐ ***UNDERTAKING*** ☐ S.272 ☐ S.278 ☐ COMMON LAW FOR _____ MONTHS UNTIL _____/_____/_____

☐ BY CHILD ☐ BY MOTHER ☐ BY FATHER ☐ BY OTHER _____

☐ ***SUPERVISION ORDER*** FOR _____ MONTHS UNTIL _____/_____/_____

CHILD IN DAY TO DAY CARE OF _____

☐ SECTION 280(3) NOTIFICATION TO COURT ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER _____

☐ ***CUSTODY TO THIRD PARTY ORDER*** FOR _____ MONTHS UNTIL _____/_____/_____

☐ SOLE ☐ JOINT CUSTODY TO _____of_____

☐ ***SUPERVISED CUSTODY ORDER*** FOR _____ MONTHS UNTIL _____/_____/_____

☐ SOLE ☐ JOINT CUSTODY TO _____of_____

☐ ***CUSTODY TO SECRETARY ORDER*** FOR _____ MONTHS UNTIL _____/_____/_____

☐ ***GUARDIANSHIP TO SECRETARY ORDER*** FOR _____ MONTHS UNTIL _____/_____/_____

☐ SECTION 289(2) NOTIFICATION TO COURT ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER _____

☐ ***LONG-TERM GUARDIANSHIP TO SECRETARY ORDER***

SECTION 290(3) NOTIFICATION TO COURT ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER _____

☐ ***EXTENSION OF PROTECTION ORDER***

ORDER: ☐ SUPERVISION ☐ SUPERVISED CUSTODY ☐ CUSTODY TO SEC ☐ GUARDIANSHIP TO SEC

ORIGINALLY MADE ON _____/_____/_____ IS EXTENDED FOR _____ MONTHS UNTIL _____/_____/_____

☐ SECTION 297(1)(f) DIRECTION (extended custody to Sec/guardianship to Sec only)

☐ SECTION 298(1) NOTIFICATION TO COURT ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER _____

☐ ***PERMANENT CARE ORDER***

CUSTODY AND GUARDIANSHIP OF THE CHILD WAS GRANTED TO:

_____ of _____

& _____ of _____

☐ TO THE EXCLUSION OF ALL OTHER PERSONS

☐ GUARDIANSHIP VESTED JOINTLY WITH PARENTS: _____

of_____

☐ ***PROCEDURAL ORDER***

DHHS IS TO FILE & SERVE ANY FURTHER REPORT UPON WHICH IT PROPOSES TO RELY NO LATER THAN

_____/_____/_____

☐ ***OTHER ORDER:***

_____

_____

_____

_____

NOTATIONS

_____

_____

_____

_____

_____

_____

_____

MAGISTRATE/JUDGE _____

5.25.2 Mauve form

The following 2-sheet mauve document is a supplementary sheet, used in the Family Division to provide minutes of less commonly made proposed orders. It enables input of the variables required for each prescribed form for the orders referred to.

MINUTES OF PROPOSED FAMILY DIVISION ORDERS [CYFA] SUPPLEMENTARY SHEET

*CHILD(REN)*_____*DATE*_____/_____/_____

TEMPORARY ASSESSMENT ORDER [TAO]

☐ LEAVE FOR APPLIC'N FOR TAO TO BE DEALT WITH WITHOUT NOTICE ☐ GRANTED ☐ REFUSED

☐ APPLICATION FOR TAO ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ ***ADJOURNED*** TO _____/_____/_____ AT _____ AM/PM FOR MENTION/DRC/DIRECTIONS/CONTEST

☐ ***TEMPORARY ASSESSMENT ORDER*** MADE UNDER ☐ S.228 [ON NOTICE] ☐ S.229 [WITHOUT NOTICE]

REMAINS IN FORCE FOR _____ DAYS BEGINNING ON _____/_____/____

DHHS MUST PROVIDE A REPORT IN WRITING TO THE COURT BY _____/_____/____

☐ THIS TAO:

☐ Authorizes the Secretary to enter the premises where the child is living:

_____

☐ Requires _____ to permit the Secretary to enter the premises where the child is living:

_____

☐ Requires _____ to permit the Secretary to interview the child and to take the child to a place to be determined by the Secretary for that interview

☐ Authorizes, subject to section 233, the medical examination of the child by a registered medical practitioner or a registered psychologist.

☐ Directs _____ to permit the Secretary to take the child for that medical examination.

☐ Authorizes the results of the medical examination to be given to the Secretary.

☐ Requires _____ to attend an interview with the Secretary and, subject to section 234, to answer any questions put to him/her in the interview.

☐ Contains the following further direction(s)/conditions(s): _____

_____

☐ APPLICATION to **VARY** TAO ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ TAO DATED _____/_____/____ IS VARIED AS FOLLOWS: _____

_____

☐ APPLICATION to **REVOKE** TAO ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ TAO DATED _____/_____/____ IS REVOKED

☐ ***OTHER ORDER:***

_____

_____

THERAPEUTIC TREATMENT ORDER [TTO]
THERAPEUTIC TREATMENT (PLACEMENT) ORDER [TTPO]

☐ APPLICATION FOR ☐ TTO ☐ TTPO ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ ***ADJOURNED*** TO _____/_____/_____ AT _____ AM/PM FOR MENTION/DRC/DIRECTIONS/CONTEST

☐ ***THERAPEUTIC TREATMENT ORDER*** FOR _____ MONTHS UNTIL _____/_____/____

DETAILS OF PROGRAM_____

☐ CONDITIONS: ☐ _____ is to take any necessary steps to allow the child to participate in the program.

☐ The child is to permit reports of progress and attendance at the program to be given to the Secretary.

☐ _____

☐ ***THERAPEUTIC TREATMENT (PLACEMENT) ORDER*** FOR _____ MONTHS UNTIL _____/_____/____

☐ CONDITIONS: _____

_____

_____

☐ APPL'N to **VARY** ☐ TTO ☐ TTPO ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ TTO DATED _____/_____/____ IS VARIED AS FOLLOWS: _____

☐ TTPO DATED _____/_____/____ IS VARIED AS FOLLOWS: _____

☐ APPL'N to **REVOKE** ☐ TTO ☐ TTPO ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ TTO DATED _____/_____/____ IS REVOKED

☐ TTPO DATED _____/_____/____ IS REVOKED

☐ APPL'N to **EXTEND** ☐ TTO ☐ TTPO ☐ GRANTED ☐ DISMISSED ☐ STRUCK OUT

☐ TTO DATED _____/_____/____ IS EXTENDED FOR _____ MONTHS UNTIL _____/_____/_____

☐ TTPO DATED _____/_____/____ IS EXTENDED FOR _____ MONTHS UNTIL _____/_____/_____

RELEASE OF REPORTS/SUMMARIES/DOCUMENTS/NOTES

☐ _____

RELEASED TO LEGAL REP FOR: ☐ DHHS ☐ MOTHER ☐ FATHER ☐ CHILD(REN) ☐ OTHER _____

RELEASED TO: ☐ DHHS ☐ MOTHER ☐ FATHER ☐ CHILD(REN) ☐ OTHER _____

☐ NO COPIES TO BE MADE WITHOUT COURT ORDER ☐ NOT TO BE REMOVED FROM COURT PRECINCTS

☐ TO BE RETURNED TO _____

☐ CONDITION(S): _____

_____

☐ _____

RELEASED TO LEGAL REP FOR: ☐ DHHS ☐ MOTHER ☐ FATHER ☐ CHILD(REN) ☐ OTHER _____

RELEASED TO: ☐ DHHS ☐ MOTHER ☐ FATHER ☐ CHILD(REN) ☐ OTHER _____

☐ CONDITION(S): _____

_____

MAGISTRATE/JUDGE _____

5.25.3 Orange form

The following one sheet orange document is a supplementary sheet, used in the Family Division to provide minutes for orders for appointment of an Independent Children's Lawyer and for costs orders.

MINUTES OF PROPOSED FAMILY DIVISION ORDERS [CYFA] SUPPLEMENTARY SHEET [ICL / COSTS]

*CHILD(REN)*_____*DATE*_____/_____/_____

APPOINTMENT OF INDEPENDENT CHILDREN'S LAWYER [ICL]

☐ The Court having found that there are exceptional circumstances and that the child(ren)

_____D.O.B. _____/_____/_____

_____D.O.B. _____/_____/_____

_____D.O.B. _____/_____/_____

is/are

☐ aged under 10 years

☐ aged 10 years or more and not mature enough to give instructions

and that it is in the best interests of the child(ren) to be legally represented, the Court makes the following orders:

1. Pursuant to s.524(4) of the *Children, Youth and Families Act* 2005, the child(ren) be legally represented by an Independent Children's Lawyer [ICL] and it is requested that Victoria Legal Aid arrange such representation.
2. Within 2 working days of the notification to the parties of the appointment of an ICL, the parties provide the ICL with copies of all relevant documents in their possession or control which they have created or commissioned or upon which they otherwise rely.
3. The ICL is a party to the proceeding for all purposes under the *Children, Youth and Families Act* 2005.

☐ The Children's Court Clinic report(s) be released to the ICL on condition that no copies be made without Court order and on the following conditions:

_____

_____

_____

☐ The ICL be permitted to inspect any documents subpoenaed by any other party.

COSTS

☐ The Court orders that _____

is to pay to _____

costs in the sum of $_____.

Stay of ___ month(s).

MAGISTRATE / JUDGE _____

5.26 Family Division standard conditions

While the parties have an unfettered discretion in framing appropriate conditions for protection and like orders, it is recommended that wherever possible they select from the following standard conditions, drafted by a committee of involved professionals in late 1997 and slightly amended as from 01/12/2013 and as from March 2015. Words in italics contained within parentheses, e.g. [*directed by/agreed with*], are alternatives.

		VISITS & COOPERATION
1		**must accept visits from and cooperate with DHHS.**
		SUPPORT SERVICES
2		**must accept support services as *[directed by/agreed with]* DHHS.**
		COUNSELLING
3		**must go to counselling as *[directed by/agreed with]* DHHS and must allow reports *[about attendance]* to be given to DHHS.**
		FAMILY VIOLENCE COUNSELLING
4		**must go to family violence counselling as *[directed by/agreed with]* DHHS and must allow reports *[about attendance]* to be given to DHHS.**
		ANGER MANAGEMENT
5		**must go to a course on anger management as *[directed by/agreed with]* DHHS and must allow reports *[about attendance]* to be given to DHHS.**
		PSYCH ASSESSMENT AND/OR TREATMENT
6		**must go to a *[psychologist, psychiatrist, psychologist and/or psychiatrist]* as *[directed by/agreed with]* DHHS for *[assessment, treatment, assessment and treatment]* and must allow reports to be given to DHHS.**
		PAEDIATRIC ASSESSMENT & TREATMENT
7		**must *[take the child/allow the child to be taken]* to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DHHS.**
		ALCOHOL / DRUG TESTING
8		**must submit to random supervised *[alcohol, drug, alcohol and drug]* testing [** times per week*] or otherwise as directed by DHHS and must allow the results to be given to DHHS.**
9		**must submit to testing for *[alcohol, drug, alcohol and drug]* use as directed by DHHS and must allow the results to be given to DHHS.**
		ALCOHOL / DRUG ASSESSMENT/TREATMENT
11		**must participate in assessment and/or treatment for *[alcohol, drug, alcohol and drug]* dependence as directed by DHHS and must allow reports to be given to DHHS.**
		ABSTINENCE
12		**must not *[drink alcohol, drink alcohol to excess, use illegal drugs, drink alcohol or use illegal drugs, drink alcohol to excess or use illegal drugs]*.**
13		**must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.**
		ACCOMMODATION
14		**may have respite as agreed between**
15		**must [make best endeavour to] find a suitable home.**
16		**must live where DHHS directs.**
17		**must live with**
		CHANGE OF ADDRESS
18		**must tell DHHS [*at least 24 hours before/within 24 hours of*] changing address.**
		CURFEW
19		**must not be away from home/placement between unless his/her parent or caregiver agrees or he/she is with his/her parent or caregiver.**

		NO COHABITATION
20		**must not live or have contact with the *[mother and, father and]* child *[other than during Court-ordered contact]*.**
		NO CONTACT
21		**must not have any contact with the child.**
		EXPOSING CHILD TO VIOLENCE
22		**must not expose the child to physical or verbal violence.**
		NO PHYSICAL DISCIPLINE
23		**must not expose the child to physical or verbal violence.**
		NO THREATS / ASSAULTS
24		**must not threaten or assault DHHS staff.**
		CHILD'S HEALTH
25		**must take the child to the Maternal and Child Health Nurse as often as the nurse recommends.**
26		**must take the child to the doctor for regular check-ups as required by DHHS or the doctor and must allow reports to be given to DHHS.**
		SCHOOL
27		**The child must go to school every school day unless he/she is ill *[and a medical certificate is obtained]*.**
28		**must send the child to school every school day unless the child is ill *[and a medical certificate is obtained]*.**
		LIBERTY TO APPLY
29		**has/have the right to come to Court and ask the Court to change the order.**
		CHILDREN'S COURT CLINIC
30		**must go to the Children's Court Clinic for an assessment.**
		THE CHILD'S RIGHT TO CONTACT
31		**may have contact with the child [*for a minimum of*]** **at times and places as agreed between**
32		**may have contact with the child [*for a minimum of*]** **at times and places as agreed between** **DHHS or its nominee will supervise contact unless DHHS assesses that supervision is not necessary.**

5.27 Emergency care search warrants

5.27.1 Issue

Various provisions in the CYFA empower the Court, on application by a protective intervener or the Secretary (as the case may be), to issue a search warrant for the apprehension of a child and his or her placement in emergency care in the eleven circumstances set out in the following table:

	CYFA	PRE-CONDITIONS FOR ISSUE OF WARRANT
1	s.237 **TEMPORARY ASSESSMENT**	A necessity to enable the Secretary to exercise his or her powers under a temporary assessment order.
2	s.241(1) **PROTECTION**	A child is in need of protection and it is inappropriate to proceed by notice.
3	s.243(3) **PROTECTION BY NOTICE**	Proceedings have been taken by notice in respect of a child said to be in need of protection, the Court has ordered that the child appear before the Court for the hearing of the application and the child does not appear.

4	s.247(1) **THERAPEUTIC TREATMENT**	A child in relation to whom a notice under s.246(1) has been issued does not appear before the Court for the hearing of a therapeutic treatment application.
5	s.261(1) **IRD APPLIC'N**	The Court has ordered that the child appear before the Court for the hearing of an IRD application and the child does not appear.
6	s.268(5)(b) **VARIATION OF IAO**	An application has been made by notice for the variation of an interim accommodation order and- • in the case of an IAO made under s.262(1)(c) on an application for a therapeutic treatment order, the child does not appear; or • in the case of an IAO made under any other limb of s.262(1) and the child has been ordered pursuant to s.216A to appear before the Court and the child does not appear.
7	s.269(3)(b) s.269(4)(b) **BREACH OF IAO**	269(3): Breach of IAO proceedings have been initiated by notice and- • in the case of an IAO made under s.262(1)(c) on an application for a therapeutic treatment order, the child does not appear; or • in the case of an IAO made under any other limb of s.262(1) and the child has been ordered pursuant to s.216A to appear before the Court and the child does not appear.
		269(4): A protective intervener is satisfied there has been a breach of an IAO or a condition thereof and it is inappropriate to proceed by notice.
8	s.270(5)(b) s.270(6)(b) **APPLICATION FOR NEW IAO**	270(5): Application has been made by notice for a new IAO and- • in the case of an IAO made under s.262(1)(c) on an application for a therapeutic treatment order, the child does not appear; or • in the case of an IAO made under any other limb of s.262(1) and the child has been ordered pursuant to s.216A to appear before the Court and the child does not appear.
		270(6): On an application for a new IAO, a protective intervener is satisfied it is inappropriate to proceed by notice.
9	s.291(4)(b) **FAIL TO APPEAR IPO**	If the Court has considered it necessary for the child to appear before the Court [see ss.291(3)(d) & 291(3A)] and the child does not appear at the time specified in the IPO or at any time specified in a notice caused by the Court to be served on the parent/carer and the child (if aged 12 or more).
10	s.313 s.314 **BREACH OF VARIOUS PROTECTION ORDERS**	313: Proceedings have been taken by notice alleging- • there has been a breach of a supervision order, supervised custody order or interim protection order; or • in the case of a supervision order or a supervised custody order, a direction given by the Secretary has not been complied with; or • the child is living in conditions which are unsatisfactory in terms of the safety and wellbeing of the child- and the child does not appear before the Court if ordered to do so by the Court.
		314: The Secretary is satisfied that there is good reason not to proceed by notice and is satisfied on reasonable grounds that- • there has been a breach of a supervision order, supervised custody order or interim protection order; or • in the case of a supervision order or a supervised custody order, a direction given by the Secretary has not been complied with; or • the child is living in conditions which are unsatisfactory in terms of the safety and wellbeing of the child.
11	s.598(1) **FAILURE TO COMPLY**	A judicial officer is satisfied that: (a) an undertaking under s.530(2) has not been complied with; or (b) a child is absent without lawful authority or excuse from the place in which he or she was placed under an IAO, a custody to third party order, a supervised custody order or by the Secretary under s.173 or from the lawful custody of a member of the police force; or (c) a child or parent/carer is refusing to comply with a lawful direction of the Secretary under s.173 as to the placement of the child.

5.27.2 Warning: Bail justices must not issue emergency care search warrants

Under certain sections of the CYPA an "authorised bail justice" was empowered to issue a warrant. However, no bail justices had ever been authorised by the Attorney-General to issue emergency care search warrants. Under the CYFA there are no provisions empowering bail justices to issue emergency care search warrants.

5.27.3 Statistics

The number of emergency care search warrants issued state-wide has almost doubled since 2007/08:

2003 /04	2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
1258	1833	1847	2103	2053	2634	2784	3395	3831	4001

5.27.4 Form

The prescribed form for a emergency care search warrant is Form 36 in Schedule 4 to the Children, Youth and Families Regulations 2007 [S.R. No.21/2007] as amended as and/from 01/12/2013 by S.R. No.145/2013.

5.27.5 Authority & Directions

A emergency care search warrant is directed either to a named member of the police force or generally all members of the police force [s.242(2)(a)]. It authorises the police officer(s)-

- to break, enter and search any place where the child named or described in the warrant is suspected to be; and
- to place the child in emergency care.

What happens upon the execution of the search warrant depends on the circumstances under which the warrant has been issued:

- In the case of a warrant issued under s.237: The executing officer must bring the child to the Secretary to enable the Secretary to enable the Secretary to exercise his or her powers under the temporary assessment order.
- In the case of a warrant issued under ss.241, 243, 261, 291, 313 or 314 or issued under ss.268, 269 or 270 and the child is **not** the subject of an IAO made under s.262(1)(c) [i.e. **not** an IAO made on a therapeutic treatment application]:
  - ☑ The Court must hear an application for an IAO or an application under s.269(7) [as the case may be] as soon as practicable and, in any event, within one working day after the child was placed in emergency care. Unless the Court hears such application within 24 hours after the child was placed in emergency care, a bail justice must hear the application as soon as possible within that period of 24 hours; or
  - ☑ The child is to be released on an IAO of the type referred to in ss.263(1)(a) or 263(1)(b) endorsed on the warrant and the further hearing of the matter is at the Court venue on the date endorsed on the warrant.
- In the case of a warrant issued under ss.241, 243, 261, 291, 313 or 314 or issued under ss.268, 269 or 270 and the child is the subject of an IAO made under s.262(1)(c) [i.e. an IAO made on a therapeutic treatment application]:
  - ☑ The executing officer must bring the child before the Court for the hearing of an application for an IAO or an application under s.269(7) [as the case may be] as soon as practicable and, in any event, within one working day after the child was placed in emergency care. Unless the Court hears such application within 24 hours after the child was placed in emergency care, he or she must be brought before a bail justice as soon as possible within that period of 24 hours for the hearing of the application; or
  - ☑ The child is to be released on an IAO of the type referred to in ss.263(1)(a) or 263(1)(b) endorsed on the warrant and the child is to appear for the further hearing of the matter at the Court venue on the date endorsed on the warrant.
- In the case of a warrant issued under s.598(1)(a): The executing officer must bring the child before the Court as soon as practicable and, in any event, within one working day after the child was placed in emergency care.

- In the case of a warrant issued under ss.598(1)(b) or 598(1)(c): A member of the police force must take the child to the place specified in the warrant or, if no place is specified, to a place determined by the Secretary or, in the absence of a determination, to a place referred to in s.173.

5.27.6 Multiple entries authorised

An emergency care search warrant remains alive until the child named in it is placed in emergency care or the warrant is returned unexecuted. It is not restricted to a single entry to one premises.

5.27.7 IAO endorsement

Any emergency care search warrant, except one issued under ss.598(1)(a), 598(1)(b) or 598(1)(c), may be endorsed by the issuing judicial officer with an endorsement that upon execution of the warrant the child is to be released on an IAO of the type referred to in s.263(1)(a) [child's undertaking] or s.263(1)(b) [IAO to parent]: see s.241(2)(b) of the CYFA. It is the writer's experience that such an endorsement is very rare.

5.27.8 Protocols

The following protocols in relation to emergency care search warrants have been established between the Court, the Department and Victoria Police:

- **Application for warrant**: Most applications are made by the applicant faxing an affidavit in support to the Court or the after hours registrar. However, occasionally the applicant will attend Court and give *viva voce* evidence in support of the application.
- **Upon issue**: If the warrant is issued, the Court faxes it to Victoria Police Central Records [CRB]. The issuing Court faxes confirmation of issue to the applicant (not after hours).
- **Before execution**: When the warrant is required to be executed, a police officer contacts CRB and arranges for the warrant to be faxed to him/her.
- **After execution**: The executing police officer endorses the warrant as executed and returns it to the issuing Court.
- **Unexecuted warrant**: If the warrant is no longer required or is unexecuted for 1 month, CRB returns the warrant to the issuing Court for cancellation.

5.28 Interstate transfer of child protection orders and proceedings

Schedule 1 of the CYFA, originally introduced into the CYPA in 2000, sets out provisions relating to the transfer of child protection orders and proceedings between Victoria and another State or a Territory of Australia or between Victoria and New Zealand or vice versa. Schedule 1 is linked to the body of the CYFA by s.338. It comprises 28 paragraphs and amounts to a code regulating such transfers. Its purpose is said in clause 1 to be two-fold:

(a) so that children who are in need of protection may be protected despite moving from one jurisdiction to another; and
(b) so as to facilitate the timely and expeditious determination of court proceedings relating to the protection of a child.

There are two types of transfers from Victoria which are contemplated by Schedule 1:

- an administrative transfer pursuant to clause 3;
- a judicial transfer pursuant to clause 8.

It is a condition precedent to both types of transfer that the child protection authorities in Victoria and in the other State, Territory or New Zealand each consent to the transfer: see clauses 3(1) and 8(a) & 8(c) respectively. Clause 27 allows the Secretary to consent or refuse to consent to a proposal to transfer a child protection order to Victoria under an interstate law. It follows that a child protection order cannot be foisted on to an unwilling interstate child protection authority. There is apparently a protocol between Victorian and other child protection authorities governing the types of orders which may be the subject of transfer but the details are unclear to the writer. During evidence in the case of *DOHS v Mr O & Ms B* [2009] VChC 2 he was initially told that "Tasmania only accepts custody to Secretary orders and above". Subsequently he was told: "If the Court is minded to make a supervision order in contemplation of the mother and [child] returning to live in Tasmania…it may be that day to day case management can be by Tasmanian child protection authorities."

In that case counsel for DOHS raised a potential problem about the enforceability interstate of an untransferred Victorian order but also suggested a solution: "Victorian authorities wouldn't be in a position to act on [any] breach unless the parties were in the jurisdiction. An option is to have the Tasmanian authorities issue their own protection application." In the unusual circumstances of that case the writer considered that:

- a breach of the order in Tasmania was very unlikely; and
- it was better that the order was not formally transferred to Tasmania (assuming that it could be) notwithstanding that the mother and child were returning to live in Tasmania.

At pp.43-44 the writer said:

> "There are some cases in which a Victorian child protection order involving a child living interstate could not properly be administered remotely from Victoria. This is not one of them. Given the limited protective concerns about [the mother], the only matters likely to require DOHS' supervision or input are:
> (1) checking up from time to time on [the mother's] and her daughter's whereabouts;
> (2) arranging such [contact] as is possible between [the chid] and [the father] and ensuring that it is supervised by the paternal grandmother or another appropriate person if she is not available; and
> (3) arranging a course in Tasmania to educate [the mother] on the risk factors associated with child sexual abuse.
>
> None of these matters requires that the supervision order be transferred. In fact it is better that the order remains a Victorian responsibility since Victoria is where any [contact] between [the child] & [the father] will have to occur."

Sections 334-337 of the CYFA contain a number of provisions relating to the interstate movement of children in respect of whom DHHS has responsibility for guardianship, custody or supervision:

- Section 335 empowers the Secretary, on request by or on behalf of the Minister or other person in another State or Territory exercising guardianship over a child, to declare the child to be under the guardianship of the Secretary if the child has entered or is about to enter Victoria. Such declaration is deemed to be a Victorian guardianship to Secretary order of 12 months duration.
- Section 337(1) empowers the Minister to enter into a general agreement with an interstate Minister for the transfer of children in the custody or under the supervision of the Secretary-
  (a) into or out of Victoria; or
  (b) through Victoria from one State or Territory to another.

5.29 Case planning & stability planning responsibilities of the Secretary

5.29.1 Preparation of case plan

A case plan is a plan prepared by the Secretary for a child [s.166(1)]. It must contain all significant decisions made by the Secretary concerning a child that relate to the present and future care and wellbeing of the child, including the placement of, and contact to, the child [s.166(2)]. A case plan includes any stability plan prepared for the child [s.166(3)].

Sections 167-168 of the CYFA require the Secretary to ensure that-

(a) a case plan is prepared in respect of a child within 6 weeks after the making by the Court of a supervision order, a supervised custody order, a custody to Secretary order, a guardianship to Secretary order, a long-term guardianship to Secretary order or a therapeutic treatment (placement) order;
(b) a copy of the case plan is given to the child and parent(s) within 14 days after its preparation;
(c) the case plan is reviewed from time to time by the Secretary as appears necessary.

It is clear from s.8(2) of the CYFA that the principles which the Secretary must follow in the case planning process are the best interests principles in s.10, the additional decision-making principles in s.11 and in the case of an Aboriginal child, the principles set out in ss.12-14.

5.29.2 Preparation of stability plan

A stability plan is a plan prepared by the Secretary which plans for stable long-term out of home care for a child [ss.169(1) & 169(2)].

Section 169(3) provides that a stability plan may include details of-

(a) the proposed long-term carer of the child or the type of carer who should be sought;

(b) the appropriate Court order that the Secretary considers best supports the long-term stable placement of the child;
(c) matters relevant to the out of home care of the child that may relate to the family or environmental circumstances that caused the child to be placed in out of home care and that may give rise to particular needs or requirements in relation to the child;
(d) planning for contact arrangements by the child to parents and siblings;
(e) steps to be taken by the carer to meet the developmental needs of the child, including health, emotional and behavioural development, education, family and social relationships and identity.

Under ss.170 & 171(1) unless the Secretary considers that the preparation of a stability plan is not in the best interests of a child, he or she is required to ensure that a stability plan is prepared for each child who is in out of home care under an IAO or a protection order once the child has been in out of home care-

- For a child under 2: For period(s) totalling 12 months.
- For a child aged 2-6: For period(s) totally 18 months;
- For a child aged 7+: For period(s) totalling 2 years of the previous 3 years.

The Secretary must provide a copy of a stability plan to parent and child of 12 years or more within 6 weeks of its preparation [s.170(5)].

5.29.3 Review of case plan

Section 331 of the CYFA provides for internal review of decisions made as part of the decision-making process following the making of a protection order.

Section 333 empowers a child or parent to apply to the Victorian Civil and Administrate Tribunal [VCAT] for the review of:

- a decision contained in a case plan; or
- any other decision made by the Secretary concerning the child; or
- a decision relating to the recording of information in the central register referred to in s.165.

Section 333(3) prohibits an application to VCAT unless the appellant has exhausted all available avenues for internal review under ss.331-332.

It is the writer's experience that a significant number of contested cases in the Children's Court involve an attack on the Department's case planning process as a central component. Hence, the writer considers it unfortunate that the statutory power to review child protection decisions remains vested in a separate tribunal. This is not a criticism of VCAT, simply a criticism of the splitting of the judicial process between two different judicial bodies.

5.29.4 The role of the Children's Court in relation to case planning decisions

The fact that the Children's Court has no power to conduct a formal review of a case planning decision does not, however, mean that the Court has no role at all in relation to case planning decisions.

In *NM, DOHS and BS* [2004] VChC 1 at pp.15-16 Judge Coate held that the review jurisdiction created by s.122 of the CYPA, the predecessor of s.333 of the CYFA, did not in any way oust or curtail the jurisdiction of the Children's Court in the exercise of its statutory functions:

> "Section 122 of the CYPA confers jurisdiction on VCAT for the review of administrative decisions of DOHS if a party chooses to use that forum for such a review. The review jurisdiction of the Tribunal is contained in s.48 of the Victorian Civil and Administrative Tribunal Act (Vic). Section 52 of that Act purports to limit the jurisdiction of the Supreme Court and Magistrates' Courts in relation to the exercise of powers under planning legislation in certain circumstances. No like provision has been made with respect to the jurisdiction of the Children's Court in its Family Division.
>
> That VCAT has jurisdiction to review a decision of the Secretary of DOHS is no basis to assert that has any impact whatsoever on the Children Court of Victoria's power and obligations to exercise its complete statutory jurisdiction under the Children and Young Persons Act. There is no basis to assert that the capacity to review an administrative decision by the Secretary ousts the jurisdiction or curtails the jurisdiction in the Children's Court in the exercise of its statutory functions. The logical conclusion of such an assertion is that the court would be bound by every case planning decision of DOHS."

It follows from Judge Coate's judgment that the fact that the Department has endorsed a particular case plan for a child does not oust or curtail the jurisdiction of the Children's Court to make an order – within its power - which is inconsistent with that case plan. One particular example which occurs from time to time is where a parent or child lodges an application to vary a custody to Secretary order to allow for increased contact. The fact that the Department's case plan is for permanent care does not prevent the Court from increasing contact if it considers that to be in the best interests of the child.

In the case of *DOHS v Mr & Mrs B* [2007] VChC 1 at p.40 Magistrate Power discussed the role of the Court in relation to case planning decisions:

> "Though this did not happen in the present case, it is not unknown for the Department through its counsel to submit that the Children's Court has no role at all in case planning decisions: see for instance the judgment of Judge Coate in *NM, DOHS and BS* [2004] VChC 1 where this submission was raised and rejected. It is certainly true that under Part 4.3 of the CYFA the preparation and review of a case plan is the sole responsibility of the Secretary: see especially ss.166-168 of the CYFA. But in making its decisions and orders the Court has to act independently of DOHS and on the basis that the best interests of the child are paramount: see s.10 of the CYFA.
>
> In the course of determining what is in a child's best interests, the Court usually hears evidence from a number of witnesses – many of whom are professional witnesses with expertise in disciplines relating to child development, child welfare and human behaviour – in order to determine how to weigh the 3 matters in s.10(2) of the CYFA and the 18 matters in s.10(3). For instance, to determine the appropriate orders in the present case, it is necessary for me to consider whether the Department's draft case plan for non-reunification is correct in order to decide-
>
> - whether this plan is the best mechanism for protecting each child from harm, protecting his or her rights and promoting his or her development; and
> - what weight to give to each of the potentially partly conflicting matters in paragraphs (a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (o), (p) & (q) of s.10(3).
>
> My orders in this case would be markedly different if I considered the Department's draft case plan was not in the best interests of one or more of the children."

See also *DOHS v Ms B & Mr G* [2008] VChC 1 at pp.108-109 per Magistrate Power.

There is a specific provision in s.295(2)(a) of the CYFA which requires the Children's Court, when determining an application to extend a custody to Secretary order or a guardianship to Secretary order, to give due consideration to the appropriateness of making a permanent care order in respect of the child. In the event that the order sought to be extended has already been in force for 12 months or more, s.297(1)(d) requires the Court to consider whether a permanent care order or similar order made by another court would be in the best interests of the child and there is no likelihood of reunification of the child with his or her parent. If the Court is satisfied of the matters in s.297(1)(d), it has power under s.297(1)(f) to direct the Secretary to take steps to ensure that at the end of the extended order a person other than a parent applies to a court for a permanent care or similar order. Such a direction is binding on the Secretary and if it has been given s.297(2) prevents the Secretary from applying for any additional extension to the order. For further discussion of ss.297(1)(d) & 297(1)(f), see the following unreported judgments of Magistrate Power in the Children's Court of Victoria:

- *DOHS v Mr J & Ms B* [06/06/2007] at pp.128-129;
- *DOHS v Mr & Mrs B* [2007] VChC 1 at p.42;
- *DOHS v Ms B & Mr G* [2008] VChC 1 at pp.117-119;
- *DOHS v Mr D & Ms B* [2008] VChC 2 at pp.104-106;
- *DOHS v Mr M & Ms H* [11/05/2009] at pp.108 & 125-127.

However, except in cases involving the extension of certain custody to Secretary orders and guardianship to Secretary orders under s.297(1) there remains an uneasy tension between the case planning powers of the Secretary and the obligations of the Children's Court under s.8(1) to have regard to best interests principles in making any decision or taking any action under the CYFA. The tension boiled over in the case of *DOHS v Ms O'C*. After a 6 day hearing in the Children's Court of Victoria in April 2005 in which he heard evidence from 15 witnesses, Magistrate Levine returned the oldest two of four children to their mother on supervision orders but placed the two youngest children on custody to Secretary orders. In his judgment his Honour said: "I would hope that continuing work by professionals with the mother will enable a gradual reunification of [the children] with their mother." Following that decision a case plan meeting took place on 22/06/2005. The case planner ignored the basis of Magistrate Levine's decision and determined the case plan for the two youngest children was

to be permanent care. In a judgment dated 28/11/2005 on the mother's appeal against Magistrate Levine's decision, Judge Walsh upheld the decision of Magistrate Levine both in relation to the orders he made and the spirit of his judgment and disapproved the Department's case plan:

> "I have noted that, after the decision of the Children's Court, the Department almost immediately went about the preparation of a case plan which involved the permanent removal of the two children from the custody of [Ms O'Connell]. This was not in accordance with either the spirit or the letter of the very comprehensive and very caring decision of the Magistrate in the Children's Court and it does not have the approval of this Court. I consider that the actions of members of the Department have done nothing to promote good relationships between [Ms O'Connell] and the Department and little to promote the interests of the children."

That too fell on deaf ears so far as the Department was concerned. In a further 10 day hearing before Magistrate Levine in December 2006 in which the Department was seeking that the two youngest children be placed on guardianship to Secretary orders, the then unit manager had the temerity to say: "If there is a large discrepancy between our view and the judge then we may not follow the court's decision." She said that she was continuing to deal with the case as a permanent care case plan. The writer finds it shocking when a government employee strikes at the constitutional bases of this State for it is nothing more or less than anarchy. Magistrate Levine was slightly more circumspect:

> "It is in my view astonishing and extremely concerning that DOHS, notwithstanding any expertise that it may have in issues relating to child protection, could at the one time seek to bring applications to this court seeking adjudication of the protective issues and then when it is displeased with the decisions or recommendations of the court to then immediately invoke a case plan entirely contrary to the court's recommendation. Further, when the decision was reviewed by the County Court on appeal and that court confirmed the Children's Court decision, making critical comments about DOHS, it is most concerning that DOHS should then choose to ignore the County Court Judge's expressed views as well."

Despite his criticism of the Department, Magistrate Levine extended the custody to Secretary orders but refused to make guardianship to Secretary orders and again recommended the case plan be one of reunification. In order to attempt to achieve a beginning to a possible reunification, Magistrate Levine varied the extended custody to Secretary orders to allow for some overnight contact of the children with their mother. In a subsequent application before the writer for an additional extension of the custody to Secretary orders, the then protective worker wrongly said: "The recommendation made by the magistrate stated we needed to run a dual case plan, one of reunification and one of permanent care." His Honour had said no such thing. Ultimately on 29/02/2008 another unit manager made a further case plan decision that the children should not be reunited into the full time care of their mother. After yet another lengthy hearing in April 2008, June 2008 & September 2008 in which he heard evidence from 13 witnesses, the writer placed the youngest child in the full time care of her mother on a supervision order but extended and varied the custody to Secretary order in relation to the second youngest child. For full details of this difficult case, see the unreported decisions of Magistrate Power in *DOHS v Ms O'C* [07/04/2008], *DOHS v Ms O'C* [16/06/2008] & *DOHS v Ms O'C* [18/09/2008].

5.30 Victorian Aboriginal Child Care Agency [VACCA]

5.30.1 Definition of 'Aboriginal person'

Under s.3 of the CYFA, 'Aboriginal person' means a person who:
(a) is descended from an Aborigine or Torres Strait Islander; and
(b) identifies as an Aborigine or Torres Strait Islander; and
(c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

5.30.2 'Aboriginal agency'

Sections 6(1) & 6(2) of the CYFA empower the Governor-in-Council to declare an organisation to be an Aboriginal agency if it is a registered community service and the Secretary of DHHS is satisfied-

- that the organisation is managed by Aboriginal persons; and
- that its activities are carried on for the benefit of Aboriginal persons.

The Victorian Aboriginal Child Care Agency [VACCA] has been established since 1978. By an administrative oversight it was not declared to be an Aboriginal agency under the CYPA until 16/12/1997 when the relevant Order was published in the Government Gazette. It remains an

Aboriginal agency under the CYFA by virtue of the transitional provisions in item 5 of Schedule 4 to the CYFA.

5.30.3 Role of VACCA

VACCA is a state-wide Aboriginal community controlled and operated service whose objectives and responsibilities include:

- the promotion of, advocating for, and achieving positive changes in the lives of Indigenous children, their families and the community; and
- the preservation, strengthening and protection of the cultural and spiritual identity of Indigenous children; and
- the provision of culturally appropriate and quality services which are responsive to the needs of the Indigenous community.

In addition VACCA has a proactive responsibility to provide quality services which, by empowering and strengthening families and communities to develop and reach their full potential, will reduce-

- the number of Aboriginal child protection notifications; and
- the number of Aboriginal children living away from their families and communities.

VACCA operates within the context that Aboriginal children are significantly over-represented in the Victorian protection and care system. For example, as at June 2009 an indigenous child in Victoria was 12 times more likely to be in out of home care than a non-indigenous child.

In *DOHS and K siblings* [2013] VChC 1 at pp.25-27, Wallington M stated:

> "VACCA, an Aboriginal community controlled organisation, was established in the later 1970's to respond to the disproportionate number of Aboriginal children placed away from their families, and to provide support services to Aboriginal children and families. Lakidjeka is one of a number of programs under the VACCA umbrella and its mandate is to provide advice to Child Protection. By law, Child Protection is required to consult with Lakidjeka on all decisions involving placement of Aboriginal children.
>
> The VACCA file reveals numerous instances where their workers did not feel that Child Protection was listening to them…The DHS report of 17th August 2010 refers to 'updates' as the means by which adherence to the Aboriginal Child Placement Principle was implemented. When cross-examined as to what these updates entailed, the protective worker replied that they updated Lakidjeka and VACCA by email. In response to a further question as to why there were no copies of emails on the DHS file, the worker said that it was extremely hard to get hold of them so a lot of the contact 'was leaving messages'…
>
> One of the difficulties in the consultation process is that despite the recognition in the CYFA of self-determination, the only section which gives VACCA any power to make decisions is section 323(b) which deals with Permanent Care Orders, i.e. at the **end** of the protective intervention process. Otherwise the Act only speaks of 'consultation' and the lip-service paid to 'consultation' seems to sometimes whittle down to 'keep in the loop – when you remember'."

5.31 Protocol between DHHS child protection service and VACCA

On 11/04/2002 a protocol was signed by Pam White, Director Community Care DOHS & Margaret Stewart, Chairperson VACCA. The protocol was established to facilitate contact between DOHS & VACCA to ensure the provision of a culturally appropriate and effective response to protecting Aboriginal children from harm. Its purpose is to establish mechanisms for ensuring the Child Protection Service ['CPS'] is fully informed of all cultural needs and issues including knowledge of extended family in reaching decisions in regard to Aboriginal children. The protocol sets out broad roles and responsibilities of DHHS and VACCA in responding to Aboriginal children notified to the CPS. It aims to enhance and foster the working relationship between VACCA & DHHS by ensuring that the CPS is better able to engage with Aboriginal children and families that come to the attention of the CPS.

In the protocol:

- 'Indigenous' has the same meaning as 'Aboriginal';
- 'Family' includes extended family; and
- 'Care arrangements' means arrangements concerning the voluntary or statutory placement of a child, including care, custody or guardianship.

The key components of the protocol are set out below.

5.31.1 Bases of the protocol

The bases of the protocol are-

- The United Nations Convention on the Rights of the Child;
- The Aboriginal Child Placement Principle prepared by the Secretariat of National Aboriginal and Islander Child Care [SNAICC], which has been endorsed by all of the states and territories of the Commonwealth and which is now the basis of ss.13-14 of the CYFA;
- The Case Planning Principles which were previously in s.119 of the CYPA and which are now set out in ss.10-14 of the CYFA.

5.31.2 Other principles underlying the protocol

- Protecting children from harm is a shared responsibility between the family, the general community, Aboriginal community, community agencies and professionals working with children, police and government. Each has a significant role to play in ensuring the safety and well-being of children and young people, and in helping prevent harm from occurring.
- DHHS and VACCA agree that every Aboriginal Child has the right to have his or her cultural needs considered and that the provision of culturally relevant services is necessary to achieve this.
- The CPS will actively consider cultural issues and extended family information in all decisions concerning Aboriginal children.

5.31.3 Roles & responsibilities of DHHS' Child Protection Service [CPS] under the protocol

The CPS works to ensure that children are protected from significant harm when their parent or caregiver is unable or unlikely to provide that protection. Services are based on the principle that, normally, the best protection for children is within the family. The CPS will, in the first instance, as required under the CYFA, take every reasonable step to enable the child or young person to remain in the care of their family by strengthening the family's capacity to protect them.

The CPS recognizes that all Aboriginal child protection cases require informed consideration of cultural and kinship arrangements. The CPS agrees to seek advice to ensure they provide a culturally relevant service to Aboriginal children and their families.

5.31.4 CPS referrals to VACCA under the protocol

The CPS will consult with VACCA on all Aboriginal notifications and investigation decisions, including notifications that do not proceed to direct investigation as follows:

1. The CPS will seek to identify the Indigenous status of all notifications. Where the child is identified as Aboriginal, the CPS will provide VACCA with identifying client information and details of the notification concerns.
2. The CPS will seek information and cultural advice in assessing if the case is to be directly investigated.
3. Where it is determined that a case is to be directly investigated, the CPS will inform and involve VACCA in the investigation and in providing an Indigenous perspective in the risk assessment and case planning.
4. The CPS and VACCA will discuss how to identify and involve relevant members of the Aboriginal community to which the child belongs in all decisions.
5. Where case planning decisions involve care arrangements of the child, the CPS will consult with VACCA. The purpose of the consultation will be to ensure that the persons involved in these care arrangements are, or at least one of them is, a member of the Aboriginal community to which the child belongs; or if this is not reasonably possible that the persons involved, or at least one of them, must be members of an Aboriginal community.
6. Where it has not been reasonably possible to make care arrangements for the child within their family, their Aboriginal community or with an Aboriginal person, the CPS will seek the assistance of VACCA in ensuring a cultural support plan is developed for these placements until such time as the child can be placed within their family or more culturally appropriate care arrangements identified.

7. When, in the course of a direct investigation or during any subsequent case planning, the CPS becomes aware that a child is Aboriginal, the CPS will follow points 3 to 6 above. In undertaking the consultation set out in this section, the CPA will at all times comply with the CYFA, for example by authorizing release of information under ss.205(2)(a) & 205(3) and by ensuring that all decision making is in accordance with ss.10-14.

5.31.5 VACCA's response under the protocol to referrals from CPS

VACCA considers the best interests of the child are of paramount importance and will work in partnership with the CPS to ensure the provision of a culturally appropriate and effective response to all Aboriginal notifications and investigations by:

1. Providing the CPS with an Indigenous perspective in the assessment of risk and case planning processes.
2. Discussing with the CPS how to identify and involve relevant members of the Aboriginal community to which the child belongs in all decision making. The involvement of such persons will always be in accordance with the best interests and welfare of the child or young person.
3. Where case planning decisions involved care arrangements of the child, providing provide advice and assistance to ensure that the persons involved in the care arrangements are, or at least one of them is, a member of the Aboriginal community to which the child belongs or, if this is not reasonably possible, that the persons involved, or at least one of them, must be members of an Aboriginal community.
4. Providing assistance to the CPS on cases where it has not been reasonably possible to make care arrangements for the child within their family, their Aboriginal community or with an Aboriginal person. VACCA will provide the CPS assistance in ensuring a cultural support plan is developed for these placements until such time as the child can be placed within their family or more culturally appropriate care arrangements identified.
5. Providing advice to the CPS and liaison assistance to children and their families in accessing relevant specialist or family support services.

5.32 Cultural plan for an aboriginal child

Under s.176(1) of the CYFA the Secretary must prepare a cultural plan for each Aboriginal child placed in out of home care under a guardianship to Secretary order or long-term guardianship to Secretary order.

The Court may impose a condition incorporating a cultural plan for an Aboriginal child in respect of whom the Court makes a custody to third party order [s.283(1)(e)(ii)], a supervised custody order [s.284(1)(e)(ii)], a custody to Secretary order [s.287(1)(d)(ii)] or a permanent care order [s.321(f)]. Under s.323(c) of the CYFA the Court may require a cultural plan to be prepared before a permanent care order can be made for an Aboriginal child.

Under s.176(2) of the CYFA a cultural plan must set out how an Aboriginal child placed in out of home care is to remain connected to his or her Aboriginal community and to his or her Aboriginal culture. For these purposes, a child's Aboriginal community is defined in s.176(3) to be-

(a) the Aboriginal community to which the child has a sense of belonging, if this can be ascertained by the Secretary; or
(b) if paragraph (a) does not apply, the Aboriginal community in which the child has primarily lived; or
(c) if paragraphs (a) or (b) do not apply, the Aboriginal community of the child's parent or grandparent.

The Department advised the Court in June 2009 that by the end of August 2009 a cultural plan will have been prepared for every Aboriginal child who is the subject of a guardianship to Secretary order, a long-term guardianship to Secretary order or a custody to Secretary order.

So much for the advice. The reality is very different. In a decision handed down on 08/02/2013 – *DOHS and K siblings* [2013] VChC 1 – Wallington M stated at pp.27-28:

> "The Department of Human Services has defaulted on its obligation to provide and implement a Cultural Plan for the K children for the past 2½ years since the children were placed on Guardianship to Secretary Orders on 07/09/2010.

As was the case in relation to Aboriginal Family Decision Making meetings, none of the Child Protection practitioners could explain the process for obtaining a Cultural Plan. There was confusion as to whether DHS, Ozchild or Lakidjeka was to produce the Plan, a mandatory document protecting an Aboriginal Child's cultural safety.

Mr MW explained in his evidence that it was the responsibility of none of the above. Though the legislative responsibility lies with DHS under section 176, in 2011 DHS, following an evaluation by KPMG, had provided funding for VACCA, via its Aboriginal Family Decision Making meeting convenors, to be responsible for the provision of Cultural Plans.

It makes sense that responsibility for the content of Cultural Plans had been given to a culturally appropriate organisation. It was disheartening though when Mr MW advised that not a single Cultural Plan had been produced in the Southern Region in the previous two years. This seemed to cover the period both before and after the new funding arrangement with VACCA."