

1. ACTS, REGULATIONS, RULES

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"The rule of law is...a vital component in the proper functioning of any civilised society. Without it, civilisation cannot exist."

Law Institute Victoria Ltd v Telfer [2007] VSC 535 at [16] per Harper J.

"Your excellency being appointed to the High and responsible position you now fill I beg most humbly as a legal colonist to draw your attention and that of your responsible Advisors (what you will surely have too much eye witness proof of) to the said condition of a very large number of houseless and homeless boys now commencing a life of nomadic and erratic wanderings without having any visible means of support, not only in and about Melbourne but in all the large towns of the colony; these boys, unless some intermediate steps be taken to stop their career and growth of idle habits will soon burst pupa shell and change into the thief, the bushranger or lawless wretch and become the worst curse of the colony and contaminars also of others than themselves and be drawn into the Vortex of Crime and Misery in Time and Forever and therefore by Your Excellencies permission I will bring before your Notice a partial Remedy which I am persuaded by God's blessing, would go far to alleviate the present sufferings of many and make them useful to their own Class and to the colony generally."

Humble address of Thomas Bury of Melbourne to His Excellency the Governor of Victoria and His Responsible Advisors on a Reformatory for and Protection to those who have no Employment.
Melbourne, 12th October 1863.

The Victorian Parliament duly passed the Neglected & Criminal Children's Act 1864

"Laws were made to prevent the strong from always having their way."

Ovid.

The Victorian child protection authority has changed its name several times in the last 30 years. In 1989 it was called Community Services Victoria. Subsequently its name changed to the Department of Human Services (DHS or DOHS), then to the Department of Health and Human Services (DHHS) and from 01/02/2021 the Department of Families, Fairness and Housing (DFFH). Colloquially it is sometimes simply called "the Department".

1.1 Acts

The legislation underpinning the Children's Court of Victoria, as it operates today, is the product of 150 years of social, philosophical, political and legislative debate, research and development and in particular of a number of years of research and debate in the 1980s and in the 2000s.

The Neglected & Criminal Children's Act 1864 (Vic) [Act 27 Vict. No.216] was in operation from 1865 to 1888. It was replaced by the Neglected Children's Act 1887 (Vic) and the Juvenile Offenders' Act 1887 (Vic) and ultimately by the Neglected Children's Act 1890 (Vic) [Act 54 Vict. No.1121].

However, it was not until 1906 that a special Children's Court was established in Victoria. Before that Victorian children were dealt with in the same courts and with the same procedures as adults. Under the Children's Court Act 1906 (Vic) [No.2058] – in operation from 1906 to 1915 – the Children's Court was established as a closed court at every place where a Court of Petty Sessions – now known as the Magistrates' Court – was held. The jurisdiction of this new Children's Court was an exclusive one, confined to children under the age of 17 years with responsibility conferred by ss.12(1) & 12(2) for-

- hearing and inquiring into all charges and informations against children for felony and misdemeanour, with power to discharge or commit for trial;
- hearing and determination of all informations for offences punishable on summary conviction; and
- hearing and determination of all charges and applications in relation to the committal of children authorised by the Neglected Children's Act 1890 (Vic) or Part II, Division 2 of the Crimes Act 1890 (Vic).

The 'criminalisation' of Victorian children who were merely in need of protection – as instanced in the language of the 3rd dot point above and throughout most of the 20th century Victorian Children's Court Acts – continued through replacement Acts until 1992, surviving the following five changes of legislation:

- Children's Court Act 1915 (Vic) [consolidating Act No.2627], in operation 1915-1929;
- Children's Court Act 1928 (Vic) [No.3653], in operation 1929-1957;
- Children's Court Act 1956 (Vic) [Act No.6053], in operation 1957-1959;
- Children's Court Act 1958 (Vic) [consolidating Act No.6218], in operation 1959-1974;
- Children's Court Act 1973 (Vic) [Act No.8477], in operation 1974-1992.

The Children's Court also continued largely unaltered through these legislative changes.

In 1982 the Victorian government set up the Child Welfare Practice and Legislation Review, chaired by Dr Terry Carney of Monash University. In 1984 the Committee handed down its final report, entitled "Equity and Social Justice for Children, Families and Communities", to which was annexed a draft Bill. The Carney report recommended a number of changes to the structure and jurisdiction of the Children's Court and significantly enhancing its powers.

One of the most significant issues addressed in the Carney Report was the failure of the previous system to distinguish between children in need of protection and young people who were offending against the criminal law. Not only did the Court buildings and the Court processes and outcomes not make any clear distinction between these two classes of children, the institutions in which they were placed were often the same. Babies, children and young persons before the Court were **charged** with being in need of protection and if this charge was found proved it would appear on a police criminal history sheet. This has subsequently been recognised as a legislative evil and has been made the subject of a statement of recognition and various remedies in Chapter 7A of the Children, Youth and Families Act 2005 (Vic) [inserted by Act No.42/2018].

1.1.1 Children and Young Persons Act 1989 (Vic) [Act No.56/1989]

In 1989 the Victorian legislature passed the Children and Young Persons Act 1989 (Vic) [No.56/1989] ('the CYPA'). The CYPA adopted many of the recommendations of the Carney Review. It brought together in the one piece of legislation all the legislative provisions governing children and young persons who are in need of protection or who have committed offences while at the same time drawing a sharp distinction between the two. In effect it consolidated and replaced the Children's Court Act 1973, the Children's Court (Amendment) Act 1986, the Community Services Bill 1986 and most provisions of the Community Services Act 1970.

The objectives of the CYPA were described in the Second Reading Speech [08/12/1988, p.1150] as follows:

- to provide a comprehensive and high-quality child protection service which strengthens the capacity of the community to protect children and young people who have been maltreated or who are at risk of harm and which responds appropriately to the needs of the children and families with which the service is involved;
- to strengthen the role of the Children's Court of Victoria as a specialist court responsible for dealing with matters affecting children and young people;
- to maintain and strengthen the distinction between the Family Division and the Criminal Division of the Children's Court, so as to ensure that their procedures, standards of proof and dispositions reflect the fundamental difference in the nature of child protection and juvenile justice proceedings;
- to provide an adequate and constructive response to children and young people who have been charged with and found guilty of committing offences;
- to enhance the rights of children, young people and their families in their relationships with the court system, the child protection authority and other service providers, in accordance with justice principles; and
- to provide for an extended and more flexible range of dispositions in each of the divisions of the Court, which seek to enable children to remain at home wherever practicable and appropriate.

These objectives were consistent with the recommendations of the Child Welfare Practice and Legislation Review.

Most of the CYPA came into operation in 1991. It established a Family Division of the Children's Court, distinct and separate from the Criminal Division, with special procedures available for the hearing of protection cases. This recognised the force of the Carney Review's view: "Adjudication in offender matters is based on a philosophy focussing on the individual responsibility of the young offender whereas in protection matters responsibility for the acts or omissions by adults should not be attributed to the child." [See p.238 of the Carney report].

The CYPA also provided this new Family Division with a broader range of protection orders for children found to be in need of protection. The new hierarchy of orders was said in the Second Reading Speech (at p.1153) to be designed to ensure:

- that the dispositional powers of the Family Division range from minimum to maximum intervention in the life of the child, with principles to assist the court in choosing the least interventionist order appropriate; and
- flexibility in the range of orders available to the Family Division, including the capacity to add conditions to these orders so that the court can tailor the order to the needs of the particular child and family.

In 2004 the Victorian legislature passed the Children and Young Persons (Koori Court) Act 2004 (Vic) [No.89/2004]. This created a third Division of the Children's Court, in effect a sub-division of the Criminal Division: see s.3(6) of the CYPA. The purposes of the 2004 Act are-

- (a) to establish a Koori Court (Criminal Division) of the Children's Court; and
- (b) to provide for the jurisdiction and procedure of that Division- with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Children's Court through the role to be played in that process by the Aboriginal elder or respected person and others so as to assist in achieving more culturally appropriate sentences for young Aboriginal persons.

In order to fulfil the objective of maintaining and strengthening the distinction between the Family Division and the Criminal Division of the Children's Court, those two Divisions share no common orders and the procedures in the two Divisions are quite different. In contrast with the legislation in operation prior to 1991, the 'guardianship to Secretary order', formerly known as wardship, is no longer available as a sentencing option in the Criminal Division. Sections 8(3)-8(5) of the CYPA enshrine the philosophy:

- "(3) The Court has the following Divisions-
 - (a) the Family Division;
 - (b) the Criminal Division;
 - (c) the Koori Court (Criminal Division).
- (4) Every proceeding in the Court must be commenced, heard and determined in one of those Divisions.
- (5) The Court must not sit as more than one Division at the same time in the same room."

See now ss.504(3), 504(4) & 504(5) of the CYFA.

The Second Reading Speech highlighted [08/12/1988, p.1150] the philosophy of ensuring "that protective issues are dealt with in the Family Division and do not obscure issues of criminal responsibility, which are the proper concern of the Criminal Division". This philosophy is given effect by s.18(2) of the CYPA which provides: "If at any time there are proceedings in both Divisions of the Court relating to the same child, the Court must, unless it otherwise orders, hear and determine the proceedings in the Family Division first." However, it must be said that the Court frequently has no option other than "otherwise to order", especially where there is an issue in the criminal case as to whether the child should be detained in custody. So, for example, the question of a child's placement under a Family Division order is of its nature subservient to the question of whether or not the child is to be granted bail or remanded in custody. It must also be said - and to say this is not to criticise any agency but merely to reflect reality, to reflect what is a central cause of child offending - that a disproportionate proportion of young offenders are or have been found to be in need of protection.

Thus, by and large the Family & Criminal Divisions are water-tight. The only area of overlap was to be found in the "referral" provisions of ss.132-133 of the CYPA, enabling the Court to refer a defendant in the Criminal Division to the Secretary to investigate whether grounds exist for the making of a protection application in respect of the child [see now ss.349-350 of the CYFA].

In line with the recommendations of the Carney Review, the CYPA increased the minimum age of criminal responsibility from 8 to 10 years. It also expanded the non-custodial sentencing options available to the Court to strengthen the rehabilitative focus in sentencing young offenders.

The CYPA enshrined principles of natural justice by requiring that a child or young person found guilty of an offence be treated strictly in accordance with those principles. How it achieves this was summarised in the Second Reading Speech (at p.1154) as follows:

- revising the procedures and criteria for bail to ensure that young people are not denied bail on the grounds of lack of accommodation;
- stipulating requirements relating to the content of pre-sentence reports, the right of access to such reports by young people and their legal representatives and a right to challenge information in such reports;
- setting out the matters to be taken into account by the court when it decides which sentencing order to impose; and
- setting out clearly the procedures and penalties for breaches of sentencing orders.

The CYPA also sought to ensure that the procedures operating in the Children's Court are consistent with those in the Magistrates' Court wherever practicable and unless specific provisions to the contrary are contained in the CYPA. (see p.1151).

The CYPA was replaced by the Children, Youth and Families Act 2005 (Vic) in April & October 2007.

1.1.2 Children, Youth and Families Act 2005 (Vic) [Act No.96/2005]

The Children, Youth and Families Act 2005 (Vic) ('the CYFA') received the Royal Assent on 07/12/2005. The CYFA updates and combines the CYPA and part of the Community Services Act 1970 (Vic) ('the CSA') to create an integrated child protection and child and family support system. Much - but not all - of the contents of the CYFA had been foreshadowed in an Exposure Draft released by the Victorian Minister for Children on 03/08/2005 under the title The Children Bill. Amendments to the original CYFA were made by the Children, Youth and Families (Consequential and Other Amendments) Act 2006 (Vic) [assented 15/08/2006] and the Terrorism (Community Protection) (Amendment) Act 2006 (Vic) [assented 07/03/2006].

The CYFA exists, in conjunction with the Children's Services Act 1996 (Vic) and the Adoption Act 1984 (Vic), within the over-arching framework provided by the Child Well-being and Safety Act, which sets objects and principles relevant to the broad range of services delivered to children; young people and families in Victoria and which guides the operations of the Child Safety Commissioner, the Children's Services Coordination Board and the Victorian Children's Council.

The CYFA replaced most of the CYPA on 23/04/2007. A few sections [involving Dispute Resolution Conferences (now called Conciliation Conferences), Therapeutic Treatment & Therapeutic Treatment (Placement) Orders and s.18] did not come into operation until 01/10/2007.

In *AA v DHHS & Ors* [2020] VSC 400 at [68]-[69], Inceri J said of the CYFA:

“The Act is the bedrock legislation regulating the law in relation to children, youth and families in this State. It is one of the most important pieces of legislation in this State. At the heart of the legislation are a set of values propounded by Bell J in *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221, 227 at [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 and 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.’

The importance of the Act and how it relates to the daily lives of children and families across the State cannot be underestimated. The Secretary wields significant power and holds tremendous responsibility in relation to these children and families.”

The purposes of the CYFA are set out in s.1 and are-

- (a) to provide for community services to support children and families; and
- (b) to provide for the protection of children; and
- (c) to make provision in relation to children who have been charged with, or who have been found guilty of, offences; and
- (d) to continue the Children’s Court of Victoria as a specialist court dealing with matters relating to children.

Purpose (a) involves the incorporation into the CYFA of some of the CSA in a somewhat varied form.

The CYFA retains the largely water-tight compartmentation of the Family & Criminal Divisions established by the CYPA. The only areas of overlap are to be found in the “referral” provisions of ss.349-350 of the CYFA. Section 349(1) provides that if-

- (a) a child appears as a defendant in a criminal proceeding in the Court; and
- (b) the Court considers that there is prima facie evidence that grounds exist for the making of a protection application in respect of the child-

the Court may refer the protective matter to the Department of Families, Fairness and Housing for investigation.

Section 349(2) provides that if-

- (a) a child appears as a defendant in a criminal proceeding in the Court; and
- (b) the Court considers that there is prima facie evidence that grounds exist for the making of an application for a therapeutic treatment order in respect of the child-

the Court may refer the matter to the Department of Families, Fairness and Housing for investigation.

The powers and functions of the Koori Court (Criminal Division) of the Children’s Court in ss.517-520 of the CYFA are unchanged from those in ss.16A, 16B, 16C & 16D of the CYPA.

The CYFA made no substantial alteration to the operation of the Criminal Division of the Children’s Court other than the important addition of a power to order a Group Conference as an adjunct to the sentencing powers of the Court and a power to breach sentencing orders and to enforce fines imposed by the Children’s Court against a person who is no longer a child.

Nor did the CYFA substantially alter the existing powers of the Family Division of the Court. However, it does invest a number of new powers in the Family Division, including powers to hear and determine applications for the following new orders together with associated applications-

- temporary assessment order [ss.228-239];
- therapeutic treatment order [ss.244-251 & 255-258];
- therapeutic treatment (placement) order [ss.252-258];
- extension of supervision order (now called family preservation order) [ss.293-298];
- extension of supervised custody order (abolished 01/03/2016);
- long-term guardianship to Secretary order (now called long-term care order) [s.290].

The CYFA assembles in ss.8-14 a number of principles to which decision makers must have regard in making any decision or taking any action under the CYFA. In particular, all judicial and administrative

decisions and actions under the CYFA – other than those in relation to Chapter 5 [Children and the Criminal Law] – must be consistent with the “best interests principles”:

- (1) “the best interests of the child must always be paramount”; and
- (2) when determining whether a decision or action is in the best interests of a child, “the need to protect the child from harm, to protect his or her rights and to promote his or her development [cf. ‘welfare’ in s.87(1)(aa) and ss.119(1)(b) & 119(1)(c) of the CYPA] (taking into account his or her age and stage of development) must always be considered”; and
- (3) consideration must also be given, where they are relevant to the decision or action, to each of the 18 other matters listed in s.10(3), many of which are in identical or similar terms to those in s.87(1) of the CYPA.

In addition, principles which must be complied with when dealing with Aboriginal children include, in ss.13-14, the nationally agreed Aboriginal Child Placement Principle.

In an information sheet about The Children Bill which had been posted on the DHS website www.dhs.vic.gov.au/protectingchildren it was said:

“Wherever possible, cases will be managed in the community, rather than through protection applications and court orders. This will require the development of collaborative case planning, case management, and consultation capacities.

Child Protection will continue to have responsibility for the investigation of notifications, for making applications to the Children’s Court, and for planning for the safety and well-being of children and young people subject to Children’s Court orders.

The voluntary placement provisions in the Act will continue.”

In her Second Reading Speech the Minister, noting that “the protection of children cannot be separated from policies and programs to improve children’s lives as a whole”, reiterated that “the Children’s Court will remain central to the statutory system of child protection”. The Minister went on to explain the intended operation of the dual gateway provisions of the new legislation and to clarify the relationship between community-based intake, assessment and referral services and child protection intake services:

“Rather than over-relying on child protection to provide a gateway into services for children and their families...[p]rofessionals and any member of the public will be able to go to [community-based intake, assessment and referral services] for help if they have concerns that a family is under stress and would benefit from support. This is before problems escalate to the point that the children are placed at risk of significant harm...Child protection will continue to be targeted at children and young people who are in need of protection, based on concerns they may be at risk of significant harm.”

The writer believes that one of the greatest impacts on the Court of the new legislation is philosophical, flowing from the changed permanent care pre-condition in s.319 of the CYFA: Child’s parent has not had care of the child for a period of at least 6 months or for periods that total at least 6 months of the last 12 months (not counting periods on voluntary child care agreements). This is a significant reduction on the pre-condition formerly in s.112 of the CYPA which requires out of home care for at least 2 years or periods that total at least 2 of the last 3 years.

It is clear from the Second Reading Speech that the Minister saw stability for children and associated time frames as the central legislative changes:

“An absolutely critical theme of the Act is to improve vulnerable children and young people’s stability of care. 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. They will provide children and young people with the stable relationships that they need to grow up healthier, happier and better able to fulfil their potential.”

This factor was ultimately the catalyst for further amendments to the CYFA as from March 2016 which are discussed below.

1.1.3 Amendments to Children, Youth and Families Act 2005 (Vic) from March 2016

On 09/09/2014 the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 (Vic) [No.61 of 2014] received the Royal Assent. This Act came into operation on 01/03/2016 and made very substantial amendments to the CYFA. The main purposes of the amending Act were said to be-

- (i) to make further provision for the protection and permanent care of children; and
- (ii) to abolish the Youth Residential Board and transfer its functions to the Youth Parole Board; and
- (iii) to provide for group conferences where the Children's Court is considering making certain youth justice orders; and
- (iv) to further improve the operation of the CYFA.

On 15/03/2016 the Children Legislation Amendment Act 2016 (Vic) [No.8 of 2016] received the Royal Assent. It came into operation on the following day. It was designed to correct errors and fill gaps in the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 (Vic).

In addition to transitional provisions, the amendments to the CYFA caused by these two Acts included-

FAMILY DIVISION

- replacing the concepts of “custody” and “guardianship” with the concept of “parental responsibility” defined as “all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children”; however, the CYFA does retain the concept of “major long-term issues” for a child [guardianship by another name] which include issues about the child's education, religious and cultural upbringing, health and name;
- changing the definition of parent to include “any person who has parental responsibility for the child, other than the Secretary”;
- adding two circumstances in which the Court must not make an interim accommodation order;
- adding placement with a disability service provider as a placement option for an IAO;
- amending the restrictions on making a protection order;
- requiring the Court to have regard to [but not necessarily to accept] advice from the Secretary about certain matters in determining whether to make a protection order;
- renaming certain protection orders: supervision order -> “family preservation order”, custody to Secretary order -> “family reunification order”, guardianship to Secretary order -> “care by Secretary order” and long-term guardianship to Secretary order -> “long-term care order”;
- abolishing interim protection orders, custody to third party orders and supervised custody orders;
- changing the pre-requisites for conditions on family preservation and family reunification orders;
- imposing significant restrictions on both the length of a family reunification order and the extension of such order;
- changing the length of a care by Secretary order from a maximum of 2 years to a non-variable 2 years (unless child turns 18 in meantime) but providing a changed review procedure after 12m;
- allowing a family reunification order or a care by Secretary order to be converted into a family preservation order by administrative direction [in the same way as a supervised custody order can currently be converted into a supervision order];
- allowing the Secretary to apply *ex parte* for a variation of the conditions of a family reunification order in certain circumstances;
- making provision for applications for care by Secretary orders and long-term care orders;
- making substantial amendments to the provisions governing permanent care orders, in particular placing significant limits on conditions involving contact between the child and the child's parent;
- requiring leave of the Court as a pre-requisite to a parent applying to vary or revoke a PCO;
- repealing provisions involving a “stability plan” and including a requirement of one of five types of “permanency objectives” in a case plan;

CRIMINAL DIVISION

- expanding the power of the Court to order a group conference [previously restricted to cases where the Court was considering imposing probation or a YSO] and allowing the Court to make a YAO or YRC or YJC order notwithstanding that the child has participated in a group conference;
- restricting deferral of sentence to 2 months maximum if the child has been remanded in custody;
- abolishing the Youth Residential Board and transferring its functions to the Youth Parole Board;
- empowering the Court to discharge a child who has voluntarily participated in a therapeutic treatment program but is not subject to a therapeutic treatment order;
- requiring the Court to have regard to 4 specific matters in deciding whether to discharge a child who has participated – voluntarily or pursuant to a TTO – in a therapeutic treatment program.

A more detailed version of the above is contained in the “Papers & Speeches” section under the tab “Publications” on the Children's Court website and in Chapter 5 of these Research Materials.

Part 11 of the 2014 amending Act inserted new ss.175A & 175B. Section 175A allows the Secretary to specify certain issues relating to a child in out of home care about which a person who has care of the child may be authorized to make decisions. The specification may relate either to a particular child, a child subject to a particular type of order or a person who provides a certain category of care. If the child is subject to an interim accommodation order, a family reunification order or a therapeutic treatment (placement) order, the specification must not relate to “a major long-term issue”. Examples given of issues to which s.175A(1) applies (presumably these are regarded as minor long-term issues or short-term issues) are the signing of school consent forms, obtaining routine medical care for a child or the day to day treatment of a child who suffers from a chronic or serious health condition. Section 175B empowers the carer of a child placed in out of home care under an IAO or a protection order that confers parental responsibility for the child on the Secretary to make a decision in relation to the child on an issue specified under s.175A without consulting the Secretary, if authorized by the Secretary or the person in charge of an out of home care service to make decisions on the issue. Part 11 came into operation on 10/09/2014.

1.1.4 COVID-19 temporary amendments to relevant legislation [25/04/2020 to 25/04/2021]

In Victoria a State of Emergency was declared on 16/03/2020 as a consequence of the health risks associated with the COVID-19 pandemic. As a consequence of this pandemic the Victorian Parliament enacted the COVID-19 Omnibus (Emergency Measures) Act 2020 which came into operation on 25/04/2020. This Act temporarily amends certain Acts, and temporarily empowers the making of regulations, to modify certain aspects of the law of Victoria to respond to the COVID-19 pandemic. A summary of the provisions of this Act which have some relevance to the Children’s Court is available for download from this website. The amendments which are relevant to the Children’s Court were to be repealed on 24/10/2020.

The COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020 came into operation on 21/10/2020. This Act extends the repeal date of the original COVID-19 Act until 26/04/2021. It also introduces three new amendments which are relevant to the Children’s Court:

- section 600OA CYFA adds up to 6 months to the period of a family reunification order or extension in certain defined circumstances;
- section 600WA CYFA increases the powers of Children’s Court registrars to extend or abridge bail;
- section 120 Crimes (Mental Impairment and Unfitness to be Tried Act 1997 has some technical changes to the original COVID-19 provisions to allow proceedings relating to non-custodial supervision orders to be conducted entirely by written submissions.

A summary of both of the Acts referred to in this sub-section can be downloaded from this website.

1.2 Regulations

This section contains a summary of various sets of Regulations that have some relevance to the operation of the Children’s Court.

1.2.1 Children, Youth and Families Regulations 2017

Section 600 of the CYFA empowers the Governor in Council to make regulations for or with respect to 30 listed matters relating to various aspects of the Act.

The Regulations originally made under the CYFA were the Children, Youth and Families Regulations 2007 [S.R. No.21/2007]. They were made on 17/04/2007 and came into operation on 23/04/2007. They were amended as from 01/01/2010 by S.R. No.159/2009. The major effect of this amendment was to revoke the forms used for or with respect to proceedings in the Criminal Division of the Court, these being placed initially in the Children’s Court Criminal Procedure Rules 2009 [S.R. No.189/2009] and now in S.R. No.161/2019. Minor amendments were also made in 2010 [S.R. No.67/2010 & 105/2010], 2011 [S.R. No.152/2011], 2012 [S.R. No.35/2012], 2013 [S.R. No.140/2013], 2014 [S.R. No.91/2014 & 160/2014] & 2016 [S.R. No.72/2016].

These Regulations were revoked and replaced by the Children, Youth and Families Regulations 2017 [S.R. No.19/2017]. They were made on 17/04/2017 and came into operation on the same day. The new Regulations also revoke and replace the Children, Youth and Families (Bail) Regulations 2016 [S.R. No.27/2016].

These Regulations prescribe various matters required to be prescribed or permitted under the CYFA. The majority of the regulations have no relevance to the operation of the Children's Court. Those which have at least some relevance are:

REG.	SUBJECT MATTER
15	Information required under ss.242(1) & 247A(1) of the CYFA to be given by a protective intervener to parent(s) and child of or above the age of 12 years when a child is taken into safe custody.
16	Criteria to which the Secretary must have regard in preparing a report pursuant to s.263(6) of the CYFA on the suitability of a person for the purpose of placing a child with that person on an interim accommodation order.
17+Sch.2 [Form 6]	Prescribed forms of notices of direction by the Secretary under ss.282(2) & 285(2) of the CYFA in relation to compliance with a supervision order or a supervised custody order.
18	Matters to be considered by a Court for the purposes of s.319(1)(c)(i) of the CYPA in determining whether to make a permanent care order in respect of a child.
23 + Sch.3	Prescribed regions for the placement in a police gaol of a child remanded in custody pursuant to s.347(1) of the CYFA.
24	The whole of the State is a prescribed region pursuant to s.387(2)(a) of the CYFA for the making of youth supervision orders.
25+Sch.4 [Form 1]	Prescribed form for notice of suspension of youth supervision order pursuant to s.390(1) of the CYFA.
26+Sch.4 [Form 2]	Prescribed form for notice of required attendance at a youth justice unit pursuant to s.402(2) of the CYFA.
27+Sch.4 [Form 3]	Prescribed form for notice of suspension of youth attendance order pursuant to s.403(1) of the CYFA.
30	Terms and conditions of a youth parole order for the purposes of s.458(4) of the CYFA.
37	Remission of sentences of detention in youth residential centre or youth justice centre where a detainee is not eligible for parole
38	Prescribed particulars for the issue of warrants in electronic form pursuant to s.528B of the CYFA.
43	Infringement notice
44	Minimum registrable amount
45+Sch.6	CAYPINS forms

1.2.2 Intervention Orders Regulations

The following Regulations are ancillary to the legislation in respect of intervention orders and hence are relevant to the Children's Court:

- Personal Safety Intervention Orders Regulations 2011 [S.R. No.89 of 2011];
- Family Violence Protection Regulations 2018 [S.R. No.161 of 2018].

These Regulations came into operation on 05/09/2011 and 01/12/2018 respectively and prescribe various matters required or necessary to be proclaimed under the respective Acts.

1.2.3 COVID-19 temporary Regulations

Section 4 of the COVID-19 Omnibus (Emergency Measures) Act 2020 – which came into operation on 25/04/2020 – temporarily empowers the making of regulations to modify certain aspects of the law of Victoria to respond to the COVID-19 pandemic. Four sets of such regulations have some relevance to the operation of the Children's Court. These are:

- COVID-19 Omnibus (Emergency Measures)(Electronic Signing and Witnessing) Regulations 2020 [S.R. No.34/2020] commenced 12/05/2020. These modify the application of the *Electronic Transactions (Victoria) Act 2000* and the *Electronic Transactions (Victoria) Act 2000* to further provide for electronic signatures, witnessing the signing of documents by audio visual link and related matters.
- COVID-19 Omnibus (Emergency Measures) (Integrity Entities) Regulations 2020 [S.R. No.38/2020] commenced 19/05/2020. These modify the application of various provisions of the *Oaths and Affirmations Act 2018* to further provide for service, attendance by audio visual link and related matters.
- COVID-19 Omnibus (Emergency Measures) (Criminal Proceedings and Other Matters) Regulations 2020 [S.R. No.45/2020] commenced 02/06/2020. These modify the witnessing, execution or signing of legal documents such as affidavits and undertakings under the *Bail Act*

1977, the conduct of proceedings under the *Criminal Procedure Act 2009* and the operation of witness summonses under the *Magistrates' Court Act 1989*.

- COVID-19 Omnibus (Emergency Measures) (Criminal Proceedings and Other Matters) and (Integrity Entities) Amendment Regulations 2020 [S.R. No.120/2020] commenced 04/11/2020. These modify ss.464U(11) & 464V(6) of the *Crimes Act 1958* to allow a child respondent to an application for a forensic procedure to appear by audio visual link as an alternative to being physically present in court. A similar modification to s.464T(4) has also been made for adult respondents.

A summary of all of the temporary Regulations referred to in this sub-section can be downloaded from this website.

1.2.4 Criminal Procedure Regulations 2020

The Regulations originally made under the Criminal Procedure Act 2009 were the Criminal Procedure Regulations 2009 [S.R. No.169/2009] which were amended by S.R. No.1/2011 and S.R. No.46/2018. They were revoked and replaced by the Criminal Procedure Regulations 2020 [S.R. No.134/2020] which were made on 08/12/2020 and came into operation on 13/12/2020.

The objective of these Regulations are-

- to provide for the making, use, possession, copying, storage, access to and destruction of audio and audiovisual recordings referred to in Division 5 and Division 6 of Part 8.2 of the **Criminal Procedure Act 2009**; and
- to specify the allowances and expenses that are to be paid to prosecution witnesses; and
- to provide for the use of various audio or audiovisual recordings made in certain proceedings for the purpose of assisting intermediaries or the training or evaluation of intermediaries; and
- other matters required or necessary to be prescribed by the **Criminal Procedure Act 2009**.

REG.	SUBJECT MATTER
Part 2 Regs.6-13	<u>Division 5 recordings</u> Division 5 of the Act deals with the use of recorded evidence-in-chief of children and cognitively impaired witnesses in sexual offence, assault and family violence matters.
	Reg. 6: For the purposes of s.367 of the Act who may ask questions Reg. 7: Information to be included in a Division 5 recording Regs. 8-9: Copies and transcript of a Division 5 recording Reg.10: Right of accused to listen to or view Division 5 recording Reg.11: Record of persons listening to or viewing Division 5 recordings Reg.12: Use of Division 5 recordings, copies or transcripts Reg.13: Retention and destruction of recordings and copies
Part 3 Regs.14-17	<u>Division 6 recordings</u> Division 6 of the Act deals with procedure and rules for children and cognitively impaired complainants.
	Reg.14: Right of accused to listen to or view Division 6 recording Reg.15: Record of persons listening to or viewing Division 6 recordings Reg.16: Use of Division 6 recordings, copies or transcripts Reg.17: Retention and destruction of recordings and copies
Part 4 Regs.18-24	<u>Prosecution witnesses allowances and expenses</u> Reg.18: Attendance allowance for expert witness Reg.19: Allowances and expenses of other witnesses Regs.20-22: Meal, accommodation and travelling allowances for witnesses Reg.23: No payment to prisoners Reg.24: Evidence of expenses etc. to be produced
Part 5 Regs.25-26 Sch.1	<u>Intermediaries</u> The function and use of intermediaries are governed by Division 2 of Part 8.2A of the Act. Their function – set out in s.389I – is to communicate or explain: (a) to a witness for whom an intermediary is appointed, questions put to the witness to the extent necessary to enable them to be understood by the witness; and (b) to a person asking questions of a witness for whom an intermediary is appointed, the answers given by the witness in reply to the extent necessary to enable them to be understood by the person.
	Reg.25+Schedule 1: Intermediaries' oath or affirmation Reg.26: Use of recordings and transcripts

1.3 Rules

Section 588 of the CYFA empowers the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to-

- the prescription of forms for the purposes of the Family Division of the Court;
- judicial resolution conferences, including but not limited to the practice and procedure of the Court in relation to judicial resolution conferences;
- prescribing forms for the purposes of the Criminal Division of the Court;
- generally any matter relating to the practice and procedure of the Criminal Division of the Court;
- the form in which process may be issued out of the Court and the manner in which it may be authenticated, stored, transmitted or otherwise dealt with;
- the manner in which orders may be authenticated;
- the storage, disposal or destruction of documents;
- any matter or thing required or permitted by or under the Vexatious Proceedings Act 2014 (Vic) to be dealt with by rules of court or otherwise necessary or required for the purposes of that Act.

In addition s.588(1AB) of the CYFA empowers the President, together with 2 or more magistrates for the Court, jointly to make rules of court in relation to judicial registrars-

- (a) the prescription of the proceedings or class of proceedings which may be dealt with by the Court constituted by a judicial registrar;
- (b) delegating to the judicial registrars all or any of the powers of the Court specified by the rules of court in relation to proceedings prescribed under paragraph (a), including, but not limited to, the exercise by judicial registrars of the jurisdiction of the Court other than the power-
 - (i) to impose a sentence of detention in a youth justice centre or a youth residential centre; or
 - (ii) to make a youth attendance order;
- (c) the transfer or referral of proceedings between the Court constituted by a judicial registrar and the Court constituted by a magistrate of the Court;
- (d) reviews of, and appeals from, the Court constituted by a judicial registrar.

There are currently no such rules and to date no judicial registrars have been appointed.

In addition s.588(1B) of the CYFA empowers the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to prescribing forms for the purposes of the CAYPINS procedure or generally any matter relating to the CAYPINS procedure.

Sections 589-590 & 590A of the CYFA empower the President together with 2 or more magistrates for the Court jointly to make rules of court for or with respect to-

- requirements for the purposes of Part IIA of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) for or with respect to 6 specific matters relating to audio visual or audio links;
- applications to the Court under Division 2 or 3 of Part IIA of the Evidence (Miscellaneous Provisions) Act 1958 (Vic);
- any matter relating to the practice and procedure of the Court under Part IIA of the Evidence (Miscellaneous Provisions) Act 1958 (Vic);
- any matter relating to the practice and procedure of the Koori Court (Criminal Division);
- the transfer of proceedings to and from the Koori Court (Criminal Division);
- any matter relating to the practice and procedure of the Neighbourhood Justice Division of the Court;
- the transfer of proceedings to and from the Neighbourhood Justice Division of the Court.

Section 591 of the CYFA provides that the power of the President together with 2 or more magistrates for the Court jointly to make rules of court is subject to the rules being disallowed by a House of Parliament in accordance with s.23 of the Subordinate Legislation Act 1994 (Vic).

Section 210(1) of the Family Violence Protection Act 2008 (Vic) ('the FVPA') empowers the President of the Children's Court, together with 2 or more magistrates of the court, jointly to make rules for and with respect to proceedings in the court in relation to applications and orders made under the FVPA, including the non-exhaustive list of matters set out in s.210(2).

Section 184(1) of the Personal Safety Intervention Orders Act 2010 (Vic) ('the PSIA') empowers the President of the Children's Court, together with 2 or more magistrates of the court, jointly to make rules for and with respect to proceedings in the court in relation to applications and orders made under the PSIA, including the non-exhaustive list of matters set out in s.184(2).

The following seven sets of rules are current:

RULES		OBJECT OF RULES
S.R.No.20/2017 IN OPERATION 18/04/2017 AMENDED 01/02/2019	<i>Children, Youth and Families (Children's Court Family Division) Rules 2017</i> [as amended by S.R.No.185/2018 & 3/2019]	<ul style="list-style-type: none"> To prescribe certain matters and 42 forms for the purposes of the Family Division of the Court. The amendments on 01/02/2019 include addition of rules 9, 9AA & 9A-9H (Witness summons) and rule 10 (Application to the Court – publication of proceedings).
S.R.No.94/2011 IN OPERATION 05/09/2011	<i>Children's Court (Personal Safety Intervention Orders) Rules 2011</i>	To make rules of procedure for proceedings in the Children's Court of Victoria under the PSIA.
S.R.No.161/2019 IN OPERATION 22/12/2019 REPLACES S.R. No.189/2009	<i>Children's Court Criminal Procedure Rules 2019</i>	To provide for the practice and procedure of the Criminal Division of the Children's Court, including various forms prescribed for the purposes of the Criminal Division.
S.R.No.169/2018 IN OPERATION 03/12/2018 AMENDED 01/03/2020	<i>Children's Court (Family Violence Protection) Rules 2018</i> [as amended by S.R.No. 10/2020]	To make rules of procedure for proceedings in the Children's Court of Victoria under the FVPA. To revoke Children's Court (Family Violence Protection) Rules 2008 & Children's Court (Family Violence Protection) (Amendment No.1) Rules 2011.
S.R. No.15/2018 IN OPERATION 26/02/2018 REVOKES S.R. No.11/2008	<i>Children's Court (Evidence – Audio Visual and Audio Linking) Rules 2018</i>	To facilitate applications to the Court under Part IIA of the Evidence (Miscellaneous Provisions) Act 1958, namely applications under ss.42E, 42L, 42M, 42N & 42P relating to the giving of evidence and/or the appearance of a person at court by means of an audio visual link or audio link.
S.R.No.126/2020 IN OPERATION 17/11/2020	<i>Children's Court Authentication and Electronic Transmission Rules 2020</i>	To provide for the following in the Children's Court: (a) the authentication of orders; (b) the issue and authentication of process; (c) the authentication of warrants; (d) the filing of documents by electronic communication.
S.R.No.127/2020 IN OPERATION 17/11/2020	<i>Children's Court Criminal Procedure, (Family Violence Protection) and (Personal Safety Intervention Orders) Amendment Rules 2020</i>	To amend S.R.No.161/2019, 169/2018 and 94/2011 to enable filing of documents in accordance with Order 3 of S.R. No. 126/2020.

See the "Rules and Regulations" section under the tab "Legal" on the Children's Court website.

1.4 Practice Directions, Practice Notes & Guidelines

1.4.1 Practice Directions & Practice Notes

Section 592 of the CYFA empowers the President to issue practice directions, statements or notes – which must not be inconsistent with any provision in any legislation – for the Court-

- in relation to proceedings or any class of proceedings in either the Family Division or the Criminal Division of the Court; or
- in relation to the exercise by a registrar of any jurisdiction, power or authority vested in the registrar as registrar under Schedule 3 of the CYFA.

Practice Directions have been issued by the President since 2006 and are summarized as follows. A gap in the numbering system (for example there is no PD No.1 of 2006 listed) indicates that the missing PD has been revoked.

<p>No. 2 of 2006 15/03/2006</p>	<p style="text-align: center;"><u>CONSENT ORDERS</u></p> <p>Requires consent of a party to a proceeding in the Family Division of the Court to be in writing in a specific form if the party is not present in Court at the time of the making of a protection order, an interim protection order, an extension and/or variation of a custody to Secretary order, an extension of a guardianship to secretary order or a permanent care order.</p>
<p>No. 3 of 2006 15/03/2006</p>	<p style="text-align: center;"><u>PREPARATION OF CHRONOLOGIES IN FAMILY DIVISION MATTERS</u></p> <p>As from 10/04/2006 in all Family Division matters that proceed to a Directions Hearing a chronology must be filed by the Department of Human Services setting out (a) the Court history of the proceeding; (b) a brief factual history of the incidents relied on to found the application/breach; (c) the current placement of the child together with any movement of placement during the currency of the proceeding; (d) the name/region of the allocated protective worker(s).</p>
<p>No. 4 of 2006 15/03/2006</p>	<p style="text-align: center;"><u>PROVISION OF WITNESS LISTS IN FAMILY DIVISION MATTERS</u></p> <p>Except with the leave of the Court, in all Family Division matters that proceed to a Directions Hearing each party must file a witness list.</p>
<p>No. 5 of 2006 15/03/2006</p>	<p style="text-align: center;"><u>ADJOURNMENTS</u></p> <p>Except with the leave of the Court, every application for an adjournment must be accompanied by a filed adjournment application sheet.</p>
<p>No. 6 of 2006 15/03/2006</p>	<p style="text-align: center;"><u>INTERSTATE TRANSFER OF CHILD PROTECTION ORDERS</u></p> <p>A copy of any child protection order transferred to Victoria under an interstate law (which includes a law of an Australian territory and New Zealand) together with all other appropriate documentation must be filed for registration</p>
<p>No. 1 of 2007 29/06/2007</p>	<p style="text-align: center;"><u>SEXUAL OFFENCES LIST – COUNTRY CHILDREN’S COURTS</u></p> <p>This Practice Direction establishes a pilot sexual offences list (‘SOL’) in the Criminal Division of country Children’s Courts which adopts practices and procedures which are consistent with the Magistrates’ Court SOL and which have been adapted as is necessary having regard to the provisions of the CYFA.</p>
<p>No. 2 of 2007 29/06/2007</p>	<p style="text-align: center;"><u>SEXUAL OFFENCES LIST – COUNTRY CHILDREN’S COURTS – WITNESS SUMMONSES – CONFIDENTIAL COMMUNICATIONS</u></p> <p>This Practice Direction applies with respect criminal proceedings that relate wholly or partly to a charge of a sexual offence and which are listed in country Children’s Courts. It makes provision with respect to witness summonses that seek to compel production of a document containing a “confidential communication” within the meaning of s.32B of the Evidence (Miscellaneous Provisions) Act 1958.</p>
<p>No. 1 of 2009 29/01/2009</p>	<p style="text-align: center;"><u>SEXUAL OFFENCES LIST – MELBOURNE CHILDREN’S COURT</u></p> <p>This Practice Direction establishes a pilot Sexual Offences List (‘SOL’) in the Criminal Division of the Melbourne Children’s Court. It requires that at the first mention all matters that include one or more sexual offences be adjourned to the SOL. ‘Sexual offence’ includes any offence involving a sexual act or an attempt to commit a sexual act or an act alleged to have been committed with the purpose of committing a sexual act.</p>
<p>No. 1 of 2010 23/06/2010</p>	<p style="text-align: center;"><u>NEW MODEL CONFERENCES</u></p> <p>This Practice Note advises that from 01/07/2012 the Children’s Court at Melbourne will trial a new model for Dispute Resolution Conferences in the Family Division. It also sets out some changes between NMC’s and DRC’s and advises that new NMC guidelines are available on the Children’s Court website.</p>
<p>No. 1 of 2011 13/01/2011</p>	<p style="text-align: center;"><u>NEW MODEL CONFERENCES – NEW GUIDELINES</u></p> <p>This Practice Note advises that new guidelines for conducting New Model Conferences are available on the Children’s Court website and will be in effect from 31/01/2011.</p>
<p>Practice Note No. 1 of 2012 26/10/2012</p>	<p style="text-align: center;"><u>LISTINGS – MELBOURNE CHILDREN’S COURT</u></p> <p>Practice Directions 3 and 4 of 2006 do not apply to a “directions hearing” that is listed pursuant to Practice Direction 3 of 2012.</p>

No. 2 of 2012 02/02/2012	<p align="center"><u>AUTHORITY TO PROVIDE DIGITAL RECORDINGS OF PROCEEDINGS</u></p> <p>This Practice Direction clarifies the application process for obtaining digital recordings of proceedings in the Children’s Court. It also contains a form headed “Request for Copy of Digital Recording”.</p>
No.3 of 2012 23/08/2012	<p align="center"><u>LISTINGS – MELBOURNE CHILDREN’S COURT</u></p> <p>This Practice Direction requires that a case that is not resolved at New Model Conference and is not adjourned for a further NMC or mention be listed before a judicial officer for a Directions Hearing.</p>
No. 2 of 2013 23/07/2013	<p align="center"><u>MELBOURNE CHILDREN’S COURT – COURT 2 PROTOCOL</u></p> <p>This Practice Direction provides-</p> <ol style="list-style-type: none"> 1. All practitioners with a matter in the Court 2 list must enter their appearance with the Court 2 Registrar no later than 9:45am. 2. There will be a 10am call-over of all Family Division contests in Court 2 daily. The call-over will be conducted by the Court 2 Magistrate with the assistance of the Court Coordinator. Contests will be allocated to appropriate courts at the end of the call-over.
No.3 of 2013 01/08/2013	<p align="center"><u>MELBOURNE CHILDREN’S COURT – REMAND HEARINGS AND BAIL APPLICATIONS AFTER 2.00PM</u></p> <p>Where an accused person has been arrested during the day and a remand hearing is required the cut off time for the charges to be filed with the Court and prisoner lodged in the appropriate holding cells is 3.00pm. The bail application or remand hearing must be ready to proceed by 3.30pm.</p>
No. 4 of 2013 09/08/2013 EXTENDED BY No.5 of 2013 31/12/2013	<p align="center"><u>APPLICATIONS BY APPREHENSION – MELBOURNE CHILDREN’S CT</u></p> <ol style="list-style-type: none"> 1. From 2 September 2013 the Family Division registry of the Melbourne Children’s Court will not accept the filing of any child protection applications by apprehension after 1.00pm on any sitting day with the exception of secure welfare related placements which may be filed up until 2pm. 2. Protective workers should file a copy of their CRIS notes in a sealed envelope with the application at the time of filing or as soon as practicable thereafter. Applications for the release of notes shall be brought before the Court as soon as practicable after their filing. 3. Any submissions contest arising out of the filing of an application referred to in paragraph 1 must be in a position to proceed by 3pm.
No.2 of 2014 11/04/2014	<p align="center"><u>MELBOURNE CHILDREN’S COURT FAMILY DIVISION – FILING OF CONDITIONS</u></p> <p>Except with the leave of the Court, all minutes containing conditions must be filed on the pink form headed “Children’s Court-Family Division Conditions”. A fresh form must be used for each order.</p>
No.3 of 2014 25/06/2014	<p align="center"><u>FAMILY DIVISION – FILING OF REPORTS</u></p> <p>Except with the leave of the Court, all DOHS’ reports in relation to all child protection applications state-wide must be filed with the proper venue of the Court not less than 3 working days prior to the listing date.</p>
No.4 of 2014 & No.1 of 2015 & No.5 of 2015 & No.1 of 2016 & No.6 of 2016 & No.1 of 2018 & No.1 of 2019	<p align="center"><u>CRIMINAL DIVISION – SUNSHINE CUSTODY LISTINGS</u></p> <ol style="list-style-type: none"> 1. Young persons arrested and held in custody on matters where Sunshine is the proper venue are to be remanded to appear at Melbourne Children’s Court. 2. Melbourne Children’s Court will maintain carriage of such matters until finalisation with the exception of matters requiring a contested hearing. If the charges are contested, the matter will be adjourned to the proper venue for the contested hearing following contest mention. The parties are directed to contact the co-ordinator in order to obtain suitable contest hearing dates. 3. This Practice Direction [extended from time to time] will operate until 31/12/2018 unless otherwise directed.

<p>No. 6 of 2014 05/01/2015</p>	<p><u>APPLICATIONS BY APPREHENSION – MOORABBIN CHILDREN’S CT</u></p> <p>1. The Family Division registry of the Moorabbin Children’s Court will not accept the filing of any child protection applications by apprehension after 1.00pm on any sitting day which arises out of a child placed into emergency care.</p> <p>2. Protective workers should file a copy of their CRIS notes in a sealed envelope with the application at the time of filing or as soon as practicable thereafter. Applications for the release of notes shall be brought before the Court as soon as practicable after their filing.</p> <p>3. Any submissions contest arising out of the filing of an application referred to in paragraph 1 must be in a position to proceed by 3pm.</p>
<p>No.2 of 2015 20/03/2015</p>	<p><u>FAMILY DIVISION & CRIMINAL DIVISION APPEARANCES MELBOURNE CHILDREN’S COURT & MOORABBIN CHILDREN’S COURT</u></p> <p>1. All legal practitioners involved in matters, other than emergency care applications, must notify the court of their appearance by 3pm on the day prior to the listing. Appearances must be filed in the attached form or via email to coordinator@childrenscourt.vic.gov.au for Melbourne appearances or moorabbinregistry@childrenscourt.vic.gov.au for Moorabbin appearances.</p> <p>2. Legal practitioners should utilise staggered listings to ensure they do not have matters listed in more than one court room at any time.</p> <p>3. It is expected that all matters will be ready to proceed at the time listed. This Practice Direction commences on 23/03/2015.</p>
<p>No.3 of 2015 07/07/2015</p>	<p><u>SUBPOENA DOCUMENTS</u></p> <p>As of 01/08/2015 all witness summons to produce documents or things that are issued by the Court in the Family Division on the application of a party must be returnable no later than the second directions hearing scheduled in a matter.</p>
<p>No.4 of 2015 07/07/2015</p>	<p><u>MELBOURNE CHILDREN’S COURT – FAMILY DIVISION s.162(1)(d) SPECIALIST LIST</u></p> <p>Practice Direction No.4 of 2012 established a pilot s.162(1)(d) list (the “D List”) in the Family Division of the Melbourne Children’s Court for a period of 6 months. Practice Direction No.1 of 2013 extended the pilot. The D List provides intensive judicial case management of child protection cases involving allegations of sexual abuse. Practice Direction No.1 of 2014 states that the D List is no longer a pilot and will henceforth be maintained as an ongoing specialist list at Melbourne Children’s Court. Practice Direction No.4 of 2015 expands the operation of this list Moorabbin & Broadmeadows Children’s Courts.</p>
<p>No.6 of 2015 23/10/2015</p>	<p><u>BROADMEADOWS CHILDREN’S COURT – FAMILY DIVISION</u></p> <p>The Family Division of the Broadmeadows Children’s Court commenced operations on 26/10/2015. This PD directed that PD5/2013, PD2/2014, PD3/2014 & PD 2/2015 also apply to all proceedings in the Family Division of the Broadmeadows Children’s Court.</p>
<p>No.2 of 2016 02/05/2016</p>	<p><u>CHILDREN IN CUSTODY ATTENDING COURT</u></p> <p>The purpose of this PD is to improve the management of criminal proceedings at Melbourne Children’s Court where a child is on remand. The directions set out the process by which the Court will consider whether the attendance of a child in person at Court is required or whether a waiver will be approved.</p>
<p>No.3 of 2016 08/06/2016</p>	<p><u>LISTING OF MATTERS IN THE CHILDREN’S KOORI COURT (CRIMINAL DIVISION) AT MELBOURNE</u></p> <p>This PD aims to ensure that matters adjourned to the Children’s Koori Court at Melbourne are in a position to proceed as either a plea of guilty or, where appropriate, for diversion to be considered pursuant to s.59 of the <u>Criminal Procedure Act 2009</u> and s.528 of the <u>CYFA</u>.</p>
<p>No.1 of 2017 23/03/2017</p>	<p><u>FAMILY DIVISION – APPEARANCE AT MELBOURNE CHILDREN’S COURT OF IN-CUSTODY ADULTS BY AUDIO VISUAL LINK</u></p> <p>This PD sets out directions applicable – unless otherwise directed by the presiding judicial officer – to Family Division proceedings at Melbourne Children’s Court where an adult party to the proceedings is held in custody.</p>

No.2 of 2018 05/04/2018	<u>PROCEDURE FOR INDICTABLE OFFENCES THAT MAY BE HEARD AND DETERMINED SUMMARILY</u> This PD sets out directions in relation to the listing, procedure and venue for charges falling within s.356(6) [Category A serious youth offence committed by child aged 16+] and s.356(8) [Category B serious youth offence committed by child aged 16+].
No.3 of 2018 09/05/2018	<u>PROTECTION APPLICATIONS IN REGIONAL VENUES WHERE A CHILD IS PLACED IN EMERGENCY CARE</u> This PD sets out directions applicable at regional headquarters venues of the Children's Court (Ballarat, Bendigo, Geelong, Latrobe Valley & Shepparton) and at non-headquarters regional venues in relation to cases where a protection application has been filed with the child being placed in emergency care. It is in fairly similar terms to No.4/2013 & No.5/2013 which are applicable to Melbourne Children's Court.
No.4 of 2018 04/06/2018	<u>SEXUAL OFFENCES LIST – SUMMARY CONTEST LISTINGS</u> This Practice Direction applies with respect to criminal proceedings which relate wholly or partly to a charge for a sexual offence and where the proceedings are to be listed for a summary contested hearing. It requires Contest Mention Information Forms to be in Form A and Notice of Readiness for Hearing to be in Form B.
No.5 of 2018 04/06/2018	<u>SUBPOENAS RELATING TO CONFIDENTIAL COMMUNICATIONS</u> This Practice Direction applies with respect to criminal proceedings which relate wholly or partly to a charge for a sexual offence. It clarifies the procedure to apply for leave to compel the production of and to produce documents containing confidential communications.
No 6 of 2018 18/07/2018	<u>INTERMEDIARY PILOT PROGRAM AT MELBOURNE CHILDREN'S COURT</u> This PD gives effect to the new Part 8.2A of the Criminal Procedure Act 2009 as it relates to Intermediary Pilot Program (the Pilot Program) at Melbourne Children's Court. The Pilot Program commenced on 02/07/2018 and applies to criminal proceedings commenced on or after 28/02/2018 that relate to a sexual offence (as defined in s (4)(1) <i>Criminal Procedure Act 2009</i>) or a homicide offence.
No.7 of 2018 19/07/2018	<u>FAST TRACK REMAND COURT AT MELBOURNE CHILDREN'S COURT</u> This PD replaces PD No.2 of 2017 and sets out directions applicable to the Fast Track Remand Court at Melbourne Children's Court which has been set up to deal with the criminal charges of children held on remand in a timely manner.
No.8 of 2018 19/09/2018	<u>CRIMINAL DIVISION – MOORABBIN CUSTODY LISTINGS</u> This PD provides that children who are arrested and held in custody on matters where Moorabbin is the proper venue are to be remanded to appear at the Melbourne Children's Court which will retain custody of such matters until finalisation or the young person is released from custody.
No.1 of 2019 11/01/2019	<u>CRIMINAL DIVISION – SUNSHINE CUSTODY LISTINGS</u> This PD provides that children who are arrested and held in custody on matters where Sunshine is the proper venue are to be remanded to appear at the Melbourne Children's Court which will retain custody of such matters until finalisation with the exception of matters requiring a contested hearing.
No.1 of 2021 22/01/2021	<u>KOORI FAMILY HEARING DAY – BROADMEADOWS & SHEPPARTON CHILDREN'S COURTS – MARRAM-NGALA GAMBU (WE ARE ONE)</u> This PD (which revokes PD No.4 of 2016) sets out the aims and gives directions for the Koori Family Healing Day, known as Marram-Ngala Gambu which operates weekly at Broadmeadows Children's Court and every 3 weeks at Shepparton Children's Court.

The following Practice Directions introduce temporary measures for the operation of the Children's Court throughout Victoria necessitated by the COVID-19 pandemic. Again, a gap in the numbering system indicates that the missing PD has been revoked.:

- **PD No. 5 of 2020:** This PD, effective from 05/05/2020, sets out an alternative procedure for hearing unopposed applications for variation of bail in the Criminal Division consistent with the emergency health measures currently in place in Victoria and sets out Directions for such hearings.
- **PD No. 8 of 2020:** This PD, effective from 13/07/2020, outlines new temporary protocols for the listing and hearing of all intervention order proceedings (under the *Family Violence Protection Act 2008* or the *Personal Safety Intervention Orders Act 2010*) in response to the COVID-19 pandemic at all venues of the Court.
- **PD No. 9 of 2020:** This PD, effective from 13/07/2020, introduces further temporary measures necessitated by the COVID-19 pandemic for the management of proceedings in the Family Division of the Children’s Court of Victoria (the Court) at Melbourne, Moorabbin and Broadmeadows. This Practice Direction revokes PD No. 1 of 2020 for these venues of the Court only and is to be read in conjunction with PD No. 6 of 2020.
- **PD No. 10 of 2020:** This PD, effective from 03/08/2020, outlines the process that applies to the issuing of a witness summons, the listing of a return of a witness summons, the management of objections and the method of inspection of documents produced pursuant to a witness summons, including the online inspection of subpoenaed documents.
- **PD No. 11 of 2020:** This PD, effective from 10/08/2020, introduces further temporary measures necessitated by the COVID-19 pandemic and the Stage 4 restrictions imposed under the declared State of Disaster. It applies to all Criminal Division proceedings filed in the Children’s Court throughout Victoria other than CAYPINS matters. It will operate for the duration of the declared State of Disaster and revokes Practice Direction No. 2 of 2020. These Directions require that all **FILING** must be done electronically and also cover matters relating to the **MANAGEMENT OF CRIMINAL DIVISION PROCEEDINGS** including:
 - **First remand and other urgent hearings**
 - **Children in custody**
 - **Children on bail or charged on summons**
 - **Summary Case Conference – Custody and non-custody matters**
 - **Notice of resolution or request for contest mention**
 - **Diversion/Pleas/Sentencing**
 - **Contest mentions**
 - **Adjourned for further mention**
 - **Bail variation**
 - **Applications for breach or revocation.**
- **PD No. 12 of 2020:** This PD, effective from 10/08/2020, provides that all proceedings in the Children’s Court of Victoria during the period of the State of Disaster are to be held by audio visual link (including WebEx) or by audio link if audio visual link is not available.
- **PD No. 13 of 2020:** This PD, effective from 18/08/2020, modifies the process for the hearing of diversion proceedings ‘on the papers’ and revokes PD No. 4 of 2020.
- **PD No. 14 of 2020:** This PD, effective from 23/11/2020 at Melbourne Children’s Court and from 07/12/2020 at all other venues, makes modifications to the Readiness Hearing process. When it comes into effect it revokes and replaces PD No. 6 of 2020. It provides Directions for the listing, conduct and outcome of a Readiness Hearing, a hearing type introduced from 16/06/2020 which aims to explore the possible resolution of a matter by incorporating the features of a First Directions Hearing and a pre-contest Directions Hearing as well as judicially led dispute resolution processes. If a matter does not resolve at a Readiness hearing, the Court will explore whether an IAO contest or a final contested hearing can proceed safely, fairly and effectively and, if so, give whatever directions it considers necessary for the safe, fair and effective conduct of the hearing. No Directions Hearing will be held prior to the contest. The judicial officer conducting the Readiness Hearing will not preside over the contested hearing unless they consider it appropriate to do so in the circumstances of the case. No evidence of anything said or done in a Readiness Hearing will be admissible in a subsequent hearing unless the Court otherwise directs.
- **PD No. 15 of 2020:** This PD, effective from 23/11/2020 at Melbourne Children’s Court and from 07/12/2020 at all other venues, makes modifications to the **MANAGEMENT OF CHILD PROTECTION PROCEEDINGS** in the Family Division of the Children’s Court as a consequence of a lessening in the COVID-19 emergency restrictions. When it comes into effect it revokes and replaces PD No. 1 of 2020 and PD No. 9 of 2020. It requires that all **FILING** must be done electronically and also sets out directions relating to the following matters:

- Online Hearings
- Submissions Hearings
- Reserved Submissions
- Conduct of submissions and reserved submissions
- Protection applications by notice and other applications
- Mentions
- Consent orders to be filed 24 hours prior to the online hearing
- Conciliation Conferences
- Readiness Hearings [linked to PD No. 14 of 2020]

All Practice Directions & Practice Notes, listed in this section can be read and downloaded from the “Legal” followed by “Practice Directions” tabs on the website of the Children’s Court of Victoria www.childrenscourt.vic.gov.au.

1.4.2 Guidelines

In addition to these Practice Directions the Court has issued the following Guidelines which are currently in operation and can also be read and downloaded from the “Legal” followed by “Guidelines” tabs on the website of the Children’s Court of Victoria www.childrenscourt.vic.gov.au.

01/03/2016	<p style="text-align: center;"><u>GUIDELINES FOR CONCILIATION CONFERENCES</u></p> <p>A conciliation conference is intended to facilitate the early resolution of applications in the Family Division of the Court through a non-adversarial mediation process. The Guidelines are structured under the following headings:</p> <ol style="list-style-type: none"> 1. Introduction and Purpose 2. Procedural Matters 3. Role of Convenor 4. Responsibilities of All Participants 5. Role of Lawyers 6. Role of Child Protection Practitioners 7. Role of Family and Community Members 8. Conciliation Conference Report
28/06/2018	<p style="text-align: center;"><u>MULTI-JURISDICTIONAL COURT GUIDELINES FOR THE INTERMEDIARY PILOT PROGRAM: INTERMEDIARIES AND GROUND RULES HEARING</u></p> <ol style="list-style-type: none"> 1. These Guidelines relate to the use of intermediaries and ground rules hearings during the Intermediary Pilot Program [IPP] which will operate from 01/07/2018 to 30/06/2020. The scheme related to intermediaries and ground rules hearings is set out in Part 8.2A of the Criminal Procedure Act 2009 which commenced on 28/02/2018. 2. The introduction of an intermediary scheme, based on the English model, was recommended in the 2016 VLRC report “The Role of Victims of Crime in the Criminal trial Process”. An intermediary scheme and the use of ground rules hearings in Victoria was endorsed in <i>R v Ward (a pseudonym)</i> [2017] VSCA 37 on the subject of questioning of children and obligations of counsel and judicial officers. The principles also apply to other vulnerable witnesses. 3. The IPP will come into effect from 01/07/2018 after the participating venues of the Court are gazetted pursuant to s.389F(1)(b) of the Act and the panel of intermediaries is established pursuant to s.389H. 4. The IPP will operate more narrowly than the scheme set out in the Act and will apply to: <ul style="list-style-type: none"> • complainants in sexual offence matters who are vulnerable witnesses; • vulnerable witnesses, apart from the accused, in homicide matters; • Melbourne Children’s Court, Melbourne Magistrates’ Court and the Melbourne venues of the County Court & Supreme Court; and • the 4 police SOCIT sites in Frankston, Fawkner, Box Hill & Geelong. 5. The rest of the Guidelines contain information about: <ul style="list-style-type: none"> • Ground rules hearings – an introduction [13-15] • Ground rules hearings – the process [16-21] • Intermediaries – an introduction [22-24] & the process [25-29].

1.5 Charter of Human Rights and Responsibilities Act 2006 [Act No.43/2006]

The Charter of Human Rights and Responsibilities Act 2006 ('the Charter') was assented to on 25/07/2006. Under s.1(2), the main purpose of the Charter is to protect and promote human rights by-

- (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
- (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
- (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
- (d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and
- (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

Section 4 of the Charter lists organizations which are public authorities for the purposes of the Charter. In s.4(1)(j) the list specifically excludes "a court or tribunal except when it is acting in an administrative capacity". A note to s.4(1)(j) states: "Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures."

In *LG v Melbourne Health* [2019] VSC 183 at [73]-[82] Richards J – applying *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [123]-[129] – held that-

- VCAT was acting in an administrative capacity and the exception in s.4(1)(j) does not apply; and
- VCAT had not given proper consideration to the relevant human rights of the applicants in making guardianship and administration orders in relation to LG.

1.5.1 Human Rights

Part 2 of the Charter sets out the human rights that Parliament specifically seeks to protect and promote:

SECTION	HUMAN RIGHT
8	Recognition and equality before the law
9	Right to life
10	Protection from torture and cruel, inhuman or degrading treatment
11	Freedom from forced work
12	Freedom of movement
13	Privacy and reputation
14	Freedom of thought, conscience, religion and belief
15	Freedom of expression
16	Peaceful assembly and freedom of association
17	Protection of families and children
18	Taking part in public life
19	Cultural rights
20	Property rights
21	Right to liberty and security of person
22	Humane treatment when deprived of liberty
23	Children in the criminal process
24	Fair hearing
25	Rights in criminal proceedings
26	Right not to be tried or punished more than once
27	Retrospective criminal laws

Section 7(2) of the Charter – headed "**Human rights—what they are and when they may be limited**" – provides: "A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and

- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”

Section 8 of the Charter – headed “**Recognition and equality before the law**” – provides:

- “(1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Section 17 of the Charter – headed “**Protection of families and children**” – provides:

- “(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.”

Section 19 of the Charter – headed “**Cultural rights**” – provides:

- “(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.
- (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community-
 - (a) to enjoy their identity and culture; and
 - (b) to maintain and use their language; and
 - (c) to maintain their kinship ties; and
 - (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.”

Section 21 of the Charter – headed “**Right to liberty and security of person**” – provides:

- “(1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.
- (5) A person who is arrested or detained on a criminal charge-
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear-
 - (a) for trial; and
 - (b) at any other stage of the judicial proceeding; and
 - (c) if appropriate, for execution of judgment.
- (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must-
 - (a) make a decision without delay; and
 - (b) order the release of the person if it finds that the detention is unlawful.
- (8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.”

Section 23 of the Charter – headed “**Children in the criminal process**” – provides:

- “(1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
- (2) An accused child must be brought to trial as quickly as possible.
- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.”

Section 24 of the Charter – headed “**Fair hearing**” – provides:

- “(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) Despite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.
- (3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.”

Section 25 of the Charter – headed “**Rights in criminal proceedings**” – provides:

- “(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees-
 - (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
 - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
 - (c) to be tried without unreasonable delay; and
 - (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978; and
 - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the Legal Aid Act 1978; and
 - (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the Legal Aid Act 1978; and
 - (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
 - (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
 - (i) to have the free assistance of an interpreter if he or she cannot speak or understand English; and
 - (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
 - (k) not to be compelled to testify against himself or herself or to confess guilt.
- (3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child’s rehabilitation.”

In *DPP v SL* [2016] VSC 714; 263 A Crim R 193, in the course of giving directions as to the conduct of proceedings in the Supreme Court in which the 15 year old accused was pleading guilty to charges including attempted murder and burglary, Bell J said at [13] that the procedures in s.522(1) of the CYFA regarding the conduct of proceedings in the Children’s Court are clearly intended to give effect to the human rights principles in ss.8(3), 17(2), 23(1),(2) & (3) and 25(3) of the Charter of Human Rights and Responsibilities Act 2006 (Vic).

1.5.2 Interpretation of Laws

Perhaps the main impact of the Charter on the operation of the Children’s Court of Victoria is to be found in s.32 which came into operation on 01/01/2008. That section provides-

- “(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of-
 - (a) an Act or provision of an Act that is incompatible with a human right; or
 - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.”

Section 33 empowers a court or tribunal, on application of a party or on its own motion, to refer to the Supreme Court a question of law which arises that relates to the application of the Charter or a question which respect to the interpretation of a statutory provision in accordance with the Charter. If such question has been referred, the referring court or tribunal must not-

- (a) make a determination to which the question is relevant while the referral is pending; or
- (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.

Section 36(2) of the Charter provides that subject to any relevant override declaration (by Parliament under s.31), if the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, it may make a declaration of inconsistent interpretation. Section 36(5) provides that such a declaration does not-

- (a) affect in any way the validity, operation or enforcement of the statutory provision; or
- (b) create in any person any legal right or give rise to any civil cause of action.

Section 38(1) of the Charter provides that subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

Section 39(1) of the Charter provides that if, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter. Section 39(3) provides that a person is not entitled to be awarded any damages because of a breach of this Charter.

In *Gebrehiwot v State of Victoria* [2020] VSCA 315 the applicant had brought proceedings in tort against the State of Victoria claiming damages for battery and false imprisonment following an incident with officers of Victoria Police in which he was injured. The State admitted that force was used but relied on the defence that the police officers acted with lawful justification in accordance with s 462A of the *Crimes Act 1958*. The Court of Appeal (Tate, Kaye & Emerton JJA) allowed an appeal against a decision of a jury which accepted the defence. In the course of its reasons the Court of Appeal addressed several issues in relation to the Charter:

- At [132]: The judge was correct to conclude that a breach of s.38 could not found a claim for damages. Unlike human rights instruments in other jurisdictions, which confer an entitlement to plenary forms of relief for breach [see, eg, *Human Rights Act 1998* (UK) s.8(1)] or expressly acknowledge that damages may be awarded [HRA, s.8(2)] the prohibition on damages in the *Charter* is unequivocal.
- At [134]: However, *Gebrehiwot* also advanced an alternative submission relying on the *Charter*, namely, that any direction the judge gave to the jury about the meaning and application of s.462A in the circumstances had to be informed by an interpretation that was compatible with the human rights that were engaged. The judge's failure to give a direction on s.462A also meant that she did not consider and apply the interpretive obligation under the *Charter* in construing s.462A.
- At [142]: We consider that the judge was incorrect to hold that s.32 of the *Charter* was irrelevant to the jury's deliberations. In our view, s.32 was relevant to the jury's deliberations on liability because it may have affected its consideration of whether s.462A applied in the circumstances. However, there is no ground of appeal that identifies an error by the judge in the application of s.32 of the *Charter* and the determination of an interpretation of s.462A that is human rights-compatible must wait for another day.

The Court of Appeal also referred to the following cases in its discussion of the Charter: *R v DA* [2016] VSCA 325 at [44] per Ashley, Redlich and McLeish JJA; *Nguyen v DPP* (2019) 59 VR 27; [2019] VSCA 20; *Momcilovic* (2011) 245 CLR 1; [2011] HCA 34; *Slaveski v Smith* (2012) 34 VR 206; [2012] VSCA 25; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4; *Castles v Secretary, Department of Justice* (2010) 28 VR 141; [2010] VSC 310 (Emerton J).

1.5.3 The Charter applies to protection proceedings in the Children’s Court

In *DOHS v Sanding* [2011] VSC 42 four Aboriginal children aged 9, 7, 4 & 2 had been residing in the care of their maternal grandmother under custody to Secretary orders. At [279] Bell J described “the real risk to the wellbeing of the children” as “the drug-taking activity of their mother and her disturbance of the home of the grandmother in which the family was living”. Nine weeks after the custody to Secretary orders were made, the Department removed the children from the care of their grandmother and placed them separately in out of home care with non-Aboriginal families. No family was available to take the four children together and no Aboriginal family was available to take any of them. Within a week of their separation, the behaviour of the two oldest children substantially regressed. The mother made applications to revoke each of the custody to Secretary orders on the basis that the children would live with her mother and that she would not live in the home. A Children’s Court magistrate conducted a submissions contest, revoked the custody to Secretary orders and placed the children on interim accommodation orders in the grandmother’s care. An appeal by DOHS was dismissed.

At [155]-[207] Bell J discussed the application of the Charter to the conduct of protection proceedings and the making of protection orders by the Children’s Court. In the course of this, his Honour considered numerous provisions of the CYFA and referred with approval to dicta in *Kracke v Mental Health Review Board* [2009] VCAT 646; *Sabet v Medical Practitioners Board* (2008) 20 VR 414; *R v Williams* (2007) 16 VR 168, 177; *In Re K (infants)* [1963] 1 Ch 381; *Humberside County Court v R* [1977] 1 WLR 1251; *J v Lieschke* (1987) 162 CLR 447, 451; *Reynolds v Reynolds* (1973) 47 ALJR 499, 501-2; *M v M* (1988) 166 CLR 69, 76; *Neale v Colquhoun* [1944] SASR 199; *W Children* [2010] UKSC 12 and a different *M v M* [1993] 1 VR 391, 393. At [204] his Honour said:

“In protection proceedings, a number of important civil rights and obligations are at stake. These include whether the child will be taken away from their parents, whether the child will be protected from physical and emotional harm and how, where and with whom the child will live, whether the child will live with their siblings, who will have custody of the child, who will grow the child up, where the child will go to school, whether and what kind of cultural contact the child will have with their community, including the Aboriginal community (where applicable), whether and what religious instruction the child will have, what conditions will be imposed on those caring for the child and whether the child and their parents will have access to each other. The court can make interim and final orders with respect to those and other matters. Any such orders will be determinative, legally enforceable and impact heavily on the lives of the people concerned. The orders will be determinative not just of the rights and obligations of the child and their parents under the Act, but also of their fundamental rights and freedoms as children and parents under the common law and under human rights specified in the Charter, especially the right to family and to protection as a child in s.17(1) and (2). Therefore protection proceedings under Chapter 4 of the *Children, Youth and Families Act* come within the scope of the human right to a fair hearing in s.24(1) of the Charter.”

At [206]-[207] his Honour concluded:

“[A] protection proceeding (including a revocation proceeding) in the court under Chapter 4 of the *Children, Youth and Families Act* is a ‘civil proceeding’ under s.24(1) of the Charter; the child and their parents are parties to the proceeding, as may be other persons, depending on the nature of the application and the actual circumstances.

In the present case, the represented parties to the mother’s application to revoke the custody to secretary orders were the secretary, the mother and the grandmother. The father of three of the children appeared personally and was also joined as a party. All these persons were, in my view, parties to the protection proceeding for the purpose of s.24(1) of the Charter, except the secretary. The secretary was not covered by that right as she appeared in the performance of a statutory function and not in an individual capacity.”

For reasons discussed in detail in chapter 5.11.16 of these Research Materials, in *ZD v DHHS* [2017] VSC 806 Osborn J dismissed the mother’s appeal against a decision of a magistrate of the Children’s Court to include on IAOs a condition allowing for three children aged 5, 3 & 2 placed in foster care to be immunised against measles. Such immunisation was also a condition precedent to the two younger children being able to attend child care. During the hearing of the appeal the parties sought to rely on the Charter – in particular ss.17(1) & 17(2) – in support of their respective proposed interpretations of s.263(7) of the CYFA. At [106] & [109] Osborn J said:

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

[109] "...It cannot be said that a construction of s.263(7) of the CYFA that has properly taken the factors in s.10 into account is inconsistent with the rights in s.17 of the Charter."

1.6 Towards an electronic Court [eCourt]

1.6.1 Remote hearings using Webex

In Victoria a State of Emergency was declared on 16/03/2020 because of the health risks associated with the COVID-19 pandemic. As a consequence, most hearings in both divisions of the Children's Court of Victoria have been conducted remotely since late March 2020 by means of an off-the-shelf computer application known as **Webex**.

1.6.2 Courtlink & Bridge

In the mid-1980s a DOS-based computerized listing and order processing system known as **Courtlink** was developed for criminal proceedings in the Magistrates' Court. In about 1991 the **Courtlink** system was extended to include listing and order processing for intervention orders (IVOs) in the Magistrates' Court. In about 2001 the **Courtlink** intervention order system and a modified version of the **Courtlink** criminal system were introduced in the Children's Court throughout the State.

In the mid-1990s a simple order processing system for child protection cases was built by the author based on Word5 templates. This system – known as **Kidlink** – was only available at Melbourne Children's Court.

In about 2001 a web-based computer system known as **Lex** was developed as a replacement for Kidlink and was introduced for listing and order processing of child protection cases in the Children's Court state-wide. On 12/11/2018 an upgraded version of Lex – named **Bridge** – replaced Lex state-wide.

1.6.3 Case Management System (CMS), including eDocs

The 2017/18 Victorian State Budget provided \$89.2 million to Court Services Victoria for a modern computerized case management system for the Magistrates' Court and the Children's Court as part of a whole of government response to the Royal Commission into Family Violence. This new electronic **Case Management System (CMS)** is intended to replace Courtlink and Bridge. It will be efficient and easy to use for all court users, will be adaptable to the needs of a modern court and will enhance community access to justice by providing timely, accurate and complete information when required.

The CMS Project aims to provide-

- processes and systems that support minimal reliance on paper within the courts and when dealing with external parties;
- an electronic case record which acts as a single source of truth;
- automation of a number of manual processes to enable staff to focus on higher-value tasks;
- a unique digital identifier for all court users named in a case; this may include a link to any aliases or variations in the person's name and functionality which allows for a focus on both 'court users' and 'cases' in the system;
- electronically signed documents and orders that will be treated as the official court record;
- greater integration and connectivity for the whole of justice system, including sharing of court user information across jurisdictions and courts and external parties such as other Victorian and interstate courts and police;
- functionality that allows authorised third parties, where appropriate, to initiate cases (e.g. system identified agents and lawyers), submit documents and track cases through interfaced systems or online portals.

The CMS Project includes an application called **eDocs**, an online filing portal to enable the electronic transmission of documents to the Court which is intended to replace manual and paper-based processes. Release of the first phase of eDocs has been fast-tracked because of the COVID-19 pandemic and the associated need to minimise face-to-face human contact. When it is complete

eDocs is planned to operate as an electronic filing and document exchange portal between the Court and authorised agencies and other court users.

Access to the eDocs portal was introduced for Criminal Division proceedings and also for IVO applications by Victoria Police, Victoria Legal Aid and authorised legal practitioners on a staggered basis as follows:

- at Loddon-Mallee, Barwon South, Heidelberg and Ringwood Children's Courts commencing 17/11/2020;
- at Melbourne and Moorabbin Children's Courts commencing 24/11/2020;
- at all other Children's Courts on 08/12/2020.

It is planned that eDocs will be available for DHHS' applications for IVOs in 2021. Child protection matters have been excluded from the initial rollout of eDocs. A fully developed eCourt for child protection matters is scheduled for implementation in late 2021.

The whole CMS Project is scheduled for completion in September 2022.

