

## 2. COURT OVERVIEW

### CONTENTS

<b>2.1</b>	<b>Establishment, Vision &amp; Purpose</b>
<b>2.2</b>	<b>Judicial &amp; Administrative officers of the Court</b>
<b>2.3</b>	<b>Organisational Structure of the Children's Court of Victoria</b>
<b>2.4</b>	<b>Divisions of the Court</b>
<b>2.5</b>	<b>Venues of the Court</b>
<b>2.6</b>	<b>A specialist court</b>
<b>2.7</b>	<b>The Court is generally open to the public</b>
2.7.1	Section 523 of the CYFA
2.7.2	Sections 28 & 30 of the Open Courts Act 2013
2.7.3	Pseudonym orders
2.7.4	Media applications for copies of court documents in Criminal Division cases
2.7.5	Media applications for copies of audio or audiovisual recordings of police int's
<b>2.8</b>	<b>Restriction on publication of proceedings</b>
2.8.1	Statutory prohibition on publication of identifying particulars—s.534 of the CYFA
2.8.2	Suppression orders
2.8.3	Section 10(5) of the Witness Protection Act
<b>2.9</b>	<b>Bail justices</b>
<b>2.10</b>	<b>Court services</b>
2.10.1	Juvenile Justice
2.10.2	Child Witness Service
2.10.3	Court Network
2.10.4	Victoria Legal Aid
2.10.5	Interpreters
2.10.6	Salvation Army

### **2.1 Establishment, Vision & Purpose**

The Children's Court of Victoria ['the Court'] was established by s.8(1) of the Children and Young Persons Act 1989 (Vic) (No.56/1989) ['the CYPA'] and is continued in operation by s.504(1) of the Children, Youth and Families Act 2005 (Vic) (No.96/2005) ['the CYFA'].

The Court's vision is: "To facilitate the administration of justice by providing a modern, professional, accessible and responsive specialist court system focussed on the needs of children, young persons and their families."

Its purpose is: "To provide an efficient, modern and responsive specialist court to hear and determine cases involving children and young persons in a timely, just and equitable manner which is easily understood by court users and the public generally."

It is important to emphasize what the Court's purpose is not. As an institution of judicial decision-making, the Court has no power to become involved with a child until either-

- an officer of the Child Protection Service of the Victorian Government's Department of Families, Fairness and Housing;
- an officer of Victoria Police; or
- some other person-

decides to invoke its jurisdiction by commencing a case in the Court. The Court has no authority to play a general watch-dog role like an ombudsman or a commissioner for children. Nor does it provide any overall or continuous supervision of the Child Protection Service or any other agency involved with a child once the particular case before it has been completed. Nor, unlike the Coroner's Court, does it

have an investigative arm except insofar as the assistance provided by the Children's Court Clinic in the context of a particular case or its power to issue subpoenas could be so classified. The Court is, by definition, a reactive part of the system, although in its written decisions it sometimes makes general comments about perceived failures within the system.

It is also important to understand that the Court is completely independent of the Department of Families, Fairness and Housing and Victoria Police just as it is of all of the other parties – parents, children, extended family members or others - who appear in cases before it. In his report entitled "Protective Services for Children in Victoria" Justice Fogarty made this crystal clear as long ago as 1993 yet the Court still regularly hears comments along the lines that the Court and the Department are engaged in a partnership to protect the children of Victoria. The Children's Court is not in a partnership with anybody. It is not a "stakeholder" in anything nor are the police nor the Department of Families, Fairness and Housing "stakeholders" in it. They have no greater "ownership" in the Court than any other litigant. The Court's independent nature and its purpose were described by Justice Fogarty at pp.142-143 of his report as follows:

"Whilst different models could have been provided for the court or tribunal carrying out the responsibilities now imposed on the Children's Court, the fact is that throughout its history in Victoria these duties have been carried out through a court, but coupled with provisions that it is to proceed without undue formality and that it is not to be inhibited by the normal Court rules of procedure and evidence. That is also the approach generally accepted in each of the other States.

Much of the criticism [of the Court], especially from the Department, proceeds in my view from a failure to understand this. A significant reason for the existence of the Children's Court is that it stands independent of the Department, the children and the parents and represents the community in the determination of these extremely difficult and delicate issues which are likely to have a profound, perhaps permanent, effect on the lives of the young children involved. Consequently, it is necessary for the Court to be independent and to be seen to be independent, especially from the Department which is a party in every proceeding before it. It must have the confidence of the parents who come before it and the confidence of the community that it will act in an independent way in accordance with the legislation.

At times I was left with the impression in discussion with some officers of the Department, that they would really like to regard the Court as a natural extension of the Department and that they are uncomfortable with its independence. Whilst that view was not articulated in a direct way, it is important that even at a subconscious level that attitude be recognized and rejected. I felt at times, both at a high level within the Department and from speaking with some workers, that there was a view that because a notification of abuse had been investigated by the Department and because it had reached a conclusion as to what order should be made, there was something obstructive about a process by which those opinions and views were independently assessed and at times rejected.

In reality, the orders sought by the Department are accepted by the Children's Court in a surprisingly high percentage of cases. The figures demonstrate that this happened in excess of 80% of cases and even amongst the remaining 20% a number are withdrawn or not proceeded with by the Department as distinct from being rejected by the Court.

In my view the Children's Court must maintain its position of independence and integrity and if anything that position should be reinforced rather than diminished."

## **2.2 Judicial & Administrative officers of the Court**

Under s.504(2) of the CYFA, the Court consists of:

- a President;
  - the magistrates;
  - the judicial registrars; and
  - the registrars-
- of the Court.

The President is a judge of the County Court who is appointed by the Governor in Council on the recommendation of the Attorney-General made after consultation with the Chief Judge: s.508(2). The President holds office for a term not exceeding 5 years and is eligible for reappointment: s.508(3)(a).

The President may exercise any power conferred on a magistrate by or under the CYFA or any other Act: s.508(8).

The first President of the Court was Judge Jennifer Coate. She was appointed in June 2000. She had previously been Senior Magistrate of the Court since December 1995. Her predecessor, Mr Greg Levine, is currently a Reserve Magistrate at the Court. The second President, appointed in late April 2006, was Judge Paul Grant who was previously a Deputy Chief Magistrate in the Magistrates' Court. The third President, appointed on 01 May 2013, was Judge Peter Couzens who was previously a Regional Coordinating Magistrate. The fourth President, appointed on 12 May 2015, was Judge Amanda Chambers who was previously a Magistrate. The current President, as and from 01 January 2021, is Judge Jack Vandersteen who was previously a Regional Coordinating Magistrate.

The President, after consulting the Chief Magistrate, may assign any person who is appointed a magistrate or a reserve magistrate to be a magistrate for the Court, whether exclusively or in addition to any other duties: s.507(1). In making such assignment, the President must have regard to the experience of the person assigned in matters relating to child welfare: s.507(2). The President, after consulting the Chief Magistrate, may at any time revoke such assignment: s.507(3).

Under ss.509(1) & 509(3), the Governor in Council may appoint a magistrate nominated by the President to be Acting President for a term not exceeding 3 months during any period when:

- there is a vacancy in the office of President; or
- the President is absent on leave or for any reason temporarily unable to perform the duties of the office.

Provisions relating to judicial registrars, including appointment, duties, remuneration and terms & conditions, are set out in Part 7.6A of the CYFA.

The President may assign duties to a magistrate for the Court [s.510(1)] and to a judicial registrar [s.542A(1)]. Such magistrate/judicial registrar must carry out the duties so assigned [s.510(2)/s.542A(2)]. It is important to note that although the President has power to assign duties to a magistrate and to a judicial registrar, the principles of judicial independence do not permit the President to direct a magistrate or a judicial registrar as to how to carry out his or her judicial function.

The following officers of the Court are authorised by s.535(1) of the CYFA:

- a principal registrar;
- registrars; and
- deputy registrars.

The duties, powers and functions of these officers are set out in the CYFA and the regulations [s.535(3)]. Pursuant to s.539, these include:

- power to issue any process out of the Court;
- power to administer an oath;
- with the consent of the parties to a proceeding in the Family Division, power to extend an interim accommodation of a kind referred to in ss.263(1)(a) & 263(1)(b) of the CYFA;
- power to extend the bail of a person appearing on a return date in relation to a criminal proceeding in respect of which the person has been granted bail; and
- power to endorse a warrant to arrest in accordance with s.62 of the Magistrates' Court Act 1989 (Vic) [No.51/1989].

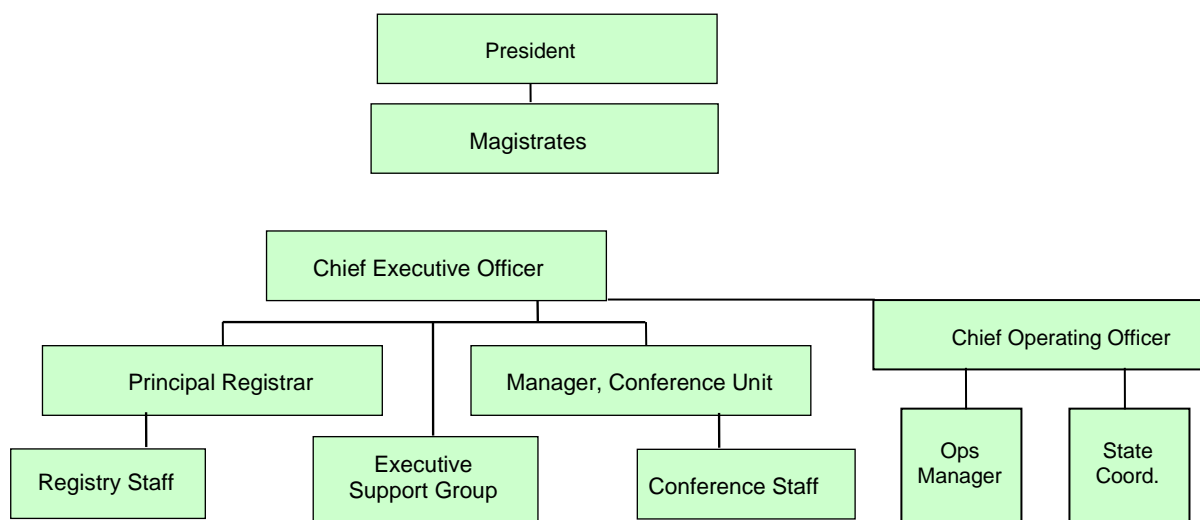
See also s.21 of the Magistrates' Court Act 1989.

The current Principal Registrar of the Court is Ms Leanne de Morton who has held that position since the retirement of her predecessor, Mr Godfrey Cabral, in December 2002. Mr Cabral had previously been Principal Registrar since September 1998.

Section 545(1) of the CYFA continues the Children's Court Liaison Office, established by s.36(1) of the CYPA. The functions of the Children's Court Liaison Office are set out in s.545(3):

- (a) to provide information and advice about the Court to children, families and the community;
- (b) to co-ordinate the provision to the Court of any reports that are required;
- (c) to collect and keep general information and statistics on the operation of the Court;
- (d) to provide general advice and assistance to the Court; and
- (e) to undertake any research that is required to enable it to carry out its functions.

## 2.3 Organisational Structure of the Children's Court at Melbourne



OFFICE HOLDERS – 01 JANUARY 2021	
President	Judge Jack Vandersteen
Chief Executive Officer	Mr Simon McDonald
Chief Operating Officer	Mr Rob Challis
Principal Registrar	Ms Leanne de Morton
Acting Manager, Conference Unit	Ms Angela Carney
State Co-ordinator	Mr Glenn Barnes
General Manager, Operations & Infrastructure	Ms Kylie Pieters
Operations Manager	Ms Courtney Coates
Senior Legal Officer	Dr Lisa Lee
Strategic Advisor to the President	Ms Louise James
Special Advisor to the President	Mr Peter Power
Online Hearings Implementation & Support Registrar	Ms Ashe Whitaker
Manager, Strategic Communications & Engagement	Ms Melissa Coade

## 2.4 Divisions of the Court

Under s.504(3) of the CYFA the Children's Court in effect has three Divisions-

- (a) the Family Division;
- (b) the Criminal Division; and
- (c) the Koori Court (Criminal Division).

For reasons which are unclear to the writer s.504(3)(d) defines a fourth Division, the Neighbourhood Justice Division. In reality, the Neighbourhood Justice Centre [NJC] is simply a venue of:

- the Criminal Division of the Court; and
- that part of the Family Division relating to intervention orders.

Section 3(4) of the CYFA provides that unless the context otherwise requires, a reference in the CYFA to the Criminal Division includes a reference to the Koori Court (Criminal Division).

The Court must not sit as more than one Division at the same time in the same room: s.504(5).

Under s.504(7), the Court, in any Division, is constituted by the President or a magistrate except in the case of any proceeding for which provision is made by any Act for the Court to be constituted by a registrar. Examples of the latter include applications for extension of bail and applications for extension of certain sorts of interim accommodation orders. However, under s.504(8) the Court may be constituted by a judicial registrar in any proceeding for which provision is made by rules of court for

- (a) the court to be so constituted; and
- (b) the delegation to judicial registrars of powers of the court to hear and determine such proceeding.

## 2.5 Venues of the Court

The Court may sit and act at any time and place [s.505(4)]. However, it must not be held at any time in the same building as that in which the Magistrates' Court is sitting at the time unless the Governor in Council, by Order published in the Government Gazette, otherwise directs with respect to any particular building [s.505(3)]. Several joint committals involving adult and child co-accused [see chapter 10.2.4] have recently been held in the Melbourne County Court building which has been gazetted for that purpose. Because of a shortage of courtrooms at Melbourne Children's Court, the Melbourne Magistrates' Court has been gazetted as a Children's Court venue and Family Division trials are occasionally transferred from Melbourne Children's Court to a courtroom on the civil floor of that building.

The dates and times at which the Court sits are set by the President after consulting the Chief Magistrate: ss.505(1)(b) & 505(2).

At present the Court sits as required at every Magistrates' Court (other than the Melbourne Magistrates' Court) and at the Neighbourhood Justice Centre [NJC] in Collingwood. The locations are listed below. At most suburban locations, the Children's Court has a separate entrance from the Magistrates' Court. At Melbourne, Broadmeadows & Moorabbin JC and at all country and regional locations, the Court sits in both Divisions. At all suburban locations other than Broadmeadows and Moorabbin JC, the Court sits only in the Criminal Division and in that part of the Family Division relating to intervention orders. Except for final contests listed for more than 5 days or unless there are security issues, all Family Division cases-

- originating from DFFH's Southern region offices are heard at Moorabbin JC;
- originating from DFFH's Preston office are heard at Broadmeadows.

All other Family Division cases arising in the extended metropolitan area are heard at Melbourne Children's Court.

### VICTORIAN CHILDREN'S COURT VENUES



Ararat  
Bairnsdale  
Ballarat  
Benalla  
Bendigo  
**Broadmeadows**  
Castlemaine  
Cobram  
Colac  
Corryong  
[Dandenong](#)  
Echuca

[Frankston](#)  
Geelong  
Hamilton  
[Heidelberg](#)  
Hopetoun  
Horsham  
Kerang  
Korumburra  
Kyneton  
Latrobe Valley  
~~Mansfield~~  
(temp. closed)  
Maryborough

**Melbourne**  
Mildura  
**Moorabbin JC**  
Myrtleford  
Nhill  
NJC  
(Collingwood)  
Omeo  
Orbost  
Ouyen  
~~Portland~~  
(temp. closed)  
[Ringwood](#)

Robinvale  
Sale  
Seymour  
Shepparton  
St Arnaud  
Stawell  
[Sunshine](#)  
Swan Hill  
Wangaratta  
Warrnambool  
[Werribee](#)  
Wodonga  
Wonthaggi

In addition, Melbourne Children's Court and many of the suburban, country and regional venues are equipped with video-conferencing & remote witness facilities. These have 2 functions:

- to allow a magistrate and/or one or more parties to be in a different location from another party; thus, for instance, a magistrate in Melbourne can preside over a case in which some or all of the parties are in Bendigo;
- to allow a witness who is in a location remote from the courtroom to give evidence and be cross-examined without coming into the courtroom; there are 2 main situations in which the Court will permit this to be used:
  - (i) where a witness is interstate or overseas or in another town or city: see e.g. s.37D & Part IIA of the Evidence Act 1958 (Vic) [No.6246].

- (ii) where a witness is in the same town or city but the court orders that, for reasons of convenience, security or protection of the witness, the witness should not be in the same room as a party: see e.g. s.37C & Part IIA of the Evidence Act 1958; see also *R v Goldman* [2004] VSC 165 where Redlich J traced the genesis of the legislation and analysed a large number of relevant cases - Victorian, Australian & foreign - before concluding at [32] that: "The accused's right to confrontation and the forensic advantages that may flow therefrom needs to be balanced against the need to protect the witness against the risk of harm."

Melbourne Children's Court is the headquarters of the Children's Court of Victoria. The President and Principal Registrar of the Court are located there, as are 13 magistrates and 3 reserve magistrates who are currently assigned full-time to the Children's Court. In addition RCM Dotchin is located at Moorabbin JC and is assisted by two magistrates. RCM Macpherson is located at Broadmeadows and is assisted by one magistrate. At present there are no judicial officers appointed to the Children's Court.

At suburban, country & regional locations, a magistrate assigned to that court generally hears all cases in the Children's Court in addition to his or her other duties in the Magistrates' Court. However, a relieving judicial officer is provided on request from Melbourne Children's Court to country & regional courts to hear contested Family Division cases whose estimated duration is 4 days or more. In addition, contested suburban criminal cases of more than 1 day's duration are generally adjourned for hearing at Melbourne Children's Court, albeit at the discretion of the coordinators of both courts.

Unless it is impossible or impracticable to do so, any application in either Division of the Court should be filed at the 'proper venue'. Under s.3 of the CYFA this is:

- in relation to a proceeding in the Family Division, the venue of the Court that is nearest to:
  - (i) the place of residence of the child; or
  - (ii) the place where the subject-matter of the application arose;
- in relation to a proceeding in the Criminal Division, the venue of the Court that is nearest to:
  - (i) the place of residence of the child; or
  - (ii) the place where the offence is alleged to have been committed.

Subsequently, the Court will generally adjourn an application from the 'proper venue' to some other venue should that be agreed between the parties or should the Court consider that to be the most appropriate venue for a further hearing of the case.

Factors to be considered in relation to an application to change the venue of a Supreme Court murder trial are set in *R v Allan (Change of Venue)* [2018] VSC 571 at [5]-[7]. In [5] her Honour referred with approval to the legal principles set out in *R v Iaria and Panozzo* [2004] VSC 96 at [10] where Nettle J quoted with approval the formulation of Pincus JA in *R v Yanner* [1988] 2 Qd R 208:

"... the proper rule to be applied is that each case in which an application is made for a change of venue falls to be considered on its own merits and not with any preconceptions, save that a trial should ordinarily proceed in the district in which the offence charged is alleged to have been committed 'removal being warranted where sufficient cause is shown'."

See also *R v Vjestica* [2008] VSCA 47 per Maxwell P.

## 2.6 A specialist court

Section 507(2) of the CYFA requires the President, in assigning a magistrate or a reserve magistrate to be a magistrate for the Court, to have regard to his or her experience in matters relating to child welfare.

In order to enhance their experience in this specialist area, judicial officers assigned to the Court attend regular seminars on various matters relating to child welfare, especially on psychological and psychiatric issues and on aspects of child abuse. Many of these are closed seminars arranged by the Children's Court Clinic.

In *T v Secretary of Department of Human Services* [1999] VSC 42 Beach J dismissed an appeal by a mother against interim accommodation orders placing her 2 children in the care of a suitable person. At the conclusion of his judgment, Beach J said at [21]:

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

In *P v RM & Ors* [2004] VSC 14 Gillard J, after referring to the above dicta, said at [28]: "I would not raise the hurdle as high as that...Speaking for myself I take the view that weight should be accorded to decisions made by Magistrates experienced in this area." In *DOHS v SM* [2006] VSC 129 at [14] Hansen J expressed a similar view:

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

In *DOHS v Sanding* [2011] VSC 42 at [28] Bell J referred with approval to the first two sentences of the above dicta of Beach J in *T's case* and to dicta of Gillard J in *R v RM & Ors* at [27] and of Habersberger J in *CJ v DOHS* [2004] VSC 317 at [21] and said:

"This Court recognizes the specialist nature of the jurisdiction of the Children's Court and the expertise which it has developed in the exercise of that jurisdiction... This will be an important consideration in the present case, for the court will be cautious before interfering with decisions made by the Children's Court concerning the procedures to be followed in the exercise of its specialist jurisdiction."

In *Cardell (a pseudonym) v DHHS* [2019] VSC 781 Maxwell P said at [40]-[41]:

"The written submission for the appellant contended that, if the appeal from the Children's Court orders failed, then this Court should proceed to make its own order with respect to the care and protection of Oliver. I expressed the provisional view in the course of argument that, were that to be the outcome of the appeal, it was extremely unlikely that I would be persuaded to exercise the Court's inherent [*parens patriae*] power. I drew attention to authorities relied on by the Secretary (who is the defendant to the originating motion), the effect of which is that where a child's welfare is being dealt with by a specialist court, under a legislative scheme explicitly directed at child welfare, the Supreme Court would be very slow to step in and exercise its own jurisdiction: *Re Anna, Bruno, Courtney and Deepak* [2001] NSWSC 79, [20]; *RC v Director-General, Department of Family and Community Services* [2014] NSWCA 38, [65]. I remain of that view."

## 2.7 The Court is generally open to the public

Generally, courts are open to the public. Anyone has a right to go into any court when it is sitting, unless for special reason in a particular case the presiding judge/magistrate has ordered a closed court hearing. The reason for this was stated in eloquent terms by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417. Quoting Bentham, his Lordship said at 477-8:

"Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial'. 'The security of securities is publicity' but amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this Kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial exercise and in their constant exercise."

The principles espoused in *Scott v Scott* were recognized by the High Court in *Russell v Russell* (1976) 134 CLR 495, a case which concerned, among other things, the constitutional validity of sections of the Family Law Act 1975 (Cth) which at that time required Family Courts to be closed and prohibited publication of their proceedings. At p.520 Gibbs CJ said:

"It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (*Scott v Scott* [1913] AC 417 at 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure' (*McPherson v McPherson* [1936] AC 177 at 200). To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality in the interests of privacy or delicacy may in some cases be thought to render it desirable for a matter, or part of it, to be heard in closed court."

Similar statements of principle are to be found in numerous other cases, including *Dickason v Dickason* (1913) 17 CLR 50, *David Syme & Co Ltd v General Motors Holden's Ltd* [1984] 2 N.S.W.L.R. 294 per Street CJ at 299, Hutley AP at 307 & Samuels JA at 310, *Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47 per Kirby P at 50-53, *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 N.S.W.L.R. 465 per McHugh JA at 476; *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84 per Brooking J; *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267 at 278-292 per Hedigan J; *The Queen v G* [2007] VSC 503 [Edited Version] esp at [14]-[16] per Whelan J; *Russo v Russo* [2010] VSC 98 at [9]-[16] & [25] per Croft J.

When the Family Law Act (Cth) commenced in 1975, it provided that cases would be heard in closed court and also prevented publication of any details of the cases. This was to preserve the privacy of the people involved, including the children, and to prevent reporting in the media of sensationalised stories about peoples' private lives. Following wide-spread criticism, the provision for closed Family Court hearings was repealed in 1983 and the prohibition on publication was substantially modified, so that now it only prohibits publication of anything which identifies people involved in the case.

### 2.7.1 Section 523 of the CYFA

Prior to the commencement of the Children and Young Persons Act 1989 ['the CYPA'], proceedings in the Children's Court were closed to the public. Without leave of the Court, the only persons who could attend were the child, a parent or guardian of the child, the child's legal representative and representatives of various service providers. That was changed in 1991 by s.19 of the CYPA and the change has been continued by s.523 of the CYFA. However, this section is subject to s.527A which makes evidence of anything said or done in a judicial resolution conference inadmissible unless the Court otherwise orders, having regard to the interests of justice and fairness.

For the same sorts of reasons as led to the opening of Family Courts, all proceedings in the Children's Court must now be conducted in open court unless the Court, on the application of a party or of any other person who has a direct interest in the proceeding or without any such application, orders that-

- (a) the whole or any part of a proceeding be heard in closed court; or
- (b) only persons or classes of persons specified by it may be present during the whole or any part of a proceeding.

See ss.523(1), 523(2) of the CYFA. See also s.125(1) of the Magistrates' Court Act 1989 (Vic). Victoria is comparatively unusual in this respect. In many other jurisdictions, including China and England, children's court proceedings are closed to the public.

So far as the presence in Court of an accused is concerned, the Court of Appeal in *Mareangareu v The Queen* [2019] VSCA 101 said at [59]: "It is a fundamental principle that, unless there is some disentitling conduct or waiver, all aspects of a trial for an indictable offence must be conducted in the presence of the accused. See *Lawrence v The King* [1933] AC 699, 708; *R v Abrahams* (1895) 21 VLR 343, 347-8; *R v Vernell* [1953] VLR 590, 596; *R v Jones* (1998) 72 SASR 281, 294-5." However, the accused may be present in Court by audio visual link or audio link in circumstances falling within Division 3 of Part IIA of the Evidence (Miscellaneous Provisions) Act 1958.



### 2.7.2 Sections 28 & 30 of the Open Courts Act 2013

In order “to strengthen and promote the principle of open justice”, the Open Courts Act 2013 (‘the OCA’) provides in s.28 a presumption in favour of hearing a proceeding in open court. The OCA does not, in its express terms, apply to the Children’s Court: see definition of “court or tribunal” in s.3. Section 523 of the CYFA remains the primary source of power. However, it is the opinion of the writer that s.528(1) of the CYFA makes those provisions of the OCA which invest jurisdiction on the Magistrates’ Court equally applicable to the Children’s Court. The Director of Criminal Law Policy of the Department of Justice and Community Safety has advised the Principal Registrar of the Children’s Court that-

“The Children’s Court was considered as the [OCA] was drafted...[I]n so far as the Children’s Court can exercise the powers of the Magistrates’ Court under s.528(1), it retains the power to make any order that the Magistrates Court can make. There was certainly no intention for the OCA to be interpreted as narrowing s.528(1) of the CYFA.”

Hence, in deciding whether or not a Children’s Court hearing should be closed in whole or part under s.523 of the CYFA, the provisions of s.30(2) of the OCA [replacing s.126(1) of the Magistrates’ Court Act 1989] are relevant by virtue of s.528(1) of the CYFA. Insofar as it is relevant, s.30(2) of the OCA provides:

“A court...may make a closed court order if satisfied as to one or more of the following grounds-

- (a) the order is necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means;
- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
- (c) the order is necessary to protect the safety of any person;
- (d) the order is necessary to avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence;
- (e) the order is necessary to avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding...”

However, in the writer’s view these five circumstances do not comprise a complete list of pre-conditions to the making of a Children’s Court closed court order under s.523 of the CYFA.

### 2.7.3 Pseudonym orders

Section 7(d) of the Open Courts Act 2013 provides that that Act does not limit or otherwise affect the making of an order or decision by a court or tribunal that—

- (i) conceals the identity of a person by restricting the way the person is referred to in open court;
- (ii) restricts the way an event or thing may be referred to in open court;
- (iii) prohibits or restricts access to a court or tribunal file.

As Dixon J noted in *AS v Minister for Immigration and Border Protection* [2014] VSC 486 at [3], such orders – known as pseudonym orders – differ from other restrictions on open justice, such as suppression orders and closed court orders. In that case the litigation guardian for a 6 year old asylum seeker living in detention in Christmas Island and proposing to issue proceedings on behalf of AS for damages for psychological harm had sought a suppression order. Dixon J did not make a proceeding suppression order but made a pseudonym order that the plaintiff only be referred to by the pseudonym AS and that all documents filed in the proceeding only refer to the plaintiff as AS. At [7] his Honour referred to and applied the following principles applicable in making pseudonym orders as distilled by J Forrest J in *ABC v D1 and Others; Ex Parte The Herald Sun & Weekly Times Limited* [2007] VSC 480 at [64]-[71]:

“First, that the principal rule is that judicial hearings should take place in open court: publicly and in open view, with no restriction on reporting. This is a fundamental precept underpinning the administration of justice.

Second, that in certain circumstances the administration of justice requires a qualification of the general rule. There will be circumstances where modifications of the general rule are necessarily made to ensure that the administration of justice is not frustrated. These exceptions are many and varied and cannot be prescriptively identified.

Third, that the test to be applied by the court in making the pseudonym order is, to use the words of the statute, where it is necessary to do so in order not to prejudice the administration of justice.

Fourth, that a court, in determining whether to make a pseudonym order, is entitled to take into account the individual considerations affecting the person seeking the order and balance those against the principal rule of open justice in determining whether the administration of justice warrants the making of the order. Relevant to these individual considerations is whether there is a real risk of the party or witness suffering psychological harm as a result of publication of his or her name or the names of other parties. Also relevant is the real risk of a party not proceeding with an action in the event that he or she or another person is identified.

Fifth, that in certain circumstances, particularly those involving sexual assaults, it may be appropriate not only to suppress the name of the plaintiff but also to suppress the name of the defendant or defendants.

Sixth, that in determining whether to make such an order, a court is entitled to take into account the fact that there will still be a reporting of the proceeding and that the hearing itself will be conducted in open court, subject to the restrictions imposed by the pseudonym order.

Seventh, in determining whether it is necessary to make such an order, usually the proofs must be cogent and will not be satisfied by mere belief on the part of a party that the order is necessary. However, in certain cases a court can, in a practical sense, act on its own experience and draw appropriate inferences.”

As Dixon J also noted at [9], the fourth point identified by Forest J, that “genuinely held fears of psychological harm upon disclosure of identity will be a relevant factor for the court’s consideration is illustrated by *TTT & JJJ v The State of Victoria* [2013] VSC 162 at [18] per Cavanough J.

In making a pseudonym order in *XYZ v State of Victoria & Anor* [2016] VSC 339, T Forrest J approved and applied the principles espoused by J Forrest J in *ABC v D1 and Others; Ex Parte The Herald Sun & Weekly Times Limited* [2007] VSC 480 and by Cavanough J in *TTT & JJJ v The State of Victoria* [2013] VSC 162 and added at [17] (emphasis mine):

“The *Open Courts Act* recognises that a pseudonym order differs from other restrictions on open justice, such as suppression orders and closed court orders. When a proceeding suppression order is made under s.17 of the *Open Courts Act*, it is necessary to comply with Part 3 of that Act. The order I propose to make will not constitute a proceeding suppression order. There will be no effect on the public nature of the proceedings and the ability of the media to fully report on proceedings will only be restricted on the issue of the identity of the proposed plaintiff and other individuals involved: see the comments in *X v Sydney Children’s Hospitals Speciality Network* [2011] NSWSC 1272 [15] and *Witness v Marsden & Anor* (2000) 49 NSWLR 429.

599 at [24]-[32]. order will not directly restrain conduct by publication, although a potential liability in contempt may arise on breach of the order [*AAA v BBB* (unreported, Supreme Court of Victoria, Ashley J, 26/08/1994, 6-7; *R v Savvas, Stevens & Peisley* (1989) 43 A Crim R 331; *Attorney-General for NSW v Mayas Pty Ltd* (1988) 14 NSWLR 342,355], but **no need arises for media proprietors to be heard in respect of either the making or the revocation of the order.** My order will be subject to any further order.”

See also *Giurina v Giurina* [2018] VSC 599 at [24]-[32]; *XBA (ex parte)* [2019] VSC 49 at [4]-[17]; *GHJ v Secretary to the Department of Justice and Community Safety* [2019] VSC 89.

#### **2.7.4 Media applications for copies of court documents in Criminal Division cases**

A protocol regarding media access to certain documents in cases in the Criminal Division of the Children’s Court has been developed by the court. Journalists making applications for access to materials are generally required to file a completed “Application for Access to Material” form which also contains a 6 point undertaking to be given by the journalist in the event that materials are released. A copy of this Application form can be downloaded from the Children’s Court website by tabbing “Forms” → “General” → “Application for Access to Material”. Whether or not all or any part of the requested material is released is entirely at the discretion of the presiding judicial officer in each case.

## 2.7.5 Media applications for copies of audio or audiovisual recordings of police interviews

There are specific prohibitions in the Crimes Act 1958 (Vic) in relation to the possession and playing of audio recordings or audiovisual recordings of police interviews and associated recordings made under ss.464B(5H), 464G or 464H. Section 464JA(2) makes it an offence punishable by level 8 imprisonment for a person other than the suspect, his/her legal representative and an authorized person acting in the course of his or her duties knowingly to possess such a recording. Section 464JA(3) makes it an offence, also punishable by level 8 imprisonment, to play such a recording except in certain circumstances. One such circumstance is if “the recording is played by an authorised person acting in the course of his or her duties”. Eighteen categories of persons are defined in s.464JA(1) as “authorized persons”. The relevant category for media applications is s.464JA(1)(i): “...a person acting under the direction of a court”. This must be read in conjunction with s.464JB(2): “A court may give directions, with or without conditions, as to the supply, copying, editing, erasure, playing or publishing of [such a] recording.”

When Parliament enacted the Open Courts Act 2013 (Vic) it chose not to include records of interview in that Act but left the question of their release totally in the hands of the Court under s.464JB(2) of the Crimes Act 1958: see *R v Hemming (Ruling 1)* [2015] VSC 351 [8] & [18] per King J. In *DPP v Angela Maree Williams (Ruling No.1)* [2015] VSC 107 – a decision approved and applied by both King J in *R v Hemming* and Lasry J in *R v Reed-Robertson* [2016] VSC 236 [20]-[22] – Hollingworth J provided at [11] the following non-exhaustive list of factors which may be relevant to the exercise of the court's discretion pursuant to s.464JB:

- “(a) the privacy of the interviewee, interviewers, and others mentioned in the interview;
- (b) whether the interviewee consents to the release;
- (c) the attitude of other people affected by the interview;
- (d) whether any person (such as victims or children) would be adversely affected by release;
- (e) whether the record of interview discloses graphic details of offending;
- (f) whether any criminal investigations or trials are ongoing;
- (g) whether release may undermine the integrity of the criminal justice process;
- (h) the level of contemporaneous public interest in the case;
- (i) whether release will enhance the fair and accurate reporting of the case;
- (j) the principle of open justice (where the record of interview has been played in open court); and
- (k) the nature of the proposed publication.”

Applying this test ultimately all three applications for release of audiovisual recordings were refused.

In the Children's Court the restriction on publication of proceedings set out in s.534 of the CYFA – discussed below – creates an additional hurdle for a media applicant seeking copies of audio or audiovisual recordings of police interviews of accused children.

## 2.8 Restriction on publication of proceedings

### 2.8.1 Statutory prohibition on publication of identifying particulars-s.534 of the CYFA

The *quid pro quo* for the general opening of the Children's Court is to be found in s.534(1) of the CYFA [previously in s.26 of the CYP A] under which it is an offence punishable by fine or imprisonment for a person to publish or cause to be published-

- (a) except with the permission of the President, a report of any proceeding in the Court or of a proceeding in any other court arising out of a proceeding in the Court that contains any particulars likely to lead to the identification of-
  - (i) the particular venue of the Children's Court, other than the Koori Court (Criminal Division) or the Neighbourhood Justice Division, in which the proceeding was heard; or
  - (ii) a child or other party to the proceeding; or
  - (iii) a witness in the proceeding; or
- (b) except with the permission of the President, a picture as being or including a picture of a child or other party to, or a witness in, a proceeding referred to in (a) above; or
- (c) except with the permission of the President (or – per s.534(3) – of the Secretary granted in special circumstances in relation to a child who is the subject of a family reunification order, care by Secretary order or long-term care order), any matter that contains any particulars likely to lead to the identification of a child as being the subject of an order made by the Court.

Section 534(1A) provides that on application to the Court, a magistrate may exercise the powers of the President under ss.534(1)(a), (1)(b) or (1)(c) and grant permission for the requisite publication if the magistrate is satisfied that-

- (a) the circumstances giving rise to the request for permission to publish are an emergency; and
- (b) publication is reasonably necessary for the safety of-
  - (i) the child, other party or witness referred to in s.534(1); or
  - (ii) any other person in the community.

Section 534(4) of the CYFA lists 8 particulars – not intended to be exhaustive – which are deemed to be particulars likely to lead to the identification of a person.

In *Herald & Weekly Times Pty Ltd v AB* [2008] VChC 3 at [14]-[19] Judge Grant outlined the legislative background and rationale for s.534 and its predecessor provisions as follows:

[14] Prior to the commencement of the CYPA matters heard in the Children’s Court of Victoria were heard in closed court. This is still the case in some jurisdictions throughout the world.

[15] The United Nations Standard Minimum Rules for the Administration of Justice (also known as the Beijing Rules) of November 1985 state-

‘8.1 The juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to him or her by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.’

[16] The official commentary to the Rules recognises how young people are particularly susceptible to stigmatization. There is a reference to criminological research into labelling processes. This research has provided evidence of the detrimental effects resulting from the permanent identification of young people as criminal or delinquent.

[17] The *Child Welfare Practice and Legislation Review Report* of 1984 (often referred to as the Carney Report) recommended that proceedings in the Children’s Court should be open to both the public and the media. The ‘trade off’ for opening the court was to recommend a bar on reporting or disseminating any identifying information of children and families. At p.409 of the report there is the following analysis – ‘The mischief which it is unanimously agreed must be avoided at all costs is the dissemination of information which would, or which could, identify and embarrass individual children and families appearing before the court.’

[18] The recommendations in the Carney Report were influential in the development of the CYPA. The changes to law introduced by that Act opened the Children’s Court to the public for the first time in its history. There were, however, two important riders on the open justice principle. In s.19 the court was provided with a wide unfettered power to close the court in appropriate circumstances. Section 26 contained a prohibition as to the publication of identifying information of the children and parties and witnesses involved in the court’s proceedings without the permission of the head of the Children’s Court.

[19] In the Criminal Division of the court the limit on identification of the child/young person subject to proceedings was in line with established principle. It was designed to protect a young person appearing in the Criminal Division from the indignity of being labelled a criminal and the stigma that attaches to that description. In the Second Reading Speech for the CYPA the then Minister stated ‘The rights of children and young people who come before the court are clearly established in the proposed legislation. The Bill provides that proceedings must be comprehensible to children and their families, respect cultural identity and minimize stigma.’ Section 534 of the CYFA significantly reproduces the old s.26. One sub-section not found in the old Act is s.534(5)...It allows publication of accounts of proceedings of the court where those accounts have been approved by the President...Section 534(5) was included in the legislation at the request of the court and I am satisfied that its intended purpose was limited to the court’s use of its own website for the publishing of de-identified decisions.”

It is rare for the President to give permission for identifying material to be published pursuant to ss.534(1)(a), 534(1)(b) or 534(1)(c) of the CYFA. In the past seven years, the only cases in which such permission has been given have involved:

- abandoned children where details were permitted to be published in an attempt to locate a parent;

- children who were missing or had absconded in an attempt to locate them;
- children believed to be in need of protection but whose whereabouts are currently unknown; and
- a case in which a TV channel was permitted to identify a child - with consent of child and family – in a program highlighting the success of the child's rehabilitation.

In *ABC and DOHS & others* [2014] VChC 1 an application was made to Judge Couzens to publish reports of a proceeding in the Children's Court, including pictures of parties in de-identified form. Counsel agreed that 'likely' in the context of particulars 'likely to lead to the identification of' should be taken to mean 'a real possibility that cannot be sensibly ignored' as opposed to being 'more likely than not': see in *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 583. His Honour adopted dicta of the Court of Appeal in *Howe v Harvey* (2008) 20 VR 638 at 653 that-

"We are inclined to think that s.26 [of the CYP A] would be breached if the particulars which are published are sufficient to enable those who know a child (for example his or her school friends or neighbours) to identify him or her as the child who has been involved in court proceedings, even though a general reader would not do so."

Judge Couzens held [at pp.12-13] that a pixilated/distorted/partial picture of a child or other party or witness in a proceedings in the Children's Court was subject to the prohibition in s.534(1)(b) whether or not publication of the picture is likely to lead to the identification of the child, party or witness. His Honour said: "In my view, if the legislature had intended to limit the prohibition to only pictures that were likely to lead to the identification of a child, other party or witness, it would have been expected to include those words as it did with (1)(a) and (c)." However, his Honour ultimately granted the ABC's application and permitted the publication of reports – which included a partial picture of the child and a distorted picture of the child's father – for the following reasons [at p.16]:

"Ultimately, the question of whether or not to grant the ABC's application is a balancing exercise between the paramount interests of the children who are the subject of the report and the public's right to know about what is reported to have happened to the children whilst in the care of DHS.

Where, as in this case, I am satisfied that the risk of the children being identified is at best minimal, the public's interest in knowing what is said to have happened to these highly vulnerable children in the care of the State weighs the balance firmly in favour of publication."

In *HWT v DM & Ors* [2016] VChC 3 an application had been made to Judge Chambers for permission to publish pixilated pictures and video recordings of children who have been involved in proceedings in the Criminal Division of the Children's Court and in respect of whom the Court has sentenced, or has deferred sentencing, under the provisions of the CYFA. The application was made in the context of the involvement of the HWT in a "Youth Summit" to be convened by the Chief Commissioner of Police on 21/07/2016. The application was opposed by the three young persons whose pixilated photographs were proposed to be published for the following factual reasons (set out at [12]):

"[T]hey fear being identified by family members, friends and associates who are not aware of their role in this offending, or by other members of their community, including other young people held in detention, if their images (even where pixilated) accompany the feature article....[They] are ashamed of their offending behaviour, and submit that the shame and embarrassment to them and to their families will be exacerbated by the publication of the images. They fear becoming the 'face' of the problems leading to the Youth summit being convened."

In refusing the HWT application her Honour held-

[15] "...I intend to adopt the approach of Judge Couzens to my consideration of this application. In doing so, it is instructive that Parliament has not utilised the language it purposely adopted for s.534(1)(a) and (1)(c). Section 534(1)(b) does not limit the prohibition of images of a child, a party or a witness involved in proceedings in the Children's Court to those likely to lead to their identification. It is a broader prohibition, prohibiting the publication of such images without the permission of the President, even where the images may not lead to the identification of those whose image is represented in picture.

[16] Clearly, in exercising my discretion under s.534(1) of the Act, I must have regard to a number of competing interests.

[17] [I]n considering any proceedings under the Act, it is necessary to have regard to, and to the extent possible, give effect to the purposes of the Act contained in s.3, which includes making provision in relation to children who have been charged with, or been

found guilty of offences. Parliament has sought to achieve this objective by creating a distinct sentencing regime for children with discrete sentencing considerations set out at s.362 of the Act, in marked contrast to the sentencing considerations applicable to adults under the *Sentencing Act 1991*. These considerations include those aimed at achieving the important objective of rehabilitating the child while minimising the stigma to the child resulting from a Court determination.

[18] The distinctive nature of the Children's Court criminal jurisdiction was recently considered by the Victorian Court of Appeal in the decision of *Webster (a Pseudonym) v The Queen* [2016] VSCA 66... at [7]-[9]...

[19] The desirability of avoiding stigma to a child is also emphasised in the procedural guidelines set out at s.522 of the Act which requires the Court, as far as practicable, to minimise the stigma to the child and his or her family in any proceeding, including an application under Part 7.5. The Court is also required to have regard to the expressed wishes of the child.

[20] Against this, the case of the applicant is framed in the context of the public interest in promoting an understanding of and facilitating public debate surrounding the nature and extent of criminal offending by a small cohort of young offenders.

[21] In my view, this application must be considered in the context of the harm sought to be ameliorated by s534(1) of the Act. As stated in *Howe v Harvey (2008) 20 VR 638 at 651* the provision is intended to protect against 'the stigmatisation and interference with the privacy of the child and his or her family caused by identifying them as participants in court proceedings'. In so stating, the Court echoed the fundamental rights of a child as outlined in Article 40 of the UN Convention of the Rights of the Child to 'have his or her rights to privacy fully respected at all stages of the proceedings'.

[22] Here, even where the facial images of the offenders are pixilated or distorted, there are other identifying features of the offenders that are relevant to my consideration. These include, but are not limited to, distinctive clothing or clothing generally worn by the offender or their physical characteristics including their height, build, gait and particular mannerisms that may otherwise lead to identification. This is relevant to my consideration of the potential stigmatising impact of publication of the images on the respondents.

[23] The HWT is able to report...on the nature and extent of the offending conduct leading to the charges before the Court, provided it does so in a manner that is not likely to lead to their identification. A question arises whether the public interest in understanding the nature and extent of the offending is furthered by the incorporation of the images and CCTV footage. Moreover, that the public interest in being so informed overrides the competing interest in avoiding stigma to the child, protecting the child's privacy and facilitating the important objective of furthering the child's rehabilitation to achieve the twin objectives of reducing the risk of further offending and promoting community safety.

[24] In respect of this application, having the benefit of considering the draft feature article and the detail contained in that article regarding the offences, I do not consider that the public interest or public understanding is significantly advanced by the incorporation of even heavily redacted images of the offending. Certainly, not to the extent that it overrides the legislative objective of protecting child offenders from stigmatisation and promoting the rehabilitation of those who are the subject of proceedings in the 'distinctive' criminal jurisdiction of this Court."

In *Victoria Police v. AY & NA (pseudonyms)* [Melbourne Children's Court, 29/05/2019] the respondents were 2 of 4 youths who were believed to have committed two aggravated home invasions, an attempted carjacking, a carjacking and associated offences. Applications were made to Judge Chambers by Victoria Police to publish identifying details of the respondents whose whereabouts were unknown. Holding that the circumstances giving rise to the applications are an emergency and that publication is reasonably necessary for the safety of other persons and members of the community, her Honour granted the applications for permission to publish particulars likely to lead to the identification of the child in the form of the draft media release produced by Victoria Police together with the accompanying photographs. Pursuant to s.534(1A) of the CYFA her Honour made self-executing orders in these terms but held that upon the location and arrest of the child the permission to publish will no longer apply and the permission granted by the order will be taken to be revoked.

In 2009 the then President, Judge Grant, had taken advice from the Director of Public Prosecutions and agreed with his advice that the publication of photographs of children or witnesses involved in Children's Court proceedings, "whether pixilated or otherwise altered to prevent the identity of the [person] being revealed, would breach [s.534(1)(b) of the CYPA]". By letter dated 28/05/2009 his Honour requested the Strategic Communications Advisor to the Supreme Court of Victoria to publish a warning to all media outlets about this interpretation of s.534(1)(b). A copy of that Media Warning can be downloaded from the Children's Court website by tabbing "About Us" → "Media Information" → "Warning to the Media".

There have been several prosecutions of persons or bodies corporate alleged to have breached s.534 of the CYFA or s.26 of the CYPA. One such prosecution was *Peter Harvey v Channel 7 Melbourne Pty Ltd, The Herald and Weekly Times Pty Ltd, Nationwide News Pty Ltd & Others*, a decision of Magistrate Lisa Hannan [now Judge Hannan of the County Court] on 15/05/2006. This prosecution followed the publication of identifying particulars of a 14 year old boy who had made an application at Melbourne Children's Court alleging irreconcilable differences with his mother. Her Honour held at pp.9-11 that an offence against s.26 is a strict liability offence. At pp.15-18 she was unable to be satisfied beyond reasonable doubt that those of the defendants who were reporters or news readers had the necessary degree of control over what was ultimately broadcast or telecast to bring them within the scope of "publish" or "cause to be published" in s.26. She ultimately dismissed the charges against 12 of the 17 defendants. She found the charges proved against the remaining 5 defendants and imposed significant fines. Appeals and cross-appeals against Her Honour's decision were dismissed by the Supreme Court: *Howe & Ors v Harvey; DPP v Quist & Ors* [2007] VSC 130. Ensuing appeals and cross-appeals were dismissed by the Court of Appeal: *Howe & Ors v Harvey & DPP & Ors* (2008) 20 VR 638; [2008] VSCA 181.

## 2.8.2 Suppression orders

Leaving aside the restriction in s.534 of the CYFA on publication of identifying particulars and/or pictures, the legal principles applying to suppression orders are the same for the Children's Court as for the Magistrates' Court.

Suppression orders are the antithesis of the open justice principle. In *R v Robert Scott Pomeroy* [2002] VSC 178, a case involving an order suppressing publication of certain aspects of an adult criminal proceeding in the Supreme Court, Teague J said at [7]:

"The open justice principle has been applied in many cases and in many differing situations. It requires that courts must be open, and that what is said and done in the courts can be published with only such restrictions as are necessary in the interests of justice. The media is vigilant to see that it continues to be applied. But the courts, and particularly superior courts, are also vigilant to see that it continues to be applied, because the operation of the principle is an essential attribute of a court. The leading authority on the scope of, and the reasons for, the principle is *Scott v Scott* [1913] AC 417. The application of the principle has often been endorsed as in *Dickason v Dickason* (1913) CLR 50, and *Russell v Russell* (1976) 134 CLR 495."

The superior courts had an inherent power at common law to make suppression orders but in the absence of express statutory power inferior courts or tribunals did not: *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267 at 278-292 per Hedigan J. That common law power has been abrogated by s.5(1) of the Open Courts Act 2013 ("the OCA") and s.4 of that Act creates a presumption in favour of disclosure of information. The statutory powers to make suppression orders previously vested in the Supreme Court by ss.18-19 of the Supreme Court Act 1986, in the County Court by s.80 of the County Court Act 1958 and in the Magistrates' Court by s.126 of the Magistrates' Court Act 1989 have been repealed by ss.54, 45 & 51 of the OCA respectively.

In lieu the Supreme Court, the County Court and the Magistrates' Court now have power under s.17 of the OCA to make a "proceeding suppression order" to prohibit or restrict the disclosure by publication or otherwise of-

- (a) a report of the whole or any part of a proceeding;
- (b) any information derived from a proceeding.

The grounds for making a "proceeding suppression order" are set out in s.18(1) of the OCA and are identical to those in s.30(2) for the making of a closed court order. So far as is relevant, s.18(1) provides:

“A court...may make a proceeding suppression order if satisfied as to one or more of the following grounds-

- (a) the order is necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means;
- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
- (c) the order is necessary to protect the safety of any person;
- (d) the order is necessary to avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence;
- (e) the order is necessary to avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding...”

In *IMO an Application by “The Age” and Ors re: R v Carl Anthony Williams* [2004] VSC 413 at [14] Kellam J, citing dicta of McPherson J in *Ex parte the Queensland Law Society* [1984] Qd R 166 at 170 and of McHugh J in *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477, reiterated the ‘necessity’ test for the application of s.18 of the Supreme Court Act 1986:

“That [suppression] orders should be made in cases only of clear necessity is established beyond any argument by the decision of the Court of Appeal of the Supreme Court of Victoria in *An Application by Chief Commissioner of Police (Vic) for leave to appeal* [2004] VSCA 3 when the Court in a unanimous judgment stated that orders suppressing publication of court proceedings should be made only when ‘clearly necessary’ {at [30]}. I observe that that decision was upheld by the High Court.”

For a partly redacted discussion of ss.17(b) and 18(1)(a) & (c) of the Open Courts Act 2013 – including whether or not a non-publication order was necessary to prevent prejudice to the administration of justice or was necessary to protect safety of any person – see *AB (a pseudonym) v CD (a pseudonym) & EF (a pseudonym)* [2019] VSCA 28 esp. at [64]-[80] & [85]-[89].

Section 19 of the OCA allows a “court” to make a “proceeding suppression order”-

- on its own motion; or
- on application of a party to the proceeding; or
- on application by any other person considered by the court to have a sufficient interest in the making of the order.

In *DPP v QPX* [2014] VSC 211 Bongiorno JA made a 5 year proceeding suppression order preventing disclosure of the identity of the accused who had pleaded guilty to infanticide and the identities of the three related children. His Honour had expert evidence from a psychiatrist who had examined the accused as well as a senior psychologist which expressed opinions, *inter alia*, about the potential negative impact of disclosure on the psychological health of the accused and the surviving children. At [15] his Honour said:

“The grounds upon which a suppression order relevant to this case might be made are set out in s 18 of the [OCA]. They include the ground set out in s 18(1)(c), that the order is necessary to protect the safety of any person. Accordingly, the order must be *necessary*, not merely ‘convenient, reasonable or sensible’: *Hogan v Australian Crime Commission* (2010) 240 CLR 651, [31]–[33]. Without the order, the safety of a person or persons must be endangered. The protection of a person’s safety implies the defending or shielding of that person from injury or danger. That danger might involve danger of physical harm or it might involve danger to a person’s psychological health or a combination of both. There is no warrant to qualify the meaning of the word ‘safety’ in s.18(1)(c) by confining it to physical safety. Psychological harm to a person may be as serious or worse than physical harm. In any event psychological harm may well create a serious danger of physical harm, as the evidence in this case suggests.”

In *Re Williams (a pseudonym) (No 2)* [2016] VSC 364, in the course of hearing a bail application by an adult facing serious criminal charges Maxwell ACJ on his own motion concluded that a “proceeding suppression order” should be made under s.19(1)(a) of the OCA in order “to prevent a real and substantial risk of prejudice to the proper administration of justice [which] cannot be prevented by other reasonably available means”: s.18(1)(a). Exercising a right under s.19(2)(e) to appear and be heard on the hearing of the subsequent application by the DPP for a suppression order, counsel for The Herald and Weekly Times Pty Ltd ingenuously advised the Court that his client “only had an



interest in opposing the [suppression] application in the event that bail was to be granted". At [14] & [16] Maxwell ACJ was strongly critical of this one-sided approach to reporting:

"If it is important for the community to know that bail has been granted in a case where there are concerns about interference with witnesses, it must be equally important for the community to know that bail has been refused precisely because of those concerns...

The public interest would be much better served, in my view, if the community was made aware of the full range of bail decisions which are made including, in particular, decisions to refuse bail and decisions to grant bail subject to onerous conditions. Promoting that awareness is a shared responsibility of the Court and the media: *WCB v The Queen* (2010) 29 VR 483, 492 [27]. Properly informed in that way, the community would be entitled to have a high degree of confidence in the careful and conscientious decision-making undertaken on their behalf."

Section 20 of the OCA empowers a "court" to make an interim order in any application for a "proceeding suppression order".

In addition, s.26 of the OCA gives the Magistrates' Court power to make a "broad suppression order" prohibiting the publication of any specified material, or any material of a specified kind, relevant to a proceeding that is pending in the Court if in its opinion it is necessary to do so in order not to-

- (a) prejudice the administration of justice; or
- (b) endanger the safety of any person.

The following provisions of the OCA also apply to suppression orders:

SECTION	SUBJECT MATTER
21, 26(2), 26(3) & 26(4)	Where a suppression order applies.
22, 26(5)	Provides exceptions for the conduct of the proceeding, recovery or enforcement of any penalty imposed in the proceeding or informing persons of the existence of suppression orders or interim orders
23, 27	Offence to contravene proceeding suppression order, broad suppression order or interim order. Maximum penalty for an individual is level 6 imprisonment or 600 p.u. or other. Maximum penalty for a body corporate 3000 p.u.

The OCA does not, in its express terms, apply to the Children's Court: see definition of "court or tribunal" in s.3. However, it is the opinion of the writer that s.528(1) of the CYFA makes those provisions of the OCA which invest jurisdiction on the Magistrates' Court equally applicable to the Children's Court. The Director of Criminal Law Policy of the Department of Justice and Community Safety has advised the Principal Registrar of the Children's Court that-

"The Children's Court was considered as the [OCA] was drafted. It was not specifically listed as a 'court' able to make suppression orders, as the provisions of the CYFA already provided a statutory ban to the publication of material coming out of the Court - rather than providing the power to make a suppression order.

In developing the provisions about broad suppression orders, the aim was generally to replicate the current powers of the Courts, rather than to create any new powers. So in so far as the Children's Court can exercise the powers of the Magistrates' Court under s.528(1), it retains the power to make any order that the Magistrates Court can make. There was certainly no intention for the OCA to be interpreted as narrowing s.528(1) of the CYFA."

The relationship between s.534 of the CYFA [formerly s.26 of the CYPA] and the power of the Supreme Court to make suppression orders [now under s.17 of the OCA, formerly under ss.18-19 of the Supreme Court Act 1986] is illustrated by the case of *R v SJK & GAS* [2002] VSC 94. Bongiorno J had sentenced each of the child accused to a term of imprisonment of 6 years with a non-parole period of 4 years for manslaughter of a frail 73 year old woman. At the commencement of the plea on 11/10/2001 His Honour had made an order pursuant to the inherent jurisdiction of the Supreme Court and ss.18-19 of the Supreme Court Act 1986 (Vic) that "any report of a proceeding in this Court that contains any particulars likely to lead to the identification of SJK and GAS is prohibited until further order". On a Crown appeal the Court of Appeal increased the sentences to 9 years with a non-parole period of 6 years: see *DPP v SKJ & GAS* [2002] VSCA 131. The Court of Appeal did not interfere with the suppression order. On 15/08/2006 solicitors for the Herald and Weekly Times Ltd, being

apparently unaware of the existence of the suppression order of Bongiorno J, applied to the President of the Children's Court pursuant to s.26(1)(a) of the CYPA for permission to publish the names and photographs of SJK & GAS. Judge Grant dismissed the application, observing, *inter alia*, that he would not consider the application because of the suppression order made by Bongiorno J. On 07/09/2006 solicitors on behalf of the Herald and Weekly Times Ltd filed a summons in the Supreme Court seeking an order that the suppression order made by Bongiorno J on 11/10/2001 be vacated. Gillard J held that the suppression order should not be discharged: see *R v SJK & GAS* [2006] VSC 335. In the course of his decision Gillard J held-

- (i) {At [32]-[34]} Section 26 of the CYPA applies to criminal proceedings which have been heard and finalized in the Supreme Court {*DPP v R & T* [Supreme Court of Victoria-Cummins J, unreported, 15/08/1995] referred to}.
- (ii) {At [35]-[37]} Section 26 of the CYPA does not oust the jurisdiction of the Supreme Court founded on both ss.18 & 19 of the Supreme Court Act 1986 (Vic) and its inherent jurisdiction to make a suppression order. The jurisdiction vested in the President of the Children's Court by s.26 of the CYPA is a concurrent jurisdiction, it does not "cover the field".
- (iii) {At [39]-[43]} The principle protecting a young person from being identified in a criminal proceeding is well established and applies throughout the common law world. The observations of Rehnquist J in *Smith v Daily May Publishing Company* (1979) US 97 at 106-108 apply with equal force in Victoria:
  - "While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favour of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented."
  - "It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity."
  - "Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public."
  - "By contrast, a prohibition against publication of the names of youthful offenders represents only a minimal interference with freedom of the press."
- (iv) {At [46]} If the Supreme Court order was discharged, the applicant would still have to make an application to the President of the Children's Court for permission under s.26 to identify the prisoners and publish a photograph of them.
- (v) {At [49]} Bongiorno J thought it appropriate that a suppression order ought to be made. When the Court of Appeal increased the sentence, rehabilitation was a factor relevant to the sentencing exercise. The Supreme Court should continue to have control over the question of publication of the names of the prisoners. When each sentence has been fully completed [i.e. not just the non-parole period], a different view may be taken but whilst the sentences are still operating it is inappropriate to remove the control of the Supreme Court over the question of publication of the identity of each prisoner.

As at September 2011, the suppression order made by Bongiorno J in this case remained on foot: see *R v SJK & GAS* [2011] VSC 431.

For a discussion of some relevant authorities and relevant considerations for the exercise of a judicial discretion to order suppression pursuant to s.126 of the Magistrates' Court Act 1989 [now s.17 of the OCA], see the judgment of Williams J in *The Age Company Ltd v Dupas* [2003] VSC 312 at [10], [21], [28]-[33] & [34]-[40], the judgment of Hansen J in *AB v The Magistrates' Court of Victoria* [2003] VSC 378 at [22] & [30]-[37], the judgment of Kaye J in *The Age Co Ltd & Ors v The Magistrates' Court of Victoria & Ors* [2004] VSC 10 at [12]-[13] & [19]-[20]; the judgment of Kaye J in *DPP (Cth) v Corcoris and The Age (No.2)* [2005] VSC 142 and the judgment of Whelan J in *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [2004] VSC 194 at [10]-[18] & [22]. See also *Herald & Weekly Times Ltd & Others v Magistrates' Court of Victoria* [1999] 2 VR 672; *Commonwealth DPP v Magistrates' Court of Victoria* [2011] VSC 593.

For a discussion of the powers of a Supreme Court judge to make suppression orders whether pursuant to ss.18-19 of the Supreme Court Act 1958 (Vic) [now s.17 of the OCA] or in its former inherent jurisdiction, see the joint judgment of Winneke P, Ormiston & Vincent JJA in *In the Matter of*

*an Application by Chief Commissioner of Police (Vic.) for Leave to Appeal* [2004] VSCA 3 at [2]-[3] & [23]-[47] and its references to judgments of the Supreme Court of Canada in *R v Mentuck* [2001] 3 SCR 442 & *R v O.N.E.* [2001] 3 SCR 487. [This decision of the Victorian Court of Appeal was upheld by the High Court of Australia.] See also *BK v ADB* [2003] VSC 129 per Nettle J; *R v Goldman* [2004] VSC 167 at [15]-[31] per Redlich J; *DPP v Carl Williams & Ors* [2004] VSC 209 at [15]-[20] per Cummins J; *AB v Attorney-General* [2005] VSC 180 per Hargrave J; *R v Condello (Ruling 2)* [2006] VSC 27 per Osborn J; *ANN v ABC & XYZ (No 1)* [2006] VSC 348 per Hollingworth J; *R v Strawhorn (No 2)* [2006] VSC 433 (Habersberger J); *The Queen v G* [2007] VSC 503 [Edited Version] (Whelan J); *General Television Corporation Pty Ltd v DPP & Others* [2008] VSCA 49 at [21]-[22]; *AX v Stern* [2008] VSC 400 at [4]-[7] per Warren CJ; *BY v Australian Red Cross Society & Others* [unreported, Supreme Court of Victoria-Vincent J, 31/10/1991]; *ABC v D1 & Ors; Ex Parte The Herald & Weekly Times Limited* [2007] VSC 480 at [65]-[71] per Forrest J; *AB v D1* [2008] VSC 371 per Kyrou J; *R v Mokbel (Ruling No.2)* [2009] VSC 652 per Kaye J; *R v Mokbel (Ruling No.3)* [2009] VSC 653 per Kaye J; *Lew v Priester (No.2)* [2012] VSC 153 per Davies J.

In *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 Nettle J invoked s.77RE(1)(a) of the Judiciary Act 1903 (Cth) to make non-publication orders in circumstances where the risk of harm to children associated with a party to the proceeding were held to be "acute".

In *Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154 the Court of Appeal (Whelan, Beach & Weinberg JJA) allowed in part an application to vacate or vary suppression orders, holding that revocation of the orders entirely would increase risk but varying the orders to permit disclosure to and by the Royal Commission in accordance with Inquiries Act 2014 and the Witness Protection Act 1991. In this process the Court applied *AB v CD* [2019] VSCA 28 and *AB v CD; EF v CD* [2019] HCA 6.

### 2.8.3 Section 10(5) of the Witness Protection Act 1991

Section 10(5) of the Witness Protection Act 1991 (Vic) prohibits – under a penalty of level 5 imprisonment – a person without lawful authority from disclosing information about the identity or location of a person who is or has been a participant in the witness protection program or that compromises the security of such a person. In *DPP & Anor v Dale & Ors* [2010] VSC 88 Beach J analysed the proper construction and operation of s.10(5) and its relationship with s.126 of the Magistrates' Court Act 1989 [now s.17 of the OCA]. At [48]-[49] his Honour said:

"A potential or threatened breach of s 10(5) of the *Witness Protection Act* does not mandate that in all circumstances the Court must make a non-publication order under s 126 of the *Magistrates' Court Act* (or its equivalent, ss 18 and 19 of the *Supreme Court Act*). It remains necessary in each case for the Court to consider the terms of s 126 of the *Magistrates' Court Act*. That is, the question is whether, in all the circumstances that have been established, is it necessary to make a non-publication order in order not to prejudice the administration of justice or endanger the physical safety of any person (referring only to paragraphs (b) and (c) as relevant in this case).

However, it must be said that it would be a very unusual case where a threatened breach of s 10(5) did not lead to the conclusion that a non-publication order was necessary (giving full allowance to the fact that the requirement that the order be 'necessary' imposes a high standard)."

## 2.9 Bail justices

Under s.14(1) of the Honorary Justices Act 2014 (Vic) [replacing s.120(1) of the Magistrates' Court Act 1989 (Vic)] the Governor-in-Council may appoint eligible lay persons as bail justices. Eligibility criteria are set out in s.14(2).

Under s.18 members of the public service who hold a "prescribed office" classification are bail justices without the need for any other appointment provided they have completed a course of training prescribed for the purposes of this section to the satisfaction of the Attorney-General. The "prescribed office" classifications are set out in reg.10 of the Honorary Justices Regulations 2014 [S.R.No.110/2014].

The functions and powers of bail justices are set out in the Bail Act 1977 (Vic) [No.9008] and in the CYFA and include the hearing and determination of out-of-sessions applications:

- for remand or bail in relation to adult & child defendants; and
- for interim accommodation orders in relation to children [this Family Division role is temporarily suspended during the COVID-19 pandemic: see s.600ZA of the CYFA].

Although their role is of importance for the Children's Court, bail justices do not fall within the definition of "Court" in s.504(2) of the CYFA, namely that "the Court consists of the President; the magistrates, the judicial registrars and the registrars of the court."

For more information about the roles of bail justices and Justices of the Peace see:

- <http://www.justice.vic.gov.au/justices> (maintained by the Victorian Department of Justice and Community Safety);
- <http://www.rvahj.org.au> (maintained by the Royal Victorian Association of Honorary Justices).

## 2.10 Court services

A number of organisations provide services for and/or at the Children's Court. These include the following:

### 2.10.1 Youth Justice

At Melbourne Children's Court and at many other Children's Courts the Youth Justice Division of the Department of Justice and Community Safety has officers in attendance on each court sitting day to provide support, advice and practical assistance (which may include assistance in arranging accommodation) for young accused attending or brought before the Court. The officers also coordinate arrangements between regional offices of the Department and young persons who have been placed on supervisory sentencing orders by the Court or in respect of whom a deferral of sentence has been ordered. Youth Justice officers are also involved in the diversion. There is also a dedicated diversion officer – entitled Children's Court Youth Diversion Coordinator – present at each Children's Court Criminal Division sitting. The role of the diversion officer is to undertake diversion assessments and make recommendations to the presiding judicial officer in relation to individual diversion plans.

### 2.10.2 Child Witness Service

The Child Witness Service [CWS] – which commenced operation in 2007 – is a specialist agency of the Department of Justice and Community Safety but is separate from the courts. The role of the CWS is to offer specialised support and practical preparation to assist children and young persons under the age of 18 years who are victims of or witnesses to a criminal offence and who may be required to give evidence in the Magistrates' Court, the Children's Court, the County Court or the Supreme Court.

The CWS' specialist team of six social workers and psychologists help prepare child witnesses for court and support them during and after the case, fully explaining the case and providing a link with police and prosecutors and victims' services. The CWS aims to reduce the trauma and stress which may be experienced by a child witness by:

- preparing the witness for the process of providing his or her evidence;
- familiarising the witness with the court process and personnel;
- supporting the witness through the criminal proceedings and court hearing; and
- supporting the principal carer throughout the legal process.

However, although the CWS supports and prepares child witnesses on an individual basis, the evidence is never discussed.

A dedicated unit, with child-friendly surrounds, the CWS also provides remote witness facilities by means of which a child witness is able – if the court so orders – to give evidence without being in the presence of the accused person in the courtroom or to have his or her evidence pre-recorded by a court officer.

The CWS does not provide a counselling service but can make referrals to appropriate agencies if additional support is requested.

Although the CWS is based in the Melbourne legal precinct, the service is state-wide and will support children giving evidence in rural regions as well as those giving evidence in metropolitan Melbourne.

Referrals to the CWS can be made by anyone. This includes Victoria police members, the Office of Public Prosecutions, legal professionals, other professionals or directly by the child or young person or his or her family. This can be done by phone, fax or email:

Phone: 1300 790 540

Fax: 9603 9202

Email: [childwitnessservice@justice.vic.gov.au](mailto:childwitnessservice@justice.vic.gov.au).

The CWS considers it important that a child or young person who may be required to give evidence is referred to the service as soon as possible after charges have been laid. It does not matter whether a decision has been made about whether the child or young person will need to give evidence.

The CWS has been assisting approximately 500 child witnesses in Victoria each year, many of whom are victims of serious crimes such as sexual assault or physical assault.

Ms Vicki Bahen is the manager of the service. Ms Bahen has extensive experience in the Department of Health & Human Services' child protection branch and has worked closely with the Children's Court and Family Court.

### **2.10.3 Court Network**

Since 2003 Court Network has provided volunteer "Networkers" each sitting day at Melbourne Children's Court and most other Children's Court locations to give information, assistance and support to court users.

### **2.10.4 Victoria Legal Aid**

There are duty lawyers from Victoria Legal Aid at all Children's Courts in the Melbourne metropolitan area and on mention days at all other Children's Courts in Victoria. They are available for children in family or criminal cases, and parents of children in family cases who need legal advice or representation in court. Most children are able to obtain legal aid free of charge.

For more information, call Victoria Legal Aid on (03) 9269 0120 or 1800 677 402 (for country callers) between 9.00 am and 5.00 pm. Multilingual telephone information is provided in English and 11 community languages at certain times each week.

### **2.10.5 Interpreters**

Qualified and accredited interpreters are available when needed and can be booked through the registry of the relevant Children's Court. Arrangements must be made with as much notice as possible to ensure that an appropriate interpreter is available.

### **2.10.6 Salvation Army**

For many years the Salvation Army had maintained a daily information and support service at the Melbourne Children's Court and some suburban & regional Children's Courts and has provided a wide range of services for clients of the Court. The Court is sorry that the Salvation Army has reprioritised its mission and is no longer able to provide services for the Court.

Special tribute should be paid to Brigadier Doreen Griffiths who provided generations of clients with support and succour at Melbourne Children's Court and to Major Vicki McMahon who was transferred to Bridgehaven after supporting children, parents and family members at Melbourne Children's Court for 13 years.

