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## 3.1 Roles of judicial officers

**"I've been a judge for 21 years. The voices have kept at me and at me. Mellifluous, strident, sad, cool, persuasive, angry – voices demanding justice - voices insisting upon the law – some voices wanting both. "**  
Robert Shenton French (Former Chief Justice of the High Court of Australia)

**"Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."**  
Socrates

The President and Magistrates preside over all hearings – other than dispute resolution conferences - in both Divisions of the Children's Court of Victoria. There is no distinction in judicial role between the President and any of the magistrates. Each has the same powers and the same obligations. Each can be assigned to any case. Each has the same orders at his or her disposal. The only difference is that one of the avenues of appeal from a decision of the President is different from those of an appeal from a decision of a magistrate. Neither the President nor the Magistrates wear wigs or gowns in the courtroom.

About 5% of all applications which are filed in the Family Division proceed to a final contested hearing in which evidence is called, although a significantly greater percentage involve at least one contested interim hearing. Only about 2% of charges filed in the Criminal Division proceed to a final contested hearing, but again a significantly greater percentage involve at least one contested application for bail.

The role of the judicial officer is to determine the dispute between the parties by applying the relevant law to particular fact situations. In *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors (No 2)* [2011] VSC 153 at [12] Pagone J said of this: "The overriding duty for the Court must be to achieve justice between the parties and to ensure that it is satisfied that the burden which a party bears is adequately and reliably discharged." In this process, the judicial officer is required by law to accord procedural fairness – sometimes described as "natural justice" – to all parties. In *SZBEL v Minister for Immigration and Multicultural Affairs* [2006] HCA 63 the High Court of Australia held that the Tribunal which had refused to grant the Iranian appellant a protection visa had not accorded the appellant procedural fairness in that it had not given the him a sufficient opportunity to give evidence, or make submissions, about what turned out to be two of three determinative issues arising in relation to the decision under review. In its joint judgment at [32] the High Court referred with approval to the following dicta of Northrop, Miles & French JJ in the Federal Court of Australia in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592:

"It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues* and to be informed of the nature and content of adverse material." [emphasis added]

However at [48] the High Court also approved the limitation enunciated by Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369:

"The rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental

processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."

In *Mehmet Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492; [2007] VSCA 181 the Court of Appeal, applying the principle in *Stead v State Government Insurance Commission* (1986) 161 CLR 141, granted a new trial as a consequence of a trial judge's reliance on his observations of the appellant's movements in court behind counsel which he had not disclosed to counsel. At [43] the Court said that the obligation of a judicial officer to provide a party with an opportunity to be heard extended to the following circumstance:

"Where the risk of an adverse finding being made does not necessarily inhere in the issues to be decided or where the facts or the inference which the judge contemplates drawing from the facts and which gives rise to such a risk is unknown to the party, the fundamental rule of fairness requires the decision-maker in some way to draw attention to the existence of that risk."

In *Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337 at [86]-[88], Bell J said:

"A trial judge has an overriding duty to ensure a fair trial. This emerges with crystal clarity and moral force from *Dietrich v R* (1992) 177 CLR 292...Deane & Gaudron JJ made clear the requirement for a 'fair trial' went further than a trial 'according to law'. To Deane J the requirement 'transcends the content of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law' [at p.326].

What is required to produce a fair trial depends on the circumstances. In some cases it may be necessary to have interpreters, acceptable custodial facilities or a special court venue: (1992) 177 CLR 292 at 331 per Deane J, 363 per Gaudron J. In other cases, evidence may have to be excluded because of its unfair prejudicial effect [*ibid* at 363 per Gaudron J] or an adjournment granted to allow pre-trial publicity to abate. This list is far from exhaustive and the categories are not closed. Indeed 'the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances' [*ibid* at 328 per Deane J; see also *Jago v District Court of New South Wales* (1989) 168 CLR 23, 57]. The general principle is that the courts possess all the necessary powers to ensure a fair trial [*Barton v R* (1980) 147 CLR 75, 96 cited in *Dietrich v R* (1992) 177 CLR 292, 327], one aspect of which is the power to give assistance to a litigant in person."

In *Austin v Dobbs* [2019] VSC 355 at [86]-[90] – upheld by the Court of Appeal [2019] VSCA 296 – Ginnane J discussed the role of a judicial officer when dealing with self-represented litigants:

"When dealing with self-represented litigants, judicial officers must ensure, to the extent possible, a fair trial and 'equality of arms' by providing due assistance to such litigants. Such a duty recognises the disadvantage self-represented litigants face in Court, principally due to their lack of professional legal skills and their lack of objectivity. As Bell J stated in *Tomasevic v Travaglini* (2007) 17 VR 100 at [139]-[141]:

'Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.'

Although this statement is directed towards trials and final hearings, the duty of a judicial officer extends to interlocutory and procedural steps that occur before, and lead up to, the trial or final hearing.

However, the duty of the judicial officer must be viewed in light of the inherent restraints posed by the adversarial system in which they operate. In *Tomasevic* at [142] Bell J went on to state that:

'The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances - it must ensure a fair trial, not afford an advantage to the self-represented litigant.'

More recently in *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624; [2017] VSC 61 at [134] Bell J elaborated upon this the limits of the assistance that a Judge can provide:

'However, under both the common law and s 24(1) [of the Charter of Human Rights and Responsibilities Act 2006 (Vic)] there is a boundary that cannot be crossed by virtue of the judicial nature of the function of the court or tribunal, which requires maintenance of both the appearance and reality of neutrality in the proceeding between the parties. Under the common law, the limits of this boundary are marked out by the fundamental requirement that advice and assistance provided by the court or tribunal must not be such as to give rise to a reasonable apprehension of bias in the mind of a properly informed fair-minded observer. Under s 24(1), the limits are marked out by the fundamental requirements of judicial independence, impartiality and fairness and respect for the human rights of other participants.'

In my opinion, had the Magistrate done what the plaintiff asserted he should have done, the 'boundary' identified by Bell J would have been crossed. By raising applications that he thought that the plaintiff should have made, the Magistrate would have ceased being an impartial arbiter and would have instead begun to act as advocate for the plaintiff. To strike out a proceeding to assist a self-represented litigant, in the absence of an application by a party, would result in the surrender of judicial neutrality."

In relation to procedural fairness see section 3.5.6.4 below and see generally *J v Lieschke* (1987) 162 CLR 447 at 457 per Brennan J (Mason, Wilson, Deane & Dawson JJ agreeing); *R v Fisher* [2009] VSCA 100 at [65]; *Pantorno v The Queen* (1989) 166 CLR 466 at 473 per Mason CJ & Brennan J; *Friend v Brooker* [2009] HCA 21 at [115] per Heydon J; *MH6 v Mental Health Review Board and Another* [2009] VSCA 184 at [20]-[36]; *[CL] v [RP] (Ruling)* [2011] VSCA 297; *DPP v Sanding* [2011] VSC 42 at [135]-[147] per Bell J; *AB v Magistrates' Court at Heidelberg* [2011] VSC 61 at [93] per Mukhtar AsJ; *Zigouris v Sunshine Magistrates' Court* [2012] VSC 183 at [24]-[27] per Zammit AsJ; *DOHS v Children's Court of Victoria & Ors* [2012] VSC 422 at [12]-[21], [29] & [32] per Dixon J; *Danne v Coroner* [2012] VSC 454 at [20]-[26] per Kyrou J; *Eaton v Dental Board of Australia* [2012] VSC 510 at [25]-[32] per Kyrou J; *Trkulja v Markovic* [2015] VSCA 298 at [37]-[39] per Kyrou & Kaye JJA and Ginnane AJA; *Roberts v Harkness* (2018) 85 MVR 314; *Davies v The Queen* [2019] VSCA 66 at [518]-[581], esp. [523] per Kaye, McLeish & T Forrest JJA; *David Hingst v Construction Engineering (Aust) Pty Ltd* [2019] VSCA 67 at [67]-[76] per Priest AP & Beach JA; *Shadi Farah v The Queen* [2019] VSCA 300 at [72]-[80]; *Celsius Fire Services Pty Ltd v Magistrates' Court of Victoria & anor* [2019] VSC 835 at [36]-[44].

In determining cases judges and magistrates must also act impartially and, although it rarely happens, a party can request that a judicial officer disqualify himself or herself from hearing a matter on the ground of actual bias or a reasonable apprehension of bias. The Guide to Judicial Conduct published for the Council of Chief Justices of Australia in 2002 states the guiding principles to be [at p.8]:

- "Whether an appearance of bias or a possible conflict of interest is sufficient to disqualify a judicial officer from hearing a case is to be judged by the perception of a reasonable well-informed observer. Disqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers;
- The parties should always be informed by the judicial officer of facts which might reasonably give rise to a perception of bias or conflict of interest but the judicial officer must himself or herself make the decision whether it is appropriate to sit."

Some examples where disqualification might be appropriate include cases where the judicial officer:

- was related to or had significant personal knowledge of one of the parties or a witness;
- had a direct or significant indirect interest in the outcome of the litigation (eg. if a corporation was a party and the judicial officer was a shareholder);
- had strongly expressed pre-conceived views about a relevant issue; or
- intervened in the course of the proceedings in an unwarranted and excessive manner or appeared to be taking sides.

However, the expression of tentative views during the course of a case does not necessarily amount to bias. In *Concrete Pty Limited v Parramatta Design & Developments Pty Ltd* [2006] HCA 55 the Full Court of the Federal Court had allowed an appeal from the decision of the primary judge on the grounds that in his conduct of the case the primary judge had demonstrated apparent bias. The High Court restored the judgment. At [112] Kirby & Crennan JJ said:

“Sometimes judicial interventions and observations can exceed what is a proper and reasonable expression of tentative views. Whether that has happened is a matter of judgment taking into account all of the circumstances of the case: *Antoun v The Queen* (2006) 80 ALJR 497 at 502 [22] per Gleeson CJ, 503-504 [27]-[30] per Kirby J, 508-509 [56]-[57] per Hayne J, 517 [81] per Callinan J. However, one thing that is clear is that the expression of tentative views during the course of argument as to matters on which the parties are permitted to make full submissions does not manifest partiality or bias: *Bienstein v Bienstein* (2003) 195 ALR 225 at 232 [34] per McHugh, Kirby & Callinan JJ.”

At [180] Callinan J said:

“Taken cumulatively, his Honour's interventions and reasons for judgment do not give rise to an apprehension of bias. Critical, strong and candid they may have been, but excessively so they were not. To some extent they may be taken to be expressions of exasperation, unfortunately so perhaps, but as a matter of degree, still falling short of apparent bias.”

In *R v Fisher* [2009] VSCA 100 there had been an exchange of emails between a sentencing judge's associate and the Office of Public Prosecutions during a period of adjournment of the plea. The emails contained information bearing upon substantive issues in the plea. Although holding that there had been no unfairness in the sentencing judge continuing after the out of court communication had been disclosed, Redlich & Dodds-Streton JJA cautioned at [20] against the use of out of court material:

“It is an undoubted principle that a judge's decision should be made on the basis of the evidence and arguments in the case, and not on the basis of information or knowledge which is acquired out of court. In *Re Media, Entertainment and Arts Alliance; ex parte Hoyts Corporation Pty Ltd* (1994) 119 ALR 206, 210 Mason CJ and Brennan, Deane, Dawson and Gaudron JJ, described it as an aspect of ‘the rule against bias’. Their Honours said that this aspect of the rule is similar to the rule of procedural fairness, but not identical because the question is whether in the circumstances, the parties or the public ‘might entertain a reasonable apprehension that information or knowledge which has been independently acquired will influence the decision’.

In *R v Al-Assadi* [2011] VSCA 111 the 21 year old applicant was found guilty by a jury of two counts of sexual penetration of a child under the age of 16 years but was acquitted of 13 other sexual offences against the same 15 year old complainant. Two of the grounds of appeal were that the trial judge (i) failed to disqualify herself for ostensible bias and (ii) failed to advise counsel for the applicant that she had earlier given evidence for the Crown in committal proceedings for sexual offences where her daughter was a complainant of a similar age and in similar circumstances with a sentence pending in a case of *R v Balassis* [2009] VSC 127. At [25]-[31] Buchanan JA (with whom Hansen & Tate JJA agreed) rejected the assertion by the applicant that the trial judge had displayed “excessive solicitude” to the complainant, saying at [31]: “Her Honour quite properly sought to ensure that a young witness was not overawed or frightened by a strange, formal and potentially hostile environment. Critically, the complainant, unlike the applicant, was not represented by counsel.” However, at [32]-[40] the Court of Appeal went on to uphold the first ground of appeal, saying at [39]:

“The mere fact that a judge is related to a victim of crime is not sufficient to disqualify the judge from presiding at a trial of a person accused of a like crime: cf. *R v Goodall* (2007) 15 VR 673. In the present case, however, the relationship of the judge to the victim of the first crime, the similar age and circumstances of the victims and the emotional involvement of the judge might have led a fair minded observer to think the similarity in the crimes and victims might have induced in her Honour a sympathy for the alleged victim of the offences with which the applicant was charged which prevented her from bringing an impartial mind

to the conduct of the trial. In this respect I think it is significant that the judge underwent the harrowing experiences of searching for her child overnight and then dealing as best she could with her daughter's distress."

Other cases in which principles relating to disqualification for bias have been discussed include *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Clenae v ANZ Banking Group Ltd* [2000] HCA 63; *Anne Wintle v Stevedoring Industry Finance Committee & Others* [2002] VSC 39; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Re JRL: Ex parte CJL* (1986) 161 CLR 34; *Vakautu v Kelly* (1989) 167 CLR 342; *Webb v R* (1994) 181 CLR 44; *Johnson v Johnson* (2000) 201 CLR 488 at 506; *Mond & Mond v Dyan Rabbi Isaac Dov Berger* [2004] VSC 45; *Gascor v Ellicott* [1997] 1 VR 332; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Webb v The Queen* (1993) 181 CLR 41; *Re Keeley: Ex parte Ansett Transport Industries (Operations) Pty Ltd* (1990) 94 ALR 1; *Antoun v The Queen* (2006) 80 ALJR 497 at [22], [27]-[30], [56]-[57] & [81]; *Smits v Roach* [2006] HCA 63; *Commonwealth Bank of Australia v Taylor* [2008] VSC 3; *Anderson v National Australia Bank* [2007] VSCA 172; *R v Rich (Ruling No.21)* [2009] VSC 32; *Slaveski v Victoria* [2010] VSC 97; *R v Sonnet* [2010] VSCA 315 at [15]-[27]; *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; *Velissaris v Bruno Distributors Pty Ltd* [2011] VSC 395; *Moorfields Community & Ors v Stanislawa Bahonko* [2011] VSCA 295; *Bahonko v Moorfields Community* [2012] VSCA 89; *R v Vasiliou* [2012] VSC 216 at [9]-[11]; *Flavel v Morsby* [2012] VSC 433; *Waddington v Magistrates' Court of Victoria & Kha (No. 2)* [2013] VSC 340 at [51]-[61]; *Wain & Ors v Drapac & Ors (No 3)* [2014] VSC 23; *Katherine Jackson v The Queen* [2019] VSCA 65; *AB v XYZ Pty Ltd* [2019] VSC 788 at [38]-[58]; *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; *In the Matter of Kornucopia Pty Ltd (No 2)* [2019] VSC 802; *Gild v The Queen* [2017] VSCA 367; *Bayley North (a pseudonym) v DPP (Cth)* [2020] VSCA 1 at [39]-[49]; *Elliott v Lindholm* [2020] VSC 567; [2020] VSCA 260.

In *Grima v MacCallum* [2014] VSC 473 on two occasions early in the summary hearing of criminal charges the presiding Magistrate had warned the accused in relation to the issue of costs if he was unsuccessful. The accused brought an application for judicial review alleging that there was a reasonable apprehension that the Magistrate was biased against him. During the review proceeding the Prothonotary brought into court an email message sent on behalf of the Magistrate which made a number of contentious assertions, including criticism of the accused. Allowing the review, Bell J said:

"[5] As established by *R v The Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, 35-6, the usual and proper practice for the court or tribunal to take in judicial review proceedings is not to participate as a party but to abide the decision of the court. There may be occasions where it is appropriate for the court or tribunal to provide factual or like information to the court. But it is generally not appropriate for the court or tribunal to 'enter the fray' and make contentious submissions as to the merits of the issue in the case, as her Honour did in the present case.

[6] The foundation of this principle is that it is very difficult, and usually impossible, for the tribunal or court to participate in a judicial review proceeding without creating a reasonable apprehension of bias. In most cases, the only safe way of protecting the continuing jurisdiction of the court or tribunal is to abide by the outcome of the application. It is the responsibility of the party opposing the application to present evidence and make submissions as to the matters in issue, including evidence and submissions of the kind to which her Honour referred in the forwarded email. Moreover, a forwarded email is hardly an appropriate way for a court or tribunal to present evidence or make submissions to this court, even given that the application was being heard in the Practice Court."

Judicial officers must be aware not only of what the relevant legislation says, but of how it has been interpreted and applied in other decided cases. If there is a decision made by another magistrate with which a particular magistrate disagrees, the latter is not bound to follow the interpretation or application of the law as decided in that case, but would need to show clearly why he or she disagrees. Where the decision is one made by the Supreme Court of Victoria or the High Court of Australia, the President and magistrates of the Children's Court are bound to accept that interpretation of the law and apply it.

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## 3.2 Judicial Independence

**"Judicial independence is the freedom of judges [and magistrates] from legislative and/or executive interference in the performance of their functions. The Australian system seeks to ensure that members of the judiciary are impartial, independent, and that they are able to apply the law even-handedly in a fair and unprejudiced way."**

Sir Daryl Dawson, former Justice of the High Court of Australia

Judicial independence is important in safeguarding each individual person's rights and ensuring that the rule of law, fundamental to our democratic society, is upheld. The basic protections of judicial independence are security of tenure and adequate remuneration which is beyond legislative or executive interference. See Chapter III, ss.71-72 Commonwealth of Australia Constitution Act 1900.

A number of statutory provisions enshrine judicial independence. For example, a magistrate is appointed until the age of 70. He or she can only be suspended or removed from office by the Governor in Council if the Supreme Court has first determined incompetency or impropriety in one or more of the limited circumstances set out in s.11(2) of the Magistrates' Court Act 1989. See also s.9 of the County Court Act 1958 (Vic) [No.6230]. Further, his or her salary is determined by the judicial remuneration tribunal, a body independent of the executive. And so on.

## 3.3 Children's Court Judicial Powers

The judicial powers of Children's Court judicial officers are conveniently summarized in the following four categories.

### 3.3.1 Powers conferred by the Magistrates' Court Act 1989

Section 528(1) of the CYFA provides that the Children's Court has and may exercise in relation to all matters over which it has jurisdiction all the powers and authorities that the Magistrates' Court has in relation to matters over which it has jurisdiction. Note also that under s.528(2) of the CYFA, the Magistrates' Court Act 1989 (except s.58 & Part 5 - Civil proceedings) and the regulations made under that Act apply with any necessary modifications, unless the contrary intention appears, to the Children's Court and proceedings of any Division of the Court.

Included in these powers are powers to deal with Contempt in face of the Court [s.133] and Contempt of Court [s.134]. For some examples of the latter see *R v Nationwide News Pty Ltd* [2018] VSC 572 and the annexure thereto. See also *Moiria Shire Council v Sidebottom Group Pty Ltd (No.3)* [2018] VSC 556.

### 3.3.2 Powers conferred by the Vexatious Proceedings Act 2014

In s.3 of the Vexatious Proceedings Act 2014 ['the VPA'] 'court' is defined as-

- (a) the Supreme Court;
- (b) the County Court;
- (c) the Magistrates' Court;
- (d) in relation to an order under this Act that relates to intervention order legislation, the Children's Court.

In s.3 of the VPA, 'intervention order legislation' is defined as-

- (a) the Crimes (Family Violence) Act 1987 as in force immediately before its repeal;
- (b) the Family Violence Protection Act 2008;
- (c) the Personal Safety Intervention Orders Act 2010; and
- (d) the Stalking Intervention Orders Act 2008 as in force immediately before its repeal.

Because the jurisdiction of the Children's Court under the VPA is so expressly and restrictively defined, the writer is of the view that the Children's Court probably cannot rely on s.528(1) of the CYFA to 'piggy-back' on to the additional jurisdiction that the Magistrates' Court has under the VPA. Sections 19, 36, 39 & 74 of the VPA give the Children's Court power to make four types of orders restraining litigation but only in relation to proceedings conducted under intervention order legislation-

- an Extended Litigation Restraint Order;
- an Acting in Concert Order;
- an Appeal Restriction Order; and
- a Variation or Revocation Application Prevention Order.

For details of these four types of orders, see section 6.15.



### 3.3.3 Powers conferred by the CYFA or any other legislation

A Children's Court judicial officer has any powers expressly or impliedly conferred by the CYFA or any other legislation {for example the Family Violence Protection Act 2008}; see *R v McGowan & Another; ex parte Macko & Sanderson* [1984] VR 1000; *Willis v Magistrates' Court of Victoria & Buck* {MC9/97}.

This includes power to adjourn proceedings, on application of a party or on the Court's own motion, to such times and places, for such purposes, and on such terms as to costs or otherwise as he or she considers necessary or just [s.530(1) of the CYFA]. Note however that s.530(8) of the CYFA provides: "The Court must proceed with as much expedition as the requirements of this Act and a proper hearing of the proceeding permit." Section 530(9) provides: "The Court should avoid the granting of adjournments in Family Division proceedings to the greatest extent possible." Section 530(10) provides: "The Court must not grant an adjournment of a proceeding in the Family Division unless it is of opinion that- (a) it is in the best interests of the child to do so; or (b) there is some other cogent or substantial reason to do so." Section 531(11) provides that: "In deciding whether and for how long to adjourn a proceeding under this section, the Court must have regard to the requirements in ss.530(8), 530(9) & 530(10)."

In *PA v Karavidas & Ors* [2001] VSC 185 an uncle of a teenage child who had been charged with offences involving sexual penetration of the child had applied to the Children's Court for the contested hearing of a protection application to be adjourned until after the determination of the criminal charges against him. The magistrate had refused to grant the adjournment sought. There is conflicting authority on this issue. In *Atkins v. Minister of Community Welfare and Crowe* (1988) 34 A Crim R 26 a decision to adjourn a protection hearing pending the hearing and determination of criminal charges against a party was upheld by the Full Court of South Australia. In *Re K.* (1994) FLC 92-461 the Full Court of the Family Court took the opposite view, refusing to adjourn the Family Court proceeding pending the hearing and determination of criminal charges against a party. The magistrate had preferred *Re K.* to *Atkins' Case*. At [20] Beach J agreed: "Having regard to the circumstances in this case I would have adopted the same course." In *Re K.* at p.544 the Full Court had said:

"The question whether the court should make interim or final orders depends ultimately upon the circumstances of the individual case. However, that decision is to be made solely against the criterion of the welfare of the child. **The circumstance alone that one of the parties has criminal charges pending would not justify an adjournment. In most cases the child's welfare would not be served by his or her custody remaining in abeyance over what might be a substantial period of time pending the outcome of proceedings in the criminal courts. Generally a child is benefited by certainty and regularity in his or her life.**" [emphasis added]

"...So far as the 'right of silence' and any wider question of potential prejudice in the party's subsequent criminal proceedings are concerned, we consider that the position was correctly stated by Young CJ, namely that it would be a rare case where that alone would justify an adjournment."

In *PA v Karavidas & Ors* Beach J made the following observations at [15]-[17] about the comparative inviolability of a magistrate's decision to grant or to refuse an adjournment:

[15] "It is rare that this court will disturb a decision of a magistrate to grant or refuse an adjournment.

[16] The matter was clearly spelled out by the Court of Appeal of New South Wales in *Cucu v. District Court of New South Wales* (1994) 73 A Crim R 240. At p.246, Kirby, P., as he then was, said:

'It is rare that a court such as this - either in appeal or in judicial review - will disturb the decision to grant or refuse an adjournment. This is because such decisions are essentially discretionary in character. They are made, as necessity requires, quickly and as the justice of the application strikes the decision-maker. The reasons for not disturbing such decisions are too well known to require lengthy elaboration: see, eg *Sali v SPC Ltd* (1993) 67 ALJR 841 at 848-849; *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246 at 250; *Adamopoulos* (at 77); *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 712.

These principles do not, however, mean that this Court forfeits its responsibility to consider a claim that a refusal of an adjournment has miscarried and/or that it has occasioned such a serious risk of miscarriage of justice that the Court must intervene.'



However, His Honour then held that the Judge of the District Court who refused the adjournment in that case had erred and held that there should be a re-hearing.

[17] At p.249 Meagher JA said:

'I have read Kirby P's judgment in draft, and reluctantly agree with it. I say 'reluctantly', because in my view a trial judge's decision to grant or refuse an adjournment ought be almost inviolable.'

See also *McColl v. Lehmann* [1987] VR 503."

In *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27 the High Court held that:

- case management principles were relevant to applications for adjournment and amendment; and
- statements by an earlier High Court in *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146; [1997] HCA 1 "which suggest only a limited application for case management do not rest upon a principle which has been worked out in a significant succession of cases" and "should not be applied in the future": see the joint judgment of Gummow, Hayne, Crennan, Kiefel & Bell JJ at [111] with which French CJ agreed at [6] & [30].

In his judgment – with which the majority did not differ – French CJ saw the issue of adjournments as not a matter confined solely to the interests of the parties but as also having an element of public interest. At [5] & [30] his Honour said:

[5] "In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system."

[30] "It might be thought a truism that 'case management principles' should not supplant the objective of doing justice between the parties according to law. Accepting that proposition *JL Holdings* cannot be taken as authority for the view that waste of public resources and undue delay, with the concomitant strain and uncertainty imposed on litigants, should not be taken into account in the exercise of interlocutory discretions... Also to be considered is the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification, whether they be for adjournment, for amendments giving rise to adjournment, or for vacation of fixed trial dates resulting in the resetting of interlocutory processes."

### 3.3.4 Implied powers to govern the process of the Court

The Court also has such implied powers as are necessary to govern the process of the Court: see for example the judgment of Dawson J in *Grassby v The Queen* (1989) 168 CLR 1 at 16 where his Honour said: "[N]otwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise."

#### 3.3.4.1 Power to prevent an abuse of the Court's own judicial process

This includes power to prevent an abuse of the Court's own judicial process, as to which see the judgment of Kaye J in *Mokbel v DPP (Vic) & Ors* [2008] VSC 433 at [24]-[39] and the cases cited therein. See also *Neville Donohue v The Queen (No.3)* [2020] VSCA 302. It also includes in a "rare and exceptional" or an "extreme" case power to grant a permanent stay: see *Hadju v Breguet* [2008] VSC 185 at [15]-[18]; *Champion v Richardson* [2003] VSC 482 at [38]; *Jago v District Court of NSW* (1989) 168 CLR 23 at 76; *Pound v The Queen* [2019] VSCA 279 at [114]-[115].

An example of a permanent stay granted in the Criminal Division of the Children's Court is the case of *MDC* [unreported, Children's Court of Victoria, 08/12/2010]. All of the charges against the accused had been withdrawn immediately prior to a final contest. Before leaving court, the accused made a statement in writing to police implicating an adult co-accused. Later the accused attended the co-accused's committal to give evidence but the prosecution elected not to require him to give evidence. Subsequently the prosecution recommenced the proceedings against the accused. In granting a permanent stay of the charges, Magistrate Levine:

- adopted dicta from the cases of *Williamson v Trainor* [1992] 2 Qd R 572, *R v Croydon Justices; Ex Parte Dean* [1993] QB 769, *R v Mohi* (2000) 78 SASR 55 and *R v Georgiadis* [1984] VR 1030;
- distinguished the cases of *Swingler* 80 A Crim R 471 and *R v Glencross* [1999] SASC 563; and
- held that in the circumstances of this case the prosecution of the charges for the second time was an abuse of the process of the Children's Court.

An example of a permanent stay not granted in the Magistrates' Court is the case of *Prestia v Machok* [unreported, Sunshine Magistrates' Court, 28/10/2010]. On 27/04/2010 the informant filed 5 charges against the accused in respect of offences including an assault alleged to have been committed on 13/09/2008. The accused was 17y8m at the time of the alleged offences but was not charged until he was 19y3m. This delay meant that the accused was no longer within the jurisdiction of the Children's Court and hence did not have an opportunity to take benefit of the rehabilitative nature of the CYFA. In refusing a permanent stay of the charges, Magistrate Jones:

- held [at p.10] that the Magistrates' Court has power to stay criminal proceedings when the Court believes it appropriate to do so: see *DPP v Shirvanian* (1998) 102 A Crim R 180 per Mason J; *Edebone v Allen* [1991] 2 VR 659; the five factors that must be considered are set out in *Jago v District Court of New South Wales* (1989) 168 CLR 23 and may be summarized as: [1] fairness to the accused; [2] the public interest in the disposition of charges of a serious nature; [3] the conviction of those guilty of crime; [4] the need to maintain public confidence in the administration of justice; [5] the interest of victims of crime in seeing that justice is done.
- held [at p.8-9 & 20] that s.23(2) of the Charter of Human Rights and Responsibilities Act 2006 – providing that an accused child must be brought to trial as quickly as possible – only applied to Mr Machok from the time he was served with the charge and summons and that there was “no delay in bringing the matter before the Court once the accused was served”; in so holding, Magistrate Jones preferred the reasoning of Magistrate Capell in a judgment on s.23(2) of the Charter [unreported, Horsham Children's Court, 22/10/2008] to the contrary reasoning of Magistrate Somes in *Perovic v CW (Young Person)* [unreported, A.C.T. Children's Court, 01/06/2006].

Another example where a permanent stay was not granted is the case of *PG v R* [2010] VSCA 298. The accused had been charged with 11 counts of indecent assault and four counts of taking part in an act of sexual penetration with a child under 10. He had previously been convicted of indecent assault on one of the complainants. He sought to have permanently stayed the subsequent prosecution for 15 similar offences committed against the same complainant and her sister during a similar but not the same period of time. At the time the accused was prosecuted for and pleaded guilty to the previous indecent assault in 1993, the prosecution was unaware of the conduct the subject of the later allegations made in 2005 & 2006. In the circumstances of this case, the Court of Appeal held that the unavailability of a record of interview, the period of delay and the use of the previous conviction as tendency evidence did not make the subsequent proceedings an abuse of process. The Court applied dicta of Brennan J in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 49-50:

“The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances. If a power to grant a permanent stay were to be exercised whenever a judge came to the conclusion that prejudice might or would be suffered by an accused because of delay in the prosecution, delay in law enforcement would defeat the enforcement of the law absolutely and prejudice resulting from delay would become a not unwelcome passport to immunity from prosecution. Refusal by a court to try a criminal case does not undo the anxiety and disability which the pendency of a criminal charge produces, but it leaves the accused with an irremovable cloud of suspicion over his head. And it is likely to engender a festering sense of injustice on the part of the community and the victim.”

At [23] the Court of Appeal said: “Any disadvantage which may be suffered by the applicant must be weighed against the interests of the community in ensuring the prosecution of persons alleged to have committed serious criminal offences. This is particularly the case where the victims were children at the time of offending.”

### 3.3.4.2 *Res judicata*, cause of action estoppel, issue or claim estoppel & *Anshun* estoppel

Related to the issue of abuse of the processes of the court are the associated doctrines of:

- *res judicata* {Latin for “a thing decided”};
- cause of action estoppel, issue or claim estoppel {estoppel is Norman French for “stopper” or “bung”};
- *Anshun* estoppel {named after the case of *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 and sometimes also known as the principle in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313}.

The purpose of all of these doctrines is to ensure the finality of judicial decisions. If any judicial tribunal in the exercise of its jurisdiction delivers a judgment which is in its nature final and conclusive, the judgment is said to be *res judicata*. If in any subsequent proceedings – unless they be of an appellate nature – in the same or in any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

All of these doctrines were discussed by the High Court in *Clayton v Bant* [2020] HCA 44. The case involved an appeal from a judgment of the Full Court of the Family Court of Australia on appeal from a judgment of a single judge of that Court. The wife is a citizen of Australia. The husband is a citizen of the United Arab Emirates. They met and commenced living together in 2006 in Dubai. There they married in 2007 in a Sharia court. They separated in 2013 with the wife and child remaining in Australia. The husband initiated divorce proceedings in the Personal Status Court of Dubai which granted him an “irrevocable fault-based divorce” and ordered the wife to repay an amount of advanced dowry and costs. The question before the High Court was whether the ruling of the Dubai court made in favour of the respondent husband against the appellate wife had the effect of precluding the wife from pursuing property settlement and spousal maintenance proceedings against the husband under the *Family Law Act 1975* (Cth). The judge at first instance had held that the Dubai judgment did not bar the wife’s Australian proceedings and refused the husband’s application for a permanent stay: see *Clayton & Bant* [2018] FamCA 736. The Full Court held that it did: see *Bant & Clayton [No 2]* (2019) FLC ¶93-925. Contrary to the view of the Full Court, the High Court unanimously held that the Dubai ruling did not bar the wife’s Australian proceedings. At [26] in their joint judgment Kiefel CJ, Bell & Gageler JJ held that the Dubai order did not give rise to a *res judicata*:

“Once it is appreciated that the rights in issue in the property settlement proceedings and in the spousal maintenance proceedings are the statutory rights of the wife to seek orders under ss 79(1) and 74(1) of the Act, it is apparent that the ruling made by the Dubai Court cannot give rise to a *res judicata* in the strict sense in which that term continues to be used in Australia: *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 516 [20]; *Zetta Jet Pte Ltd v The Ship Dragon Pearl [No 2]* (2018) 265 FCR 290 at 294 [15][16], 296 [24]-[26]. The rights created by ss 79(1) and 74(1) cannot ‘merge’ in any judicial orders other than final orders of a court having jurisdiction under the Act to make orders under those sections. The rights of the wife to seek orders under ss 79(1) and 74(1) continue to have separate existence unless and until the powers to make those orders are exercised on a final basis and thereby exhausted: *Mullane v Mullane* (1983) 158 CLR 436 at 440; *In the Marriage of Florie* (1988) 90 FLR 158 at 165-167; *Hickey and Hickey and Attorney-General for the Commonwealth of Australia (Intervener)* (2003) FLC ¶93-143 at 78,387-78,388 [44]-[48]; *Strahan v Strahan* (2009) 241 FLR 1 at 25-28 [106]-[113].”

At [27]-[28] & [31]-[32] their Honours also held that no form of estoppel had any operation:

[27] “For the ruling made by the Dubai Court to preclude the wife from pursuing the property settlement proceedings and the spousal maintenance proceedings, that preclusion can occur, if at all, through the operation of the common law doctrine of estoppel. No argument is made that the operation of that common law doctrine is excluded by the scheme of the Act.

[28] Two forms of estoppel are potentially applicable. One is that sometimes referred to as ‘cause of action’ estoppel: *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517 [22]. The terminology has been recognised as problematic given the range of senses in which the expression ‘cause of action’ tends to be used: see *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 610-612; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508. The relevant sense is that of title to the legal right established or claimed: *Blair v Curran* (1939) 62 CLR 464 at 532; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 611. See also *Baltimore Steamship Co v Phillips* (1927) 274 US 316 at 321, quoted in *Philip Morris Inc v*

*Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 514. Especially in a statutory context such as the present, the form of estoppel would be better referred to by the more generic description of 'claim' estoppel: cf Casad and Clermont, *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (2001) at 9-10. The other form of estoppel is most commonly referred to in Australia as 'Anshun estoppel', after *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, although the Full Court chose to refer to it as the 'Henderson extension'."

[31] "In the manner in which the application for the permanent stay appears to have been conducted, the husband did not deign to prove the unreasonableness of the choice made by the wife. His case for the existence of *Anshun* estoppel seems to have been put on the basis that the fact that the wife *could* have asserted a right in the Dubai proceedings meant that she *should* have asserted that right in the Dubai proceedings in the sense that it was unreasonable for her not to have done so. That approach to *Anshun* estoppel has rightly been said to involve 'fundamental error': *Champerslife Pty Ltd v Manojlovski* (2010) 75 NSWLR 245 at 247 [4].. As was pointed out in *Port of Melbourne Authority v Anshun Pty Ltd*, 'there are a variety of circumstances ... why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings eg expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few' (1981) 147 CLR 589 at 603.

[32] But the problems with the husband's reliance on estoppel are not confined to his failure to engage with the unreasonableness element of *Anshun* estoppel. His more fundamental problem lies in his failure to establish the requisite correspondence between the rights asserted by the wife in the property settlement proceedings and the spousal maintenance proceedings and any right the existence or non-existence of which was or might have been both asserted in the Dubai proceedings and finally determined by the Dubai Court. Absent such a correspondence of rights, neither form of estoppel can have any operation."

In *DOHS v Ms B & Mr G* [2008] VChC 1, a case involving 4 boys – KB aged 7, TG aged 3 and twins WB & JB aged 10 months – the live applications included applications to extend custody to Secretary orders for the older boys and protection applications for the twins who had been out of parental care since birth. At the commencement of the contested case, counsel for DOHS made an application, said to have been based on the principle of **issue estoppel**, for an order that the Secretary be permitted to tender absolutely 19 protection and disposition reports without making the authors of the reports available for cross-examination. Three of the reports in question were prepared by DOHS for earlier proceedings in 2005 & 2006 involving KB & TG and 15 were prepared in 1998-2000 for cases involving half-siblings A, B, C & D. The application was opposed by counsel for the mother, father & KB. Magistrate Power refused the application, drawing at pp.24-25 a clear distinction between **issue estoppel** and **procedural fairness** and giving the following *extempore* reasons (emphasis added):

"This case is limited to the question of the appropriate level of access between the children and their parents. In order to determine that, the Court will probably – albeit not necessarily – have to consider whether or not a permanent care caseplan for the children is appropriate or alternatively whether planning should be engaged in for the children's return to their parents. Hence, some of the history of the parents and their children will no doubt be relevant to the issue of the appropriate level of access.

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

The Department relies on the doctrine of issue estoppel to support that submission. In my view the Department's submission is not correct. The governing principles of issue estoppel were stated by the High Court in *Blair v Curran* (1939) 62 CLR 464, a case that was involved with the determination of a will although that is no reason why the principles are not equally applicable in proceedings in this Court. The leading judgment to which I have been referred is that of Dixon J who said at pp.531-532:

'A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. **The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion...Nothing but**

**what is legally indispensable to the conclusion is thus finally closed or precluded.** In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.'

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

I have sat in this Court for about 13 years over a 15 year period dealing with thousands of cases involving Departmental reports. Sometimes I make a decision without accepting all of the material that is contained in the Department's reports. Sometimes it appears wrong or irrelevant. Sometimes it is obviously wrong, as in the case of the most recent report dated 01/04/2008 which refers to the applications before the Court as including breach of custody to Secretary orders and applications for guardianship orders, neither of which are known to the law. Sometimes not all of the contents of reports are accepted by the Court because objectively they seem improbable but there is frequently still enough material which is accepted to enable the Court to make the order that the Department is seeking or that the parties have agreed should be made. Sometimes – quite often in contested hearings – I have made findings of fact that certain material in the Department's reports is simply wrong. [There were a number of examples which ultimately came to light in which material in several of the 19 DOHS' reports was either misleading or wrong or both.] It is not uncommon for Departmental reports to be written to achieve an outcome and for material which does not support that outcome to be omitted from the reports. I could give dozens of examples of that over the past 5 years. The Department's submission, if it is adopted, would require me to accept as 'gospel truth' and as the last word everything which is contained in the 19 reports which it seeks to tender without calling the respective writers. But I don't know what factual material in those reports each of the judicial officers who made the orders has relied on – or not relied on – in making the orders. **Hence the relevance to this case of the limitation put by Dixon J in *Blair v Curran*: 'The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion...Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded.'**

In this case what is closed or concluded is any suggestion by any party that the findings or orders made by the Court on previous occasions were not appropriate orders and can be the subject of challenge in this hearing. I don't understand that anyone is seeking to do that anyway but taking it to its logical conclusion DOHS' submission is that everything contained in its reports must be regarded by the Court on any later occasion as being 'gospel truth'...

DOHS needs seriously to consider whether it needs to adduce before this Court factual material dating back to 24/04/1998 when the orders made by the Court and the circumstances of each of the 4 children involved speak for themselves. In any event as in my view issue estoppel does not enable the reports to be tendered absolutely as evidence of the truth of the material contained in them, it would be a denial of natural justice for counsel for the parents & KB not to be able to cross-examine the authors of those reports on any factual matters which are relevant to the current case."

Subsequently counsel for DOHS called former protective worker witness 4 to adopt documents D4 to D6 and senior protective worker witness 8 to adopt documents D10 to D17. It seemed to Magistrate Power that – at least partly as a consequence of very good cross-examination by counsel for the mother – their evidence was relatively favourable to the mother. This confirmed his view that it would have been quite unjust to the parents and to KB to allow admission of these reports without affording them procedural fairness in the form of an ability to cross-examine witnesses upon whose reports DOHS sought to rely.

In *DHHS v C1, C2 & C3* [2020] VChC 7 the Department had filed protection applications pursuant to ss.162(1)(c), 162(1)(d) & 162(1)(e) of the CYFA. These were based on protective concerns related to disclosures made by C1 and C2 to police in December 2018 that their father F had, for some time, been subjecting them to unwanted sexual attention. These disclosures also prompted the police to file an application for an intervention order against F under the *Family Violence Protection Act 2008*. After a contested hearing before Hubble M in October 2019 her Honour found that it was more likely than not that F did commit family violence against C1 and C2, and accordingly ordered that the girls should be protected by an intervention order until 07/11/2021. This order contained two conditions:

1. F must not commit family violence in relation to C1 & C2.
2. F must comply with any restrictions on contact with C1 & C2 contained in a child protection order.

Subsequently the contested hearing of the protection applications was listed before Hubble M. At [5] her Honour held:

“At the beginning of this hearing, I determined that the principle of issue estoppel precluded the court reconsidering the question of whether the allegations of sexual misconduct made by C1 and C2 against the father were proven on the balance of probabilities. Accordingly, this hearing proceeded on the basis that the factual matters which formed the basis of the Intervention Order contest were proven.”

### **3.3.4.3 Requirement of leave by the Children’s Court to withdraw a protection application**

A very significant power of the Family Division is illustrated by *Secretary of the Department of Human Services v Y* [2001] VSC 231. At [23] Nathan J summarised the central issue in *Y’s Case* as follows: “Does a protective intervener need the leave of the Court to withdraw or discontinue a protection application once it has been filed and served? On the one hand the Secretary contends withdrawal or discontinuance is a ministerial act which is not amenable to the Court’s jurisdiction. On the other, the Attorney-General...contends that once the Secretary invokes the Court’s jurisdiction, she becomes subject to it, and to such rules of procedure as the Court may decide. If the Court decides that in governing itself, protection applications can only be withdrawn by way of leave, then the Minister must submit, like any other litigant, to that rule of procedure.” Nathan J preferred the latter contention and held that leave of the Court was required. At [42] he said that “once a protection application has been made, then the jurisdiction of the court is enlivened. It is not for the Secretary to resolve the matters set out in the application, that responsibility is the Court’s. The Secretary’s functions become cognate once she decides whether or not to pursue the making of an application. The Court is not an appendage to the Secretary’s ministerial duties. The very function of the Court is to assess and to deliberate upon the Secretary’s application that the children are in need of protection. Adjudication of that issue must proceed before the Court. The Court has power to decide how that shall best be accomplished. Once the judicial process has been enlivened in this specialist jurisdiction, then it requires a judicial process to bring it to an end. If the Court decides as a matter of process that leave is required, then leave is required.” Leave to appeal was refused by the Court of Appeal.

## **3.4 Procedural guidelines**

### **3.4.1 Comprehensibility etc.**

Section 522(1) of the CYFA requires the Court, as far as practicable in any proceeding (whether Criminal or Family)-

- (a) to take steps to ensure that the proceeding is comprehensible to-
  - the child;
  - the parents; and
  - all other parties who have a direct interest in the proceeding;
- (b) to seek to satisfy itself that the child understands the nature and implications of the proceeding and of any order made in the proceeding;
- (c) to allow the child and in the case of a proceeding in the Family Division, the parents and all other parties who have a direct interest in the proceeding to participate fully in the proceeding;
- (d) to consider any wishes expressed by the child;

- (e) to respect the cultural identity and needs of-
  - the child; and
  - the parents and other members of the child's family; and
- (f) to minimise the stigma to the child and his or her family.

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).

### 3.4.2 Pilot program for Intermediaries and Ground Rules Hearings

The most vulnerable witnesses are those under 18 years and those with a cognitive impairment. Intermediary schemes aim to enable vulnerable witnesses to give their best evidence in light of the research and the experience, particularly in England and Wales since 2008, which shows that the way in which questions are asked of witnesses can affect their evidence.

The introduction of an intermediary scheme, based on the English model, was recommendation 30 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 *R v Ward (a pseudonym)* [2017] VSCA 37, a decision relating to the questioning of children and obligations of counsel and judicial officers. The statutory authority for the use of intermediaries and ground rules hearings is in Part 8.2A of the Criminal Procedure Act 2009 (Vic) ['CPA'] which commenced on 28/02/2018. See also regs.25-26 & Schedule 1 of the 2.

**Intermediaries** are trained professionals with specialist skills in communication. They are officers of the Court appointed by the Court, under the Intermediary Pilot Program ['IPP'], to assist a vulnerable witness and the Court so that the witness can give their best evidence-

- during the visual and audio recording of evidence by police (VARE – see section 3.5.5 below); and
- in their evidence in Court, namely in examination in chief, cross-examination and re-examination.

The intermediary's role is to assess the communication needs of a vulnerable witness and provide practical strategies and recommendations on how best to communicate with the witness. For this purpose they advise on the formulation of questions and when necessary – and as directed by the Court – they actively assist and intervene during questioning.

A **ground rules hearing** is a pre-hearing process used to discuss and establish how vulnerable witnesses will be enabled to give their best evidence, by the Court setting ground rules for the questioning of the witness. The ground rules take the form of Court directions: CPA/s.389E.

A Pilot program for Intermediaries and Ground Rules Hearings ['IPP'] commenced operation at Melbourne Children's Court on 02/07/2018 and applies to criminal proceedings which commenced on or after 28/02/2018 that relate to a sexual offence (as defined in s.4(1) of the Criminal Procedure Act 2009) or a homicide offence. See Practice Direction No 6 of 2018.

The IPP initially operates more narrowly than the scheme set out in the CPA/s.389A and applies to-

- complainants in sexual offences matters who are vulnerable witnesses;
- vulnerable witnesses, apart from the accused, in homicide matters;
- at any stage of the relevant criminal proceeding, including an appeal or rehearing in all court jurisdictions in the Melbourne legal precinct;
- police sexual offence and child abuse investigative team (SOCIT) sites at Frankston, Fawkner, Box Hill & Geelong.

It is expected that-

- either the accused will be legally represented in the matters to which the IPP applies; or
- an order will have been made by the Court under CPA/s.357 for legal representation of the accused for cross-examination of a protected witness.

At a **ground rules hearing** the Court may make or vary any direction for the fair and efficient conduct of the proceeding, including but not limited to a direction about:

- the manner and duration of questioning of a vulnerable witness;
- the questions that may or may not be put to a witness;



- if there is more than one accused, the allocation amongst the co-accused of the topics about which a witness may be asked;
- the use of models, plans, body maps or similar aids to help communicate a question or answer;
- whether the party is not obliged to put the evidence in its entirety in cross-examination where it is intended that evidence be led that contradicts or challenges the evidence of a witness or that otherwise discredits a witness.

The above information is summarized from a Multi-Jurisdictional Court Guide for the IPP which can be downloaded from <https://www.childrenscourt.vic.gov.au/legal/guidelines-intermediary-pilot-program>.

### 3.4.3 Standing to participate as a party

It is the writer's view that the standing of a person to participate as a party in the Family Division is governed by s.522(1)(c) of the CYFA. That sub-section provides:

"As far as **practicable** the Court must in any proceeding allow-

- (i) the child; and
- (ii) in the case of a proceeding in the Family Division, the child's parents and all other parties who have a **direct interest** in the proceeding- to participate fully in the proceeding."

It is also the writer's view that ss.8(1) & 10 of the CYFA prevent a person being granted standing to participate as a party in a proceeding unless to do so is in the best interests of the subject child.

Since joinder of persons other than parents and children is frequently a contentious and contested issue in the Family Division of the Children's Court, it is unfortunate that "**direct interest**" and "**practicable**" are neither defined in the CYFA nor the subject of any case law.

A contrary view of s.522(1)(c) is that it is not the source of an implied power to join **persons** as parties to a Family Division proceeding but rather that is confined to the procedure to be followed in relation to persons who are already deemed by the CYFA to be **parties**. This interpretation focuses on a perceived distinction in the Act between "person" and "party" and concludes that the CYFA provides **only** for the following persons to be parties to a Family Division proceeding-

- the Attorney-General [s.215(2)];
- the Secretary or his or her delegate [s.215(3)];
- persons approved by the Secretary to become permanent carers of the child if granted leave by the Court [ss.320(2)-(3)];
- the child; and
- the child's parent.

For the following reasons the writer strongly disagrees with the above restrictive view of s.522(1)(c). The predecessor of s.522 of the CYFA is s.18 of the *Children and Young Persons Act* 1989 ['the CYPA'] which uses exactly the same words, not just in sub-section (1)(c) but in all four sub-sections. The Explanatory Memorandum accompanying the *Children and Young Persons Bill* said in relation to clause 18 that it "sets out procedural guidelines to be followed by the Children's Court to **ensure that the child, and the child's family, can understand and participate in the proceedings...**" [emphasis added]

The origin of the CYPA can be traced back to the Child Welfare Practice and Legislation Review of 1984, known colloquially as the 'Carney Report' and entitled "Equity and Social Justice for Children, Families and Communities". In the Introduction to Chapter 5 of that report – entitled "The Process of the Court" – the authors say at p.420 [emphasis again added]:

"The three basic imperatives of a system of justice can be summed up as: correctness of decisions; **participation by affected parties**; and public confidence in its rulings (Rubenstein 1976:48). The general upgrading in the status of the court, the enhanced qualifications of the bench, and the provision of opportunities for responsible public scrutiny, should all contribute to securing its public standing. In this Chapter much of the focus will be on designing processes which will advance the twin objectives of promoting correctness of decisions and of **ensuring that people affected have every opportunity to participate in hearings**.

So far as participation is concerned, this has three elements. First, people can only participate in processes if they have prior information about what the process entails. **Secondly, procedures should be designed to provide real opportunities for them to make their views known.** Finally, in many cases, people require assistance from legal or lay advocates – or interpreting services – if **they are to take full advantage of opportunities for participation...**

**It is essential that we provide adequate opportunities for people to understand and participate in the proceedings** (Langley, 1978). To do anything less is to deny one of the fundamental principles of justice.”

This led to the authors’ recommendation #271: “...**Children and families should have maximum opportunity to participate in the court process....**” In turn, that recommendation led to clause 49 in the proposed Act annexed to the Carney Report [emphasis again added]:

- (1) In proceedings in relation to a child, the Court may give leave to **any interested party** to appear in the proceedings.
- (2) A person who is given leave to appear pursuant to this section may, unless the Court otherwise orders-
  - (a) appear in person in the proceedings;
  - (b) be represented by a lawyer or other advocate in the proceedings; and
  - (c) examine and cross-examine witnesses.

In the extrinsic materials which underpin the CYPA – and hence which underpin this aspect of the CYFA – the words “**person**” and “**party**” are sometimes used interchangeably. This is especially evident in clause 49. It is clear that in enacting the CYPA Parliament has wished to broaden – not reduce – the capacity of interested persons to participate in Family Division proceedings in appropriate cases. It is a pity that the formulation in clause 49 did not find its way into the CYPA and ultimately into the CYFA because it is much clearer and contains an express source of judicial power rather than the implied source of power inherent in the writer’s interpretation of s.18(1)(c) of the CYPA and s.522(1)(c) of the CYFA. But it is clear enough from the Second Reading Speech to the CYPA [08/12/1988] that the legislature:

- did not intend to depart from the formulation in clause 49; and
- did not contemplate participation in Family Division proceedings being restricted to children, their parents, proposed permanent carers, the Attorney-General and the Secretary DFFH.

Such a restricted operation is not consonant with the CYPA’s Explanatory Memorandum on s.18 nor with the other extrinsic materials. And s.522 of the CYFA is in **identical** language to s.18 of the CYPA. Further, the narrow interpretation of s.522(1)(c) is far too constrained. It leaves the Court with no ‘joinder’ provision at all, with no power to allow persons who are significant to the child to provide first-hand information to the Court and to examine and cross-examine witnesses. There will inevitably be cases in which to adopt such a restricted interpretation would not be in the best interests of the subject child and so would be contrary to ss.8 & 10 of the CYFA. Whenever there are alternative interpretations of a section in the CYFA, the interpretation which best accords with the ‘best interests’ provisions of the legislation should be the preferred interpretation.

Although the language might perhaps have been more carefully chosen, in the writer’s view it is tolerably clear that the expression “*all other **parties** who have a direct interest in the proceeding*” in s.522(1)(c) of the CYFA is intended to mean “*all other **persons** who have a direct interest in the proceeding and who have been given leave by the Court to become **parties***”.

Accordingly, it is the writer’s strong view that s.522(1)(c) of the CYFA is an implied source of power by which the Court may join any person as a party in a proceeding in the Family Division if-

- the person has a “**direct interest**” in the proceeding; and
- it is “**practicable**” to allow the person to be joined as a party; and
- it is in the best interests of the child, the subject of the proceeding, to do so.

Further that s.522(1)(c) requires that all parties – whether as of right or joined by the Court – be allowed to participate fully in the proceeding as far as it is practicable to do so.

### 3.4.4 Interpreter

Section 526 of the CYFA prohibits the Court from hearing and determining a proceeding without an interpreter if the Court is satisfied that a child, a parent or any other party to the proceeding has a difficulty in communicating in the English language that is sufficient to prevent him or her from understanding or participating in the proceeding. Speaking in the context of an appeal, Maxwell P, with whom Redlich JA & Habersberger AJA agreed, said in *R v Yasso* [2007] VSCA 306 at [5]:

“It is, of course, an elementary requirement of natural justice that a defendant in criminal proceedings be able to participate fully, to present argument and answer questions, and to understand everything that is said by the bench and by opposing counsel. For a non-English speaking defendant, accurate interpreting is vitally important. See, for example, *R v Lee Kun* [1916] 1 KB 337 (right of accused to an interpreter at trial); *Kunnath v The State* [1993] 4 All ER 30 (incomplete interpretation at criminal trial); *Dietrich v R* (1992) 177 CLR 292 (right of accused to fair trial according to law); *R v Johnson* (1986) 25 A Crim R 433 (whether a witness should have an interpreter); *R v Saraya* (1993) 70 A Crim R 515 (deficient interpretation at criminal trial) cf *Fernando de la Espriella-Velasco v R* [2006] WASCA 31 (requisite standard of interpretation at criminal trial). See also *Charter of Human Rights & Responsibilities Act 2006* s 25(2)(i).”

### 3.4.5 Representation of adults in the Family Division

The representation of children is dealt with in Chapter 4 entitled “Family Division – General”. Under s.215(3) of the CYFA, the Secretary is entitled to appear:

- (a) personally; or
- (b) by an Australian legal practitioner within the meaning of the Legal Profession Act 2004; or
- (c) by an employee of the public service (whether or not admitted as a barrister and solicitor of the Supreme Court) who is authorized by the Secretary to appear in proceedings before the Family Division.

There is no provision in the CYFA relating to the representation of an adult party other than the Secretary. The common law position thus appears to apply. In *Tomasevic v Travaglini* [2007] VSC 337 at [84] Bell J said:

“The rule is that, in the ordinary course of civil or criminal litigation, all natural persons have a right to appear unrepresented: *Collins (alias Hass) v R* (1975) 133 CLR 120, 122; *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389. The right to defend yourself without legal representation in criminal proceedings is ‘fundamental’ and should not be interfered with: *R v Zorad* (1990) 19 NSWLR 91, 95; *Cachia v Hanes* (1994) 120 ALR 385, 391. People who choose to defend themselves against criminal charges forfeit none of their legal rights, although they obtain no special advantages {*MacPherson v R* (1981) 147 CLR 512, 546; *R v Zorad* (1990) 19 NSWLR 91, 95; *In Re an Inquiry into Mirror Group Newspapers PLC* [2000] Ch 194, 212 (a civil case)}, and their election to appear self-represented means the trial cannot be unfair on that ground: *Dietrich v R* (1992) 177 CLR 292, 336; see also *Craig v South Australia* (1994-1995) 184 CLR 163, 185-186. A person who refuses or neglects to comply with the reasonable requirements of a legal aid authority cannot be said to be unable to obtain legal representation, and their trial without legal representation will also not be unfair on that ground: *Karounos v R* (1995) 77 A Crim R 479, 485-6.”

In *McKenzie v McKenzie* [1971] P 33; [1970] 3 All ER 1034 at 1036 the English Court of Appeal approved dicta of Lord Tenterden CJ in *Collier v Hicks* (1831) 2 B & Ad 663 at 669:

“Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.”

Thus an adult party – other than the Secretary – may probably only appear personally or by a legal practitioner but an unrepresented adult may be assisted in the conduct of his or her case by a ‘McKenzie friend’, such assistance falling short of actual legal representation. However, in the exceptional circumstances of the civil case of *Skrijel v Mengler* [2003] VSC 270 at [7] Nettle J permitted a McKenzie friend to transmogrify into a lay advocate on the 15<sup>th</sup> day of a 29 day hearing, albeit an advocate formally acting on the instructions of Mr Skrijel’s solicitor. Though *Skrijel’s Case* might be thought to be an extreme example, it is the writer’s experience that it is generally very difficult for an unrepresented litigant to do justice to his or her case, as witness the following observation of Gleeson CJ, Gummow, Kirby, Hayne & Crennan JJ in *Mansfield v Director of Public Prosecutions for Western Australia* [2006] HCA 38 at [49]:

“In *Dietrich v The Queen* (1992) 177 CLR 292 at 302, Mason CJ and McHugh J repeated the extrajudicial opinion of Lord Devlin that, save in the exceptional case of the skilled litigant, in practice the adversarial system breaks down where there is no legal representation.”

In *R v Yasso* [2007] VSCA 306 the applicant was represented at each of his trials but was unrepresented on the hearing of the appeal Maxwell P (with whom Redlich JA & Habersberger AJA agreed) said at [3]:

“[The applicant] was very considerably assisted by a friend, Mr John Walsh, in the preparation of his appeal grounds and in the presentation of his written argument. Mr Walsh deserves the highest commendation for his efforts over a long period on the applicant's behalf.”

In *Tomasevic v Travaglini* [2007] VSC 337 Bell J discussed “The Duty of a Trial Judge to Assist a Self-represented Litigant” under a number of headings, citing *inter alia* the *International Covenant on Civil and Political Rights* and a number of authorities including the following:

- [66]-[77] **The significance of the human rights of equality before the law and access to justice:** *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414, 422 per Kirby P, 426 per Samuels JA and 427 per Clarke JA, agreeing with Kirby P; *Dietrich v R* (1992) 177 CLR 292, 321, 326, 362; *R v Kerbatieh* (2005) 155 A Crim R 367, 374; *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 38-39 per Maxwell P; *Minister for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 CLR 273, 288, 291, 302, 304-305; *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 448; cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 and *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 39-40;; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 41-43 (per Brennan J with whom Mason CJ and McHugh J agreed); *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569; *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770, 812-813; *Nulyarimma v Thompson* (1999) 165 ALR 621, 676; *Smits v Roach* (2006) 227 CLR 423, 459-460.
- [78]-[85] **The disadvantages suffered by self-represented litigants:** *R v Nilson* [1971] VR 853, 864; *Nagy v Ryan* [2003] SASC 37, [40]-[41]; *Commissioner of Taxation v Metaskills Pty Ltd* (2003) 130 FCR 248, 273; *R v White* (2003) 7 VR 442, 454-459; *Tobin v Dodd* [2004] WASCA 288, [13]; *Panagiotopoulos v Rajendram* [2005] NSWCA 58, [33]; *Stock v Anning* [2006] WASC 275, [54]; *R v Rostom* [2007] SASC 210, [59] (accused could not read English); *In the Marriage of Sajdak* (1992) 16 Fam LR 280, 283-284 (no legal representation or reliable interpreter, so “almost laughable to speak of notions such as equality of access to the courts”); *Awan v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 120 FCR 1, [46].
- [86]-[88] **The over-riding duty of a trial judge to ensure a fair trial:** *Dietrich v R* (1992) 177 CLR 292; *Jago v District Court of New South Wales* (1989) 168 CLR 23, 57; *Barton v R* (1980) 147 CLR 75, 96.
- [89]-[96] **The trial judge's duty to assist self-represented litigants:** *Self-represented Parties: A Trial Management Guide for the Judiciary* (County Court of Victoria, 2004); *R v Nilson* [1971] VR 853, 864; *Cooling v Steel* [1971] 2 SASR 249, 251; *MacPherson v R* (1981) 147 CLR 512, 524, 534, 546-547; *R v Gidley* [1984] 3 NSWLR 168, 181; *R v Zorad* (1990) 19 NSWLR 91, 100; *Dietrich v R* (1992) 177 CLR 292, 327; *R v White* (2003) 7 VR 442, 453-458; *Pezos v Police* (2005) 94 SASR 154, 159-160; *R v Kerbatieh* (2005) 155 A Crim R 367, 379-380; *R v Rostom* [2007] SASC 210, [35]-[43]; *MacPherson v R* (1981) 147 CLR 512. The same duty applies to magistrates: *Cooling v Steel* [1971] 2 SASR 249, 250-251; *Black v Smith* (1984) 75 FLR 110, 112-113; *Nagy v Ryan* [2003] SASC 37, [39]-[46]; *Pezos v Police* (2005) 94 SASR 154, [8]-[20]; *KC Nominees Pty Ltd v Arrowsmith* (2006) 232 ALR 789, 798, 806; *Stock v Anning* [2006] WASC 275, [54]-[58].
- [97]-[132] **The scope of the duty to assist and the judge's dilemma:** *Abram v Bank of New Zealand* (1996) ATPR ¶41-507, 43,341; *Microsoft Corporation v Ezy Loans Pty Ltd* (2004) 63 IPR 54; *Pezos v Police* (2005) 94 SASR 154; *R v Gidley* [1984] 3 NSWLR 168; *R v Zorad* (1990) 19 NSWLR 91; *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438; *Panagopoulos v Southern Healthcare Network* [unreported, Supreme Court of Victoria-Smith J, 15/09/1997]; *Mentyn v Law Society of Tasmania* [2004] TASSC 24; *R v White* (2003) 7 VR 442; *Zegarac v Tomasevic* [2003] VSC 150, [3].
- [133]-[137] **The guidelines of the Family Court of Australia:** *Re F: Litigants in Person Guidelines* (2001) 27 Fam LR 517, 551.

At [155] Bell J summed up the relevant duty as follows:

“A judge has a fundamental duty to ensure a fair trial by giving due assistance to a self-represented litigant, whilst at the same time maintaining the reality and appearance of judicial neutrality. The duty is inherent in the rule of law and the judicial process. The human rights of equality before the law and access to justice specified in the *International Covenant on Civil and Political Rights* are relevant to its proper performance. The assistance to be given depends on the particular litigant and the nature of the case, but can include information about the relevant legal and procedural issues. Fairness and balance are the touchstones.”

In *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors (No 2)* [2011] VSC 153 at [12]-[14] Pagone J – citing dicta of the Court of Appeal in *McWhinney v Melbourne Health* [2011] VSCA 22 and of the High Court in *Neil v Nott* (1994) 121 ALR 148, 150 – reiterated that a court has some obligation to assist an unrepresented litigant, an obligation which arises from the court’s duty to ascertain the rights of the parties and, in that process, to ensure that the parties have a fair trial. However, despite this obligation the court must remain impartial [*Minogue v HREOC* (1999) 84 FCR 438,446] and must not confer upon the unrepresented litigant “a positive advantage” or give the represented parties less than they are entitled to [*Rajski v Scitec Corporation Pty Ltd* (unreported, NSW Court of Appeal, 16/06/1986)].

In *Austin v Dwyer* [2018] VSC 770 at [30]-[32] Derham AsJ gathered together the various authorities relating to the Court’s duty to an unrepresented litigant:

“It is the duty of the Court in relation to represented and unrepresented litigants alike to ensure that a hearing or trial is conducted fairly and in accordance with law: *MacPherson v The Queen* (1981) 147 CLR 512, 523; *Dietrich v The Queen* (1992) 177 CLR 292; *Werden v Legal Services Board* (2012) 36 VR 637, [53]. Procedural fairness is ‘an essential attribute of a court’s procedure’: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99, [156]. It is a frequent consequence of self-representation that the Court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy: *Neil v Nott* (1994) 68 ALJR 509, 510; 121 ALR 148, 150; *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, [27]-[29], [33]; *Platcher v Joseph* [2004] FCAFC 68, [104]. What a judge must do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant’s intelligence and understanding of the case: *Abram v Bank of New Zealand* (1996) ATPR 41-507, 43,341, 43,347 ; *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, [27]-[29], [33]; *Platcher v Joseph* [2004] FCAFC 68 [104]; *Tomasevic v Travaglini* (2007) 17 VR 100, 130. The judge cannot be the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. The judge must maintain the reality and appearance of judicial neutrality at all times and to all parties. The assistance must be proportionate in the circumstances — it must ensure a fair trial and not afford an advantage to the self-represented litigant: *Tomasevic v Travaglini* (2007) 17 VR 100, 130.

The advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent. An unrepresented party is as much subject to the rules as any other litigant and, although the Court must be patient in explaining them and may be lenient in the standard of compliance which it exacts, it must see that the rules are obeyed, subject to any proper exceptions: *Rajski v Scitec Corporation Pty Ltd* Unreported, Court of Appeal, NSW, Full Court, No CA 146 of 1986, (16 June 1986), 14 (Samuels JA).

In the recent decision of the Court of Appeal in *Roberts v Harkness* [2018] VSCA 215 which was applied in *Doughty-Cowell v Kyriazis* [2018] VSCA 216, the Court made it clear that a litigant must have a reasonable opportunity of presenting her case. What amounts to a reasonable opportunity of presenting a case depend on the circumstances of the case, including the nature of the decision to be made, the nature and complexity of the issues in dispute, the nature and complexity of the submissions which the party wishes to advance, the significance to that party of an adverse decision (‘what is at stake’) and the competing demands on the time and resources of the court or tribunal: *Roberts v Harkness* [2018] VSCA 215, [8]-[49].”

See also *She v RMIT University & Anor* [2021] VSC 2 where Inceri J discussed the cases of *Roberts v Harkness* (2018) 57 VR 344, *Tomasevic v Travaglini & Anor* (2007) 17 VR 100 and *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 in the course of a judgment in which her Honour found that the self-represented plaintiff had not been given a reasonable opportunity by the presiding magistrate to respond to the first defendant's application to strike the matter out and had failed to appropriately assist the plaintiff, and had thereby failed to comply with s.24 of the *Charter of Human Rights and Responsibilities Act 2006* to afford her a fair hearing.

The primary duty of counsel appearing for a party in court is to the court. That duty takes precedence over the duty owed by counsel to the client: see *Giannarelli v Wraith* (1988) 165 CLR 543 at 556-7 per Mason CJ and 578-9 per Brennan J; *R v Serrano (Ruling No 4)* [2007] VSC 208 at [6] per Kaye J. See also *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors (No 2)* [2011] VSC 153 at [12] where Pagone J emphasized that "in every case the legal practitioners have duties to assist the court in the discharge of its functions". See also *Westpac Banking Corporation v Angela Barrett & Ors* [2011] VSC 326 at [13] where Pagone J reiterated:

"That legal practitioners are officers of the court is not an empty statement. The court relies fundamentally upon its officers, namely legal practitioners, to perform its work. It is unacceptable for a solicitor who acted for a party to continue to appear as solicitor on record for that party and not attend court on a day set down for trial. The proper procedure is for the solicitor who no longer wishes to represent a client who is a party to a proceeding to apply for leave to be removed as solicitor acting for the party pursuant to rule 20.03(3). On 3 March 2011, two days before this trial was due to commence, Mr McGindle sent my associates a letter in which he explained that Mrs Barrett was entering into voluntary bankruptcy and that he no longer had instructions to act. He asked my associates, 'In view of the above would you please advise as to any formal requirements.' It is not proper procedure for a solicitor to seek the advice of an associate of a judge about what to do. Legal practitioners are expected to be familiar with the rules and practice of the court in which they are admitted to practice and in which they hold themselves out, usually for a fee, to do so."

## **3.5 What happens in court**

### **3.5.1 Preparation**

Before a case goes before a judicial officer, it is prepared by the legal practitioners representing the various parties. The parties may negotiate a settlement at any time before or during a hearing before an order is made and entered by the Court into the records of the Court. However, while the Court usually accepts a settlement and makes consent orders, it is not bound to do so. This is especially true of child protection proceedings in the Family Division of the Children's Court where the Court has an underlying duty to ensure that orders made by it are in the best interests of the subject child.

### **3.5.2 Mention**

All cases, in both Divisions of the Court, are initially listed for "mention". These are fairly informal hearings at which witnesses are generally not called. At a mention each of the parties is given an opportunity to say in summary what he or she considers should happen to the case, i.e. whether final or interim orders should be made or the case should be adjourned, on terms or otherwise, for mediation or contest. If the parties do not agree on a settlement, the case will be adjourned:

- in the Family Division for mediation (conciliation conference) and/or contest, the latter preceded by a directions hearing;
- in the Criminal Division, for contest, the latter preceded by a contest mention.

### **3.5.3 Evidence**

Except on those occasions in the Family Division where a hearing is restricted, almost always with the consent of the parties, to legal submissions based on a statement of facts, a contested hearing involves the calling of *viva voce* evidence and usually the tendering of documents. Rules governing the admissibility of evidence in hearings in the Children's Court are contained in the Evidence Act 2008 (Vic) and in the CYFA.

The Children's Court is a "Victorian court" within paragraph (b) of the definition in the annexed dictionary. Section 4 of the Evidence Act 2008 (Vic) provides, *inter alia*-

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

- (a) relate to bail; or
  - (b) are interlocutory proceedings or proceedings of a similar kind; or
  - (c) are heard in chambers; or
  - (d) subject to subsection (2) relate to sentencing.
- (2) If such a proceeding relates to sentencing-
- (a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and
  - (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters – the direction has effect accordingly.”

### 3.5.3.1 Admissibility of evidence generally

Section 142 of the Evidence Act 2008 (Vic), headed “**Admissibility of evidence – standard of proof**” provides:

- “(1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding-
- (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
  - (b) any other question arising under this Act-
- have been proved if it is satisfied that they have been proved on the balance of probabilities.
- (2) In determining whether it is so satisfied, the matters that the court must take into account include-
- (a) the importance of the evidence in the proceeding; and
  - (b) the gravity of the matters alleged in relation to the question.”

### 3.5.3.2 Admissibility of evidence in a contested criminal case

In the Criminal Division of the Court in determining whether or not a child is guilty of an offence the rules relating to the admissibility of evidence apply strictly. Section 357(1) of the CYFA provides:

“On the summary hearing of a charge for an offence, whether indictable or summary, the Court must be satisfied of a child’s guilt on proof beyond reasonable doubt by **relevant and admissible** evidence.”

### 3.5.3.3 Admissibility of evidence in a Family Division case

On its face s.142 of the Evidence Act 2008 (Vic) also applies to evidence led in proceedings in the Family Division. However, s.8 of that Act provides- “This Act does not affect the operation of the provisions of any other Act.” Note 4 to s.4 states: “Provisions in other Victorian Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by s.8 of this Act. These include s.215 of the **Children, Youth and Families Act 2005**.”

Section 215(1)(d) of the CYFA provides – with similar effect to s.65 of the Family Violence Protection Act 2008 (Vic) and s.47 of the Personal Safety Intervention Orders Act 2010 (Vic) – that:

“The Family Division may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary.”

The proper operation of such a provision was explained by Higgins J in the Supreme Court of the A.C.T. in *A & B v Director of Family Services* (1996) 20 Fam LR 549 at 553-4-

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

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

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

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



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

It follows that s.142 of the Evidence Act 2008 does not alter the power of the Family Division of the Children's Court to "inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary".

However, notwithstanding the broad words "as it thinks fit" s.215(1)(d) of the CYFA does not authorize the Family Division to dispense with procedural fairness in any case. In *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 the Court of Appeal discussed the operation of a similar provision in s.52(1)(c) of the Medical Practice Act 1994 (Vic). In rejecting a submission that the words "may inform itself in any way it thinks fit" should be regarded as redundant but holding that the words were subject to a requirement to accord procedural fairness, Maxwell P said at [28]-[29]-

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

#### **3.5.3.4 The hearsay rule and exceptions thereto**

Section 59 of the Evidence Act 2008 (Vic) sets out the hearsay rule: Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation. In determining whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

The Evidence Act 2008 (Vic) contains a large number of exceptions to the hearsay rule, including:

- s.60: evidence relevant for a non-hearsay purpose;
- ss.63-64: first-hand hearsay in civil proceedings;
- ss.65-66: first-hand hearsay in criminal proceedings;
- s.66A: contemporaneous statements about a person's health etc;
- s.69: business records;
- s.70: tags and labels;
- s.71: electronic communications;
- s.72: Aboriginal and Torres Strait Islander traditional laws and customs;
- s.73: marriage, family history or family relationships;
- s.74: public or general rights;
- s.75: use of evidence in interlocutory proceedings;
- s.81: admissions;
- s.87(2): representations about employment or authority;
- s.92(3): exceptions to the rule excluding evidence of judgments and convictions;
- ss.110-111: character of and expert opinion about accused persons.

Section 65 applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact. Section 65(2) provides that the hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation-

- (a) was made under a duty to make that representation or to make representations of that kind; or
- (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
- (c) was made in circumstances that make it highly probable that the representation is reliable; or
- (d) was against the interests of the person who made it at the time it was made and was made in circumstances that make it likely that the representation is reliable.

Section 65(3) provides that the hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in court if in that previous proceeding the defendant in the current proceeding cross-examined – or had a reasonable opportunity to cross-examine – the person who made the representation about it.

Section 67 imposes notice requirements in relation to ss.65(2) & 65(3).

Clause 4 of Part 2 of the Dictionary provides that a person is taken not to be available to give evidence about a fact if-

- (a) the person is dead; or
- (b) the person is, for any reason other than the application of s.16 (Competence and compellability), not competent to give the evidence about the fact; or
- (c) it would be unlawful for the person to give evidence about the fact; or
- (d) a provision of the Act prohibits the evidence being given; or
- (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
- (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give evidence, but without success.

For judicial discussion of s.65 see *DPP v BB & QN* [2011] VSCA 211 per Bongiorno JA (with whom Harper & Hansen JJA agreed); *Sajanesh Easwaralingham v DPP* [2010] VSCA 353 at [32]-[44] per Tate JA (with whom Buchanan JA agreed) dismissing on this issue an appeal from Pagone J [2010] VSC 437 at [13]-[19]; *R v Rossi (Ruling No. 1)* [2010] VSC 459 per Lasry J.

For a judicial discussion of s.71 see *Colin Stevenson (a pseudonym) v The Queen* [2020] VSCA 27 at [60] & [81] per Croucher AJA (with whom Whelan & Kyrrou JJA agreed).

### **3.5.3.5 Illegally or improperly obtained evidence**

Admissibility of illegally or improperly obtained evidence is subject to the common law discretion to exclude it, as discussed in *Bunning v Cross* (1978) 141 CLR 54. That common law public policy exclusionary discretion has now been modified by s.138 of the Evidence Act 2008 which provides:

- “(1) Evidence that was obtained-
  - (a) improperly or in contravention of an Australian law; or
  - (b) in consequence of an impropriety or of a contravention of an Australian law-  
Is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
- (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning-
  - (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
  - (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account-
  - (a) the probative value of the evidence; and
  - (b) the importance of the evidence in the proceeding; and
  - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
  - (d) the gravity of the impropriety or contravention; and
  - (e) whether the impropriety or contravention was deliberate or reckless; and
  - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the the International Covenant on Civil and Political Rights; and
  - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.”

In *Kadir v The Queen; Grech v The Queen* [2020] HCA 1 the appellants were jointly charged with acts of serious animal cruelty arising from the alleged use of rabbits as live bait in training racing greyhounds. At the trial the prosecution proposed to tender 7 video recordings made by Animals Australia in contravention of s.8(1) of the *Surveillance Devices Act 2007* (NSW). Armed with this material officers of the RSPCA obtained a search warrant for the property and material supportive of the prosecution case was obtained as a consequence of the execution of the search warrant. Further, acting at the request of Animals Australia the photographer, Ms Lynch, engaged in conversations with Mr Kadir in which he is alleged to have made admissions. On a *voir dire* the trial judge found that (1) the surveillance evidence had been obtained improperly or in contravention of Australian law and that (2) the search warrant evidence and (3) the admissions had been obtained in consequence of that contravention. Holding that the desirability of admitting the evidence was outweighed by the undesirability of admitting evidence obtained in the way the evidence had been obtained his Honour, applying s.138(1) of the Evidence Act 2008, ruled that each of the 3 categories of impugned evidence was inadmissible. The Court of Criminal Appeal reversed this ruling, holding that the desirability of admitting each of the 3 categories of evidence outweighed the undesirability of admitting evidence obtained in the way the evidence was obtained: [2017] NSWCCA 288 at [111], [130] & [142]. In its joint judgment the High Court (Kiefel CJ, Bell, Keane, Nettle & Edelman JJ) took an intermediate position, holding at [9]:

“The trial judge’s conclusion that all of the surveillance evidence should be excluded was correct. The Court of Criminal Appeal was right to find that the trial judge’s assessment of the admissibility of the search warrant evidence and the admissions was flawed. The Court of Criminal Appeal’s conclusion that each of these items of evidence is admissible is correct.”

At [11]-[20] their Honours traced the aetiology of s.138, noting at [15] that “the Act does not provide guidance as to the relative weighing of each s.138(3) factor” and holding at [13]:

“As s.138 is not confined to criminal proceedings or to evidence obtained by, or in consequence of, the misconduct of those engaged in law enforcement, the public interests that the court is required to weigh are broader than those weighed in the exercise of the *Bunning v Cross* discretion. The desirability of admitting evidence recognises the public interest in all relevant evidence being before the fact-finding tribunal. The undesirability of admitting evidence recognises the public interest in not giving curial approval, or encouragement, to illegally or improperly obtaining evidence generally. In a criminal proceeding in which the prosecution seeks to adduce evidence that has been improperly or illegally obtained by the police or another law enforcement agency, the more focused public interests identified in *Bunning v Cross* remain apt.”

In holding that the none of the surveillance evidence was admissible, their Honours said at [37]:

“The gravity of the contravention {s.138(3)(d)} and the difficulty of obtaining evidence lawfully {s.138(3)(h)}, along with whether the impropriety or contravention was deliberate or reckless {s.138(3)(e)}, are overlapping factors. In the circumstances of this case, the trial judge did not err in failing to weigh the s.138(3) factors separately in relation to the first video recording. His Honour was right to find that each video recording was the product of a serious contravention of Australian law. The seriousness of the contravention was in each case the greater because the recording was made in deliberate contravention of the law with a view to assembling evidence which it was believed the proper authorities would be unable to lawfully obtain. To the extent that it was more difficult to lawfully obtain evidence of live baiting before the first video recording was made, this was a factor which weighed against admitting it. There is no suggestion that the trial judge erred in his assessment of the other s.138(3) factors. His Honour’s determination that none of the surveillance evidence is admissible is correct.”

At [40] their Honours noted: “Section 138 does not enact the doctrine that prevailed in the United States, requiring the exclusion of the ‘fruit’ of official illegality unless the impugned evidence was derived ‘by means sufficiently distinguishable to be purged of the primary taint’.” In holding that the search warrant evidence was admissible, their Honours focussed on ‘vigilantism’, saying at [48]:

“The admissibility of the search warrant evidence arises in criminal proceedings in which the desirability of admitting the evidence reflects the public interest in the conviction of wrongdoers. The undesirability of admitting evidence obtained in consequence of the deliberate unlawful conduct of a private ‘activist’ entity is the effect of curial approval, or even encouragement, of vigilantism. The RSPCA had no advance knowledge of Animals

Australia's plan to illegally record activities at the Londonderry property. There is nothing to suggest a pattern of conduct by which Animals Australia or other activist groups illegally collect material upon which the RSPCA takes action. The desirability of admitting evidence that is important to the prosecution of these serious offences outweighs the undesirability of not admitting evidence obtained in the way the search warrant evidence was obtained."

And in holding that the admissions were admissible against Mr Kadir, their Honours said at [51]:

"Since the evidence of the admissions is capable of rational acceptance {*IMM v The Queen* (2016) 257 CLR 300 at [39] & [58]; *R v Bauer* (2018) 92 ALJR at [69]}, consideration of the probative value of the admissions is to be assessed upon the assumption that the evidence will be accepted {*IMM v The Queen* at [52]}. Their probative value is high and they are important evidence in the case against Mr Kadir. The remaining factors under s.138(3) have the same weight in relation to the admissions as to the search warrant evidence. The undesirability of admitting the admissions does not raise the same concerns with respect to condoning vigilantism as the search warrant evidence. As the Court of Criminal Appeal rightly observed, the obtaining and viewing of the surveillance evidence was a step in the investigation by Animals Australia that led to Ms Lynch speaking with Mr Kadir, but that was all. And as their Honours also observed, Ms Lynch did not make use of any knowledge that she gained from the surveillance evidence in her conversation with Mr Kadir. Their Honours' conclusion, that the bare connection between the contravention of Australian law and obtaining the admissions is unlikely to convey curial approval or encouragement of the contravention, is apt. The undesirability of admitting evidence obtained in the way the admissions were is outweighed by the desirability of the evidence being admitted in support of the prosecution case."

See also the cases discussed in sections **8.2.10** & **8.2.11** which are primarily related to the admissibility of records of interview in which police have failed to comply with the statutory pre-requisites in ss.464A-H of the Crimes Act 1958 (Vic).

### 3.5.3.6 Other cases involving the admissibility of evidence

- **Sections 137, 146 & 161 Evidence Act 2008:** In *Colin Stevenson (a pseudonym) v The Queen* [2020] VSCA 27 the applicant, aged 24, had been in a sexual relationship with a complainant, aged 14 to 15. He had been charged with 9 counts of sexual penetration of a child under 16 and one of an indecent act with a child under 16. He was acquitted of 8 charges but found guilty of the last two in the series. The issue on appeal was whether the trial judge had erred in admitting evidence of Facebook posts capable of showing that the applicant became aware of the assertion that the complainant was aged 15 just prior to the last two instances of sexual penetration. Finding no error in admitting evidence as to the purported date of the applicant's comment on the Facebook posts, the Court of Appeal held:
  - **Section 146:** The impugned evidence was admissible pursuant to s.146 relating to "**Evidence produced by processes, machines and other devices**": see [63] & [71]-[73].
  - **Section 161:** The impugned evidence was also admissible pursuant to s.161 relating to "**Electronic communications**": see [64] & [75]-[77].
  - **Section 137:** The probative value of the evidence of the Facebook posts was not outweighed by the danger of unfair prejudice to the applicant: see [82]-[86].

### 3.5.4 Contested Criminal Division case

The conduct of a contested summary hearing is the same as in the Magistrates' Court. The prosecution usually calls one or more witnesses in support of its case and each may be cross-examined by the defendant or his or her legal representative. There is no obligation on the defendant to lead any evidence. The judicial officer has to be satisfied of the defendant's guilt on proof beyond reasonable doubt by relevant and admissible evidence: s.357(1) of the CYFA. If the Court is not so satisfied, it must dismiss the charge: s.357(2).

When there is conflicting evidence, how does the judicial officer decide which version of the evidence to accept? It used to be said that the primary method of resolving conflicts in evidence was to rely on the demeanour of witnesses in the witness-box. Nowadays less weight is given to demeanour and more weight to logic and objectivity. In *Fox v Percy* (2003) 214 CLR 118 at 128-9 Gleeson CJ and Gummow & Kirby JJ said:

"[I]n recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."

See also *Insurance Manufacturers of Australia v Villella* [2007] VSCA 94 at [26] per King J.

Criminal Division proceedings are adversarial in nature. But though adversarial, it is not open slather for the Crown which is obliged to act at all times with fairness and detachment as Nettle JA made clear in *R v Calway* [2005] VSCA 266 at [37]:

"It is of course a basic requirement of the adversary system of criminal justice that the Crown must act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one: *Dyers v The Queen* (2002) 210 CLR 285 at 293 [11] per Gaudron & Hayne JJ. Plainly, therefore, the Crown is required to call all available material witnesses unless there is some good reason not to do so and the fact that a witness may give an account inconsistent with the Crown case is not a sufficient reason for not doing so. But the Crown is not obliged to shape its case according to some view of the potential range of evidence most favourable to the accused. To the contrary, the Crown may for good reason and frequently does advance a case which is inconsistent with a significant portion of the available evidence that is favourable to the accused. Subject always to the imperative that the Crown act rationally and fairly, in the end it is for the Crown to determine the view of the evidence for which it will contend and it is for the jury to decide whether that view is to be accepted. Provided therefore that the Crown acts in good faith and fairly, and thus calls all available credible witnesses or makes them available for cross examination, I see no injustice in the fact of disconformity between some feature of the Crown case and some part of the evidence which is or may have been called."

See also *R v Lucas* [1973] VR 693 at 697 where Smith ACJ said:

"The Crown's duty to act with fairness, and with the single aim of establishing the truth, denies to it the right to pick and choose as between independent and apparently credible witnesses for merely tactical reasons, such as a desire to be able to cross-examine those who are unfavourable, or less favourable than others, to the Crown case; or the desire to force the defence to call evidence and thereby lose the right of the last address...[A]ll those witnesses whose testimony is necessary to put before the court the complete story of the events on which the prosecution is based ought in general to be called by the Crown...This general duty is subject to the qualification that the Crown, in its discretion, may properly decline to call any such person as its witness when it has strong and satisfactory reasons for doing so, as for example when the witness is clearly untruthful or unreliable".

And at p.705 where Newton J & Norris AJ, on the basis of a raft of authority dating back to 1838, said:

"It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry, and that it is their duty to assist the court in the attainment of the purpose of criminal prosecutions, namely to make certain that justice is done as between the subject and the State. Consistently with these principles, it is the duty of prosecuting counsel not to try to shut out any evidence which the jury could reasonably regard as credible and which could be of importance to the accused's case. We may add that these obligations which attach to prosecuting counsel apply, in our opinion, to officers in the service of the Crown, whose function it is to prepare the Crown case in criminal proceedings."

In *R v Parsons & Stocker* [2004] VSCA 92 at [109] Smith AJA said much the same in more colourful terms: "I suggest...that the best way for prosecuting counsel to present the Crown case fairly is to conduct it strictly according to the rules and not to conduct it according to what is sometimes referred to as the 'rule in Dyer's case: Don't worry about the rules. Just keep going until the umpire blows the whistle'." See also *R v Apostilidis* (1984) 154 CLR 563; *R v Libke* [2007] HCA 30 at [117]-[131] per Heydon J; *R v Smart (Ruling No. 4)* [2008] VSC 89 at [14]-[21]; *R v Chimirri* [2010] VSCA 57 at [59]-[76].

In the course of quashing a conviction for money laundering and ordering a new trial in *Anile v The Queen* [2019] VSCA 235 the Court of Appeal (Priest, Beach & Weinberg JJA) was highly critical of all of the participants in the trial, saying at [1]:

“It has been said that the central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law: see *Jago v District Court of NSW* (1989) 168 CLR 23, 56–7 (Deane J) (*‘Jago’*). It has also been observed that a criminal defendant ‘is entitled to a fair trial but not a perfect one’: *US v Lutwak*, 344 US 604, 619 (1953). See also *Jago*, 49 (Brennan J); *Dietrich v The Queen* (1992) 177 CLR 292, 362 (Gaudron J); *R v Dupas (No 3)* (2009) 28 VR 380, 422 [158] (fn 93) (Ashley JA), 430–31 [188] (Weinberg JA); *Romolo v The Queen* [2016] NSWCCA 240 [28] (Button J); *Packard (a Pseudonym) v The Queen* [2018] VSCA 45 [112]–[114] (Priest JA). Another way of putting this is that an accused person has the right not to be tried unfairly. In the present case, far too many things went wrong in the appellant’s trial for this Court to conclude that his trial was not unacceptably unfair. In our view, an aggregate of defects — including the objectively unfair tactics of the prosecutor, the incompetence of defence counsel in the manner in which he conducted the trial, the judge’s failure to rein-in improper cross-examination, and the significant misdirection of the jury in a particular respect — combined to effect a substantial miscarriage of justice.”

At [130] & [136] the Court of Appeal said:

[130] “The duty which rests upon the prosecution to disclose to the defence any material that might be of assistance in meeting the charges brought is well established. The principles that govern that duty may be summarised as follows:

- the duty to disclose is one that is owed to the Court, and not to the accused: *Cannon v Tahche* (2002) 5 VR 317, 340;
- the duty is to disclose, prior to trial, all material which can be seen on a sensible appraisal to be relevant, or even possibly relevant, to an issue in the case;
- the duty is also to disclose, prior to trial all material which could hold out a real (as opposed to fanciful) prospect of providing a lead towards exculpatory evidence: *R v Farquharson* (2009) 26 VR 410, 464 [213]; see also *R v Reardon (No 2)* (2004) 60 NSWLR 454, and *R v Spiteri* (2004) 61 NSWLR 369;
- a failure to comply with that duty may, in some circumstances, give rise to a miscarriage of justice: *Mallard v The Queen* (2005) 224 CLR 125; and
- the rule requiring disclosure applies in relation to material both in the possession of the prosecution, and material which it should obtain. In others words, the obligation to disclose includes, in an appropriate case, an obligation to make enquiries: *AJ v The Queen* (2011) 32 VR 614, 620 [22].”

[136] “...the duty to disclose is not confined to material that bears upon the credit of prosecution witnesses, though that is sometimes mistakenly believed. Any material that might enable the defence to prepare its case properly, whether seemingly admissible in evidence or not, and whether considered by the prosecution to be more generally harmful to the accused than of assistance, must be disclosed. What use, if any, is to be made of that material is a matter for the defence, not for the prosecution.”

At [149] – [152] the Court of Appeal set out some principles in relation to cross-examination:

[149] “There are rules which govern the conduct of cross-examination in this and every other State. Cross-examination can and, within proper limits, should be searching, and in appropriate cases, vigorous. It should not, however, be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive: *Evidence Act 2008* s 41(3). Questions which are intended only to annoy or insult should not be put.”

[150] While it is not improper, in cross-examination as to credit, to put questions suggesting fraud, misconduct, or the commission of criminal offences, such questions should not be put unless (a) the matters suggested are part of the client’s case, and (b) counsel has no reason to believe they are only put forward for the purpose of impugning the character of the witness. Questions which affect the credibility of a witness by attacking their character, but are not otherwise relevant to the actual matters in issue, ought not be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by those questions are well-founded or true: Sir Gregory Gowans, *The Victorian Bar Professional Conduct, Practice and Etiquette* (The Law Book Company Limited, 1979) 69 & 74.

[151] It is important in the interests of justice that cross-examination be conducted within reasonable limits. For example, previous convictions are ordinarily only likely to bear upon credibility where they are capable of showing a propensity to be untruthful: *R v Hanson*

[2005] 2 Cr App R 21. Thus convictions for traffic offences would not normally be put to a witness by way of an attack upon credibility: Compare *Bugg v Day* (1949) 79 CLR 442.

[152] Of course, there are additional constraints upon the way in which a prosecutor should go about the task of conducting cross-examination. The role of prosecuting counsel differs from that of an advocate representing an accused person. Prosecutors have a positive duty to make any evidence which could be in the interest of an accused available to that accused or their counsel. Their duty is not to obtain a conviction by any or all means. They must not adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon an accused person. That does not mean in properly carrying out their role, cross-examination and jury address must be bland or colourless, but they are not to be zealous and must ensure that they present the case against the accused fairly and honestly: *R v Smith* (2007) 179 A Crim R 453. See also *R v Bathgate* (1946) 46 SR (NSW) 281, 284–5; *Whitehorn v The Queen* (1983) 152 CLR 657; *King v The Queen* (1986) 161 CLR 423; and *R v Bazley* (1986) 21 A Crim R 19, 29.”

In *Brown v R* [2020] VSCA 26 the Court of Appeal set aside the applicant’s conviction on a charge of recklessly causing injury to his partner. The basis of the Court’s reasoning was that there had been a miscarriage of justice in that fresh evidence – a report – had become available since the time of the conviction which, had it been before the jury, would have led the jury to hold a reasonable doubt as to the applicant’s guilt or would have given rise to a significant possibility that the jury would have held such doubt. Although the report was in existence at the time of the trial, the applicant had exercised reasonable diligence in obtaining relevant records but this had failed to result in the production of the report. Because of difficulties associated with a retrial, a judgment of acquittal was entered: cf. *Spies v The Queen* (2000) 201 CLR 603 at [104].

Flowing from the same source as the Crown’s obligation to act fairly is the obligation of any presiding judicial officer to ensure that a trial is not unfair to an unrepresented party: see e.g. *Anile v The Queen* [2019] VSCA 235 at [180]. As it rarely happens that children are unrepresented in criminal proceedings in the Children’s Court, the following discussion is more apposite to unrepresented adult parties in the Family Division. In *R v Kerbaitch* [2005] VSCA 194 at [52]–[53] Chernov & Nettle JJA - with whom Byrne AJA agreed on this point – said of the Court’s duty to an unrepresented accused in a criminal case:

“It is a duty that has been described as ‘onerous’ [*MacPherson v The Queen* (1981) 147 CLR 512 at 544–546 per Brennan J] and it is plain enough that it stems from the accused’s right not to be tried unfairly: see *R v Rich* [1998] 4 VR 44 at 47 per Brooking JA; see also *Jago v District Court (NSW)* (1998) 168 CLR 23 at 56–57 per Deane J; *Dietrich v The Queen* (1992) 177 CLR 292 at 299–300 per Mason CJ & McHugh J; *Azzopardi v The Queen* (2001) 205 CLR 50 at 105 per McHugh J; *Victoria Legal Aid v Beljaev* [1999] 3 VR 764 at 772 per Winneke P.; *A-G (NSW) v X* (2000) 49 NSWLR 653 at 688 per Mason P and *Bayeh v A-G (NSW)* (1995) 82 A Crim R 270 at 275 per Hunt CJ at CL. Not surprisingly, however, when the courts have identified the scope of that duty, they have done so only in general terms. Thus, for example, in *MacPherson v The Queen*, Gibbs CJ & Wilson J said at 546:

‘There is no limited category of matter regarding which a judge must advise an unrepresented accused – the judge must give an unrepresented accused such information as is necessary to enable him to have a fair trial.’

And in *R v White and Piggin* (2003) 7 VR 442 it was said [by Chernov JA at 454] that the trial judge should ‘ensure that the accused is fully aware of the legal position in relation to the substantive and procedural aspects of the case without effectively *advising* him or her of what course should be followed, or unduly interfering with the Crown’s case as if the judge were the accused’s counsel’. It was also recognised in that case [at 456] that, in order to ensure that there is no miscarriage of justice in a trial involving an unrepresented accused, the trial judge has ‘considerable discretion not to apply strictly the procedural and evidentiary rules that would otherwise operate notwithstanding that strict adherence to such rules may be required by the Crown.’... But a trial judge must not assume the role of counsel and instruct the accused *how* to conduct a defence. As Brennan J said in *MacPherson* [at 546] in defining the limits of a judge’s duty to an unrepresented accused, a distinction must be drawn between ‘telling the players how play and telling them the rules of the game’.”

### 3.5.5 Use of recorded evidence [VARE] in certain criminal cases

The Criminal Procedure Act 2009 (Vic) makes provision for the use of recorded evidence in certain criminal cases involving witnesses who are children or have a cognitive impairment or both. For the purposes of the following paragraphs, “sexual offence” is defined in s.3 of that Act as-



- (a) an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part I of the Crimes Act 1958 or under any corresponding previous enactment; or
- (b) an attempt to commit an offence referred to in paragraph (a); or
- (c) an assault with intent to commit an offence referred to in paragraph (a).

For a discussion about the VARE [Video and Audio Recorded Evidence] rationale and procedure and about the reliability of child witnesses generally, see *Martin v The Queen* [2013] VSCA 377 at [20]-[58] per Redlich JA and at [3]-[5] per Neave JA.

#### **3.5.5.1 Evidence-in-chief in certain summary hearings, special hearings or trials**

Sections 366-368 of the Criminal Procedure Act 2009 (Vic) are restricted to a criminal proceeding (other than a committal hearing) that relates (wholly or partly) to a charge for-

- (a) a sexual offence; or
- (b) an indictable offence which involves an assault on, or injury or a threat of injury to, a person.

Under ss.366-367, a witness in such a criminal proceeding who-

- is under the age of 18 years; or
- has a cognitive impairment-

may give evidence-in-chief (wholly or partly) in the form of an audio or audiovisual recording [VARE] of the witness answering questions put to him or her by a person prescribed by the regulations for the purposes of s.367. This is broader than its predecessor in that it is not restricted to evidence by a witness for the prosecution although in practice the majority of such witnesses are likely to be witnesses for the prosecution.

Provisions regulating the use of VARE evidence in summary hearings, special hearings and trials are contained in s.368 of the Criminal Procedure Act 2009 (Vic). In *R v NRC* [1999] 3 VR 537 at 540 Winneke P spoke of the overriding obligation of the trial judge to ensure that such procedures do not expose the accused to the risk of an unfair trial. In *R v Lewis* [2002] VSCA 200 the Court of Appeal said that VARE recordings should not be admitted as exhibits in a trial but should simply be marked 'for identification'. See also *R v BAH* [2002] VSCA 164

#### **3.5.5.2 Evidence in certain criminal special hearings and trials**

Sections 369-377 of the Criminal Procedure Act 2009 (Vic) are restricted to a special hearing and a trial in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence. They have no application at all to summary hearings.

Under ss.369-370 the whole of the evidence (including cross-examination and re-examination) of a complainant who-

- was under the age of 18 years; or
- had a cognitive impairment-

at the time at which the proceeding commenced must be-

- (a) given at a special hearing and recorded as an audiovisual recording; and
- (b) presented to the trial court in the form of that recording.

Under s.370(2) the court may, on the application of the prosecution, direct that s.370(1) is not to apply and that the complainant is to give direct testimony in the trial if the court is satisfied that the complainant-

- (a) is aware of the right to have his or her evidence taken at a special hearing under Division 6 of Part 8.2 and audiovisually recorded; and
- (b) is able and wishes to give direct testimony in the proceeding.

Provisions governing the holding and conduct of a special hearing are set out in ss.371-372 of the Criminal Procedure Act 2009 (Vic). Provisions governing the subsequent tendering and admissibility at trial of evidence from a special hearing are set out in ss.373-375 & 377. Section 376 prohibits cross-examination or re-examination at trial without leave of a complainant whose evidence is recorded under s.370.

### **3.5.6 Contested Family Division case**

#### **3.5.6.1 The usual procedure**

Each party or his or her legal representative usually outlines what they are seeking in the case. Each in turn often calls one or more witnesses to give oral and/or documentary evidence about the case.

Witnesses who are experts in a particular area of knowledge may be called to support a party's case. For example, a psychologist may be called to give evidence about a child's psychological state. The Department's witnesses are usually called first. Each witness who gives evidence for one party can be cross-examined by every other party. The purpose of cross-examination is to allow the accuracy and truth of the witness' evidence to be tested or challenged by the other parties: see *Libke v The Queen* [2007] HCA 30 especially at [117]-[131] per Heydon J. Where there are conflicting accounts or material, the judicial officer must make a decision about which is the more probable account, bearing in mind the dicta of Gleeson CJ and Gummow & Kirby JJ in *Fox v Percy* (2003) 214 CLR 118 at 128-9. The law is then applied to those facts to arrive at a decision.

Judicial officers can and do ask questions of witnesses, especially in the sorts of circumstances adverted to by Davies AJA in *S v DOCS* (2002) 29 Fam LR 144; [2002] NSWCA 151 at [40]:

"In cases of this type, where persons are often unrepresented, and may be emotionally upset by the care order which has been [or may be] made, it is essential that all relevant information is obtained so that an order is made in the best interests of the child...[I]t would have been the duty of the [Children's] Court to ensure that, if relevant information was not in the affidavits, the information was obtained and examined."

The Children's Court is faced with similar problems on a daily basis. It is all very well to say that the Court has a duty to ensure that all relevant information is obtained. However, the Court's ability to inquire is limited. While it now has power under s.532 of the CYFA to subpoena material – such as hospital files or school or police records – which it believes to be relevant but which the parties have failed or refused to produce – it will not necessarily know of the existence of such materials unless one of the parties alerts it. In practice, the Court's investigative arm is largely restricted to the use of the Children's Court Clinic, an outstanding resource but a necessarily limited one.

As with criminal trials, a submission can be made in civil proceedings at the conclusion of the applicant's case that the respondent has no case to answer. The relevant test is set out in *Protean (Holdings) Ltd and Ors v American Home Assurance Co* [1985] VR 187; see also *Oakley and Anor v Insurance Manufacturers of Australia Pty Ltd* [2008] VSC 68 esp at [4]-[11]. However a no case submission is rare in the Family Division. The writer is only aware of two cases in which no case submissions have been made: *DOHS v CS* {PA268/96} [Children's Court of Victoria-Power M, unreported, 05/12/1996] and *DOHS v TD* {PA0835/2002} [Children's Court of Victoria-Power M, unreported, 28/07/2002]. The submission was upheld in the first case but not in the second.

### 3.5.6.2 Informal procedure – s.215(1) of the CYFA

Although Family Division proceedings remain to some extent adversarial in nature, the Court is required to conduct them in an informal manner and without regard to legal forms: **ss.215(1)(a) & 215(1)(b) of the CYFA**. These provisions sound as if they confer a very broad discretion on the judicial officer conducting the proceeding. However, in *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, the earliest superior court case on the interpretation of the similar provision in the Family Law Act 1975 (Cth) empowering the Family Court to proceed without undue formality, the High Court by majority granted a wife's application for a writ of prohibition against Justice Watson continuing to hear Family Court proceedings further. One of the impugned statements of Justice Watson was as follows:

"[T]his will sound a strange comment but the proceedings in this Court are not strictly adversary proceedings. The matter in which I am involved is more in the nature of an inquiry, an inquisition followed by an arbitration."

A majority of the High Court (Barwick CJ, Gibbs, Stephen & Mason JJ) disagreed, saying at 257-258:

"The judge called upon to decide proceedings of that kind is not entitled to do what has been described as 'palm tree justice'. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down...He must follow the procedure provided by the law. The provisions of s.97(3) of the Act, which require him to proceed without undue formality, do not authorize him to convert proceedings between parties into an enquiry which he conducts as he chooses."

*Re Watson; Ex parte Armstrong* was a financial dispute. The case of *Lonard* (1976) FLC 90-098, also decided in 1976, was a custody dispute. The Full Court of the Family Court drew a distinction between the two and held that judges would find it necessary to exercise more extensive powers of inquiry in children's matters. However, in *Wood v Wood* (1976) FLC 90-098, the Full Court of the Family Court set aside an order of a trial judge which had dispensed with both *viva voce* evidence and

cross-examination, on the basis that the best available evidence had not been available at first instance which, it noted, was of particular importance in cases involving children.

In a dissenting judgment in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 373 Dawson J said – in dicta not inconsistent with the majority views:

“Proceedings in the Family Court in relation to the custody, guardianship or welfare of or access to a child are, in an important respect, not of the ordinary kind... Thus the jurisdiction being exercised in this case, whilst essentially judicial, was not entirely *inter partes* because the paramount consideration was the welfare of the child. In this respect it was a jurisdiction analogous to the jurisdiction of the Court of Chancery in wardship cases which was of a special kind, permitting procedures which would not be permitted in judicial proceedings of the ordinary kind. See *In re K (Infants)* [1965] AC 201... Nevertheless these proceedings remained judicial proceedings. Neither their special nature nor the requirement in s.97(3) that the court should proceed without undue formality relieved the court of the obligation to observe, where applicable, the procedures which are followed by courts acting judicially in order to ensure impartiality and fairness.”

See also *M v M* (1988) 166 CLR 69 at 76; In *Re P (a child) and the Separate Representative* (1993) FLC 92-376; *D and Y* (1995) FLC 92-581; *C and C* (1996) FLC 92-651; *U v U* (2002) 211 CLR 238.

In *Re Lynette* (1999) FLC 92-863 at 86,203 the Full Court of the Family Court said:

“[I]t is well established that proceedings in relation to the best interests of children are not strictly adversarial. The wellspring for the departure from a strictly adversarial approach to proceedings is to be found in the Court’s obligation to treat the best interests of the child the subject of proceedings as the paramount consideration.”

Proceedings under the Children Act 1989 (UK) have also been similarly characterized: see *Oxfordshire County Council v M* [1994] Fam 151. The Court has power - and in some instances a duty - to inquire about issues which it considers relevant to the best interests of the child. This is especially so where the parties are not on a 'level playing field', e.g. where the Department is legally represented and a parent is not. As Legal Aid guidelines tighten, unrepresented parents are regrettably an increasing phenomenon, a phenomenon which often makes the adversarial system unworkable. A striking illustration is the Family Court case of *T v S* [2001] Fam CA 1147 in which the mother, unrepresented until the 6<sup>th</sup> day of the trial, had been faced with the Herculean task of cross-examining an expert witness called by the father who had testified that she suffered from a histrionic personality disorder, the symptoms of which included attention-seeking behaviour, crisis manufacture and self-harm. To put her case properly, she had also had to cross-examine the father about allegations that he had perpetrated domestic violence on her throughout the relationship. It is scarcely surprising that much of her questioning was irrelevant and of little assistance to the trial judge. The Full Court, noting that "this case highlights a serious problem affecting the administration of justice in family law proceedings", concluded that because of her lack of legal representation the mother had not been granted a fair trial, procedural fairness or the opportunity to present all material evidence relevant to the best interests and welfare of the child. In particular the Chief Justice commented that "women who have suffered serious domestic violence may be unable to present their cases unaided in family law proceedings". A re-trial was ordered.

**Section 215(1)(d) of the CYFA** is also expressed very broadly, empowering the Family Division of the Children’s Court to “inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary”.

In a paper entitled "Restructuring Child and Family Courts", delivered at a conference in Capetown, RSA in April 2003, Judge Coate explained the significant concerns which the Court has about the adversarial model of judicial decision-making in contested Family Division cases:

"In the last couple of years it has become the firm view of the full time judicial members of the Children’s Court of Victoria that this model is in need of an extensive rethink. There is a strongly developing view amongst the members of the Court that some aspects of the current system would be greatly improved by changes such as the following:

- (1) An **independent** skilled investigative team that is not a **party** to the action with appropriate training and an understanding of how the legal system works;
- (2) A statutory power available to the Court to direct the attendance of a party or the production of a document;
- (3) A court hearing that was an inquiry rather than an adversarial battle;

- (4) A capacity to order further expert assessments or examinations to assist in the first stage of the decision-making process of deciding whether or not the child was in need of protection."

In s.532(1) of the CYFA the second of Judge Coate's expressed concerns has now been met by the provision to the Family Division of a power to issue witness summonses of its own motion, i.e. without there being any application by a party to do so. And the writer considers that s.560 of the CYFA [when read in conjunction with s.557(1)(e)] is probably broad enough to enable a Children's Court judicial officer to order a Children's Court Clinic assessment as to whether or not the child was in need of protection whether or not the parties consent to such an assessment. But notwithstanding these qualifications, the fundamental principles of the adversarial system still remained operative, even if somewhat modified by ss.215(1)(a), 215(1)(b), 215(1)(d) & 215B of the CYFA.

### 3.5.6.3 Management of child protection proceedings – s.215B of the CYFA

The third of Judge Coate's concerns has finally been partly addressed. As from 01/12/2013 s.215B of the CYFA gives judicial officers much greater power to manage the conduct of child protection proceedings in a less adversarial way than the power granted by ss.215(1)(a) & 215(1)(b) as diluted by cases like *Re Watson*; *Ex parte Armstrong* and *Wood v Wood*. Section 215B provides:

- "(1) Without limiting Part 1.2 ['best Interests' principles] or s.215(1), in any proceeding before the Family Division under this Act, the Court may-
- (a) consider the needs of the child and the impact that the proceeding may have on the child;
  - (b) conduct proceedings in a manner that promotes cooperative relationships between the parties;
  - (c) ask any person connected to the proceeding whether that person considers that-
    - (i) the child has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence within the meaning of the Family Violence Protection Act 2008;
    - (ii) he or she or any other person connected to the proceeding has been, or is at risk of being subjected to family violence;
  - (d) actively direct, control and manage proceedings;
  - (e) narrow the issues in dispute;
  - (f) determine the order in which the issues are decided;
  - (g) give directions or make orders about the timing of steps that are to be taken in proceedings;
  - (h) in deciding whether a particular step is to be taken, consider whether the likely benefits justify the costs of taking it;
  - (i) make appropriate use of technology, such as videoconferencing;
  - (j) deal with as many aspects of the matter on a single occasion as possible;
  - (k) where possible, deal with the matter without requiring the parties attend Court;
  - (l) do any other thing that the Court thinks fit."

The heading of s.215B is "Management of child protection proceedings" but the section itself refers to "any proceeding before the Family Division under this Act". Section 215B is in Part 4.7 of the CYFA which is headed "Procedure in Family Division". However, under s.515(2) the jurisdiction of the Family Division includes jurisdiction given by the Family Violence Protection Act 2008 and the Personal Safety Intervention Orders Act 2010. Under s.36(1) of the Interpretation of Legislation Act 1984 (Vic) the heading to a Part of an Act forms part of the Act. By contrast, under ss.36(3) & 36(4) a heading to a section of an Act does not form part of the Act although it can be used as aid to interpretation of the section. However, as Deane J (Gibbs CJ, Brennan & Dawson JJ agreeing) held in *K. & S. Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 321-3 where the provisions of the section in dispute were complete on their face there was no basis for reading down the clear language of the section by reason of the heading to the Part of the Act in which the section was located.

But is s.215B indeed clear and unambiguous on its face? If it was intended to apply to intervention order proceedings as well as child protection proceedings, one might wonder why s.215B(1)(c) was included since its two considerations would be at the heart of any proceeding under the Family Violence Protection Act 2008. On balance, the writer considers that s.215B should probably be read within the context of the section heading which restricts its operation to child protection proceedings and that it does not apply to the conduct of intervention order proceedings. But this interpretation does leave unanswered the question of how properly to manage joint child protection and intervention order proceedings.

#### 3.5.6.4 Obligation to accord procedural fairness in ‘best interests’ context

How are the very broad procedural powers provided to the Children’s Court by ss.215(1) & 215B of the CYFA to be read in the context of-

- the Court’s obligation to accord procedural fairness – sometimes termed ‘natural justice’ – to all of the parties; and
- the requirements in ss.8(1) & 10(1), the latter of which provides: “For the purposes of this Act the best interests of the child must always be paramount.”?

These three factors are not always easy to reconcile given that one of the foundations of the adversarial system is the doctrine of procedural fairness whereas the genesis of s.215B is the Less Adversarial Trial [‘LAT’] approach in operation in the Family Court of Australia (for a discussion of which see section 3.5.7).

Broad as ss.215(1) & 215B are, the writer considers that the following cases make it tolerably clear that these statutory provisions do not allow the Children’s Court to dispense **entirely** with the rules of procedural fairness.

Section 215(1)(d) of the CYFA empowers the Family Division of the Children’s Court to “inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary”. However, despite its broad language, the Court of Appeal, by way of *obiter*, stated in *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 at [28]-[29] that s.215(1)(d) of the CYFA was subject to a requirement to afford procedural fairness to all parties. Similarly, in *Van Susteren v Packaje Pty Ltd* [2008] VSC 586 at [5]-[6] Byrne J made it clear that similar provisions regulating the conduct of proceedings in the Small Claims Tribunal did not dispense with the rules of natural justice:

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

In *T v T* [2008] FamCAFC 4; (2008) FLC 93-360; (2008) 38 Fam LR 614 the Full Court of the Family Court of Australia (Bryant CJ, Kay & Thackray JJ) highlighted at [163] the Family Court’s obligation to accord all of the parties procedural fairness notwithstanding the LAT provisions:

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

In *Secretary, Department of Human Services v Sanding* [2011] VSC 42, under the heading “**Impact of best interests of child on court’s procedural discretion**”, Bell J said at [135]-[137]:

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

[136] Thus, in *J v Leischke* (1987) 162 CLR 447 at 457, it was held by Brennan J (with whom Mason, Wilson, Deane & Dawson JJ agreed) that in ‘some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy of the welfare of the child’, but only ‘so far as necessary to avoid frustration

of the purpose for which the jurisdiction is conferred'. That principle was applied in the Family Court of Australia in *Separate Representative v E* (1993) 114 FLR 1 by Nicholson CJ and Fogarty J, who held at 14:

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

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

In *DHHS v Children's Court of Victoria & Ors* [2020] VSC 520 McMillan J said at [61]:

**"[T]he requirements of procedural fairness must be adapted to reflect the procedural flexibility granted to the Children's Court by s.215 of the Act. Although this may mean that the rules of natural justice are not given their full application, those rules cannot be done away with altogether.** In certain cases it may be necessary for the Children's Court to proceed without sworn evidence when granting interim relief, or relief on an urgent basis. In *Sanding* [2011] VSC 42, Bell J upheld the Court's decision made in the absence of sworn evidence in circumstances where there was no dispute as to the material facts, and no dispute as to the best interests of the children in that case." [emphasis added]

In *Secretary to DHHS v Children's Court of Victoria* [2012] VSC 422 at [20]-[22], John Dixon J said:

[20] "The rules of procedural fairness do not interfere with the court's obligation to consider best interests principles. As Bell J said in *Secretary, Department of Human Services v Sanding* [2011] VSC 42, 40 [135]-[147] where the jurisdiction is one in which the interests of the child are paramount, the particular content and application of the rules of natural justice will reflect the nature of that jurisdiction and influence the exercise of the court's procedural discretion. However, that influence is constrained in the way described by Brennan J in *J v Lieschke* (1987) 162 CLR 447, 457 (Mason, Wilson, Deane and Dawson agreeing) as: **'In some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy to the welfare of the child', but only 'so far as is necessary to avoid frustration of the purpose for which the jurisdiction is conferred'**. This was applied in *Separate Representative v E* (1993) 114 FLR 1, 14. See also in *Re Kaye (Infants)* [1965] AC 201; *Birmingham Juvenile Court; Ex parte G (Minors)* [1990] QB 573.

[21] I agree with Bell J's conclusions in *Sanding*. While the applicable notions of natural justice and procedural fairness afforded to the parties may be influenced by the overriding consideration of the best interests of the child if the purposes for which the jurisdiction is conferred may be frustrated, the parties must still be afforded procedural fairness. Any limitation on procedural fairness considered appropriate in the circumstances of a particular case ought to be transparently balanced against the anticipated risk of frustration of the purposes for which the jurisdiction is conferred, particularly where, as in the case of this Act, the legislature has, at some length, articulated the best interests principle that is to guide the court's decisions.

[22] Earlier decisions of this court that have considered 'submissions hearings' [some of which are discussed in chapters 4.9.1 & 5.11.11 of these Research Materials] must be considered in context. Each of these decisions was carefully considered in *Sanding* when Bell J concluded that disposition of the application that was being reviewed in that proceeding by a submissions hearing did not involve a want of procedural fairness. In my view, as the circumstances of the application that I am concerned with differ from those in *Sanding* and in the earlier decisions, the submissions hearing did involve a want of procedural fairness." [emphasis added]

The writer notes with respect that noone commenting on *Sanding's Case* appears to have noticed its fundamental flaw. In dismissing the Department's appeal, Bell J upheld the Magistrate's decision to grant the mother's application to revoke the custody to Secretary orders and to make interim accommodation orders in lieu. However, once the appeal was dismissed the case no longer came

within any of the grounds in s.262(1) upon which an interim accommodation order could lawfully be made. Accordingly, it was subsequently necessary for the Department to file a new protection application in the Children's Court for each child in order to continue its involvement with the child.

See also the detailed discussion of procedural fairness/natural justice in section 3.1 above and dicta-

- of Warren CJ in relation to the granting of adjournments by the Victorian Civil and Administrative Tribunal in *Macdiggers Pty Ltd v Maria Dickinson and Peter Dickinson* [2008] VSC 576 at [23]-28];
- of the Court of Appeal (Maxwell P, Beach & Niall JJA) in relation to proceedings involving an unrepresented litigant in the Magistrates' Court in *Roberts v Harkness & Anor* [2018] VSC 215 in allowing a prosecution appeal against a decision of Bell J [2017] VSC 646; and
- of the High Court in *HT v The Queen* [2019] HCA 40 at [17]-[52].

Although there appears to be no case law directly on point, the writer can see little reason for requiring a significantly different duty by the Court towards an unrepresented party in the Family Division than that set out by the Court of Appeal in *R v Kerbailch* [2005] VSCA 194 at [52]-[53] in relation to an unrepresented accused.

It is a moot point whether or not the Department of Families, Fairness and Housing is bound by the same rules of procedural fairness in Family Division cases as is the prosecution in a criminal trial. As to the latter see the dicta in *R v Calway*, *R v Lucas* & *R v Parsons & Stocker* referred to in section 3.5.4 above. However, since proceedings in the Family Division have similar aims of establishing the truth and ensuring that justice is done as between the individual and the State, it is difficult to see any compelling reason why the State's obligation to accord procedural fairness to all of the individuals involved in a Family Division proceeding should be lower than its obligation in a criminal trial. This view is reinforced by the fact that the Department of Families, Fairness and Housing is obliged to act as a model litigant: see "Guidelines on the State of Victoria's Obligation to Act as a Model Litigant" as set out in Schedule 4 of the Legal Services to Government Panel contract and see also section 4.1.6.

### 3.5.7 The Less Adversarial Trial approach of the Family Court of Australia

Following a successful trial of a pilot known as the Children's Cases Program – whose aim was to enable disputes about children to be conducted in a less adversarial way – a legislative amendment in 2006 has enabled the Family Court of Australia to apply a less adversarial approach to Family Court hearings generally and to develop processes to support this less adversarial trial approach (LAT). A detailed discussion of the development of the LAT and the case law which underpins it is contained in Margaret Harrison's book "Finding A Better Way" (Family Court of Australia, April 2007). In her introduction Ms Harrison describes the LAT as follows:

"In an approach pioneered by the Family Court of Australia, family law has recently undergone the most significant change to the way in which litigation is conducted in this country in modern history. The change, from a traditional common law approach to a less adversarial trial, has significant implications, not only for the conduct of family law litigation but also for the conduct of litigation as a whole. It represents a bold step towards bridging the gap between common law systems of litigation and the European civil law system. So far as family law is concerned, the change received legislative force with the passage of Division 12A of Part VII of the Family Law Act 1975 (Cth) which was inserted by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

In children's cases, Division 12A swept away restrictive rules of evidence and the control of proceedings was placed in the hands of the judge, rather than the parties or their legal representatives. The focus is a future looking one, geared to the needs of the child. As a consequence of the new procedures, parties are no longer free to conduct litigation as a forensic war between each other at the expense of the interests of the child. At the same time the best features of the Court's highly developed system for mediation and resolution of disputes has not only been preserved but also enhanced, and the role of what is now called the family consultant [initially called 'counsellor' and then 'mediator'] has become even more significant. The unique approach retains and relies on the special assistance provided by family consultants, whilst providing a clear child focus underpinned by active judicial leadership and direction...The [LAT] became mandatory for parents filing a child-related application after 01/07/2006."

However, as Margaret Harrison noted in "Finding A Better Way" at p.14:

"[T]here was never any suggestion that a complete departure from the traditional adversarial processes in children's cases would be supported. The issue was always seen as one of



balancing procedural fairness with a recognition of the special nature of children's matters. In *Northern Territory of Australia v GPO* (1999) 196 CLR 553, the High Court made it clear that there were limits to the way in which the paramountcy principle of the welfare of the child enabled the Court to depart from ordinary rules of procedure and evidence...In *T and S* (2001) FLC 93-086 at 88,522...Nicholson CJ, Ellis & Mullane JJ commented that, although proceedings involving the welfare of children are not strictly adversarial in the usual sense, they should not be equated with inquisitorial proceedings, and noted that 'the Court and its procedures are simply not equipped to conduct inquisitorial proceedings'."

In the 2008-2009 Annual Report of the Family Court of Australia at p.34 it is noted that for many years about 5% of Family Court cases required a judge to make a determination but currently over 11% of the Court's cases require the judge to make a determination. The writer wonders whether this is causally related to the court's move to a less adversarial approach. If it is, it is probably unexpected.

### **3.5.8 Use of recorded evidence in cases in the Family Division**

In the case of *The H Children* [Children's Court of Victoria, unreported, 04/02/1999], the Court held that although s.37B of the Evidence Act 1958 [as amended] and the Evidence (Recorded Evidence) Regulations 1994 did not apply to protection proceedings in the Family Division, audiovisual recordings of a child's evidence may be admitted, at the discretion of the presiding judicial officer, pursuant to s.82(1)(d) of the CYPA. Despite significant legislative changes since then, the writer has no doubt that audio or audiovisual recordings of a child's evidence – colloquially called "VARE tapes" – may still be tendered in any proceedings in the Family Division of the Court (whether protection proceedings, intervention order proceedings or any other sorts of proceedings) even if they have been specifically prepared for use in criminal proceedings. This is now authorized by s.368A(1) of the Criminal Procedure Act 2009 (inserted by Act 48/2012) which provides that "A court may order that a recording referred to in s.367 be produced for use in a proceeding (other than a [criminal] proceeding referred to in s.368) before that court if the court is satisfied that it is in the best interests of the witness to do so." Section 368A(3) provides that in making an order under s.368A(1), the court must have regard to the need to protect the privacy of the witness. If the court makes an order under s.368A(1), it is required by s.368A(2) to specify-

- (a) the persons who may view or listen to the recording; and
- (b) when and where the recording is required to be produced; and
- (c) if necessary, any requirements as to the destruction of the recording.

### **3.5.9 Production of documents in cases in the Children's Court**

It is becoming increasingly common in the Children's Court for parties to obtain production of documents in the possession of the prosecuting agency, including DFFH's files, DFFH's "notes" and Victoria police files. Sometimes these are obtained by means of sub-poena. In the Criminal Division they are usually obtained pursuant to the "Pre-hearing disclosure" provisions of ss.35-49 & 107-117 of the Criminal Procedure Act 2009 (Vic). In "apprehension cases" in the Family Division they are usually obtained by what is colloquially referred to as a "request for notes".

#### **3.5.9.1 Production under sub-poena**

In *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No.4)* [2011] VSC 269 Vickery J summarized the common law in relation to subpoenas as follows:

- "(1) A person served with a subpoena to produce, requiring the production of specified documents, must attend at the place directed by the subpoena and produce such of the specified documents which he or she is able to produce, unless he or she can establish some good reason why the documents should not be produced.
- (2) Production of documents under subpoena to produce means production to the court, not to a party.
- (3) Upon the production of a document to the court, the court takes the document into its custody to use it for the temporary purpose of resolving disputed questions of fact. That power is essential to the proper administration of justice and prevails over private property rights.
- (4) The court has a discretion to allow a party to inspect a document that appears to be relevant to the issues, whether or not it is in admissible form.
- (5) A party having a legitimate forensic purpose in seeing a document will not ordinarily be denied inspection by the circumstance of the document not being admissible in evidence.

The procedure is summarised by the steps described by Moffat PA in *Waind v Hill & National Employers Mutual* [1978] 1 NSWLR 372 at 381, where his Honour said as follows:

‘As Jordan CJ pointed out in *Small’s* case, as appears in *Birchett’s* case, there are at least two steps in the procedure of having a third party bring documents to court, and in their use thereafter. Indeed on a correct view there are three steps. The first is obeying the subpoena by the witness bringing the documents to the court and handing them to the judge. This step involves the termination of any objections of the witness to the subpoena or to the production of the documents to the court pursuant to the subpoena. The second step is the decision of the judge concerning the preliminary use of the documents which includes whether or not permission should be given to a party or to parties to inspect the documents. The third step is the admission into evidence of the document in whole or in part or the use of it in the process of evidence being put before the court by cross-examination or otherwise.’

It is during the second step described in *Waind’s* case that issues such as privilege are determined. If the document in issue is determined to be privileged, the document may not be released to other parties upon their request.”

The relevant principles for determining an accused’s entitlement in a criminal proceeding to access documents the subject of a subpoena were summarised by J Forrest J in *Commissioner of the Australian Federal Police v Magistrates’ Court of Victoria* [2011] VSC 3 at [28] as follows:

- “(a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;
- (b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;
- (c) the applicant for the witness summons must also satisfy the court that it is ‘on the cards’, or that there is a ‘reasonable possibility’ that the documents sought under the subpoena ‘will materially assist the defence’;
- (d) a ‘fishing expedition’ is not a legitimate forensic purpose and will not be permitted;
- (e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence;
- (f) a mere assertion of bad faith by an applicant or that something might be found demonstrating bad faith is not enough – the criteria set out in (c) must be satisfied;
- (g) in criminal proceedings a ‘more liberal’ view is taken by a court in respect of the application of the test. Special weight is to be given to the fact that the documents may assist the defence of the accused;
- (h) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.”

See also the judgments of Kyrou J in *Victoria v Lane* [2012] VSC 328 at [17]-[21], *R v Debono* [2012] VSC 350 at [194]-[224] and *Dolheguy v Lane* [2012] VSC 328 at [16]-[23].

Pursuant to s.190 of the CYFA, details which might tend to identify a notifier are generally removed from documents produced by DFFH under sub-poena. In *Oxfordshire County Council v M* [1994] Fam 151 it was held that in proceedings under the Children Act 1989 (UK) the court has power to override legal professional privilege in order to admit information which will enable the court to make a properly informed decision as to the interests of the child.

In *Smith v Victoria Police* [2012] VSC 374 Ferguson J granted the plaintiff “whistleblower” leave to inspect “Whistleblower” files held by the respondent, holding at [58]: “Were a narrower construction [of s.22(1)(a) of the *Whistleblowers Protection Act 2001* (Vic)] employed, the effect would be to prevent a whistleblower and the Court from having access to information that is likely to be critical to the determination of the claim. It would serve to protect the alleged wrongdoer and would be contrary to the legislative purpose of the Act.”

Public interest immunity is occasionally claimed by the Crown in relation to certain documents sought in criminal proceedings. In *R v Mokbel (Ruling No.1)* [2005] VSC 410 & *R v Mokbel (Ruling No.2)*

[2005] VSC 502 Gillard J discussed in detail the basis of subpoenas and discovery in criminal matters and the categories, principles and competing public interests involved in public interest immunity. In *R v Cox & Ors (Ruling No.3)* [2005] VSC 249 Kaye J set out one possible procedure for determining a claim for public interest immunity and discussed the underlying principles requiring the Court to balance the extent, if any, to which harm would be done to the public interest by the production of the documents against the extent, if any, to which the administration of justice would be frustrated or impaired if the documents were withheld from a party to the litigation. See also *R v Saleam* (1989) 16 NSWLR 14 at 16 *et seq* where Hunt J discussed the question of legitimate forensic purpose and *Alister v The Queen* (1984) 154 CLR 404 at 414 where Gibbs CJ enunciated his well-known test that the judge must be satisfied that it is “**on the cards**” that the documents sought will materially assist the accused in his defence.

In *Ragg v Magistrates’ Court & Corcoris* [2008] VSC 1 Bell J upheld a magistrate’s decision to require a police informant to produce a number of categories of documents sought pursuant to two subpoenas. The informant had objected to the production of the documents on the grounds that the subpoenas were an abuse of process, were oppressive, were impermissible fishing expeditions and were not supported by any legitimate forensic purpose. The magistrate had identified the applicable test by reference to the relevant authorities and had specifically mentioned *Alister v R* (1983) 154 CLR 404, *R v Mokbel (Ruling No 1)* [2005] VSC 410, *DPP v Selway* [2007] VSC 244 and *Roads and Traffic Authority of New South Wales v Conolly* (2003) 57 NSWLR 310. On the basis of those authorities, he said that the court had to adopt a liberal approach when assessing the legitimate forensic purposes of the defence in a criminal trial, that special weight had to be given to the fact that the documents sought might assist an accused person and that it was then for the judge to determine whether it appeared ‘on the cards that the documents would assist the accused in his defence’. In a very detailed judgment Bell J discussed matters under the following headings, citing *inter alia* a number of authorities including the following:

- [35]-[44] **International human rights:** *International Covenant on Civil and Political Rights* [opened for signature 16/12/1966, 999 UNTS 171, entered into force 23/03/1976] and
- [45]-[66] **“Equality of arms”:** *Foucher v France* (1998) 25 EHRR 234, [34]; *Edwards v United Kingdom* (1993) 15 EHRR 417; *Fitt v United Kingdom* (2000) 30 EHRR 480; *Mallard v R* (2005) 224 CLR 125 per Kirby J.
- [67]-[83] **Prosecutor’s duty of fairness:** *Connelly v DPP* [1964] AC 1254, 1357; *Cannon v Tahche* (2002) 5 VR 317, 339-340; *R v Higgins* (unreported, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne & Eames JJ, 2 March 1994), BC9406132, 74; *R v H* [2004] 2 AC 134; *Attorney General’s Reference (No 3 of 1999)* [2001] 2 AC 91, 118 per Lord Steyn.
- [84]-[116] **Striking out summons to produce issued by the defence in criminal cases:** *R v Saleam* (1989) 16 NSWLR 14, 19-20; *Sobh* (1993) 65 A Crim R 466, 473; *Clarkson v DPP* [1990] VR 745, 759; *R v Mokbel (Ruling No 1)* [2005] VSC 410, [33]-[42]; *Alister v R* (1983) 154 CLR 404; *Roads and Traffic Authority of New South Wales v Conolly* (2003) 57 NSWLR 310; *Felice v County Court of Victoria and Anor* [2006] VSC 12; *DPP v Selway* [2007] VSC 244.

In his conclusion at [119] Bell J enunciated the following test based on his assumption of what Gibbs CJ had in mind when he used the “on the cards” metaphor in *Alister v R* (1984) 154 CLR 404, 414:

“In my view, the governing principle is that an accused person is entitled to seek production of such documents as are necessary for the conduct of a fair trial between the prosecution and the defence of the criminal charges that have been brought. When objection is taken, the accused must identify expressly and with precision the forensic purpose for which access to the documents is sought. A legitimate purpose is demonstrated where the court considers, having regard to its fundamental duty to ensure a fair trial, that there is a reasonable possibility the documents will materially assist the defence. That is a low threshold, but it is a threshold.”

His Honour considered that this test, expressed in more certain language than Chief Justice Gibbs’ metaphor, gives proper effect to the fundamental duty of the court to ensure a fair trial and was consistent with the human rights of an accused person to equality before the law and a fair hearing, as well as the “equality of arms” principle stated in international jurisprudence.

In *Attorney-General for NSW v Chidgey* [2008] NSWCCA 65 the NSW Court of Criminal Appeal reviewed the relevant authorities and held that mere relevance is not sufficient and that the test set out in *R v Saleam* [1999] NSWCCA 86 at [11] by Simpson J (Spiegelman CJ & Studdert J agreeing) should continue to be applied. That test is as follows:

“The principles governing applications [for an order that documents not be produced] are no different from those governing applications for access to documents produced in answer to a subpoena. Before access is granted (or an order to produce made) the applicant must

- (i) identify a legitimate forensic purpose for which access is sought; and (ii) establish that it is 'on the cards' that the documents will materially assist his case."

In *Johnson v Poppeliers* [2008] VSC 461 Kyrou J analysed a number of authorities – including the afore-mentioned *Attorney-General for NSW* and the Victorian cases of *Fitzgerald v Magistrates' Court of Victoria* (2001) 34 MVR 448; [2001] VSC 348 at [31] and *Ragg v Magistrates' Court & Corcoris* [2008] VSC 1 - before stating a "legitimate forensic purpose" test at [42]:

"[In] Victoria, the test for determining whether evidence sought on summons by a defendant has a legitimate forensic purpose, is whether there is a reasonable possibility that the evidence would materially assist the defence. The test of 'within the range of probability' set out in *Fitzgerald* does not correctly state the law. The authorities also establish that while a fishing expedition is insufficient, the test of 'reasonable possibility' must be applied flexibly (and, I would add, with common sense) in order to give the accused a fair opportunity to test the Crown's case and take advantage of any defences available to the accused. See also *Gaffee v Johnson* (1996) 90 A Crim R 157, 163-5. Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of the defence does not necessarily mean that the reasonable possibility test is not met. This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively 'eviscerate' [*Alister* (1983) 154 CLR 404, 451] the defence."

In *Madafferi v The Queen* [2021] VSCA 1 the appellant sought the release of subpoenaed documents in an attempt to find out whether his solicitor Mr Acquaro and his barrister Ms Gobbo were police informers at certain relevant times and accordingly that he did not receive independent legal advice from either. The Chief Commissioner of Police opposed the release on the grounds of public interest immunity (PII), specifically the so-called public interest in protecting the anonymity of police informers. The Court of Appeal (Emerton, Weinberg & Osborne JJA) ordered the release of the documents, discussing the legal framework at [27]-[40] as follows:

[27] "It is common ground that, by reason of s 131A of the *Evidence Act 2008*, the PII application is to be determined in accordance with s 130 of that Act. Section 130(1) provides:

'If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.'

[28] Section 130(4)(e) provides that information or a document is taken to relate to 'matters of state' if adducing it as evidence would 'disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State'. There is no dispute that information or documents that would disclose whether Acquaro was a police informer relate to 'matters of state'.

[29] Likewise, there is no dispute as to the competing public interests in this case. They are:

- (a) on the one hand, the public interest in maintaining confidence in the ability of police to protect avenues of information and intelligence, including the ability of police to protect informers (whether actual or perceived); and
- (b) on the other hand, the interest in disclosing information that a person asserts may assist them in seeking to quash a conviction.

[30] Section 130(5) sets out a list of the matters a court is to take into account for the purpose of the balancing exercise in s 130(1). They are:

- (a) the importance of the information or the document in the proceeding;
- (b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor;
- (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
- (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
- (e) whether the substance of the information or document has already been published;

- (f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused—whether the direction is to be made subject to the condition that the prosecution be stayed.

[31] The construction of s 130 is informed by the common law. In *Ryan v State of Victoria* [2015] VSCA 353, Tate JA recognised at [58] that there ‘is considerable support in the authorities for the view that the principles governing public interest immunity under s 130 of the Act reflect those applicable at common law; what differences exist are of no practical significance’. In *Attorney General (NSW) v Lipton* (2012) 224 A Crim R 117; [2012] NSWCCA 156, Basten JA stated at [39] that the balancing exercise was not to be constrained by unexpressed rules derived from the general law, however, he did so in the context of a request for documents for a sentence appeal where the respondent had pleaded guilty and in response to a submission that the court was constrained by a common law rule that where nonproduction was necessary to protect the identity of an informant, the only available exception was the public interest in an accused person properly defending themselves against conviction. In stating that the balancing exercise was not constrained in the manner contended for, like Tate JA, his Honour observed the same result might be expected on either approach.

[32] The common law makes clear that there is a well-recognised public interest in maintaining the anonymity of police informers. There is a significant body of law protecting from disclosure the identities of police informers. The importance of protecting the anonymity of police informers as an aspect of the public interest has been widely accepted.

[33] In *Jarvie v Magistrates’ Court of Victoria* [1995] 1 VR 84, Brooking JA considered at pp.89-90 (albeit in obiter remarks) when the identity of an informer might be disclosed, concluding that a test laid down by Vincent J in *Cerrah v The Queen* (Victorian Court of Appeal, Young CJ, Vincent and Crockett JJ, 6 October 1988) should be understood as requiring it to be demonstrated that ‘there is good reason to think that disclosure of the informer’s identity may be of substantial assistance to the defendant in answering the case against him.’ Brooking JA said at p.90:

‘The fact that there is good reason to think that disclosure of the informer’s identity may be of some slight assistance to the defence is not sufficient to outweigh the public interest in non-disclosure. The balancing process accepts that justice, even criminal justice, is not perfect or even as perfect as human rules can make it. But once it is demonstrated that there is good reason to think that non-disclosure may result in substantial prejudice to the accused, the balance has been shown to incline in his favour and disclosure should be directed.’

[34] Having regard to this passage, the amici submitted that the weight that must be given to the public interest in the administration of criminal justice means that the public interest in favour of disclosure will necessarily prevail if there is good reason to think that disclosure may be of substantial assistance to the accused.

[35] Certainly, this is consistent with the following observation by Brooking JA at p.90:

‘It may be suggested that the notion of a balancing of relevant factors pointing in one direction against relevant factors pointing in the other is not consistent with the proposition that identity must be disclosed if there is good reason to think that disclosure may be of substantial assistance to the defendant, and that the question must always be the general one whether the public interest will be better served by disclosure or non-disclosure. On this approach it might be said that the degree of possible prejudice from non-disclosure to which a given defendant may be required to submit may depend on the strength of the considerations favouring non-disclosure. But it seems to me that the overriding need for a fair trial must mean that in no circumstances can the identity of a witness be withheld from a defendant if there is good reason to think that disclosure may be of substantial assistance to the defendant in combatting the case for the prosecution.’

[36] His Honour continued:

‘To say that in such a case no balance is called for is to say that, whatever the strength of the case in favour of non-disclosure, it cannot prevail. But a balancing has still been carried out, and effect has been given to an overriding principle that the ‘right’ to a fair trial must not be substantially impaired.

[37] Brooking JA’s remarks were taken up by this Court in *AB v CD & EF* [2017] VSCA 338, which at [59] reformulated the test in the context of criminal appeals as follows:

‘[T]he test formulated by Brooking J in *Jarvie* may be reformulated as requiring it to be demonstrated that there is good reason to think that disclosure of the informer’s identity may be of substantial assistance to the Convicted Individuals in seeking leave to appeal and appealing their convictions.’

[38] In broad compass, the Chief Commissioner submits that whether the PII documents are immune from disclosure is to be determined by balancing the relevant public interests, but where disclosure of the identity of an informer is in issue, the test for the limb that favours disclosure is as described in *Jarvie* and reformulated by this Court in *AB v CD & EF*.

[39] The Chief Commissioner therefore submits that the reformulated test expressed in *AB v CD & EF* means that ‘substantial assistance’ must be shown (at a minimum) before an informer’s identity becomes susceptible to disclosure. This may be contrasted with the interpretation advanced by the amici, which requires disclosure once the possibility of substantial assistance has been met.

[40] We consider that any debate about whether the ‘substantial assistance’ test imposes a threshold to be met before disclosure can be contemplated or a trigger requiring disclosure to be made is a sterile one, having regard to the need to carry out a balancing exercise. **Where the non-disclosure of evidence may substantially impair the ability of a defendant to answer the prosecution case in a criminal trial, the balance is very likely to favour disclosure, even where the identity of a police informer is in issue. Conversely, where there is no good reason to think that the disclosure of the identity of a police informer may be of substantial assistance to the defence, the balance is unlikely to favour disclosure. It is accepted that there is a strong public interest in protecting the anonymity of police informers, given the importance of intelligence to policing and the ‘chilling effect’ that disclosing identities may have on such intelligence gathering.**” [emphasis added]

See *Zirilli v The Queen* [2021] VSCA 2 where a similar Court of Appeal (McLeish, Emerton & Weinberg JJA) rejected the Chief Commissioner’s PII claim in a case which was very similar to *Madafferi*. See also *R v Benbrika (Ruling No 3)* [2007] VSC 283 at [11] & [15]-[22] per Bongiorno J; *State of Victoria v Brazel* [2008] VSC 37 per Maxwell P, Buchanan & Vincent JJA; *R v Rich (Ruling No.5)* [2008] VSC 435 per Lasry J; *Deputy Commissioner of Taxation v Law Institute of Victoria Ltd* [2010] VSCA 73.

In *Visy Board Pty Limited v Stephen D’Souza & Ors* [2008] VSC 572 at [15]-[24] Forrest J discussed the nature of the obligation of a party who obtains material pursuant to the compulsory processes of the Court, relying in particular on *Hearne v Street* [2008] HCA 36 at [96] where Hayne, Heydon & Crennan JJ had held:

“Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, *the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.*”

This statement of principle is derived from the decision of the House of Lords in *Harman v Home Department State Secretary* [1983] 1 AC 280 and is often referred to as the “implied undertaking”. In *Crest Homes PLC v Marks* [1987] AC 829, 860 Lord Oliver (with whom the other members of the House agreed) said that “the Court will not release or modify the implied undertaking given of discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery.”

### 3.5.9.2 Pre-hearing disclosure in the Criminal Division

**Summary hearing:** Sections 35-49 of the *Criminal Procedure Act 2009 (Vic)* provide for the informant to make pre-hearing disclosure of the prosecution case before a summary hearing. Sections 35-38 provide for and regulate the service of a “preliminary brief” upon the accused. Section 39 allows the accused to request the production of a “full brief” and ss.40-41 regulate the service of such “full brief”. Section 42 imposes on the informant a continuing obligation of disclosure. Section 43 allows the accused to make a request for the production of material etc. not provided and ss.44-45 regulate the production of such material, including the grounds on which the informant may refuse disclosure. Section 46 empowers the accused to apply for an order requiring disclosure if the informant has refused or failed to give disclosure.

**Committal proceeding:** Sections 107-117 of the Criminal Procedure Act 2009 (Vic) provide roughly similar requirements for the informant to make pre-hearing disclosure of the prosecution case before a committal proceeding.

**Case law:** In *Cvetanovski v The Queen* [2020] VSCA 272 the applicant had been convicted in 2012 of trafficking a large commercial quantity of methylamphetamine and had been sentenced to 10 years' imprisonment. Victoria Police had failed to disclose ongoing payments to a principal witness W and to his legal advisor G. The Crown conceded that, as a result of the non-disclosure-

- the applicant "could not properly interrogate W, relevant police members or G about the nature, circumstances and extent of the payments";
- the jury were not able to assess "the ways that G's involvement in Victoria Police's making of the payments" affected W's credibility or the veracity of the evidence more generally; and
- non-disclosure of G's involvement "resulted in the applicant being unable to undertake further investigations and conduct further cross-examination".

In quashing the applicant's conviction and holding it was unjust to order a new trial the Court of Appeal (Maxwell P, Beach & Weinberg JJA) said at [9]:

"In our view, the Crown's concession is properly made. The principles governing disclosure are fundamental to the integrity of criminal trials and to the maintenance of public confidence in the administration of justice. The Director rightly draws attention to what this Court said recently in *Roberts v The Queen* [2020] VSCA 58 at [56] as follows [emphasis added]:

'It is fundamental that there must be full disclosure in criminal trials. It is a "golden rule". **The duty is to disclose all relevant material of help to an accused. It is owed to the court, not the accused. It is ongoing.** It includes, where appropriate, an obligation to make enquiries. It is imposed upon the Crown in its broadest sense. And a failure in its discharge can result in a miscarriage of justice.'

### 3.5.9.3 Production of "notes" in "apprehension cases" in the Family Division

For many years it has been common at Victorian Children's Courts for legal representatives of parties in "apprehension cases" in the Family Division to make oral applications for orders that DFFH provide them with copies of all relevant documentation which is in DFFH's possession at Court. For reasons that the writer cannot understand, DFFH has always refused to make such disclosure without a formal Court order to this effect although it is very rare for DFFH to argue that some or all of the relevant documents in its possession ought not be the subject of an order for production.

As with documents produced by DFFH under sub-poena, details that might tend to identify a notifier are generally removed from documents produced by DFFH pursuant to such Court order.

The legal basis of a Court order for production of documents in these circumstances used to be said to be s.11 of the Evidence Act 1958 (Vic) which enabled a party in any case to call upon another party to produce a document which was in his or her possession at Court. However, that section was repealed as and from 01/01/2010. In an unreported *extempore* decision in *DOHS v Ms A & Mr G* [04/05/2010] Magistrate Power accepted the submission of Mr Howard Draper (solicitor for Mr G) that there were two independent sources of power to ground his application for an order that the Department provide him with copies of all relevant documentation:

- (1) In *Sobh v Police Force of Victoria* [1994] 1 VR 41 the Appeal Division of the Supreme Court of Victoria permitted disclosure of a police brief to an accused following a request by his solicitor. At pp.47-48 Brooking J said:

"That there is no right in an accused person to obtain discovery of all documents relevant to a charge undoubtedly remains correct: *R v Charlton* [1972] VR 758; *Clarkson v DPP* [1990] VR 745 at 759. But it cannot now be denied that the court in its criminal jurisdiction has inherent power to order the prosecution to produce to the defence for inspection documents or things in the possession of the prosecutor where the interests of justice require it. The interests of justice are not confined to those of the accused. In determining whether the interests of justice require production, the judge may in a given case properly consider matters like delay and expense where numerous documents, not of any real importance, are in question. Again, production will not be ordered where a claim to privilege is upheld, as where the privilege against disclosing the identity of an informer is successfully relied on. And in a given case the danger of misuse by the unscrupulous which troubled Wigmore might lead to a refusal to order production."

At p.62 Ashley J drew a clear distinction between:

- (a) the inherent power of the Court seized of a matter triable summarily in its discretion to direct that documents be provided to the accused by the prosecution; and
- (b) the power of the Court to require production of documents on the return of a subpoena or a call for production of documents in court.

And at p.72 Ashley J said: "Disclosure required by considerations of fairness goes to the heart of the criminal law."

Magistrate Power saw no reason why the principles enunciated in *Sobh's Case* were not equally applicable to protection proceedings in the Family Division of the Children's Court.

- (2) Read in conjunction with s.166(a), s.169(1)(a) of the Evidence Act 2008 (Vic) provides that if a party has, without reasonable cause, failed or refused to comply with a request to produce to the requesting party the whole or part of a specified document or thing, the court may, on application, make an order directing the party to comply with the request.

In addition, Magistrate Power accepted Mr Draper's submission that s.193 of the Evidence Act 2008 (Vic) enables the court to make such orders as it thinks fit to ensure that the parties to a proceeding can adequately, and in an appropriate manner, inspect documents of the kind referred to in paragraph (b) or paragraph (c) of the definition of **document** in the Dictionary.

As from 02/09/2013 Practice Direction No. 4 of 2013 provides:

- 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 1.00 pm 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.

Similar Practice Directions apply to applications by apprehension at Moorabbin & Broadmeadows Children's Courts and at regional venues: see Chapter 1.4.1.

### 3.5.10 Children as witnesses in court cases

Both at common law and under the repealed s.23 of the Evidence Act 1958 (Vic), there were specific requirements about which the presiding judicial officer had to be satisfied before accepting the evidence of a child witness. Although there was no fixed age below which a child was deemed incompetent to give evidence on oath nor was there any precise rule as to the degree of knowledge or intelligence which would exclude such evidence, the common law test for the competency of a child depended on whether the child possesses "a sufficient knowledge of the nature and consequences of [the] oath [and] on the sense and reason they entertain of the dangers and impiety of falsehood". See e.g. *R v Brasier* (1779) 1 Leach 199 at 200; *R v Lyons* (1889) 15 VLR 15; *R v Brooks* (1998) 44 NSWLR 121 at 124 per Grove J. This is no longer the law in Victoria.

There is no longer any special category of "child witness" as far as either competence or compellability of a witness is concerned. Section 12 of the Evidence Act 2008 (Vic) provides:

"Except as otherwise provided by this Act-

- (a) every person is competent to give evidence; and
- (b) a person who is competent to give evidence about a fact is compellable to give that evidence."

Section 17 of the Evidence Act 2008 (Vic) which applies only in a criminal proceeding provides that-

- A defendant is not competent to give evidence for the prosecution.
- An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding unless the associated defendant is being tried separately from the defendant.

Although s.190 of the Evidence Act permits a court, if the parties consent, to dispense with some of the provisions of the Act, the provisions of ss.12-20 concerning the competence and compellability of witnesses may not be waived: *Kirk v Industrial Relations Commission of New South Wales*; *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 at [51] per French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ and at [114] per Heydon J.



### 3.5.10.1 Competence

Section 13 of the Evidence Act 2008 (Vic) sets out the test for **competence** of a witness generally. The test may be summarized as “lack of capacity”. It may be that a witness is competent to answer no questions in a case. It may be that he or she is competent to answer some but not all questions. A person who is competent to give evidence about a fact may not be competent to give sworn evidence but will be competent to give unsworn evidence if the court has told the person the 3 things set out in s.13(5). There is no presumption that a person – child or adult – is not competent. The presumption is the reverse, namely that a person is not incompetent unless the contrary is proved. Section 13 provides:

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)-
  - (a) the person does not have the capacity to understand a question about that fact; or
  - (b) the person does not have the capacity to give an answer which can be understood to a question about that fact-  
and that capacity cannot be overcome.
- (2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.
- (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.
- (4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.
- (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person-
  - (a) that it is important to tell the truth; and
  - (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
  - (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.
- (6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.
- (7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.
- (8) For the purposes of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person’s training, study or experience.

### 3.5.10.2 Compellability in criminal proceedings generally

Section 18(2) of the Evidence Act 2008 (Vic) provides that in a criminal proceeding a person who is the spouse, de facto partner, parent or child of a defendant may object to being required –

- (a) to give evidence; or
- (b) to give evidence of a communication between the person and the defendant-  
as a witness for the prosecution.

Section 18(4) requires the court to satisfy itself that a person who may have a right to make an objection under s.18(2) is aware of the effect of the section.

Section 18(6) provides that a person who makes an objection under s.18(2) must not be required to give the evidence if the court finds – after taking into account, *inter alia*, the matters set out in s.18(7) – that-

- (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person or to the relationship between the person and the defendant, if the person gives evidence; and
- (b) the nature and extent of the harm outweighs the desirability of having the evidence given.

### 3.5.11 Oaths and affirmations

Under s.21 of the Evidence Act 2008 (Vic), the sworn evidence of a witness in a proceeding must be either on oath or affirmation. However a person called merely to produce a document or thing need not take an oath or make an affirmation before doing so. Under s.22 a person must either take an oath or make an affirmation before acting as an interpreter in a proceeding.

Under s.23, the choice of oath or affirmation is the person's choice and the court is required to inform the person that he or she has this choice unless the court is satisfied that the person had already been informed or knows that he or she has the choice. The court may direct a person who is to be a witness to make an affirmation if the person refuses to make a choice or if it is not reasonably practicable for the person to take an appropriate oath.

Under ss.24 & 24A it is not necessary that a religious text be used in taking an oath and a person may take an oath even if the person's religious or spiritual beliefs do not include a belief in the existence of a god.

### 3.5.12 Appearance or giving evidence in other than the traditional manner

Apart from the provisions (discussed in an earlier paragraph) which relate to the giving of evidence by audio or audiovisual recording in certain cases, there are three sets of legislative provisions which govern appearances and/or the giving of evidence in other than the traditional manner in the courtroom:

1. Sections 42D to 42I of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) provide for the appearance, the giving of evidence or making of a submission in a legal proceeding by audiovisual link or audio link by any person other than the accused in a criminal proceeding [see also s.37D].
2. Sections 42J to 42T of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) provide for the appearance by audiovisual link of an accused person in a criminal proceeding in certain circumstances.
3. Sections 359-365 of the Criminal Procedure Act 2009 (Vic) provide alternative arrangements for certain witnesses to give evidence in certain criminal proceedings in limited circumstances.

The Children's Court (Evidence - Audio Visual and Audio Linking) Rules 2008 [S.R. No.11/2008] facilitate applications to the Children's Court pursuant to ss.42E, 42L, 42M, 42N & 42P of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) for the giving of evidence and/or the appearance of a person at court by means of an audiovisual link.

#### 3.5.12.1 Appearance etc. by a person other than an accused

Section 42E(1) of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) provides:

"Subject to s.42F and to any rules of court, a court may, on its own initiative or on the application of a party to the legal proceeding, direct that a person [other than the accused in a criminal or associated proceeding] may appear before, or give evidence or make a submission to, the court by audio visual link or audio link from any place within or outside Victoria, or outside Australia, that is outside the courtroom or other place where the court is sitting."

Section 42F modifies s.42E in certain proceedings involving children in the Family Division of the Children's Court and in certain appeals from orders made in such proceedings. Section 42F(2) provides that unless the court otherwise directs under s.42E(1), a child who is required to appear, or be brought, before a court is required to appear, or be brought, physically before the court. Section 42F(7) prohibits a court from making a direction under s.42E(1) that a child appear before, or give evidence or make a submission to, the court in such proceedings by audio link.

In *R v Cox & Ors (Ruling No.6)* {also known as *R v Cox, Sadler, Ferguson & Ferguson*} [2005] VSC 364 Kaye J summarized the principles on the application of s.42E which he considered were to be elucidated from the cases of *R v Kim* (1998) 104 A Crim R 233, *R v Weiss* [2002] VSC 15, *R v Goldman* [2004] VSC 165 & *R v Strawhorn* [2004] VSC 415. At [7] his Honour said:

- “1. The question for the court is whether it is in the interests of justice that an order be made under s.42E.
2. In considering that question, the right of the accused to a fair trial is paramount.
3. It does not follow that, because the accused may sustain some forensic disadvantage by reason of an order under s.42E, such an order should not be made. As Brooking J observed in a different context in *Jarvie v. Magistrates' Court of Victoria* [1995] 1 VR 84 at 90 a ‘... fair trial does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused’.
4. The right of an accused to confront, in person, those who testify against him or her is a fundamental right in our criminal justice system: see *R v Goldman* at [18]; *R v Ngo* (2001) NSWSC 339 at [10].
5. However, as Redlich J observed in *R v Goldman* at [23]-[25] that right, while fundamental, is not an absolute right at common law. Section 42E is a further qualification of that right in appropriate circumstances.
6. The question whether it is in the interests of justice to make an order under s.42E must be determined by balancing, on the one hand, the interests of the accused, and, on the other hand, the public interest in the ability of witnesses to give evidence in significant criminal trials without thereby occasioning danger to themselves or to other members of the community.
7. Nonetheless a court should not make an order under s.42E where to do so would unduly prejudice the right of an accused person to a fair trial. For, as I have observed, that right must be paramount: see *R v Weiss* at [7]; cf. *R v Lyne* [VSCA] 118 at [31] per Eames JA; *R v Knigge* [2003] 6 VR 181 at [30] per Winneke P.”

Applying these principles in *R v Cox & Ors* Kaye J held at [25] that the Crown had established an appropriate basis for one of three Crown witnesses giving evidence by audio visual link but his Honour required two other Crown witnesses to attend at court to give their evidence. By contrast, in *R v Goldman & R v Strawhorn* the respective trial judges had made an order under s.42E in respect of a number of important Crown witnesses after assessing the degree of risk to the safety of the witnesses and the public and weighing that risk against any potential forensic disadvantage to the accused which might arise from the witness giving evidence via audio visual link.

In *DPP v Finn (Ruling No.1)* [2008] VSC 303 an application for the principal Crown witness to give evidence via a video link pursuant to s.42E of the Evidence Act was refused. At [2] Harper J described s.42E as “a merely permissive provision” and said that the section “is not intended specifically to protect witnesses who would otherwise be reluctant to give evidence in open court in the presence of an accused person”. Adopting the above propositions of law which had been set out by Kaye J in *R v Cox & Ors*, his Honour refused the application on the basis that the prosecution had failed to satisfy him that the witness’ fear of the accused was such as to materially interfere with her ability to give evidence were she required to be physically present in the witness box in Court.

### **3.5.12.2 Appearance etc. by an accused in a criminal or associated proceeding**

Section 42O of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) provides that unless the court otherwise directs, an accused child held in custody and who is required to appear, or be brought, before the court in a criminal proceeding (including a proceeding associated with, or ancillary to, or in consequence of, the proceeding for the offence) must appear, or be brought, physically before the court. Section 42P(1) provides that a court may direct a child referred to in s.42O to appear before it by audio visual link if it is satisfied that such appearance is-

- (a) consistent with the interests of justice; and
- (b) reasonably practicable in the circumstances.

Sections 42K to 42M make similar but somewhat more limited provision for the appearance of an adult accused person before a court by audio visual link.

### **3.5.12.3 Alternative arrangements for giving evidence in certain criminal proceedings**

Under s.359 of the Criminal Procedure Act 2009 (Vic), the alternative arrangements referred to below apply to all witnesses (including complainants) in a criminal proceeding that relates (wholly or partly) to a charge for-

- (a) a sexual offence; or

- (b) an offence where the conduct constituting the offence consists of family violence within the meaning of the Family Violence Protection Act 2008.

Under s.360 the court **may** direct that alternative arrangements be made for the giving of evidence by a witness. Such arrangements may include but are not restricted to-

- (a) permitting the evidence to be given from a place other than the courtroom by closed-circuit television or other facilities that enable communication between that place and the courtroom;
- (b) using screens to remove the accused from the direct line of vision of the witness;
- (c) permitting a person, chosen by the witness and approved by the court for this purpose, to be beside the witness while the witness is giving evidence, for the purpose of providing emotional support to the witness;
- (d) permitting only persons specified by the court to be present while the witness is giving evidence;
- (e) requiring legal practitioners not to robe;
- (f) requiring legal practitioners to be seated while examining or cross-examining the witness.

Under s.363, the court **must** direct use of closed-circuit television or other facilities [pursuant to s.360(a)] for a witness who is a complainant unless the prosecution applies for the complainant to give evidence in the courtroom and the court is satisfied that the complainant is aware of the right to give evidence remotely and is able and wishes to give evidence in the courtroom.

Under s.364, if the witness is a complainant and is to give evidence in the courtroom, the court **must** direct the use of screens for the complainant [pursuant to s.360(b)] unless the court is satisfied that the complainant is aware of the right to give evidence while screens are used and does not wish a screen to be used.

Under s.365, if the witness is a complainant, the court **must** direct the presence of a support person for the complainant [pursuant to s.360(c)] unless the court is satisfied that the complainant is aware of the right to have a support person and does not wish to have a support person.

### 3.5.13 The rule in *Browne v Dunn*

In *R v Coswello* [2009] VSCA 300 Williams AJA (with whom Buchanan & Nettle JJA agreed) said at [48]-[49]:

[48] “The rule in *Browne v Dunn* (1894) 6 R 67 is a rule of professional practice {*R v Birks* (1990) 19 NSWLR 677, 686 (Gleeson CJ)} designed to achieve procedural fairness: *Eastman v The Queen* (1997) 76 FCR 9, 102 (Von Doussa, O’Loughlin and Cooper JJ). In *Browne v Dunn*, Lord Herschell LC expressed the rule as follows (at 70-71):

‘My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses... . Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point on which he is impeached, and is to be impeached, is so manifest that it is not necessary to waste time in putting questions to him upon it. All that I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story has not been accepted.’

[49] The rule applies in a criminal case. [The writer interposes to say that it applies in any sort of case in which procedural fairness is a requisite.] It is based on general principles of fairness and affects the weight or cogency of the evidence: *Bulstrode v Trimble* [1970] VR 840, 847-848 (Newton J). In *R v Thompson* (2000) 187 A Crim R 89 at 111-112, Redlich JA explained the rule in the context of a criminal case:

‘In a criminal trial the rule will become relevant during the cross-examination of any prosecution or defence witness whose evidence is to be contradicted by other evidence called by cross-examining counsel or otherwise challenged. ... The rule rests upon notions of fairness. It is designed to give the witness and the party calling that witness, an opportunity to meet that challenge and to facilitate the tribunal’s assessment of the reliability and accuracy of the witness. (*R v Demiri* [2006] VSCA 64 at [36]) Where matters

in controversy are not 'put' to the witness in cross-examination, the tribunal's capacity to assess the credit of the witness is likely to be impeded. (*Johnson Matthey (Australia) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171 at [200]) Any relaxation of the obligation to comply with this rule increases the risk of injustice to the witness and the party calling that witness.

... in a criminal trial the application of the rule and the circumstances in which an inference should be drawn from non-compliance must be seriously qualified. (*MWJ v The Queen* (2005) 80 ALJR 329 at 333; *R v Demiri* [2006] VSCA 64 at [36]) Where a party seeks to invite the jury to draw such an inference, a careful direction should normally be given concerning the operation of the rule and the limited circumstances in which that inference may be drawn. (*MWJ v The Queen* (2005) 80 ALJR 329 at 333)."

Although in the end agreeing with Williams AJA that the trial judge's directions concerning the application of *Browne v Dunn* created a real possibility of the jury reasoning by impermissible means to a conclusion of guilt, Nettle JA provided substantially separate reasons in which he said at [3]-[4]:

[3] "Under the rule in *Browne v Dunn* (1893) 6 R 67, 70-1 (Lord Herschell) it is the duty of counsel before impeaching the evidence of a witness to put to the witness in cross-examination the version of events for which counsel contends {*R v Fenlon and Neal* (1980) 71 Cr App R 307, 313; *R v Birks* (1990) 19 NSWLR 677, 689; *R v Demiri* [2006] VSCA 64 [35]; *Curwen v Vanbreck Pty Ltd (as Trustee for the WS and NR Harvey Family Trust)* [2009] VSCA 284 [21] (Redlich JA)}. As Redlich JA stated in *R v Thompson* (2008) 187 A Crim R 89.

'The rule in *Browne v Dunn* is a rule of law and practice. In a criminal trial the rule will become relevant during the cross-examination of any prosecution or defence witness whose evidence is to be contradicted by other evidence called by cross-examining counsel or otherwise challenged. The obligation will also arise where the cross-examiner intends to adduce evidence as to the conduct of the witness which may be a matter of controversy. That conduct must be put to the witness. The rule rests upon notions of fairness. It is designed to give the witness, and the party calling that witness, an opportunity to meet that challenge and to facilitate the tribunal's assessment of the reliability and accuracy of the witness. Where matters in controversy are not 'put' to the witness in cross-examination, the tribunal's capacity to assess the credit of the witness is likely to be impeded. Any relaxation of the obligation to comply with this rule increases the risk of injustice to the witness and the party calling that witness.'

[4] The cases do not mark out clearly how far counsel must go in putting the accused's case to the witness: *R v Foley* [2000] 1 Qd R 290, 291. Sometimes it will need to be extensive. But where the defence case consists only in a denial of the witness's allegations, without positive evidence or hypothesis of an alternative version of events {cf *R v Costi* (1987) 48 SASR 269, 271 - alternative hypothesis}, the puttage may not need go far and, possibly, may not be necessary at all if defence counsel has made clear from the manner in which the defence case is conducted that the witness's evidence will be contested."

For further discussion of the rule, see *R v Arnott* [2009] VSCA 299 at [105]-[109]; *R v Edward Drash* [2012] VSCA 33 at [64]-[89]; *R v Michael Peter Smith* [2012] VSCA 187 at [49]-[53]; *Pasqualotto v Pasqualotto* [2013] VSCA 16 at [177] & [221]-[273]. See also *R v Morrow* [2009] VSCA 291 at [2]-[6] per Nettle JA, [36]-[71] per Redlich JA and in particular at [59] where his Honour said:

"The failure to cross-examine in accordance with the rule does not mean that the evidence led in contradiction of the evidence that should have been challenged cannot be considered. A trial judge is not entitled, by reason of non-compliance with the rule, to withdraw an issue of fact from the jury: *R v Rajakaruna (No 2)* (2006) 15 VR 592. It is a matter of weight for the court to take into account: *Advanced Wire & Cable Pty Ltd v Abdulle* [2009] VSCA 170, [14]."

### 3.5.14 The rule in *Jones v Dunkel*

The rule in *Jones v Dunkel* (1959) 101 CLR 298 relates to the unexplained failure of a party to lead evidence which may, in appropriate circumstances, enable an inference to be drawn that the uncalled evidence would not have assisted that party's case. At p.312 Menzies J stated the rule as follows:

“[A] proper direction in the circumstances should have made three things clear:

- (i) that the absence of the defendant Hegedus as a witness cannot be used to make up any deficiency of evidence;
- (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence;
- (iii) that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.”

In *Goddard Elliott v Fritsch* [2012] VSC 87 the plaintiff firm of solicitors who had acted for the defendant husband was found by Bell J to have acted negligently in settling a Family Court property dispute at the doorstep of the Court on terms overly generous to the wife. Senior counsel for the defendant in the Family Court case was not called by either party in the ensuing negligence action. Bell J held at [36] & [45]:

[36] “In a case like the present, the rule in *Jones v Dunkel* will apply where ‘it might reasonably have been expected’ [*Ronchi v Portland Smelter Services Ltd* [2005] VSCA 83 at [32] (Eames JA, Buchanan JA agreeing)], or ‘it would be natural’ [*Payne v Parker* [1976] 1 NSWLR 191, 201 (Glass JA)] for one party to call or produce the witness. It has been held the rule applies in a case where there has been an ‘unexplained failure by a party to call a witness who is in the camp of that party’ [*Ronchi* [2005] VSCA 83 at [32] (Eames JA, Buchanan JA agreeing)]; Warren CJ has laid stress on this requirement in *CGU Insurance Ltd v CW Fallow and Associates Pty Ltd* [2008] VSC 197 at [12].] That was the principal matter at issue in the present case.”

[45] “What use may be made of the unexplained failure by Goddard Elliott to lead evidence from Mr Ackman whom they could reasonably have been expected to call? The general principle which is stated in *Blatch v Archer* (1774) 98 ER 969, 970 (Lord Mansfield); followed and applied in *Weissensteiner v The Queen* (1993) 178 CLR 217, 225 (Mason CJ, Deane and Dawson JJ). is that ‘all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted’. It was held by Newton and Norris JJ in *O’Donnell v Reichard* [1975] VR 916 at 929 (which was followed by Buchanan, Eames and Nettle JJA in *Ronchi* [2005] VSC 83 at [32]) that, in so weighing the evidence, the unexplained failure of the party to call the evidence may be taken into account against that party for two purposes:

- (a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; and
- (b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken.

This was approved in *Brandt v Mingot* (1976) 12 ALR 551, 559 (Gibbs ACJ, Stephen, Mason and Aicken JJ).

The writer notes that in *O’Donnell v Reichard* [1975] VR 916 Newton & Norris JJ said at 929:

“[W]here a party without explanation fails to call as a witness a person whom he might reasonably be expected to call, if that person’s evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person’s evidence would not have helped that party’s case.”

In *Goddard Elliott v Fritsch* Bell J continued at [46] & [49]:

[46] “The unexplained failure of the party to call the witness cannot be used to reason that the evidence of the witness would not have been favourable to the party. The trier of fact cannot allow the inference which may (not must) be drawn to be elevated that high. It is limited to the inference that, if called, the evidence would not have assisted the case of the party failing to call the witness: *O’Donnell v Reichard* [1975] VR 916, 929; *R v Buckland* [1977] 2 NSWLR 452, 458, approved in *Azzopardi v R* (2001) 205 CLR 50. As was held in *Weissensteiner v The Queen* (1993) 178 CLR 217, that inference is

available when evaluating all of the evidence which is before the court, including the evidence given by witnesses whose credibility and reliability has been attacked. As applied in the case of evidence of that kind, Mason CJ, Deane and Dawson JJ held this to be the principle at 227-228:

“Doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might have been expected to give or call it.”

That is of some importance in this case as Paul's credit and reliability has been attacked.”

[49] “The unexplained failure of Goddard Elliott to call Mr Ackman [who was in its ‘camp’] gives rise to an inference that his evidence would not have assisted Goddard Elliott's case. That inference may be taken into account against Goddard Elliott in evaluating the whole of the evidence in the case, including the evidence of Paul. By reason of Goddard Elliott's failure to call Mr Ackman, I might more readily resolve any doubts I have about the reliability of Paul's evidence.”

In *Tenth Vandy Pty Ltd & Anor v Natwest Markets Australia Pty Ltd* [2012] VSCA 102 at [154]-[156] the Court of Appeal upheld dicta of the trial judge that no *Jones v Dunkel* inference could be drawn against the respondent for failing to call certain witnesses “unless and until the party bearing the burden of proof of its case [the appellant] has by the evidence it relies upon established a case for the [respondent] to answer...[T]he rule in *Jones v Dunkel* may not be resorted to by a party, in effect, to fill in the facts of its case before the threshold for the operation of the rule is reached”.

As the Court of Appeal stated in *R v Ahmed* [2012] VSCA 200, the rule in *Jones v Dunkel* is not generally applicable against an accused in criminal proceedings: see the judgment of Nettle JA (with whom Redlich & Osborn JJA agreed) at [16]:

“[A]t least since the decision of the High Court in *Dyers v The Queen* (2002) 210 CLR 285, it has been clear that a *Jones v Dunkel* inference should not be drawn against an accused, except perhaps in the extraordinary circumstances postulated in *Azzopardi v The Queen*: (2001) 205 CLR 50 at 70. As the High Court explained in *Dyers v The Queen*, the reason that a judge is ordinarily not to direct a jury that they are entitled to draw an inference adverse to an accused from his failure to call witnesses he might otherwise have been expected to call, is that it would be inconsistent with the accused's right to silence and thus would effectively reverse the burden of proof which is and must remain upon the Crown throughout: (2002) 210 CLR 285 at [9]-[10] per Gaudron and Hayne JJ, [52]-[53] per Kirby J, [121] per Callinan J.”

### 3.5.15 Unfavourable witnesses

Section 38(1) of the Evidence Act 2008 (Vic) provides:

“A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:

- (a) evidence given by the witness that is unfavourable to the party; or
- (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
- (c) whether the witness has, at any time, made a prior inconsistent statement.”

Questioning under s.38 is taken to be cross-examination [s.38(2)]. Two of the matters that the court may take into account in determining whether to grant leave are set out in s.38(6) and the procedure to be followed is set out in ss.38(4) & 38(5).

The word “unfavourable” does not mean adverse or hostile. In *DPP v McRae* [2010] VSC 114 at [24] Curtain J took it “to mean ‘not favourable’ as was held by Smart J in *R v Souleyman* (1996) 40 NSWLR 712 and subsequently followed by courts in New South Wales.” For discussion of the relevant principles, see *Adam v R* (2001) 207 CLR 96 and the judgment of Curtain J in *DPP v McRae*.

The above is a simplified summary of the Court process. For more details about Court hearings, see **4.9 Family Division Court hearings** or **10.3 Criminal Division summary proceedings**.

### 3.6 Statutory interpretation

Most of the powers invested in and the duties imposed on judicial officers and registrars in the Children's Court derive from various statutes, primarily Victorian statutes but also occasionally from Commonwealth statutes. The most frequently cited statutes are:

- Children, Youth and Families Act 2005 (Vic)
- Family Violence Protection Act 2008 (Vic)
- Personal Safety Intervention Orders Act 2010 (Vic)
- Magistrates' Court Act 1989 (Vic)
- Crimes Act 1958 (Vic)
- Evidence Act 2008 (Vic)
- Criminal Procedure Act 2009 (Vic)
- Drugs, Poisons and Controlled Substances Act 1981 (Vic)
- Road Safety Act 1986 (Vic)
- Summary Offences Act 1986 (Vic)
- Crimes Act 1914 (Cth)
- Family Law Act 1975 (Cth).

Although it is not a frequent occurrence in the Children's Court, it sometimes happens that the presiding judicial officer is required to engage in the interpretation of a statutory provision in the course of deciding a case. A large number of textbooks have been written on the topic of statutory interpretation and a vast array of case law, generated over centuries in the common law world, has addressed various aspects of the topic. The modern Australian principles of statutory interpretation are conveniently summarized in the judgment of Dodds-Streeton JA (with which Ashley JA & Hansen AJA agreed) in *Alinta Asset Management Pty Ltd v Essential Services Commission* [2008] VSCA 273 at [70]-[83]:

[70] "The principles which govern modern statutory construction were undisputed. It is well established that a purposive approach must be adopted and that purpose must be determined in the light of the language of the relevant provision and the scope and object of the whole statute: *Tasker v Fullwood* (1978) 1 NSWLR 20, [24] approved by McHugh ACJ, Gummow, Kirby & Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

[71] In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70] McHugh ACJ, Gummow, Kirby & Hayne JJ, in their joint judgment, stated:

'[T]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. (See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213 per Barwick CJ). The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole" (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617 per Lord Scarman, "in the context of the legislation read as a whole".) In *Commissioner for Railways (NSW) v Aqalianos* (1955) 92 CLR 390 at 397, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed." Thus, the process of construction must always begin by examining the context of the provision that is being construed. (*Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312 per Gibbs CJ, 315 per Mason J, 321 per Deane J).

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. (*Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J).'

[72] Their Honours observed at [70] that where provisions of an Act appear, on the basis of their language, to conflict, conflict must be alleviated to the extent possible by adjusting the meaning of the competing provisions to:



'best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. (See *Australian Alliance Assurance Co Ltd v Attorney-General of Queensland* [1916] St R Qd 135 at 161 per Cooper CJ; *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565 at 574 per Gummow J; 116 ALR 54 at 63).'

[73] Furthermore they noted at [71] that:

'a court construing a statutory provision must strive to give meaning to every word of the provision. (*The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ, 419 per O'Connor J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12-13 per Mason CJ).'

[74] In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408, the High Court stated:

'Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* (1986) 6 NSWLR 363 at 388, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonable open and more closely conforms to the legislative intent.'

[75] A purposive approach is also required by s 35 of the *Interpretation of Legislation Act* 1984 (Vic)...

[77] In *Project Blue Sky* at [78] McHugh ACJ, Gummow, Kirby & Hayne JJ stated:

'However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction (for example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437) may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

[78] The above statement was approved by McHugh ACJ, Gummow & Hayne JJ in *Network Ten Limited v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273.

[79] Their Honours also there reiterated at [11] McHugh J's observation, in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 that-

'[A] Court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context.'

[80] In *Network Ten*, Kirby and Callinan JJ dissented. They considered that the construction approved by the majority involved distorting or ignoring the language of the statute. While Kirby J endorsed the contemporary purposive approach to statutory construction, he considered at [89] 'that purpose must be found in the command of the Parliament, expressed in the Act'.

[81] While the High Court was divided in *Network Ten*, the majority did not expressly or implicitly reject Kirby J's caveat at [105] that 'the application [of the purposive construction of legislation] is always subject to textual limits' or his related observation at [87] that

'[u]ltimately, in every case, statutory construction is a text-based activity. It cannot be otherwise.'

[82] Similarly Callinan J's caveat at [129] is self-evident and uncontroversial-

'Although a Court is entitled to have regard to the legal and historical context of legislation, and in particular the mischief that it is enacted to cure, care must always be exercised in using all extrinsic material, including in particular assumed historical facts, to ensure that those facts are accurately and relevantly completely stated.'

[83] In *Mills v Meeking* (1990) 169 CLR 214, 235 Dawson J also stated that:

'However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 [of the *Interpretation of Legislation Act 1984* (Vic)] requires a court to construe an Act, not rewrite it, in the light of its purposes.'

### 3.7 Judgments - Explanation of and reasons for orders

#### 3.7.1 Explanation & Reasons

If the Court makes an order, it must explain the meaning and effect of the order as plainly and simply as possible and in a way which it considers the child, the parents and the other parties to the proceeding will understand [CYFA, s.527(1)]. The explanation must be given through an interpreter in the circumstances set out in s.527(2).

The explanation given of an order is neither part of the order [s.527(10)] nor part of the reasons for the order [s.527(11)].

If the Family Division makes a final order in a proceeding, s.527(6) of the CYFA requires it-

- (a) to state in writing the reasons for the order;
- (b) to cause the statement of reasons to be entered in the register; and
- (c) unless the Court otherwise orders, to cause a copy of the written statement of reasons to be given or sent by post within 21 days after the making of the order to the child, the child's parents and the other parties to the proceeding.

The reasons for an order are not part of the order [s.527(10)].

#### 3.7.2 Judgments

A judgment contains the decision in each individual case and the reasons that the judicial officer came to that decision. Judgments may be:

- *ex tempore*, that is the decision and the associated reasons are given orally in Court immediately or shortly after the conclusion of the case; or
- reserved, that is given orally or in writing in Court on a later day.

Most judgments in the Criminal Division of the Court are *ex tempore* as are most judgments in relation to interim orders in Family Division cases. For a useful discussion of *ex tempore* judgments, see a paper by Kirby J entitled "*Ex tempore* Judgments - Reasons on the Run" (1995) 25 WALR 213.

A judgment will show the process of reasoning which leads to the conclusions reached by the judicial officer and will usually contain:

- a statement of the issues;
- the facts as they appear from the evidence, with a statement as to why one account of the facts has been preferred to another;
- the law to be applied;
- the judicial officer's decision;
- the reasons for coming to that decision; and
- orders which the judicial officer makes as a result of the decision.

In *Murray Goulburn Coop Co Limited v Filliponi* [2012] VSCA 230, Neave JA & Beach AJA noted at [28]: "Whether reasons will be sufficient in the particular case will, of course, be influenced by the ambit of the dispute at trial."

In *Allsmanti Pty Ltd v Ernikiolis* [2007] VSCA 17 at [68] Maxwell P summed up the essentials of a good judgment in his approval of what he described as “exemplary” reasons for judgment:

“What his Honour said conveyed to the parties and their legal representatives that this application had been dealt with by someone who knew what he was doing, who understood the applicable law and was well on top of the facts as presented to him in the evidence. Most importantly, it conveyed why the judge had concluded as he did. Parties cannot reasonably expect more than that.”

In *Insurance Manufacturers of Australia Pty Ltd v Vandermeer* [2007] VSC 28 Kaye J conceded at [34] that “the requirement for the provision of reasons by a magistrate is less rigorous than that imposed on judges who are higher in the court hierarchy.” Nevertheless, his Honour held that a magistrate had erred in law in failing to give adequate reasons for his decision and referred with approval at [14] to dicta of Meagher JA in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 440 at 442:

“There are three fundamental elements of an adequate statement of reasons, namely: the judge should refer to relevant evidence; the judge should set out any material findings of fact and conclusions or ultimate findings of fact reached; and the judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts so found.”

In *Kelso v Tatiara Meat Co Pty Ltd* [2007] VSCA 267 a 5 member Court of Appeal referred with approval at [186] to dicta of Nettle JA in *Hunter v Transport Accident Commission & Anor* [2005] VSCA 1, [28] that a “mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings, is about as good as useless”. At [188]-[189] the Court of Appeal said:

“In *Mutual Cleaning & Maintenance Pty Ltd v Stamboulakis* [2007] VSCA 46 Maxwell P stated that the obligation to give adequate reasons entailed a rational explanation for preferring one witness’s opinion over another. Nettle JA, in *Spence v Gomez* [2006] VSCA 48 at [65], again emphasised that the judge was obliged to expose the reasons for ‘resolving a point critical to the contest between the parties ...; in other words, to ‘enter into’ the issues canvassed and explain why one case is preferred over another.”

The preference of the President of the Children’s Court is that judgments involving final contests in the Family Division of the Court be given in writing, if it is practicable to do so, although there is no legal requirement that this be done save for the short written reasons contemplated by s.527(6) of the CYFA. But since many such judgments contain findings which are relevant to the preparation of the Department’s case plan and may also be relevant in the event of an application to vary, extend or breach the order, most such judgments are reserved. From time to time in the Family Division the interests of justice - and in particular the interests of the child - may require the judicial officer to give an *ex tempore* judgment and follow it with a written judgment at a later date.

There is no general principle that a failure to give reasons amounts to a vitiating error of law. In *Mansbridge v Nichols & Anor* [2004] VSC 530 at [32]-[33] Williams J said:

“In *Perkins v County Court of Victoria* (2000) 2 VR 246 Buchanan JA (with whom Phillips and Charles JJA agreed) expressed the view that the requirements of natural justice did not extend to the form in which a decision was pronounced. Buchanan JA also held that there was no general principle that a court’s failure to give reasons amounted to a vitiating error of law (2000) 2 VR 246 at 270; see *Alcoa of Australia Ltd v McKenna* [2003] VSCA 182 at [22].

Buchanan JA considered the criteria for the adequacy of reasons stating at 273-274:

“The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or of law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law. ...The extent of the duty to give reasons will depend upon the way in which the case has been conducted. A judge may properly limit himself to determining facts which are in issue and dealing with the points which have been taken and the submissions made in relation to them. (See *Soulemezis v Dudley (Holdings) Pty Ltd* at 270 per Mahoney JA).”

In *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; [2002] VSCA 189 the Court of Appeal (Charles, Buchanan & Chernov JJA) extensively reviewed the case law and held:

- At [99]: "The obligation to provide reasons is 'a normal not universal' incident of the judicial process": *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-7; *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 19; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 per Meagher JA at 441; *R v Arnold* [1999] 1 VR 179 per Phillips JA at 182; *Perkins v County Court of Victoria* (2000) 2 VR 246.
- At [101]: In any case in which reasons are required, the necessary content will depend upon the circumstances of the particular matter. In *Beale*, Meagher JA suggested at 443-4 that while reasons need not be lengthy or elaborate, there were three fundamental elements of a statement of reasons:
  1. A judge should refer to relevant evidence albeit not necessarily in detail especially where it is clear that the evidence has been considered.
  2. A judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached.
  3. A judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found.
- At [103]: The failure of a judge or magistrate to refer to relevant evidence may result in an appeal court properly drawing the inference that it was overlooked or ignored: *Yendall v Smith Mitchell & Co Ltd* [1953] VLR 369 at 379; *Sun Alliance Insurance v Massoud* [1989] VR 8 at 17; *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728; *NRMA Insurance Ltd v Tatt* (1989) 92 ALR 299.
- At [157]: "The duty to deal with facts or evidence is not absolute. The evidence must be significant in the sense that, unless disposed of, it stands in the way of the court's conclusions. The court need not deal in terms with evidence when its importance falls away because of the manner in which the court disposes of the case. Nevertheless, if evidence is significant, it is not to be peremptorily shunted aside or ignored: *Sun Alliance Insurance* [1989] VR 8 at 18; *Beale* 48 NSWLR 430 at 443."

However, as Cussen ACJ noted in *Brittingham v Williams* [1932] VLR 237 at 239:

"The simplicity of the context of a case or the state of the evidence may be such that a mere statement of the conclusion will sufficiently indicate the basis of the decision."

The balancing process was explained by McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 as follows [emphasis added]:

"The limited nature of judicial resources and the cost to litigants and the general public in requiring reasons must also be weighed. For example, many reasons concerning the admissibility of evidence may require nothing more than a ruling: in NSW common law judges have long held that they are not obliged to hear argument on the admissibility of every question of evidence let alone give reasons. It all depends on the importance of the point involved and its likely effect on the outcome of the case. But when the decision constitutes what is in fact or substance a final order, the case must be exceptional for a judge not to have a duty to state reasons."

In *The Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* [2005] VSC 136 at [23] Harper J spoke of the difficulty of getting the balance right:

"As is often the case, it is easier to state the principle than apply it. Brevity in judgment writing is a virtue; but only if it does not come at the expense of completeness. Getting the balance right is just one of the difficulties of a generally difficult exercise. It is no business of a court to insist that members of tribunals deliver a thesis with every judgment. On the contrary, tribunals are expected to deliver justice with speed and economy, and against these imperatives must in their judgments be as brief as the circumstances permit."

In relation to the question of costs, it is the exception rather than the rule that detailed reasons are required. In *Ahmed v Russell Kennedy* [2003] VSC 25 [MC19/03] at [13]-[14], Balmford J. discussed the authorities generally and at [16] adopted the following dicta of the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 (Lord Phillips of Worth Matravers MR, Latham & Arden LJ) at 2419-20:

[27] "At the end of a trial the judge will normally do no more than direct who is to pay the costs and upon what basis...Swinton Thomas LJ, in a judgment with which Scott V-C,

who was the other member of the court, agreed said this in *Brent London BC v Aniedobe* [1999] CA Transcript 2003, in relation to an appeal against an order for costs:

'...this court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges...by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reasons for the judge's order are plain, in which case there is no need for a judge to give reasons for his order. However, having said that, if a judge does depart from the ordinary order (that is in the case the costs following the event) it is, in my judgment, incumbent on him to give reasons, albeit short reasons, for taking that unusual course.'

[28] It is, in general, in the interests of justice that a judge should be free to dispose of applications as to costs in a speedy and uncomplicated way...

[30] Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order. This has always been the practice of the court (see the comments of Sachs LJ in *Knight v Clifton* [1971] 2 All ER 378 at 393, [1971] Ch 700 at 721). Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs."

Depending on the nature of an impugned decision, there may be an appealable error of law if the judicial officer has provided such a lack of reasons for the decision as to render the appeal court unable to determine by what process the result was reached. In *Secretary to the Department of Justice v Yee* [2012] VSC 447 Kyrou J found that the VCAT's reasons were "disconnected" but did not amount to an appealable error of law:

[94] "Reasons for decision have to be read fairly and particular parts have to be read in the context of the reasons as a whole and the manner in which the parties conducted the proceeding: *Shock Records Pty Ltd v Jones* [2006] VSCA 180 [85]; *Hesse* [2006] VSCA 121 [3], [19]-[22]; *Church* (2008) 20 VR 566, 585 [91]; *Snibson* [2012] VSCA [81]. Reasons can be adequate by a combination of what is expressly stated and the inferences that necessarily arise from what is expressly stated: *Kamel* [2011] VSCA 110 [86]; *Snibson* [2012] VSCA 31 [81].

[95] In general, the mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings, is insufficient to disclose a path of reasoning: *Hunter v Transport Accident Commission* (2005) 43 MVR 130, 140 [28]; *Kamel* [2011] VSCA 110 [71]; *Snibson* [2012] VSCA 31 [82].

[96] In determining whether the VCAT's reasons are adequate, the Court does not scrutinise those reasons over-zealously with a view to finding error: *Minister for Immigration and Ethnic Affairs v Liang* (1996) 185 CLR 259, 271-2; *Paul & Paul* [2010] VSC 460 [69]. Nor does the Court expect the VCAT to address every issue raised in the proceeding. The reference to 'material questions of fact' in s 117(5) of the VCAT Act is to factual matters that affected the VCAT's findings or conclusions. Accordingly, under s 117(5), it is enough for the VCAT to make findings on the facts upon which its decision turns and to explain the logic of the decision. The VCAT is also expected to set out the law that it has applied in reaching its decision.

[97] The VCAT's reasons must be intelligible. Reasons are not intelligible if they leave the reader to wonder about the process of reasoning that has been followed: *Anderson* (2004) 24 VAR 181, 191 [33]; *Caruso v Kite* [2008] VSC 207 [32]; *Paul & Paul* [2010] VSC 460 [69].

[100] ...The key problem, however, is not that key issues were not addressed. Rather, it is that those issues were not expressly and coherently brought together, but were left partly to inference. This manner of providing reasons is unsatisfactory and should be avoided by VCAT in the future. Nevertheless, in the circumstances of the present case, it does not constitute a breach of s.117 of the VCAT Act or an appealable error of law."

In *Bookless v Smith* [2020] VSC 56 Priest JA found that a magistrate hearing charges of indecent assault against an accused had failed to give adequate reasons. Citing, *inter alia*, dicta of Meagher JA in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 441-444 and of Sholl J in *Sandhurst and Northern District Trustees Executors & Agency Co Ltd v Auldridge* [1952] VLR 488, 496 his Honour quashed the conviction and ordered a new trial. At [23]-[24] & [27] his Honour said:

[23] "In *Ta v Thompson* (2013) 46 VR 10, 22-3 [64] I observed that almost a century ago, in *Donovan v Edwards* [1922] VLR 87,88 Irvine CJ lamented the failure of justices in the Court of Petty Sessions to provide adequate reasons for their decision. He said:

'This case is another instance of the embarrassment which is caused to the Court, by the refusal of justices to give reasons for their decisions ... I have to repeat again that, in the exercise of their judicial functions, justices are not exempt from the duty which attaches to every judicial officer to state, to the best of his ability, the facts he finds, and the reasons for his decision. The result here is that the justices have made an order leaving it entirely uncertain on what grounds, and on what findings of fact, that order is based.'

[24] There can be no doubt that magistrates have a duty to give adequate reasons for their decisions — so much is an ordinary incident of the judicial function — the nature and content of those reasons being dictated by the evidence and issues raised in the particular case. In a proceeding such as the present, however, it is not sufficient for a magistrate simply to set out the evidence adduced by one party, and then assert that, having considered the evidence, he or she finds the charges proven, let alone wholly fail to refer to and consider the evidence adduced by the defence on critical issues. Among other things, it is necessary that a magistrate's reasons be adequate to enable this court exercising an appellate function to determine whether there was a satisfactory basis for his or her decision. The reasons need to explain the magistrate's process of reasoning and to state the basis of the judgment sufficiently to enable this court to see whether the decision did or did not involve an error of law. The discipline of having to give reasons is a vital technique for ensuring accurate fact finding, correct inferential reasoning and sound application of the law to the facts...

[27] [A]lthough she referred to much of the evidence in the prosecution case and the issues raised by it, the magistrate failed altogether to identify the basis of her ultimate conclusions by reference to relevant considerations flowing from the evidence. Moreover, she wholly failed to refer to the evidence adduced by the appellant — including as to his good character — and explain how she was seemingly able to discount it completely."

Other cases in which impugned reasons were discussed include *Sun Alliance Insurance v Massoud* [1989] VR 8; *Pettitt v Dunkley* (1971) 1 NSWLR 376; *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28; [2001] VSCA 167 at [18]-[19]; *Sam Agresta v Franco Agresta & Commercial Union Assurance Co of Australia Ltd* [2002] VSCA 23 at [28]; *The Royal Dental Hospital of Melbourne v Birsal Akbulut* [2002] VSCA 88 at [21]; *Dura (Australia) Constructions v Girgin* [2002] VSC 449 at [10]-[14]; *Smyth v Shire of Murrumbidgee* [2003] VSCA 75 at [13], [16]-[17]; *Day v Elektronik Fabric Makers (Vic) Pty Ltd & Anor* [2004] VSC 24 at [25] citing *Perkins v County Court of Victoria* (2000) 2 VR 246 at p. 273; *Barlow & Anor v Hollis* [2000] VSCA 26 at [15]-[16]; *Hunter v TAC* [2005] VSCA 1 at [21]-[22]; *Fox v Percy* (2003) 214 CLR 118 esp at 124; *VCP Investments Pty Ltd v J McCubbin & Sons Pty Ltd* [2006] VSCA 50 at [4] & [9]-[12]; *Waterways Authority v Fitzgibbon* [2005] HCA 57; *BHP Billiton Ltd & Ors v Oil Basins Ltd* [2006] VSC 402 at [9]-[15] esp at [13]; *Hamidi v KAB Seating Pty Ltd* [2007] VSCA 151 at [32] per Ashley JA; *Collins v Nave & Ors* [2008] VSC 85 at [31]-[34]; *BR v VOCAT* [2009] VSC 152 at [25]-[36] per Kaye J; *Dimatos v Coombe & Ors* [2011] VSC 619 at [20]-[25] per Beach J; *Ta v Thompson & Anor* [2012] VSC 446 per Whelan J; *Helou v Shaya* [2013] VSC 297 at [23]-[27] per Beach J; *LG v Melbourne Health* [2019] VSC 183 at [42]-[54] per Richards J; *Ata Dundar v. Yucel Bas (trading as Bas Brothers Marble and Granite) & Ors* [2019] VSCA 315 at [44]-[73]; *Celsius Fire Services Pty Ltd v Magistrates' Court of Victoria & anor* [2019] VSC 835 at [25]-[35]; *Makeham v Sheppard* [2020] VSCA 242. See also a paper by Kirby J: "Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory" (1994) 12 Australian Bar Review 121; *Gray v Brimbank City Council* [2014] VSC 13 at [35]-[56] per Rush J.

Inordinate delay in providing a judgment may, in very exceptional circumstances, vitiate a judgment. See *Nais v Minister* [2005] HCA 77 [delay of nearly 6 years].

In *Fletcher Construction Australia Ltd v Line Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28; [2001] VSCA 167 the trial judge had provided draft reasons when pronouncing judgment and final reasons five weeks later which differed to some extent from the draft reasons. The Court of Appeal held-

- It is "eminently desirable" that reasons generally be given at the same time as judgment is pronounced. The reasons for this include:
  - (1) The parties are entitled to a decision which is based on the reasoning process of the judge which has been concluded by the time the decision is pronounced. The court should not reserve to itself the opportunity to mould reasons after the pronouncement of judgement, so as to make them appear consistent with the decision. However that is not to say that a judge cannot review the reasons after they have been published.
  - (2) The unsuccessful party should be in a position to determine within the time constraints imposed by the rules whether to appeal against the decision.See per Chernov JA at [31] & Charles JA at [2].
- However there is no common law requirement that a judge of the Supreme Court must give reasons contemporaneously with pronouncing judgement. Where the interests of justice required it, a court may properly pronounce judgment and give reasons for it later. See per Chernov JA at [38] & [40], citing with approval dicta of Mahoney JA in *Mulvena v Government Insurance Office of NSW* [Court of Appeal NSW, unreported, 16/06/1992] at p.11. Chernov JA added at [38]:

"Judges are frequently requested to grant relief as a matter of urgency. Many such applications raise difficult issues and call for complex reasons for the decision to grant or refuse the remedy sought. If the court were to wait before making the appropriate orders in such applications until the reasons have been formulated to the point where they can be published, the delay may defeat the whole purpose of seeking the order in the first place. It is not uncommon, therefore, in appropriate cases, for judges to grant the relief sought and to deliver reasons for it later. That this is an accepted practice in civil and criminal cases is illustrated by reference to several randomly selected recent cases of the High Court and this Court".
- The trial judge was not *functus officio* after pronouncement of judgment: see per Chernov JA at [43]-[45] and see paragraph 3.9 below.

In *Fletcher Construction Australia Ltd v Line Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28; [2001] VSCA 167 the Court of Appeal also examined the extent to which judges of a superior court may properly alter reasons for judgment subsequent to them being given. Chernov JA said at [49] that this

"may depend not only on whether the changes are sought to be made before or after judgment has been entered, but also on the nature and extent of the alterations. A litigant is entitled to a decision that is based on reasons that have led the judge to that conclusion. It would obviously impede the proper administration of justice and work unfairness to the parties if the judge could, at a later time, give different reasons for the decision which were crafted after judgment had been pronounced. Thus, the courts limit the rights of a judge to change the reasons, but they do so consistently with the practical requirements of justice. In the case of a superior court of record, judgment is not relevantly finalised until it is entered in the records of the court. Hence, until that occurs, the judge can recall the order and the reasons and make a different order and give different reasons - *Smith v. Australia and New Zealand Banking Group Ltd*. [Supreme Court of NSW-Court of Appeal, unreported, 21/11/1996 per Priestley, Sheller & Powell JJA]; *Sherpa v. Anderson* [Supreme Court of NSW, unreported, 14/10/1993 per Young J; *Mulvena v GIO NSW* [see above]; *Re Harrison's Shares Under a Settlement* [1955] Ch 260 at 284.. But once judgment is perfected the judge cannot, in substance, re-write the given reasons so as to give different reasons for the decision or, in the words of Willmer, L.J. in *Bromley v. Bromley (No.2)* [1965] P 111 at 114, "put a different complexion on the issue in dispute". In *Nakhla v. McCarthy* [1978] 1 NZLR 291 at 296 Woodhouse, J. said that in general a judge cannot alter the reasons so as to modify or change the effect of the judgment once it has been perfected. Similarly, in *Bank of Nova Scotia v. Province of Nova Scotia* (1977) 23 NSR 357, the Nova Scotia Court of Appeal held that once judgment is entered, the substance of the reasons cannot be changed; if correction is needed it can only be made by a higher court."

For additional examples of cases where judicial alteration of reasons has been upheld see:

- *Bar Mordecai v Rotman* [2000] NSWCA 123 at [93]-[95] per Sheller, Stein & Giles JJA where it was held that *ex tempore* reasons can be altered by a judge provided the substance of them is not changed, nor are the orders they sustain;

- *Duke of Buccleuch v. Inland Revenue Commissioners* [1967] 1 AC 506 where Lord Reid & Lord Guest did not question the correctness of the action of Sankey J in deleting in the version that was later published in the authorized reports [1918] 2 KB 735 a paragraph of his reasons in *Ellesmere (Earl of) v. Inland Revenue Commissioners*, which had been published in the Law Times (119) LT 568.

For examples of cases in which judicial officers have impermissibly changed the reasons for decision see *Lam v Beesley* (1992) 7 WAR 88 at 92,94-5; *Todorovic v Moussa* [Supreme Court NSW-Court of Appeal, unreported, 09/04/2001 per Powell & Heydon JJA - see note in (2001) 75 ALJ 476].

In *Esso Australia Pty Ltd v Robinson* [2005] VSCA 138 Cummins J had orally ordered the appellant to pay the respondent compensation of \$100,000 and had given brief reasons. Some time later he prepared full reasons and his associate e-mailed them to the parties. At [9] the Court of Appeal disapproved the practice of a court e-mailing or posting written reasons to the parties without also delivering them in open court:

"It must be clearly understood that the Supreme Court of Victoria, save in certain exceptional and well-known cases, sits in public for the hearing *and determination* of proceedings. That means that judgment is delivered in open court even if it be by the handing to the Associate of the court's written reasons and even though they may be available on the Internet very soon thereafter. Members of the public are entitled to be present in court to hear judgment being given and to obtain a copy of the reasons: *Fletcher Construction Australia Ltd v Line Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28 at 41-42; [2001] VSCA 167 at [35]. Other instances of the posting or e-mailing by judges of their written reasons have come to this Court's notice. Tribunals may be authorised to do that, but the practice should be entirely discountenanced for a court. The foregoing observations do not apply to the making of consent directions in busy managed lists. About any such practice we say nothing, though it might be possible for the judge to read out or hand down any such directions in open court."

### 3.8 Amending judgments - The 'slip rule'

The power of a judicial officer to amend a final judgment is very limited. In *R v Billington* [1980] VR 625 at 628 the Full Court of the Supreme Court of Victoria - following dicta of the Full Court in *Carroll v Price* [1960] VR 651 at 657-8 - said:

"In the absence of any express legislative provision...it is settled law that until a judgment is passed and entered it is still under the control of the judge who may recall it or alter it, but once it has been passed and entered, or in the case of an order in chambers, signed by the judge it cannot thereafter be altered except in accordance with one of the rules or on appeal."

In *Bailey v Marinoff* (1971) 125 CLR at 530 Barwick CJ enunciated the rule in similar terms:

"Once an order disposing of a proceeding has been perfected by being drawn up as the requisite record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court."

However, at p.539 Gibbs J made it clear that this rule was not inflexible and indeed only applied to a perfected order in a form which correctly expressed the intention with which it was made:

"It is a well settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it. ... The rule rests on the obvious principle that it is desirable that there be an end to litigation on the view that it would be mischievous if there were jurisdiction to re-hear a matter decided after full hearing. However, the rule is not inflexible and...the court has the power to vary an order so as to carry out its own meaning or to make plain language which is doubtful, and that power does not depend on rules of court but is inherent in the court."

In *Abacus Australia Ltd v Bradstock G.I.S. Pty Ltd* [2001] VSC 19 at [31], [33] & [34], Gillard J said of the power to amend, the so-called 'slip rule':



[31] "Rule 36.07 is the 'slip rule' and provides:

"The court may at any time correct a clerical mistake in a judgment or order or an error arising in a judgment or order from any accidental slip or omission.

[33] In addition to the powers in the Rules, the court has an inherent jurisdiction to amend or vary a judgment or order which has been authenticated where there is some error and the court takes steps to ensure that the authenticated order states correctly what the court decided and intended. See *Lawrie v Lees* (1881) 7 App Cas 19 at 34-5. The inherent power also enables the court to clear up any ambiguity or uncertainty and also to correct any mistake or error made by an officer of the court in drawing up the judgment. See *Oxley v Link* (1914) 2 KB 734 at 738 and 746.

[34] But the general rule is that once a judgment or order has been authenticated in a form which correctly expresses the intention with which it was made by the court, the court has no jurisdiction to review, vary or set it aside and the only avenue open to any party to attack the judgment is to appeal."

After speaking of the power to vary contained in Rule 21.07 of the Supreme Court Rules, Gillard J. said at [45], after referring to dicta of Evershed LJ in *Meyer v Meyer* (1948) P 89 at 95 and *Thynne v Thynne* (1955) P 272 at 313:

"Rule 21.07 and the inherent power of the court give the court jurisdiction in an appropriate case to vary an order. The word 'vary' in Rule 21.07 should not be given a restricted meaning and covers a change, amendment, modification or alteration of an order. The rule and the inherent power should be applied where the purposes of justice require the court to vary the order."

However, while declining "to restrict the clear discretion which is given to the court...to vary a judgment in appropriate circumstances", His Honour noted at [42]: "The Court would not vary a judgment unless there was good cause and in the absence of proof of some error, so that what was recorded did not give effect to the object of the proceeding and what the Court intended to do."

The above reference by Gillard J to "the purposes of justice" accords with the first of 3 categories of exception to the general rule identified by Brennan J in *Permanent Trustee Co. (Canberra) Ltd. (as executor of estate of Andrews) v. Stocks and Holdings (Canberra) Pty. Ltd.* (1976) 15 ACTR 45 at 48, as noted by Sheller JA in *Logwon Pty. Ltd. v. Warringah Shire Council* (1993) 33 NSWLR 13 at 28-29:

1. Exceptions founded upon the inherent jurisdiction of the court to ensure that its procedures do not effect injustice;
2. Exceptions which are authorized by statute;
3. Exceptions which override the general rule in order to give relief where the judgment is obtained by fraud or by an agreement which is void or voidable.

See the judgment of the Court of Appeal in *Mehmed Skrijel v John Carl Mengler & Others* [2002] VSCA 55.

In *Van Phuc Diep v Appeal Costs Board* [2003] VSC 386 at [45]-[46] Gillard J reiterated that "the slip rule should not be narrowly confined in its operation" and added: "It is now well-established that the rule covers errors made not only by the court but on the part of a party's legal representative. See *L. Shaddock and Associates Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590,594 and *Gould v Vaggelis* (1995) 157 CLR 215, 274-6."

In *Hodgson v Amcor (No.8)* [2012] VSC 162 – after reviewing the relevant case law at [7]-[24] – Vickery J adopted at [25] a very broad interpretation of the 'slip rule' in amending both a judgment and the associated reasons for judgment:

"[T]he inherent jurisdiction of the Court may and ought to be invoked to amend reasons for a judgment, an order in the nature of a judgment and other orders, when they contain or result from an adjudication upon that which the court has never in truth adjudicated upon or when they do not express the intention and express the meaning of the court at the time when they were made. Such an amendment may be made at any time:

- (a) whenever it is in the interests of justice to do so after applying the overarching purpose prescribed by s 7 of the *Civil Procedure Act 2010* in accordance with s 8 of the Act in order to avoid unnecessary delay and expense involved in an appeal to the Court of Appeal and burdening that Court with unnecessary appeals relating to matters which should be dealt with at first instance; and

- (b) after taking into account and duly balancing the ‘finality of litigation’ factors such as the desirability of there being an end to litigation and the need to avoid the mischief of an application made under the guise of the slip rule which in fact amounts to an application to rehear a matter decided after a full hearing.

In *Burrell v The Queen* (2008) 238 CLR 218 at 224-225; [2008] HCA 34 at [21] Gummow ACJ, Hayne, Heydon, Crennan & Kiefel JJ said:

“The power to correct an error arising from accidental slip or omission, whether under a specific rule of court or otherwise, directs attention to what the court whose record is to be corrected did or intended to do. It does not permit reconsideration, let alone alteration, of the substance of the result that was reached and recorded.”

In *CSR Ltd v Eddy* (2005) 226 CLR 1 at 34-36 Gleeson CJ, Gummow & Heydon JJ said that the power to amend a judgment is “one to be exercised sparingly, lest it encourage carelessness by a party’s legal representative and expose to risk the public interest in the finality of litigation.”

See also *Achurch v The Queen* (2014) 253 CLR 141 at 154 per French CJ, Crennan, Kiefel & Bell JJ quoting *Gould v Vaggelas* (1985) 157 CLR 215 at 275; *Certain Lloyd’s Underwriters v Cross & Ors* [2015] HCA 52 per French CJ; *Vinton v Sim (No.2)* [2015] VSC 79 per Mukhtar AsJ.

### 3.9 Costs

Generally parties to proceedings in the Children’s Court bear their own costs. However, most children and a significant proportion of adults who are represented by legal practitioners have their own costs met by Victoria Legal Aid.

The Court’s power to order costs against a person derives from ss.131 & 132 of the Magistrates’ Court Act 1989 (read in conjunction with s.528(2) of the CYFA), from s.154 of the Family Violence Protection Act 2008 and s.111 of the Personal Safety Intervention Orders Act 2010. See *NG v IP* [2009] VSC 199 at [15] & [23].

Section 131(1) is expressed in very broad terms and is not limited to costs orders against parties to the proceeding: “The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.” For discussion of the principles governing the ordering of costs against non-parties, see *Knight v FP Special Assets Ltd* (1992) 174 CLR 178; *Bischof v Adams* [1992] 2 VR 198; *Victorian Workcover Authority v Roman Catholic Trusts Corporation for Archdiocese of Melbourne & Anor* [2013] VSC 26.

Under s.132 of the Magistrates’ Court Act 1989 the Court has power to order costs against a legal practitioner for a party to a proceeding who has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by any other misconduct of default. In *Gippsreal Limited v Kurek Investments Pty Ltd* [2009] VSC 344 at [2] Pagone J commented that this jurisdiction “must be exercised with caution but in an appropriate case should be exercised”. See also *IMO Fehring Livestock Pty Ltd* [2012] VSC 326 at [41]-[52] per Gardiner AsJ.

In relation to **civil** proceedings, the power of the Children’s Court to award costs is also governed by Order 63 of the Magistrates’ Court General Civil Procedure Rules 2010 insofar as it is relevant to proceedings in the Children’s Court. Although the civil jurisdiction of the Magistrates’ Court as contained in Part 5 of the Magistrates’ Court Act 1989 is expressly excluded from the Children’s Court by s.528(2)(a) of the CYFA, these rules are made under s.16 of the MCA which is not so excluded. Further, Order 63 relates to a subject matter - viz. ‘costs’ - which is contained in Part 7 of the MCA, not Part 5. Not all of Order 63 is applicable to the Children’s Court. For instance rule 63.00.1 and Appendix A/Table 1 are not relevant because they are limited to matters involving a claim for monetary relief. On the other hand rule 63.34 – which effectively picks up the decision of the Court of Appeal in *Mainieri & Anor v Cirillo* [2014] VSCA 227 at [41]-[54] – is relevant. Rule 63.34.2(1) provides:

“If an Australian lawyer provides legal assistance to an assisted party in a proceeding on a pro bono basis, the Court may make, in favour of the assisted party, any order for the recovery of the costs of the legal assistance that the Court might have made had the legal assistance been provided not on a pro bono basis but on the basis that the assisted party was under an obligation to pay for the legal assistance in the ordinary way.”

Since 01/01/2010 the Court's power to order costs against a person in **criminal** proceedings is governed by ss.401 & 410 of the Criminal Procedure Act 2009, sections which are in similar terms to ss.131 & 132 of the Magistrates' Court Act 1989. As read in conjunction with s.528(2) of the CYFA, s.401 provides:

- (1) Unless otherwise expressly provided by this or any other Act or by the rules of court, the costs of, and incidental to, all criminal proceedings in the Children's Court are in the discretion of the court and the court has full power to determine by whom, to whom and to what extent the costs are to be paid.
- (2) In exercising its discretion under subsection (1) in a criminal proceeding, the Children's Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the court is satisfied resulted in prolonging the proceeding.
- (3) If the Children's Court strikes out a charge under s.14(3), the court may award costs against the informant.
- (4) This section and s.410 [which provides for a costs liability of a legal practitioner] apply to a purported proceeding in the Children's Court which is beyond the jurisdiction of the court as if the purported proceeding were within jurisdiction.
- (5) If the Children's Court determines to award costs against an informant who is a member of the police force, the order must be made against the Chief Commissioner of Police.

Section 131A of the Magistrates' Court Act 1989 (read in conjunction with s.528(2) of the CYFA) gives the Children's Court power to order that the costs of, and incidental to, a proceeding in the Children's Court be assessed, settled, taxed or reviewed by the Costs Court. The writer doubts that this provision will often – if ever – be used by the Children's Court. For discussion of the power of the Costs Court to quantify costs incurred in proceedings in a Magistrates' Court see the judgment of Daly AsJ in *Brown v Glen Eira* (No. 2) [2012] VSC 273.

### **3.9.1 Criminal Division (costs of defendant)**

In the summary hearing of criminal proceedings a successful defendant is generally entitled to have his or her reasonable costs paid by the prosecution. The leading case is *Latoudis v Casey* (1991) 170 CLR 534 where Mason CJ (who with Toohey & McHugh JJ formed the majority) held (at p.544) that in criminal proceedings-

"[I]n ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all of the defendant's costs. If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor."

At p.570 McHugh JJ stated: "Nor can the successful defendant be deprived of his or her costs because the conduct of the defendant gave rise to a suspicion or probability that he or she was guilty of the offence the subject of the prosecution." However earlier in that same paragraph there are the qualifying words: "speaking generally".

In *Alexander v Renney* [Supreme Court of Victoria, {MC23/95}, 21/08/1995] Batt J upheld a refusal to award costs where relevant information was not disclosed by the defendant at the contest mention. Compare *Hehir v Bishop* [Supreme Court of Victoria, unreported, 20/04/1993] where Ashley J allowed an appeal against a magistrate's refusal to award costs when a charge of driving an unregistered motor vehicle was dismissed.

In *Jandreoski and Ors v Colley and Ors* [2004] VSC 131, in dismissing an appeal against a magistrate's refusal of costs to otherwise successful defendants, Teague J engaged in a detailed analysis of the principles espoused in *Latoudis v Casey* and six subsequent cases, these being summarized in table form at [8]:

CASE		COSTS
<i>Latoudis</i>	<i>Latoudis v Casey</i> (1990) 170 CLR 534	ALLOWED
<i>Redl</i>	<i>Redl v Toppin</i> (Full Court Supreme Court of Victoria, unreported, 01/04/1993)	REFUSAL DISAPPROVED
<i>Larrain</i>	<i>Larrain v Clark</i> (Smith J, unreported, 13/07/1995)	ALLOWED
<i>Alexander</i>	<i>Alexander v Renney</i> (Batt J, unreported, 21/08/1995)	REFUSED
<i>Oshlack</i>	<i>Oshlack v Richmond River Council</i> (1997-1998) 193 CLR 72	ALLOWED
<i>Nguyen</i>	<i>Nguyen v Hoekstra</i> (1998) 99 A Crim R 497	REFUSED
<i>Junek</i>	<i>Junek v Busuttil</i> (Kellam J, unreported [2004] VSC 115, 07/04/2004)	REFUSAL DISAPPROVED

At [9]-[13], [26]-[30] & [33] His Honour said:

[9] "Differences in positions taken in appellate decisions make the application of principles difficult in this area. In each of the leading case of *Latoudis* and of *Oshlack*, the court was split, with a majority of three, and a minority of two. *Latoudis* established that, in the ordinary case, where a prosecution is dismissed, the appropriate order will be to have the prosecutor pay the defendant's costs, but that there will be exceptional cases where no order will be made. In *Latoudis*, several examples are given by members of the court of considerations which might warrant no order being made. In *Latoudis*, and in cases after *Latoudis*, judges have stressed the importance of trying to avoid the creation of relatively rigid rules. In that regard, see, in *Redl*, Brooking J at 3, and Eames J at 11, in *Nguyen*, Phillips JA at 508, and in *Oshlack*, Kirby J at [134].

[10] What are some of the possible considerations? The cases suggest at least the following seven, that I will state in an overly summary way. First, the prosecutor's reasonableness. Was it reasonable for the prosecutor to have brought the proceedings? Secondly, any self-inflicting behaviour on the part of the defendant. Did the defendant bring the proceeding upon himself or herself? Thirdly, the defendant not taking a chance to explain his position. Did the defendant mislead or fail to assist the prosecutor in a material way? Fourthly, the defendant's other reprehensible behaviour? Was there some other reprehensible behaviour on the part of the defendant? Fifthly, the defendant's reason for succeeding? Why was the defendant not convicted? Sixthly, the defendant's luck. Was the defendant lucky to escape conviction, in that the proceeding was dismissed only because there was say a failure to satisfy the criminal onus as to an element of the offence? Seventhly, the defendant's inappropriate conduct of the proceedings. Did the defendant prolong the proceedings unnecessarily? It is obvious that the seven areas are not susceptible of neat compartmentalisation. For example, the defendant's good fortune may be but an aspect of the defendant's reason for succeeding.

[11] *Latoudis* effectively ruled out as a consideration warranting a departure from making the ordinary order as to costs, both considerations one and six, the prosecutor's reasonableness, and the defendant's luck. As to the first, I acknowledge the qualification stated in *Nguyen* at 806. A magistrate might, when stating that the prosecutor acted reasonably, mean no more than that the defendant had brought the prosecution upon himself.

[12] As I have noted, in *Latoudis*, the three majority judgments provide guidance with examples of circumstances which might warrant the ordinary order not being made. Mason CJ did so at 544. He briefly addressed considerations that I have summarised as one, two, three and seven. Toohey J did so at 565. He dealt briefly with consideration seven, and at greater length with consideration three. McHugh J did so at 569-570. He addressed aspects of considerations one, two, three, six and seven. As has been noted in *Nguyen* and *Oshlack*, the approach of McHugh J can be seen to be more rigorous in limiting the scope of exceptions.

[13] In each of the six cases since *Latoudis*, there has been a review, in some cases a very careful review, of aspects of the guidance provided by *Latoudis*. A similar review was carried out in five other cases that I have not referred to in these reasons, as they were not sufficiently relevant. *Oshlack* is the only case which is not concerned with orders in the Victorian Magistrates' Court. In *Oshlack*, brief references were made to *Latoudis* by Brennan CJ at [75] and by Gaudron and Gummow JJ at [24]-[29]. More extensive reviews were made by McHugh J at [65], [66] and [76]-[83], and by Kirby J at [123]-[135].

[26] In *Latoudis*, each of the majority commented on one or more kinds of conduct having the potential to be a consideration as operating to warrant a departure from the usual order. The focus of most of those comments, by Mason CJ at 544, Toohey J at 565-566 and McHugh J at 569-570 was on, or primarily on, conduct in relation to the proceedings or otherwise *after* the events, as distinct from conduct that led to the laying of charges (my italics). The latter conduct was considered in a limited way by McHugh J. It has been considered in a limited way in each of *Redl*, *Larrain*, *Nguyen* and *Junek*. In *Latoudis* at 570, as I have noted in another context, McHugh J, said: 'Nor can the successful defendant be deprived of his or her costs because the conduct of the defendant gave rise to a suspicion or probability that he or she was guilty of the offence the subject of the prosecution.'

[27] In *Redl*, Brooking J at 3 to 5, suggested tags of 'misconduct' and 'reprehensible conduct'. Brooking J said that, in the circumstances of *Redl*, the 'supposed misconduct' was appropriately disregarded because it was the behaviour that led to the charges, and persistence in that behaviour. However, he went on to suggest that a costs order might properly be refused on an unproved dishonesty prosecution in the context of a large fraud, noting that that kind of case could be dealt with when it arose...

[28] In *Larrain*, Smith J referred to *Redl*, but related the claimed misconduct back to what McHugh J had said in *Latoudis*. In *Nguyen*, the Court of Appeal treated the claimed misconduct as not of the kind referred to in *Redl*. In *Junek*, Kellam J at [26] & [40] referred to aspects of what Brooking J had said in *Redl*. In the circumstances before him, he concluded that there was not reprehensible conduct. After reviewing the cases, I am not persuaded that reprehensible behaviour in the circumstances out of which the charges arose is not a relevant consideration together with other considerations on the question of costs.

[29] I turn to the criticisms by the magistrate of the lack of co-operation of the defendants. In *Latoudis*, each of the majority commented on that consideration as operating to warrant a departure from the usual order. Mason CJ did so briefly at 544, and McHugh J briefly at 569. Toohey J at 565 was more expansive:

'...if a defendant has been given the opportunity of explaining his or her version of events before a charge is laid and refuses the opportunity, and it later appears that an explanation could have avoided a prosecution, it may well be just and reasonable to refuse costs: see, by way of illustration, *R v Dainer* (1988) 91 FLR 33. This has nothing to do with the right to silence in criminal matters. A defendant or prospective defendant is entitled to refuse an explanation to the police. But if an explanation is refused, the successful defendant can hardly complain if the court refuses an award of costs, when an explanation might have avoided the prosecution.'

[30] It may not be easy to reconcile, with the observations of Toohey J in *Latoudis* that I have quoted, what was said in *Larrain*, *Alexander* and *Junek* as to a defendant choosing not to answer certain police questions. The difference may be seen to lie in the distinction which arises from the use of the word 'mere' or 'merely' relative to the exercise of the right to silence. That may be the same distinction which is made in *Alexander*, by Batt J at 11 between mere omissions and conduct which provokes or leads to the prosecution. Clearly, there underlies the right of a person to decline to answer police questions, the protection against self-incrimination. As against that, generally the approach of the law is to encourage the provision of information which may tend to incriminate other persons. Hence the discount on sentencing given for co-operation with the police. There are complications however, where the provision of information as to others would or might also, albeit more indirectly, incriminate the individual. In the circumstances before me, I can see that the choice of the defendants not to answer questions could be seen to have acted as a factor which operate to their disadvantage in the way contemplated by Toohey J. By answering police questions, the defendant could have provided more information to the police that would not have incriminated them. That information might have resulted in no charges being laid at all against any of the three. That would have been so if they had said that they had gone to the service station with a fourth man, and that the fourth man alone had taken items and spilled the oil...

[33] On my analysis of his reasons, the magistrate said, in short: 'The defendants brought these charges on themselves. They chose to take a part in a piece of reprehensible conduct at the expense of those running a service station. They then chose to decline to assist the police in a way that might have avoided any charges being laid.' On my analysis

of the guidance provided by appellate decisions, those considerations were relevant and warranted the discretion being exercised as it was exercised. As I am not satisfied that the magistrate did err, the appeals will be dismissed, with the usual order as to costs."

In *NG v IP* [2009] VSC 199 a magistrate sitting in the Children's Court had dismissed three charges of rape and one charge of committing an indecent act with a child brought against NG who at the time of the alleged offences was 16 years of age. She had also refused the defendant's application for costs, giving detailed written reasons for so doing. Starting with the proposition in *Latoudis v Casey* that as a rule costs should be awarded to successful defendants, Her Honour went on to say at pp.5-6:

"*Latoudis v Casey* makes it clear that a legitimate ground upon which a Court might refuse to exercise its discretion to grant costs is where a defendant refuses to provide an explanation to the prosecution in circumstances where the prosecution may have been avoided had the explanation been given....Mr [R] for the O.P.P. submitted that had the prosecution been made aware of the Defendant's account, informed consideration could have been given to whether the prosecution should have proceeded in light of the substantially similar versions of [two eyewitnesses]. I have much sympathy for this argument. It is extremely rare in cases of sexual assault to have independent and objective eyewitness evidence. In determining this case I placed significant weight on the evidence of [the two eyewitnesses] given the discrepancies in some of the other evidence. It might be said that the O.P.P. should not have proceeded with this prosecution in the face of the eyewitness accounts alone. I do not agree with this. There was no way to determine the accuracy of the accounts without the Defendant's version having been given. In addition, it stands to reason that had the prosecution been made aware of the defence before the start of the contested hearing the case may have been shortened in length as the issues would have been confined.

I accept that the Defendant had the right to remain silent until he gave evidence at the hearing and I do not criticize him for doing so. However, having done so, for the reasons stated above, he cannot then expect costs in the particular and unusual circumstances of this case."

On appeal Beach J set aside the magistrate's order refusing costs and remitted the case to the Children's Court for a determination of the amount payable. At [15] his Honour discussed the principles to be applied, starting with *Latoudis v Casey* (1991) 170 CLR 534 and continuing with *Junek v Busuttil* [2004] VSC 115 (Kellam J), *Parker v Kelly* [Supreme Court of Victoria-Marks J, unreported, 16/07/1991], *Redl v Toppin* [Full Court Supreme Court of Victoria, unreported, 01/04/1993], *Larrain v Clark* [Supreme Court of Victoria-Smith J, unreported, 13/07/1995], *Hehir v Bishop* [Supreme Court of Victoria-Ashley J, unreported, 20/04/1993], *Nguyen v Hoekstra* (1998) 99 A Crim R 497 and *Alexander v Renney* [Supreme Court of Victoria, unreported, 21/08/1995]. In the latter case Batt J had upheld a magistrate's refusal to award costs, saying: "The appellant in this case in challenging the Magistrate's orders must really say that it was not open to the Magistrate to find that the circumstances were not ordinary." In *NG v IP* at [15]-[20] & [22]-[24] Beach J said:

[15] "*Latoudis v Casey* is authority for the proposition that in ordinary circumstances an order for costs should be made in favour of a successful defendant in a criminal proceeding in the summary jurisdiction of the Magistrates' Court. Because of s.528(2) of the CYFA, that proposition has equal force with respect to a criminal proceeding in the Children's Court...

[16] In order to succeed in this appeal, NG must show it was not open to the Magistrate to conclude that this case was out of the ordinary circumstances so as to justify the withholding of an order for costs in favour of NG or that the Magistrate's decision was affected by an error of law vitiating the exercise of her Honour's discretion.

[17] For present purposes, it can be accepted that it is 'extremely rare in cases of sexual assault to have independent and objective eye witness evidence'. However, this fact alone cannot be sufficient to take the case outside the class of cases contemplated by the expression 'in ordinary circumstances'. Similarly, merely because every case is unique (and thus involves its own 'particular...circumstances') cannot be a ground for considering such a case as falling outside 'ordinary circumstances'. In her Honour's reasons for refusing costs, the only unusual (out of the ordinary) circumstance identified is the existence of independent and objective eye witness evidence in the case of sexual assault. As I have said above, this circumstance alone is not capable of taking this case outside an application of *Latoudis v Casey* which is favourable to NG.

[18] Further, the submission made by counsel for the OPP to the Magistrate...that had the prosecution been made aware of NG's account, informed consideration could have been given to whether the prosecution should have proceeded in the light of the versions of W1 and W2 was without merit. As her Honour notes, penetration was a central issue. The complainant alleged penetration. NG denied penetration. The evidence of W1 and W2 was not directed to the issue of penetration. Additionally, if there was any merit in this submission, then the prosecution, having heard NG's version in the witness box, could have determined not to proceed further (either after the evidence was given or during the five days when her Honour's decision was reserved). While different factors may be called into play in deciding whether to discontinue a prosecution which has commenced, as compared with not commencing a prosecution, nothing in the material before me suggests there was any realistic prospect that if NG gave his version before he was charged, charges might not have been laid. This was a case of oath against oath on the issue of penetration, with a body of evidence (independent and objective) relevant to the issues of identification and consent.

[19] There was no evidence of any conduct by NG after the events in respect of which he was charged which could be described as conduct which brought the prosecution upon himself. There was no evidence justifying the conclusion that this case was outside the class of ordinary cases where an order for costs under s.131 of the Magistrates' Court Act should be made. Cf. *Transport Accident Commission v O'Reilly* [1999] 2 VR 436. Accordingly, the principles enunciated in *Latoudis v Casey* were misapplied. This constitutes a relevant error of law. Cf. *House v The King* (1936) 55 CLR 499 and *Australian Coal and Shale Employees Federation v The Commonwealth* (1953) 94 CLR 621. It follows that the appeal must be allowed. In the event that I reached this conclusion, the parties asked me to re-exercise the discretion.

[20] [T]here is nothing which establishes that NG unreasonably induced the informant, IP, to think that a charge could be successfully brought against him: cf. *Latoudis v Casey* at 569 per McHugh J. Further, there is nothing to suggest that the conduct of NG 'occasioned unnecessary expense in the institution or conduct of the proceedings: *ibid.*...

[22] At the time he was interviewed, NG was 16 years of age. Prior to being interviewed, he received advice from a solicitor to exercise his right to silence in the interview. I have already concluded that there was no evidence justifying the suggestion there was any realistic prospect that if NG gave his version before being charged, charges might not have been laid. Thus NG's exercise of his right to silence did not constitute a refusal to put forward information which may have led to a decision not to proceed with the prosecution: cf. the judgment of Eames J in *Redl v Toppin* at p.8. In my view, it was quite reasonable for NG to exercise his right to silence in the context of this case on the basis that any explanation he gave would only have had the capacity to be used against him – rather than potentially resulting in no charges being laid: *ibid.*

[23] [T]here is no reason why an order for costs should not be made under s.131 of the Magistrates' Court Act in respect of the Children's Court proceeding...I consider that in the exercise of my discretion there should be an order for costs in favour of NG.

[24] ...In the circumstances, there is nothing in the material to suggest that NG, in exercising his right to silence, prolonged the proceeding unreasonably – and thus disentitled himself to an exercise of discretion (in the ordinary course) in his favour."

By contrast, it should be noted that in superior courts – as a matter of longstanding general practice – costs are not awarded in favour of or against the Crown in criminal proceedings brought by the Crown (including appeals and most interlocutory proceedings): see *R v Payara* [2012] VSCA 266 at [6] per Nettle JA citing *R v Goa* (1988) 19 FCR 212, 213; *R v J* (1983) 49 ALR 376,379; *McEwen v Siely* (1972) 21 FLR 131,135.

### 3.9.2 Criminal Division (costs of prosecution)

In *Fitzgerald v Golden* [Supreme Court of Victoria, {MC6/96}, 05/12/1995] Beach J. quashed orders for costs in favour of the prosecutor and informant said to be "thrown away" by late service of a notice of alibi, holding (at p.10) that they "had not incurred any expense by reason of the adjournment against which they were entitled to be indemnified. Their pay had not been docked by reason of the adjournment. I have little doubt that following the adjournment...they went about their normal duties as police officers."

### 3.9.3 Family Division (protection proceedings)

In protection proceedings in the Family Division it is very uncommon for the Court to order that one party bears another party's costs. This is notwithstanding the general rule in civil proceedings that "costs follow the event" unless exceptional circumstances exist: see *Danyl Hammond (a pseudonym) v Secretary to the Department of Health and Human Services; The Attorney-General of Victoria v DPP [No 2]* [2019] VSCA 45 at [3]. A test for the exercise of the power to order costs in protection proceedings is set out in the judgment of Hampel J. in *Secretary to the Department of Human Services v. His Worship Mr Hanrahan & Ors* [Supreme Court of Victoria, {MC21/97}, 10/12/1996] where his Honour held-

"[T]he discretion is to be exercised on grounds different from those referred to in *Latoudis v Casey*. Protection application proceedings are not criminal proceedings and by their very nature are for the benefit of the children with whom they are concerned: see *M & Ors v M* [1993] 1 VR 391. A protection application may be appropriately brought but by the time the matter comes up for hearing circumstances may have changed so that it may then be equally appropriately withdrawn. This is one matter which may, in an appropriate case, affect the exercise of the costs discretion. Other relevant considerations, given the nature of the jurisdiction, may include the extent of investigation by the Secretary when the application is made, the circumstances in which it is withdrawn, the amount of notice given of the intention to withdraw and whether the action taken by the Secretary is in any way irresponsible or mischievous."

In *DOHS v Ms T & Mr M* [unreported, Children's Court of Victoria, 12/10/2009], Magistrate Power applied the test set out by Hampel J in *Secretary to the Department of Human Services v. His Worship Mr Hanrahan & Ors* and ordered that the Department pay the parents' costs for 3 days of the 9 days of the contested hearing. In section 25 of his judgment, Magistrate Power said:

"The onus of satisfying me that I should depart from the normal practice that parties in protection proceedings bear their own costs rests on the applicant parents. They have not satisfied me on balance that it was irresponsible for DOHS to have commenced this contested hearing. The DOHS' officer responsible for the decision to press for a custody to Secretary order was [the Unit Manager]. On one – perhaps charitable – view, the Unit Manager's case for a custody to Secretary order was supported by the independent observations and opinions which the PASDS worker had set out in her reports of 02/07/2009 & 27/07/2009 as well as the feedback which he had received from PASDS and other sources...

The tenor of the evidence elicited in the first four days of this hearing ought to have sounded a significant cautionary note to DOHS. However, given that the PASDS worker's opinions and recommendations had not yet been tested in the Court, I am not satisfied that it was irresponsible for the Department not to have capitulated at an earlier stage. But when, on the afternoon of the fifth day of the hearing, her opinions lay in tatters after incisive cross-examination, the Department ought to have realized that it no longer had evidence which was anywhere near sufficient to support a custody to Secretary order...

Late that afternoon, after I had stood the hearing down for a while because [the mother] had become so distressed by the process, I said words to the effect that I saw the whole process as having a very great potential to affect the mother's mental health adversely which could not be of benefit to the child... The fact that in these circumstances DOHS – as a supposedly model litigant – did not then agree to a supervision order but soldiered on without significant supporting evidence was irresponsible. The fact that, in my view, the Department's intransigence posed significant risks to [the mother's] mental health made its decision both grossly irresponsible and cruel.

However, it is likely that there would still have been a further day required...to sort out the conditions on the order...In the end the case ran for 9 days. Accordingly, in my view, DOHS' irresponsibility contributed to the case running 3 days longer than it should have.

It is just that DOHS should bear the parents' costs of legal representation for 3 days on the legal aid scale, a total amount of \$4302."

### 3.9.4 Family Division (intervention order proceedings)

Section 154 of the Family Violence Protection Act 2008 and s.111 of the Personal Safety Intervention Orders Act 2010 provide that each party to any proceedings under the respective Act must bear his or her own costs of the proceeding unless-



- the Court decides that exceptional circumstances warrant otherwise; or
- the Court is satisfied that the making of any application was vexatious, frivolous or in bad faith.

### 3.9.5 Very limited entitlement of self-represented litigants to costs

In *P v RM & Ors* [2004] VSC 78 - a case in which the bulk of the judgment is in [2004] VSC 14 - Gillard J awarded \$150 costs to the father for loss of income consequent on his attendance as a witness, not as a party. At [5] His Honour said:

"[In] *Kowal v Zoccoli* (2002) 4 VR 399 [t]he Court of Appeal held that a party was not entitled to compensation for loss of income. However it was recognized in that case that a party was entitled to witness' expenses. The High Court said in *Cachia v Hanes* (1994) 179 CLR 403: 'Of course a litigant who qualifies as a witness is entitled to the ordinary witness's fees.' The law permits a party who is a necessary witness to be allowed his loss of time in the same way as a witness who is not a party. See *Harbin v Gordon* [1914] 2 KB 577 at 586 and *McCoughtry v Schrick* [1947] VLR 342."

In *LG & EG v Melbourne Health* [2019] VSC 183 a self-represented litigant EG was legally qualified and admitted to practice but did not hold a current practising certificate. In refusing to make an order for payment of the otherwise successful litigant's professional costs at [111] Richards J applied the rule in *Cachia v Hanes* (1994) 179 CLR 403 that "a costs order should not be made to reimburse a self-represented litigant for the time they spend in preparing for and arguing their case, but is limited to money paid or liabilities incurred for professional legal services." Richards J went on to hold at [113] that the narrow exception to this principle drawn from *The London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872 and followed by the High Court in *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47 applies only to a lawyer entitled to practice. The order for costs in favour of the appellant EG was limited to expenses reasonably incurred by EG in relation to the proceeding, including for interpreters, but did not include any amount by way of professional costs for work done by him in relation to the proceeding.

EG's application for leave to appeal was run on a different basis, namely that he was entitled to costs for acting on behalf of his mother LG in the VCAT hearing as a professional advocate under ss.62(1)(b)(ii) & 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998*. The Court of Appeal refused leave to EG to rely on 'fresh evidence' of his retainer to provide professional services to his mother: see [2020] VSCA 64.

The principal costs arguments raised by the parties before Richards J had concerned the costs of the successful appeal before Richards J where EG had relied upon the *Chorley* exception. EG did not pursue that issue before the Court of Appeal as he accepted that the *Chorley* exception no longer exists in Australia following the subsequent decision of the High Court in *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007; [2019] HCA 29. In *Bell Lawyers* at [1]-[3] Kiefel CJ, Bell, Keane & Gordon J (with whom Gageler & Edelman JJ agreed) said:

[1] "As a general rule, a self-represented litigant may not obtain any recompense for the value of his or her time spent in litigation: *Cachia v Hanes* (1994) 179 CLR 403 at 410-411; [1994] HCA 14. See also *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47 at 51; [1976] HCA 57. Under an exception to the general rule, a self-represented litigant who happens to be a solicitor may recover his or her professional costs of acting in the litigation. This exception is commonly referred to as "the *Chorley* exception", having been authoritatively established as a "rule of practice" by the Court of Appeal of England and Wales in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877.

[2] One issue raised by this appeal is whether the *Chorley* exception operates to the benefit of barristers who represent themselves. Another, more fundamental, issue is whether the *Chorley* exception should be recognised as part of the common law of Australia.

[3] The *Chorley* exception has rightly been described by this Court as 'anomalous': *Cachia v Hanes* at 411. Because it is anomalous, it should not be extended by judicial decision {*Midgley v Midgley* [1893] 3 Ch 282 at 299, 303, 306-307; *Best v Samuel Fox & Co Ltd* [1952] AC 716 at 728, 733; *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1086; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 18 [35]; [2005] HCA 64} to the benefit of barristers. This view has previously been taken by some courts in Australia. See *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd* [2004] SASC 161 at [125]; *Winn v Garland Hawthorn Brahe (Ruling No 1)* [2007] VSC 360 at [10]-[11]; *Murphy v Legal Services Commissioner [No 2]* [2013] QSC 253 at [16]; *Bechara v Bates* [2018] FCA 460 at [6]. But see to the contrary *Ada Evans Chambers Pty Ltd v Santisi* [2014] NSWSC 538 at [29]. Dealing with the matter more broadly, however, the *Chorley* exception is not only anomalous, it is an affront to the

fundamental value of equality of all persons before the law. It cannot be justified by the considerations of policy said to support it. Accordingly, it should not be recognised as part of the common law of Australia.”

### **3.9.6 Enforcement of costs orders made in the Family Division**

Perhaps because it is comparatively uncommon for costs orders to be made in the Family Division of the Children’s Court, there had previously been no statutory mechanism for enforcing such orders. Section 528A of the CYFA now fills that gap. It provides:

- (1) ‘Order for costs’ means an order for costs made by the Court in proceedings in the Family Division or under s.154 of the FVPA or s.111 of the PSIA.
- (2) A person in whose favour an order for costs is made may enforce the order by filing in the appropriate court [viz. a court that has jurisdiction to enforce an amount of costs equivalent to that required to be paid under an order for costs] a copy of the order certified by the principal registrar of the Children’s Court to be a true copy.
- (3) On filing, the order must be taken to be an order of the appropriate court for payment of costs and may be enforced accordingly.

Section 170(2) of the FVPA and s.126(2) of the PSIA provide that for the purposes of enforcement of an order for costs made under s.154 or s.111 (as the case may be), Division 5 of Part 5 of the Magistrates’ Court Act 1989 and any relevant rules apply. These provisions also apply to the enforcement of costs orders made under the FVPA & PSIA in the Magistrates’ Court.

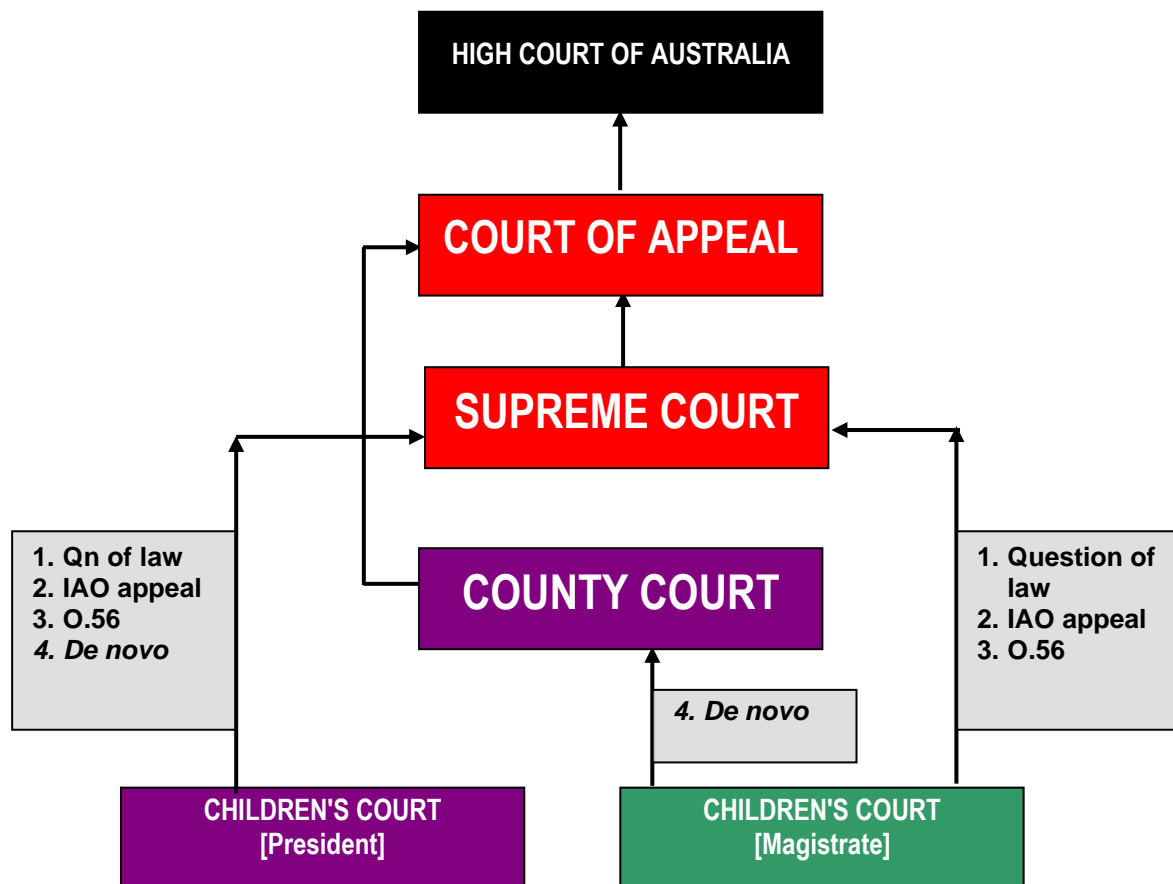
### **3.10 Appeals - General**

A party has the right to appeal to a higher court in certain circumstances if he or she is dissatisfied with the decision of either Division of the Children’s Court. Very few appeals reach the Court of Appeal and to date no appeals have reached the High Court.

Using the word "appeal" in a loose sense, there are four different types of appeal (see table below) from a decision of the Children’s Court and there are three different paths (see chart below).

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# HIERARCHY OF APPEALS FROM THE CHILDREN'S COURT



APPEAL TYPE		NOTES
1	Appeal on a question of law [appeal <i>stricto sensu</i> ]	A right of appeal to the Supreme Court on a question of law from a final order of the Children's Court (other than in a committal proceeding) is granted and regulated by s.329 (Family Division) and s.430P (Criminal Division) of the CYFA. This is an appeal "in the strict sense". It is not a re-hearing. The appellant must show that the trial judge/magistrate has made an error of law, some examples of which are detailed below.
2	IAO appeal	A right of appeal to the Supreme Court pursuant to s.271 of the CYFA on a decision to make or refuse to make an interim accommodation order in the Family Division.
3	Order 56 judicial review	Order 56.01(1) of Supreme Court Rules provides that the jurisdiction of the Supreme Court to grant any relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto shall be exercised only by way of judgment or order (including interlocutory order) and in a proceeding commenced in accordance with these Rules.
4	Hearing <i>de novo</i>	A right of appeal by certain persons against certain orders of the Children's Court is granted and regulated by ss.328-330 (Family Division) and ss.424-430O (Criminal Division) of the CYFA. The appellant need show no error by the trial judge/magistrate. An appeal from a decision of the President is heard by a single judge in the Trial Division of the Supreme Court. An appeal from a decision of a Magistrate is heard in the County Court. The appeal proceeds by way of a re-hearing, not by a determination of whether the orders made by the Children's Court should or should not have been made [see s.328(6) (Family Division) and ss.426(1) & 429(1) (Criminal Division)]. For an analysis of the nature of appeals by way of re-hearing and a discussion of the procedure to be followed on such appeals, see:

	<ul style="list-style-type: none"> <li>• <u>for Family Division appeals</u>: <i>Mr &amp; Mrs X v Secretary to DOHS</i> [2003] VSC 140 at [51]-[64] per Gillard J;</li> <li>• <u>for Criminal Division appeals</u>: <i>Neill v County Court of Victoria &amp; Anor.</i> [2003] VSC 328 at [12]-[14] per Redlich J; <i>H v R &amp; Ors</i> [2008] VSC 369 at [9]-[10] per Forrest J citing <i>Humphries v Poljak</i> (1992) 2 VR 129, 139 per Crockett &amp; Southwell JJ.</li> </ul>
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Examples of appealable errors of law are-

- application of a wrong legal principle;
- misapplication of a legal principle;
- a major error in relation to the facts in the case which has significantly affected the outcome and which is sufficiently gross to be considered an error of law;
- an outcome outside the range of orders reasonably open to the trial judge/magistrate on the evidence before him or her;
- a failure, in certain circumstances, to provide reasons for the decision which leave the appeal court unable to determine by what process the result was reached.

Section 430Q of the CYFA provides that if a person appeals under s.430P to the Supreme Court on a question of law, that person abandons finally and conclusively any right under the CYFA or any other Act to appeal to the County Court or the Trial Division of the Supreme Court in relation to that proceeding.

The Secretary to the Department may appeal pursuant to ss.271 or 329 of the CYFA only by an officer properly delegated under s.17: see the decision of Balmford J in relation to similar provisions in the CYPA in *E v W* [2001] VSC 132.

Sections 330 (Family Division) & 430ZD (Criminal Division) require that appeals under ss.328, 329, 424, 427 or 430P are to be heard in open court unless the appeal court orders otherwise.

Appeals in the Court of Appeal & the High Court of Australia are generally heard by a court comprised of 3 & 5 judges respectively. If the appeal court is not unanimous as to the outcome of the appeal, it is determined by decision of the majority.

Appeals from decisions of the County Court, the Supreme Court or the Court of Appeal are restricted to appeals on a question of law.

Sections 328(8) & 329(10) (Family Division) and ss.430A & 430Z (Criminal Division) provide for orders to be made in certain circumstances staying orders of the Children's Court when appeal proceedings have been initiated. In *CC & JC v DOHS* [2003] VSC 134 at [29] Habersberger J held that there is no statutory provision giving the County Court jurisdiction to grant a stay of an order of the Children's Court prior to the actual hearing of an appeal. However at [31] his Honour held - on the authority of *Cocker v Tempest* (1841) 7 M & W 501 at 503-4; 151 ER 864 at 865 and *Dietrich v The Queen* (1992) 177 CLR 292 - that the County Court has an inherent power to f such an order pending the hearing of an appeal in order to prevent an injustice to a party to the appeal.

Sections 426(9) & 429(9) of the CYFA provide that on an appeal under s.424 or s.427 the Supreme Court and County Court may, despite anything to the contrary in the CYFA, make a probation order, youth supervision order or youth attendance order in respect of a person even though at the time of making that order the person is of or above the age of 19 years but under 21 years.

Sections 427-429 of the CYFA grant and regulate a power for the DPP to appeal against a sentence imposed by the Children's Court in a summary proceeding in the Criminal Division. Principles upon which an appeal court must act in considering a Crown appeal against sentence are set out in the judgment of Charles J in *R v Clarke* [1996] 2 VR 520 at 522. See also *DPP v Shields* [2005] VSCA 150 at [4].

Sections 426(7) & 426(8) and ss.429(4) & 429(5) of the CYFA are reworded replacements for s.424(8) as it existed prior to 01/01/2010. The writer expects that these sections will shortly be amended. They purport to limit the sentencing powers of an appeal court in circumstances where the accused has been sentenced to be detained in a youth residential centre or a youth justice centre in respect of two or more offences for a specified aggregate period. However, in *DPP v MN*; *DPP v JC*; *DPP v JW* [2009] VSCA 312 the Court of Appeal (Maxwell P, Ashley JA & Coghlan AJA)-

- traced the legislative history of the former s.424(8); and
- held that the section was of no operative effect because it was premised upon the Children's Court having a particular sentencing power, namely a power to impose an aggregate period of detention, which it had under s.26(1)(f)(ii) of the repealed Children's Court Act 1973 (Vic) but which it no longer had under the CYPA or under the CYFA.

### 3.11 Case stated

Under s.533 of the CYFA the Children's Court has power, with the consent of the President and in both the Family Division and the Criminal Division, to "state a case", that is to reserve a question of law for determination by the Supreme Court. The section provides:

- (1) If a question of law arises in a proceeding, the Court, of its own motion or on the application of any party, may, with the consent of the President, reserve the question in the form of a special case stated for the opinion of the Supreme Court.
- (2) If a question of law has been reserved for the opinion of the Supreme Court, the Children's Court cannot-
  - (a) finally determine the matter until the opinion of the Supreme Court has been given; or
  - (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question of law.

