

4. FAMILY DIVISION - GENERAL

CONTENTS

- 4.1 The Child Protection Service [‘DFFH’]**
 - 4.1.1 Functions of the Child Protection Service
 - 4.1.2 Duty of care of the Child Protection Service
 - 4.1.3 Principles governing decision-making by the Child Protection Service
 - 4.1.4 Voluntary intervention
 - 4.1.5 Statutory intervention
 - 4.1.6 The Child Protection Service as a model litigant
- 4.2 Role of the Children’s Court in Child Protection in Victoria**
- 4.3 Jurisdiction of Family Division**
 - 4.3.1 Jurisdiction under the CYFA
 - 4.3.2 Whether jurisdiction under the Family Law Act 1975 (Cth) [as amended]
- 4.4 Definitions of ‘child’ & ‘parent’**
- 4.5 Parental responsibility & contact**
 - 4.5.1 Parental responsibility – Major long-term issue
 - 4.5.2 Where carer may exercise parental responsibility
 - 4.5.3 Contact
 - 4.5.4 Terms used in the Family Law Act
- 4.6 Protective intervention reports [previously termed “Notifications”]**
 - 4.6.1 Anonymity of protective intervention reporter [notifier]
 - 4.6.2 Mandatory protective intervention report
 - 4.6.3 Child protection reports by report source – 1999-2000 & 2007-2010
 - 4.6.4 Trends in child protection reports 1989-1990 to 2012-2013
 - 4.6.5 Australian rate of reports of alleged child abuse
- 4.7 Representation of children in the Family Division of the Court**
 - 4.7.1 Obligation to afford child a fair hearing
 - 4.7.2 Models of child representation
 - 4.7.3 Child usually represented if aged 10 years or more
 - 4.7.4 Represent’n of child under 10 or not mature enough to give instructions
 - 4.7.5 Representing more than one child in a proceeding
 - 4.7.6 Child representation in Children’s Court and Family Court compared
 - 4.7.7 Recommendations by Australian Law Reform Commission
 - 4.7.8 Recommendations by Victorian Law Reform Commission
 - 4.7.9 Recommendations by the “Cummins Inquiry”
 - 4.7.10 Representation of child who is not respondent or applicant under FVPA
- 4.8 Conduct of proceedings in Family Division**
 - 4.8.1 Informal procedure
 - 4.8.2 Court may inform itself as it thinks fit - Rules of evidence not mandatory
 - 4.8.3 Impact of the “best interests” principle on the Court’s procedure
 - 4.8.4 Findings on balance of probabilities
 - 4.8.5 Expert evidence
 - 4.8.6 Attendance of child at Court
- 4.9 Family Division Court hearings**
 - 4.9.1 Apprehension – Hearing after child placed in emergency care
 - 4.9.2 Mention
 - 4.9.3 Conciliation
 - 4.9.4 First directions hearing & Directions hearing preceding a contest
 - 4.9.4A Readiness hearings
 - 4.9.5 Contested hearing
 - 4.9.6 Marram-Ngala Ganbu Program

4. FAMILY DIVISION - GENERAL

CONTENTS [continued]

- 4.10 Alternative Dispute Resolution**
 - 4.10.1 Conciliation Conferences
 - 4.10.2 Jurisdiction & Purpose of CC
 - 4.10.3 Convenor
 - 4.10.4 Repeal of advisory conference provisions
 - 4.10.5 Attendance at CC
 - 4.10.6 Guidelines & Procedure
 - 4.10.7 Reports & Confidentiality
 - 4.10.8 Court orders
 - 4.10.9 Statistics
 - 4.10.10 Judicial Resolution Conferences
- 4.11 Children's Court & Family Court compared & contrasted**
 - 4.11.1 Public law versus private law
 - 4.11.2 Responsibilities and obligations of the Family Court to children
 - 4.11.3 Notification by the Family Court to State welfare authorities
 - 4.11.4 Representation of children
 - 4.11.5 Priority of orders
- 4.12 Relationship between attachment and child's emotional wellbeing**
- 4.13 Shared care of a young child**
- 4.14 Frequency of contact between young child and parent**
 - 4.14.1 "Baby on Board" and research cited therein
 - 4.14.2 Case law
 - 4.14.3 American judicial guidelines 2009
 - 4.14.4 Contact conditions are an integral part of a court order
- 4.15 Cumulative harm**
- 4.16 Effect on child of separation from primary attachment figure**
- 4.17 Family Drug Treatment Court**
- 4.18 Some other relevant papers**

"What is learned in childhood is engraved in stone."
Mary McAleese (President of Ireland – Belfast, August 2006)

4.1 The Child Protection Service ['DFFH']

Most Victorian children and young people are adequately cared for and nurtured by their family. It is only when parents or caregivers are unable or unwilling to protect children against significant harm that the Child Protection Service of the Victorian Government's Department of Families, Fairness and Housing ('DFFH' or 'the Department') – formerly called the Department of Health & Human Services ('DHHS') or the Department of Human Services ('DHS' or 'DOHS') – intervenes to protect children and young people. The permanent head of the Department is entitled 'the Secretary' [s.3 of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA')].

4.1.1 Functions of the Child Protection Service

The main functions of the Child Protection Service are:

- to investigate matters where it is alleged that a child is at risk of significant harm;
- to refer children and families to services that assist in providing the ongoing safety and well-being of the children;

- to take matters before the Children's Court if the child's safety cannot be ensured within the family;
- to supervise children on legal orders granted by the Children's Court; and
- to provide and fund accommodation services, specialist support services, and adoption and permanent care to those children and adolescents in need.

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

4.1.2 Duty of care of the Child Protection Service

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

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

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

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

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

[299] There is no incompatibility between the existence of such a duty and the Department's statutory responsibilities. The duty would serve to enhance the standards observed by the Department and its officers and will further the principal objectives of the legislation. The imposition of a duty of care on the

Defendant does not cut across the legislative intent of the Act, as was the case in *Sullivan v Moody*. As the name of the Act indicates, the general legislative intent of the Act is the protection of child welfare. The duty of care toward children injured by reason of the exercise or failure to exercise powers granted under the Act may clearly co-exist with, and be consistent with, the purposes of the Act. Recognition of a duty would serve to emphasise the primary responsibility of the Department and its officers to promote the welfare of children generally and its wards.

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

4.1.3 Principles governing decision-making by the Child Protection Service

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

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

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

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

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

Section 10(2) requires a decision-maker, in determining whether a decision or action is in the best interests of a child, to consider always the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development).

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

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

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

- (a) the advice of the relevant Aboriginal agency; and
- (b) the criteria in s.13(2); and
- (c) the principles in s.14.

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

4.1.4 Voluntary intervention

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

4.1.5 Statutory intervention

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

4.1.6 The Child Protection Service as a model litigant

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

1. In order to maintain proper standards in litigation, the State of Victoria, its Departments and agencies behave as a model litigant in the conduct of litigation.
2. That obligation requires that the State of Victoria, its Departments and agencies:
 - act fairly in handling litigation brought by or against the State or an agency;
 - act consistently in the handling of litigation;
 - avoid litigation, wherever possible;
 - keep the costs of litigation to a minimum, including by not requiring the other party to prove a matter which the State or the agency knows to be true;
 - not rely on technical defences unless the State's or the agency's interests would be prejudiced by the failure to comply with a particular requirement;
 - not take advantage of a person who lacks the resources to litigate a legitimate claim;
 - not pursue appeals unless the State or agency believes it has reasonable prospects of success or the appeal is otherwise justified in the public interest.
3. In essence, being a model litigant requires that the State and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State will act as a model litigant has been recognized by the Courts: see, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 142; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1977) 75 FCR 155.
4. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.
5. The obligation does not prevent the State and its agencies from acting firmly and properly to protect their interests [including the interests of the children the subject of litigation].
6. The obligation does not prevent the State from enforcing costs orders or seeking to recover its costs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3 Jurisdiction of Family Division

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

4.3.1 Jurisdiction under the CYFA

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

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

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

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

4.3.2 Whether jurisdiction under the Family Law Act 1975 (Cth) [as amended]

It has long been accepted in Victoria as a matter of general practice that paradoxically:

- i. the **Magistrates' Court of Victoria** has jurisdiction to hear and determine certain matters relating to children pursuant to Part VII of the Family Law Act 1975 (Cth) [as amended] ('the FLA'), including applications for parenting orders in certain circumstances; but
- ii. the **Children's Court of Victoria** does not have jurisdiction under the FLA.

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

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

In an earlier version of this paragraph, the writer agreed "but with less certainty that the Family Law Council" that the Children's Court of Victoria does not have FLA jurisdiction. The writer has resiled a long way from that view. This is largely a consequence of reading a detailed Memorandum of Advice dated 03/07/2006 provided to the Department of Justice by eminent senior & junior counsel on a related question: "Does the Children's Court have jurisdiction to vary Family Court orders that conflict with intervention orders made under the Crimes (Family Violence) Act 1987 (Vic) ('the CFVA')?" [The same question is relevant to the FVPA which replaced the CFVA on 08/12/2008.] Counsels' conclusion was: "The Children's Court does have jurisdiction to vary Family Court orders that conflict with intervention orders made under the CFVA, provided that the jurisdiction is exercised by a magistrate rather than by the President of the Court."

Having read counsels' opinion, the writer accepts that "*Le Mesurier v Connor* (1929) 42 CLR 481 at 503 is not authority for the proposition that Commonwealth legislation can confer jurisdiction only on State courts that exist at the time the Commonwealth legislation that invests federal jurisdiction is passed".

The issue about which the writer remains uncertain is whether or not the investing of FLA jurisdiction by s.69J of the FLA on 11/06/1996 survived the significant change in the constitution of the Children's Court of Victoria brought about by Act No.36/2000 on 26/06/2000.

The writer-

- accepts that when it is constituted by the President, the Children's Court of Victoria cannot exercise the jurisdiction which a Magistrates' Court has under the FLA; but
- considers it moot that when it is constituted by a magistrate, the Children's Court of Victoria can exercise the jurisdiction which a Magistrates' Court has under the FLA.

As counsel concede, the underlying reasoning is complex. It is as follows:

1. By ss.51(xxi) & 51(xxii) of the Constitution, Federal Parliament is empowered to make laws with respect to:
 - (xxi) marriage;
 - (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.

In purported exercise of these powers the FLA had originally defined 'matrimonial cause' as including "proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage": s.4(1)(c)(iii). In *Russell v Russell* (1976) 134 CLR 495 at 556 a majority of the High Court read down s.4(1)(c)(iii) to apply only to "proceedings between the parties to a marriage with respect to the custody, guardianship or maintenance of, or access to, the natural and adopted children of the parties to the marriage". In brief the High Court held that the Federal Parliament had no power to legislate with respect to the custody and guardianship of ex-nuptial children.

2. In 1986 all of the States except Western Australia referred to the Federal Parliament until further notice some of their powers in relation to custody and guardianship of children. By s.3(1) of the Commonwealth Powers (Family Law - Children) Act 1986 (Vic) - assented to on 16/12/1986 - the State of Victoria referred to the Parliament of the Commonwealth certain of its powers to legislate with respect to-
 - (a) the maintenance of children and the payment of expenses in relation to children or child bearing; and
 - (b) the custody and guardianship of, and access to, children.

By s.3(2) of that Act, a number of powers were excepted from this general referral, including the jurisdiction of a Victorian court, under a provision of the Children's Court Act 1973 (Vic), the Community Welfare Services Act 1970 (Vic) and subsequently the CYPA and the CYFA, to make orders or take any other action, in respect of-

- (i) the custody, guardianship, care or control of children; or
- (ii) access to [now called contact with] children or the supervision of children.

So the State has retained its jurisdiction in respect of the protection of children.

3. Subsequently the Federal Parliament accepted and acted upon this limited referral. By s.24 of Act No.181 of 1987 - which came into operation on 01/04/1988 - Federal Parliament amended the title of Part VII of the FLA from "Welfare & Custody of Children" to "Children" and made substantial changes to that Part. By ss.69ZE(1) & 69ZE(3) Part VII of the FLA was said to extend to Victoria for so long as there is in force either:
 - (a) a Victorian Act referring to the Commonwealth Parliament the requisite powers in relation to children; or
 - (b) a Victorian law adopting Part VII.

The amendments to Part VII included a new s.63(2) which - in reliance on the power conferred on Federal Parliament by s.77(iii) of the Constitution to "make laws investing any court of a State with federal jurisdiction" - provided: "Subject to subsection (5), **each court of summary jurisdiction** of each State is invested with federal jurisdiction...in relation to matters under this Part." It seems clear that the several Victorian children's courts existing at that time were courts of summary jurisdiction within the meaning of s.63(2) for in s.26(d) of the Acts Interpretation Act 1901 (Cth) ('the AIA'), 'court of summary jurisdiction' is defined as

"any justice or justices of the peace or other magistrate of the Commonwealth or part of the Commonwealth, or of a State or part of a State, or of an external Territory, sitting as a court for the making of summary orders or the summary punishment of offences under the law of the Commonwealth or part of the Commonwealth or under the law of the State or external territory or by virtue of his or their commission or commissions or any Imperial Act".

4. The Children's Court of Victoria, in its present manifestation, was created on 31/01/1991 when s.8 of the CYPA came into operation. By clause 1(1) of Schedule 8 of the CYPA, that Court was "deemed to be the same Court as the several children's courts existing immediately before the commencement of section 8". However there was not included in the Transitional provisions in Schedule 8 of the CYPA any equivalent to clause 1(9) of Schedule 8 of the Magistrates' Court Act 1989 (Vic) which preserved any jurisdiction, power or authority previously vested in a magistrate of the several predecessor magistrates' courts.
5. By Act No.167 of 1995 - most of which came into operation on 11/06/1996 - Federal Parliament again made substantial amendments to Part VII of the FLA. Among the powers thus vested on State courts of summary jurisdiction were power to make interim parenting orders [s.69N(4)] and power to make parenting orders by consent but not power to hear and determine contested proceedings for a parenting order [ss.69N(2) & 69N(3)].
6. The 1995 amendments also included, as a replacement for s.63(2), a new s.69J(1) which - again in reliance on the power conferred by s.77(iii) of the Constitution - provided: "Subject to subsection (5), **each court of summary jurisdiction** of each State is invested with federal jurisdiction in relation to matters arising under this Part (other than proceedings for leave [for adoption proceedings to commence] under s.60G)." Section

69J(5) provides: "A court of summary jurisdiction must not hear and determine proceedings under this Part otherwise than in accordance with any Proclamation in force under subsection (3)." There has been no relevant Proclamation relating to Victoria.

7. Just as with the predecessor s.63(2), it seems clear that the Children's Court of Victoria was - as at 11/06/1996 - a court of summary jurisdiction within the meaning of s.69J of the FLA and s.26(d) of the AIA, being comprised of magistrates of the State of Victoria sitting as a court for the making of summary orders or the summary punishment of offences under the law of the Commonwealth and under the law of the State of Victoria. That is enough to confer FLA jurisdiction on the Children's Court, a jurisdiction which pursuant to s.69M of the FLA is "in addition to any jurisdiction conferred on or invested in the court apart from this Division". [See also p.2051 of CCH Australian Family Law & Practice]. In particular, there does not seem to be a requirement that any such invested federal jurisdiction be legislatively adopted by the State upon whom the jurisdiction was invested.
8. Up to this point the writer agrees with counsels' opinion. But one major question remains, a consequence of two different legislative quirks each of which was probably unintended. By Act No.36/2000, which came into operation on 26/06/2000, the Victorian Parliament significantly changed the constitution of the Children's Court of Victoria. Previously the Court had consisted of the magistrates and the registrars of the Court. By s.4(1) of Act No.36/2000, s.8(2) of the CYPA was amended to read: "The Court shall consist of a President, the magistrates and the registrars of the Court." By s.5 of the amending Act, ss.12(1) & 12(2) were substituted and provide:
 - (1) "There is to be an office of President of the Children's Court.
 - (2) The President must be a judge of the County Court who is appointed by the Governor in Council on the recommendation of the Attorney-General made after consultation with the Chief Judge."From 23/04/2007 s.8 of the CYPA has been replaced by s.504 of the CYFA and s.12 of the CYPA by s.508 of the CYFA but both new sections are effectively identical to the old.
9. The question which in the writer's view remains moot is whether the changes to the constitution of the Children's Court of Victoria introduced on 26/06/2000 resulted in the Court ceasing to be a **court of summary jurisdiction** within the meaning of s.69J of the FLA.
10. It is counsels' opinion at [50] that "the fact that one member of a Court does not fall within the definition of a 'court of summary jurisdiction' in s.26(d) of the AIA does not mean that the Children's Court when constituted by a magistrate falls outside the definition". Counsel continue at [51]:

"Section 69J of the FLA invests federal jurisdiction in 'courts of summary jurisdiction'. While it is tempting to regard the 'court' for this purpose as the institution that is created by s.8(1) of the CYPA, reading s.69J of the FLA in that way would ignore the language used by the Commonwealth Parliament. In particular, it would ignore the definition in s.26(d) of the AIA. That definition provides that the phrase 'court of summary jurisdiction' means specified individuals (magistrates, justices of the peace etc) when those individuals are carrying out specified functions. It does not mean the institution of which those individuals form a part."

In support, counsel relied on dicta of Scrutton LJ in *Huish v Liverpool Justices* [1914] 1 KB 109 at 116-117 and the High Court in *Pearce v Cocchiaro* (1977) 137 CLR 600. Accordingly counsel concluded at [54]-[55]& [58]:

[54] "In our opinion, on any occasion when a magistrate (including a magistrate who constitutes the Children's Court) sits as a court to make summary orders under State law, the magistrate will be a 'court of summary jurisdiction' for the purpose of s.26(d) of the AIA and federal jurisdiction will be invested by s.69J of the FLA.

[55] On the above analysis, federal jurisdiction is conferred on some members of the institution that is created by s.8 of the CYPA (the magistrates) but not on others (the President and registrars). Subject to one possible objection, we consider it likely that the vesting of federal jurisdiction

in only some members of the State court created by s.8 of the CYPA will be held to be permissible...

[58] Accordingly, because the CYPA contemplates that the Children's Court can be constituted either by the President or by a magistrate, there is nothing to prevent the Commonwealth from choosing to invest federal jurisdiction when the Court is constituted by a magistrate but not when the Court is constituted by the President. Although that may be an odd distinction as a matter of policy (it is probably an unintended consequence of s.26(d) of the AIA), in our opinion it is unlikely to be held objectionable as a matter of constitutional law."

11. The "one possible objection" to which counsel referred arises from the decision of the High Court in *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 58 where the Court held that, for the purposes of s.77(iii) of the Constitution, a "court" is an organisation "consisting of judges and with ministerial officers having specified functions". In that case it was said that federal jurisdiction is "conferred on the court regarded as an entity, rather than on the individual persons who compose its membership". Counsel say of this at [59]-[61]:

[59] "That appears to suggest that federal jurisdiction would ordinarily be taken to be invested in the Children's Court as a whole (that is, the institution created by s.8(1) of the CYPA), rather than in the magistrates who constitute the court.

[60] However, the effect of s.26(d) of the AIA is that the Commonwealth Parliament has not attempted to invest federal jurisdiction in the Children's Court as an institution. The 'court' in which it has invested jurisdiction consists of the individual magistrates when constituting the Court and exercising judicial power.

[61] If, as suggested in paragraph [59] above, it is constitutionally necessary to invest jurisdiction in an institution rather than a person, it would seem to follow that s.26(d) of the AIA is invalid. It is unnecessary to reach a concluded view on this point because if s.26(d) is invalid, the consequence would be that the term 'court of summary jurisdiction' in s.69J(1) of the FLA would bear its ordinary meaning. On the basis of the passages from *John L Pierce Pty Ltd v Kennedy* (2000) 104 FCR 225 at [24], [30] & [46] quoted in paragraphs [39]-[41] of this opinion, the ordinary meaning of the Children's Court would include the Children's Court. It would follow that s.69J would invest federal jurisdiction in the entire Children's Court, and that both the President and the magistrates would be empowered to make orders under s.68T [now s.68R] of the FLA.

12. Counsel concluded at [62]:

"In our opinion, the safer course is to assume that s.26(d) of the AIA is valid. That provision has been discussed in several cases by the High Court with no suggestion that its validity is questionable. The consequence is that the President of the Children's Court cannot exercise jurisdiction under s.68T [now s.68R] of the FLA but that there is no impediment to the Children's Court exercising this jurisdiction when constituted by a magistrate."

13. If s.26(d) of the AIA is in fact invalid and the "one possible objection" referred to by counsel is a good objection, the question is whether the Children's Court of Victoria is a "court of summary jurisdiction" within the ordinary meaning of the phrase. In *John L Pierce Pty Ltd v Kennedy* (2000) 104 FCR 225 at [30] Madgwick J – with whom O'Connor J agreed – said:

"As a matter of ordinary language, the description 'court of summary jurisdiction' captures the foregoing notion of a relative lack of formality of the proceedings."

14. At [44] of their opinion counsel say:

“As we understand it, the Children’s Court follows procedures of the kind followed in the Magistrates’ Court. There is no material distinction between the level of formality in proceedings in the two courts.”

15. In the writer’s opinion that is largely correct, but arguably not entirely correct. Section 215(1) of the CYFA provides that the Family Division of the Court:

- (a) must conduct proceedings before it in an informal manner;
- (b) must proceed without regard to legal forms; and
- (d) may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary.

16. Moreover, new section 215B of the CYFA – introduced on 01/12/2013 – gives judicial officers even greater power to manage the conduct of child protection proceedings in the Family Division of the Children’s Court in a less adversarial way. This supports counsels’ understanding, making the Children’s Court procedure even more summary in a sense than that in the Magistrates’ Court. However, s.527(6) of the CYFA [in the same terms as s.23(5) of the CYPA] imposes an obligation on the Family Division of the Children’s Court to give a written statement of reasons in every case in which it makes a final order in a proceeding. This is certainly not one of the ordinary indicia of a court of summary jurisdiction.

Counsels’ attractive argument, if correct, leads to highly unattractive consequences for the operation of the Children’s Court. It is an intolerable position that the judicial head of a court should have less power than the puisne judicial members of the court. Section 508(8) of the CYFA [previously s.12(8) of the CYPA] provides that the President may exercise any power conferred on a magistrate by or under this or any other Act. But this provision of State legislation cannot by itself vest federal judicial power on the President. If anything, counsels’ opinion has strengthened, rather than weakened, the writer’s view that legislative amendment is necessary to invest all judicial members of the Children’s Court of Victoria unambiguously with federal jurisdiction in relation to matters under Part VII of the FLA as is currently invested in the Magistrates’ Court of Victoria. After all, the Children’s Court of Victoria has been described by State parliament in s.1(d) of the CYFA as “a specialist court dealing with matters relating to children”.

In its Final Report on Family Law and Child Protection (September 2002) the Family Law Council recommended at p.82: “The FLA should be amended to allow Children’s and Youth Courts to make consent orders regarding residence and contact in certain circumstances.”

With respect, it is the writer’s view that this recommendation does not go far enough. If the legislation is to be amended, the writer sees no reason why any FLA jurisdiction unambiguously invested in the Children’s Court of Victoria should be any less than the FLA jurisdiction currently invested in the Magistrates’ Court of Victoria. That is, it should not be restricted to parenting orders by consent [s.69N(2)] but should also include power to make interim parenting orders [s.69N(4)] as well as power to revive, vary, discharge or suspend a parenting or other order in proceedings to make or vary a state family violence order [s.68R(1)].

4.4 Definitions of ‘child’ & ‘parent’

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

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

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

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

- (a) the father and mother of the child; and
- (b) the spouse of the father or mother of the child; and
- (c) the domestic partner of the father or mother of the child; and
- (d) any person who has parental responsibility for the child, other than the Secretary; and
- (e) a person whose name is entered as the father of the child in the register of births in the Register maintained by the Registrar of Births, Deaths and Marriages under Part 7 of the Births, Deaths and Marriages Registration Act 1996; and
- (f) a person who acknowledges that he is the father of the child by an instrument of the kind described in s.8(2) of the Status of Children Act 1974; and
- (g) a person in respect of whom a court has made a declaration or a finding or order that the person is the father of the child.

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

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

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

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

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

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

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

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

See also a broader discussion of the concept of 'parent' contained in sub-section 5.2.3.

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4.5 Parental responsibility & contact

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

4.5.1 Parental responsibility – Major long-term issue

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

In s.3(1) of the CYFA 'major long-term issue', in relation to a child, is defined as "an issue about the care, wellbeing and development of the child that is of a long-term nature and includes an issue of that nature about–

- (a) the child's education (both current or future); and
- (b) the child's religious and cultural upbringing; and
- (c) the child's health; and
- (d) the child's name."

These are the issues that were previously categorized as 'guardianship issues'.

4.5.2 Where carer may exercise parental responsibility

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

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

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

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

- (a) an interim accommodation order; or
 - (b) a protection order that confers parental responsibility on the Secretary–
- to make decisions in relation to the child on the issues specified by the Secretary under s.175A.

4.5.3 Contact

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

- (a) a visit by or to that person, including attendance for a period of time at a place other than the child's usual place of residence; or
 - (b) communication with that person by letter, telephone or other means–
- and includes overnight contact.

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

4.5.4 Terms used in the Family Law Act

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

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

4.6 Protective intervention reports [previously termed "Notifications"]

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

4.6.1 Anonymity of protective intervention reporter [notifier]

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

- (a) in the case of a proceeding in a court or VCAT, the court or tribunal is satisfied that it is necessary for the evidence to be given to ensure the safety and well being of the child;
- (b) in any other case, the court or tribunal is satisfied that the interests of justice require the evidence to be given.

4.6.2 Mandatory protective intervention report

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

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

The relevant professionals referred to in s.182 include-

- registered medical practitioners and registered nurses;
- teachers, head teachers or principals;
- members of the police force.

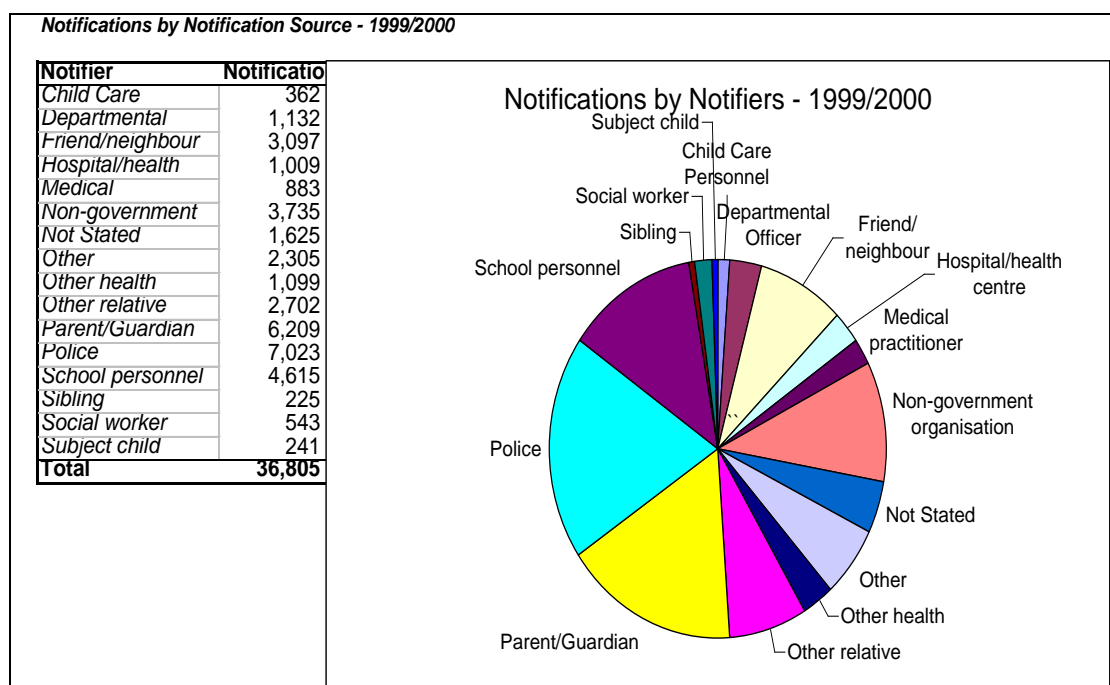
They also include – but only from the "relevant date" which has not yet been prescribed–

- proprietors and persons with a post-secondary qualification in the care, education or minding of children employed by a children's service to which the Children's Services Act 1986 (Vic) applies;
- post-secondary qualified youth, social or welfare workers who work in the health, education, or community or welfare services field;
- persons employed under the Public Administration Act 2004 (Vic) to perform the duties of youth and child welfare workers;

- registered psychologists;
- youth justice officers and youth parole officers; and
- members of prescribed classes of persons.

4.6.3 Child protection reports by report source – 1999-2000 & 2007-2010

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



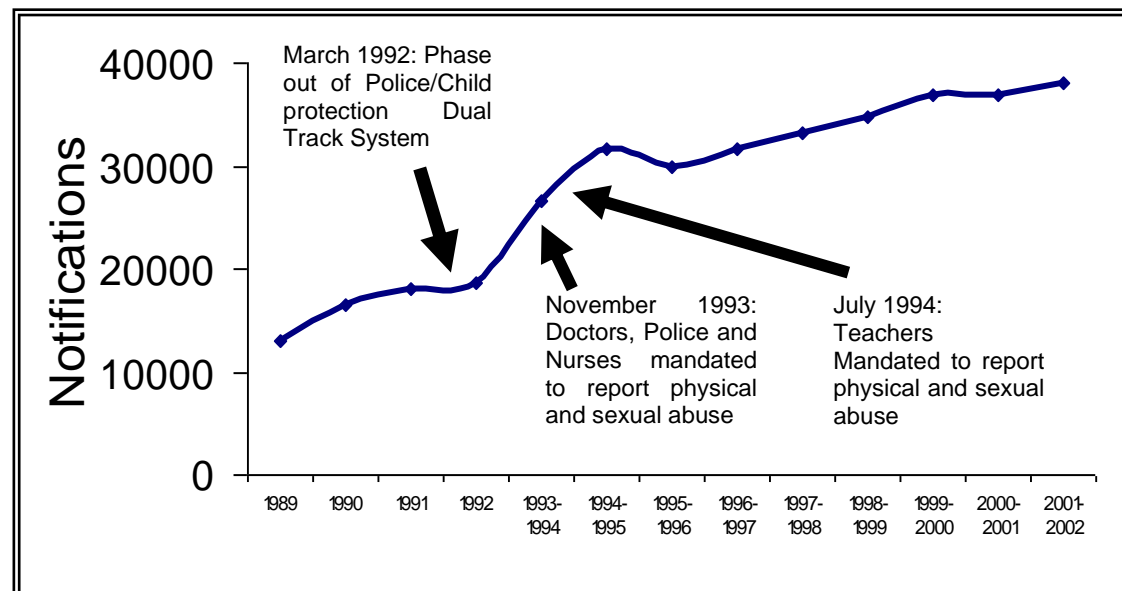
The following table – compiled from “Child protection Australia” publications in the Child Welfare Series published by the Australian Institute of Health and Welfare, Canberra – shows the origin in percentage terms of investigated child protection reports in Victoria in 2007-2008, 2008-2009 & 2009-2010:

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

As in Victoria, the most common source of child protection reports for finalised investigations throughout Australia was police. In 2009-2010 the national average was 26%. Also as in Victoria, the second most common source of investigated child protection reports was school personnel. In 2009-2010 the national average was 20%, a significantly higher figure than in Victoria. To some extent, this may reflect differences across the states and territories in mandatory reporting requirements.

4.6.4 Trends in child protection reports 1989-1990 to 2012-2013

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



The proportion of non-mandated and mandated notifications in 1995-1996 and 2000-2001 and the changes in the respective reporting rates are shown in the following chart also provided in the afore-mentioned paper of Mr Peter Green, Manager DOHS Child Protection & Care:

STATUS	1995-1996		2000-2001		% CHANGE
Non-mandated notifiers (including family, neighbours)		20,993		23,146	+10%
All mandated professionals		8,887		13,850	+56%
Police	4,492		6,707		+49%
Teachers	2,798		4,945		+77%
Nurses	538		1,119		+108%
Medical practitioners	1,049		1,079		+3%
TOTAL		29,870		36,966	+24%

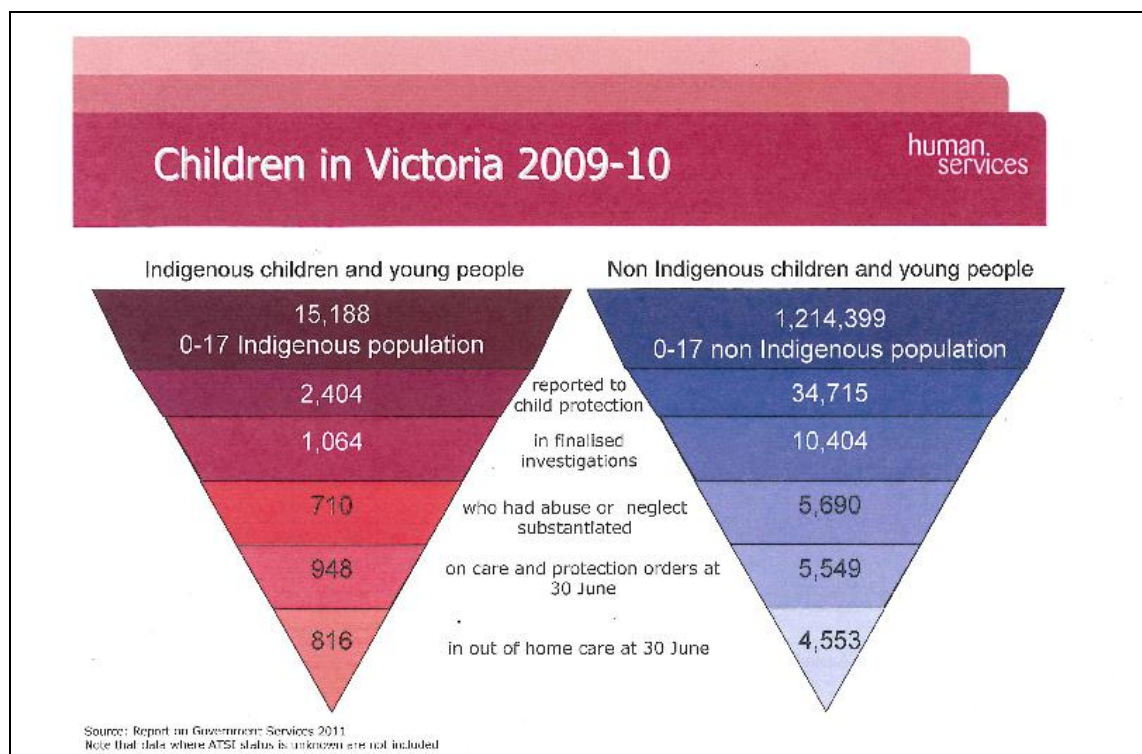
Some general characteristics of notifications in 2002 were summarised by Mr Green as follows:

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

The following snapshots show that only a comparatively small percentage of Victorian child protection reports are investigated by DFFH and of those investigated between a half and two thirds are substantiated:

VICTORIAN NOTIFICATIONS/REPORTS				
YEAR	TOTAL NUMBER	NUMBER INVESTIGATED	NUMBER SUBSTANTIATED	NUMBER OF PROTECTION APPLIC'NS
1997-1998	33,164	14,682	7,412	2,135
1998-1999	n/a	n/a	n/a	n/a
1999-2000	36,805	n/a	7,359	n/a
2000-2001	36,966	n/a	7,608	n/a
2001-2002	37,976	n/a	7,687	n/a
2002-2003	37,635	n/a	7,287	2,319
2003-2004	36,956	n/a	7,412	2,399
2004-2005	37,523	n/a	7,398	2,586
2005-2006	37,987	n/a	7,563	2,916
2006-2007	38,675	10,537	6,828	3,101
2007-2008	41,607	10,080	6,365	3,353
2008-2009	42,851	10,300	6,344	3,048
2009-2010	48,369	12,174	6,603	3,046
2010-2011	55,718	13,941	7,643	3,270
2011-2012	63,830	16,072	9,075	3,920
2012-2013	73,265	17,476	10,489	3,804
2013-2014	82,056	19,206	11,395	Approx 4,200

The writer does not know why only a comparatively small percentage of child protection reports are ultimately investigated. It is noteworthy – and potentially alarming – that the increase in the number of protective intervention reports received by the Department in Victoria in 2009-2010 was almost as great as the total increase over the previous ten years and that there has been such a large increase in reports and substantiations in each year since 2008-2009.



But it is important to keep in perspective the fact – as the above diagram shows – that only a very small percentage of Victorian children are the subject of reports – whether substantiated or unsubstantiated – to the Department. However, the percentage of indigenous children who

are the subject of protective intervention reports is grossly out of proportion to the percentage of indigenous children in the Victorian child population. An indigenous child in Victoria is about 7½ times as likely to be the subject of a substantiated report as a non-indigenous child, as the following chart shows:

VICTORIAN NOTIFICATIONS/REPORTS				
YEAR	TOTAL NUMBER	SUBSTANTIATED REPORTS		
		TOTAL NUMBER	INDIGENOUS	NON-INDIGENOUS
2006-2007	38,675	6,828	697 [5.66%]	5,891 [0.53%]
2007-2008	41,607	6,365	681 [5.50%]	5,461 [0.49%]
2008-2009	42,851	6,344	684 [4.50%]	5,441 [0.45%]
2009-2010	48,369	6,603	710 [4.67%]	5,690 [0.47%]
2010-2011	55,718	7,643	768 [5.02%]	6,557 [0.54%]
2011-2012	63,830	9,075	963	7,778
2012-2013	73,265	10,489	1,067	8,977
2013-2014	82,056	11,395	1,249	10,145

As the following chart shows, the proportion of indigenous children the subject of substantiated child protection reports in Victoria is significantly more than in Queensland and Tasmania but less than in the other States & Territories.

RATIO OF INDIGENOUS/NON-INDIGENOUS SUBSTANTIATED REPORTS									
YEAR	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	TOTAL
2008-09	8.2	10.0	6.5	10.7	13.4	n/a	8.1	6.1	7.5
2009-10	8.7	10.0	6.1	12.7	10.1	2.8	12.5	6.7	7.7
2010-11	8.9	9.3	6.3	12.4	9.2	2.5	13.0	6.6	7.7
2011-12	9.0	9.7	6.0	13.4	11.6	2.7	13.8	7.8	7.8
2012-13	9.5	9.4	6.7	15.0	13.0	3.3	10.8	9.3	7.9
2013-14	7.9	7.4	6.2	13.3	10.6	2.0	8.2	10.5	6.8

Further, in 2013-2014 an indigenous child in Victoria was nearly 12 times as likely to be on a protection order than a non-indigenous child.

4.6.5 Australian rate of reports of alleged child abuse

In an address to Parliamentarians Against Child Abuse given at Parliament House, Canberra on 05/09/2006, Professor Dorothy Scott (Director of the Australian Centre for Child Protection, University of South Australia), asserting that some Australian child protection systems are imploding under a flood of reports of alleged child abuse, commented that Australia has the second highest rate of such reports in the world:

“Most of the statutory child protection services in Australia are in crisis. They are potentially harmful to the children and families they are designed to serve. The dedicated people doing this excruciatingly difficult work operate under hazardous conditions. Media moral outrage which erupts when children die or are hurt, and which politicises that which should be above politics, further weakens fragile services and exacerbates staff vacancies. In some States child protection systems are imploding. They have become like huge Casualty Departments unable to cope with a flood of referrals.

Australia has the second highest rate of reports of alleged child abuse in the world (52.4 notifications per 1000 children each year). In England the figure is 6.2 reports per 1000 children and in Scotland it is 8.6. Child Protection notifications in Australia increased from 107,134 in 1999-2000 to 252,831 in 2004-2005. One in five was substantiated as child abuse. There is no evidence that child abuse is a more serious problem in Australia than in the UK, and the number of children in State care is not markedly different from other English speaking countries, with Australia having 4.9 children in care per 1000 children, England 5.0, Scotland 6.6 and the U.S.A. 7.1. So is part of the problem that too many Australian children are caught unnecessarily in the net of our child protection systems and could this be making them unworkable? I believe so...

In some Australian jurisdictions it is now estimated that one in five children will be the subject of a child protection notification. This is completely unsustainable.”

Professor Scott's view that most of the Australian child protection services are in crisis is shared by many other professionals. For example, writing in 2009 in CIS Policy Monograph 97 entitled “Fatally Flawed: The Child Protection Crisis in Australia”, Jeremy Sammut & Toby O'Brien say at p.vii:

“Despite record government spending on child welfare services in this country, the child protection system is in crisis – most markedly in New South Wales. Australian child protection authorities are failing to fulfil their core responsibility of protecting and rescuing vulnerable children. Reports of suspected child abuse and neglect are not being fully investigated, and the ‘Starved Girls’ of Australia are falling through the cracks in increasing numbers.”

However, unlike Professor Scott and most policy advisors Messrs Sammut & O'Brien do not blame mandatory reporting. Nor do they consider that the growth in reports has been concentrated in less serious types of abuse and neglect. On the contrary, they postulate that in NSW at least the “real cause of the child protection is the large number of ‘hard core’ obviously dysfunctional parents” about whom a disproportionate number of reports are made.

It appears, however, that until 2009-2010 Victoria was the one state in which the number of notifications/reports had not increased significantly. [The figures for SA in 1999-00, in Tasmania until 2002-2003 and in ACT until 2001-2002 are calculated on a different basis from those in subsequent years]. The number of notifications in each Australian state and territory from 1999-2000 to 2013-2014 and the number of substantiated notifications from 2004-2005 to 2013-2014 which are detailed in the charts below are taken from tables in various editions of “Child protection Australia” in the Child Welfare Series published by the Australian Institute of Health and Welfare, Canberra.

NOTIFICATIONS/REPORTS									
YEAR	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	TOTAL
1999-00	30,398	36,805	19,057	2,645	15,181	422	1,189	1,437	107,134
2000-01	40,937	36,966	22,069	2,851	9,988	315	794	1,551	115,471
2001-02	55,208	37,976	27,592	3,045	11,203	508	801	1,605	137,938
2002-03	109,498	37,635	31,068	2,293	13,442	741	2,124	1,554	198,255
2003-04	115,541	36,956	35,023	2,417	14,917	7,248	5,325	1,957	219,384
2004-05	133,636	37,523	40,829	3,206	17,473	10,788	7,275	2,101	252,831
2005-06	152,806	37,987	33,612	3,315	15,069	13,029	8,064	2,863	266,745
2006-07	189,928	38,675	28,580	7,700	18,434	14,498	8,710	2,992	309,517
2007-08	195,599	41,607	25,003	8,977	20,847	12,863	8,970	3,660	317,526
2008-09	213,686	42,851	23,408	10,159	23,221	10,345	9,595	6,189	339,454
2009-10	156,465	48,369	21,885	12,160	20,298	9,895	10,780	6,585	286,437
2010-11	98,845	55,718	21,655	10,976	21,145	10,689	11,712	6,533	237,273
2011-12	99,283	63,830	24,823	13,745	19,056	11,836	12,419	7,970	252,962
2012-13	104,817	73,265	24,763	15,201	19,120	12,311	13,518	9,985	272,980
2013-14	125,994	82,056	23,256	16,801	19,578	12,862	10,600	12,950	304,097

SUBSTANTIATED NOTIFICATIONS/REPORTS									
YEAR	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	TOTAL
2004-2005	15,493	7,398	17,307	1,104	2,384	782	1,213	473	46,154
2005-2006	29,809	7,563	13,184	960	1,855	793	1,277	480	55,921
2006-2007	37,094	6,828	10,108	1,233	2,242	1,252	852	621	60,230
2007-2008	34,135	6,365	8,028	1,464	2,331	1,214	827	756	55,120
2008-2009	34,078	6,344	7,315	1,523	2,419	1,188	896	858	54,621
2009-2010	26,248	6,603	6,922	1,652	1,815	963	741	1,243	46,187
2010-2011	18,596	7,643	6,598	1,907	2,220	1,225	636	1,641	40,466
2011-2012	23,175	9,075	7,681	2,759	2,139	1,025	861	1,705	48,420
2012-2013	16,236	10,048	7,149	2,686	1,836	918	494	1,204	40,571
2013-2014	15,074	11,395	6,685	3,053	2,190	712	341	1,394	40,844

In 2012-2013 the number of substantiated reports in Victoria increased by 11% in 2012-2013 and by % in 2013-2014. The decreases in NSW [30%], ACT [43%] and NT [29%] were particularly marked in 2012-2013. Is this proof positive of Professor Scott's "crisis" theory?

4.7 Representation of children in the Family Division of the Court

"Lawyers, I suppose, were children once."

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

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

4.7.1 Obligation to afford child a fair hearing

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

At [209] his Honour said:

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

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

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

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

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

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

4.7.2 Models of child representation

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

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

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

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

4.7.3 Child usually represented if aged 10 years or more

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

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

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

- (a) application for IAO;
- (b) protection application;
- (c) irreconcilable difference application;
- (d) application for a temporary assessment order (unless the Court grants leave for the application to proceed ex parte);
- (e) application for a therapeutic treatment order or therapeutic treatment (placement) order;
- (ea) application for a care by Secretary order;
- (eb) application for a long-term care order;
- (f) application for a permanent care order;
- (g) application for variation of an IAO;
- (h) application for variation or revocation of a temporary assessment order, a therapeutic treatment order or therapeutic treatment (placement) order, a family preservation order, a family reunification order or a permanent care order;
- (i) application in respect of breach of an IAO or a family preservation order;
- (j) application for extension of a family preservation order, a family reunification order or a care by Secretary order;
- (k) application for revocation of a care by Secretary order or a long-term care order;
- (l) application for an order regarding the exercise of any right, power or duty vested in a person with joint parental responsibility for a child;
- (m) application for an order transferring a child protection order within the meaning of Schedule 1 to a participating State;
- (n) application for an order transferring a child protection proceeding within the meaning of Schedule 1 to the Children's Court in a participating State;
- (o) application for the revocation of the registration of a document filed under clause 19 of Schedule 1.

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

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

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

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

- cases falling within s.216, i.e. where, upon an application for extension of a custody or guardianship to Secretary order, the Court is satisfied that the child has agreed on the terms of the order and that the making of the order is in the best interests of the child;
- cases where the Court has granted leave under s.524(8) for the child to be represented by a non-lawyer; and
- cases where the Court has determined pursuant to s.524(1B) that a child aged 10 years or more is not mature enough to give instructions to a legal practitioner, considering-
 - (a) the child's ability to form and communicate the child's own views; and
 - (b) the child's ability to give instructions in relation to the primary issues in dispute; and
 - (c) any other matter the Court considers relevant.

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

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

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

- the objectives of the CYFA and its predecessor “to enhance the rights of children, young people and their families in their relationships with the court system” [see e.g. CYPA Second Reading Speech, 08/12/1988, p.1150],
 - art.12 of the *Convention on the Rights of the Child*,
 - the recommendations by the Victorian Law Reform Commission in June 2010; and
 - the recommendations by the “Cummins Inquiry” in January 2012-
- the amendments made to ss.524 & 525 as and from 27/03/2013 have resulted in children aged under 10 not being entitled to legal representation in any Family Division proceedings in the absence of exceptional circumstances. This is a substantial reduction of the previous statutory rights of children aged 7, 8 & 9.

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

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

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

An Independent Children’s Lawyer appointed under s.524(4) is required by s.524(11)-

- (a) to act in accordance with what he or she believes to be in the best interests of the child; and
- (b) to communicate to the Court, to the extent to which it is practicable to do so, the instructions given or wishes expressed by the child.

The CYFA has thus adopted model 3 – ‘**the best interests model**’ – as its model of child representation in those limited cases where a legal representative has been appointed under s.524(4). The numbers of ICLs appointed are as follows:

2014/15	2015/16	2016/17	2017/18	2018/19			
147	261	291	418	383			

4.7.5 Representing more than one child in a proceeding

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

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

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

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

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

4.7.6 Child representation in Children’s Court and Family Court compared

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

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

Guidelines for child legal representatives are contained in Louise Akenson’s “Guidelines for Lawyers Acting for Children and Young People in the Children’s Court”. See also “Representing Children and Young People – A Lawyers Practice Guide” by Lani Blackman (Victoria Law Foundation, 2002).

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

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

4.7.7 Recommendations by Australian Law Reform Commission

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

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

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

4.7.8 Recommendations by Victorian Law Reform Commission

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

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

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

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

4.7.9 Recommendations by the "Cummins Inquiry"

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

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

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

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

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

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

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

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

- (a) considers it appropriate in all the circumstances of the case; and
- (b) gives leave for the child to be represented.

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

- (a) the desirability of protecting children from unnecessary exposure to the court system; and
- (b) the harm that could occur to the child and to family relationships if the child is directly represented in the proceeding.

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

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

To the extent of any inconsistency, it is the writer's view that s.62, being the later enactment, prevails. The writer deplores this departure from the enlightened philosophy underpinning s.524 into a paternalistic world of adults knowing best and children being not seen and not heard. It is arguable that s.62-

- is at odds with the United Nations Convention on the Rights of the Child to which Australia is a signatory; and
- improperly discriminates against a child and so is contrary to the Preamble and ss.8 & 17(2) of the Charter of Human Rights and Responsibilities Act 2006 (Vic).

It will be interesting to see whether anyone is prepared to challenge it.

4.8 Conduct of proceedings in Family Division

4.8.1 Informal procedure

In addition to-

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

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

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

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.”

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

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

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

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

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

4.8.2 Court may inform itself as it thinks fit – Rules of evidence not mandatory

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

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

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

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

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

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

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

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

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

- (a) the Supreme Court; or
 - (b) any other Court created by Parliament-
- and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

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

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

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

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

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

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

- “(1) Subject to this Act, in a proceeding for a family violence intervention order the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary...
- (3) The court may refuse to admit, or may limit the use to be made of, evidence if the court is satisfied-
 - (a) it is just and equitable to do so; or
 - (b) the probative value of the evidence is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party or misleading or confusing.”

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

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

4.8.3 Impact of the “best interests” principle on the Court’s procedure

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

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

In the course of his extensive judgment at [135]-[147], Bell J discussed the relationship between the “best interests” principle, the court’s procedural discretion and the rules of natural justice, saying *inter alia*:

[135] “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, it was held by Brennan J (at p.457, Mason, Wilson, Deane & Dawson JJ agreeing) 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* by Nicholson CJ and Fogarty J (1993) 114 FLR 1 at 14...

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

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

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

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

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

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

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

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

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

4.8.4 Findings on balance of probabilities

New s.215A of the CYFA – which replaces s.215(1)(c) – provides that the "standard of proof of any fact in an application under [the CYFA] in the Family Division is the balance of probabilities."

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

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

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

And at p.343 Latham CJ said-

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

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

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

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

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

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

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

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

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

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

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

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

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

'The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters

"reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect references.'

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

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

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

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

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

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

- (a) the Court may find that a future state of affairs is likely even if the Court is not satisfied that the future state of affairs is more likely than not to happen;
- (b) the Court may find that a future state of affairs is unlikely even if the Court is not satisfied that the future state of affairs is more unlikely than not to happen."

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

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

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

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

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

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

4.8.5 Expert evidence

From early times courts have been accustomed to act on the opinions of experts. The topic is dealt with in very great detail in "Expert Evidence", a 5 volume loose-leaf service by Ian Freckleton & Hugh Selby. The relevant principles are discussed and applied in *HG v R* (1999) 197 CLR 414 at [39] & [44] per Gleeson CJ; *Makita Australia Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] per Heydon JA; *Ocean Marine Mutual v Jetopay* (2000) 120 FCR 146 at [21]-[23] per Black CJ, Cooper & Emmett JJ; *Ronchi v Alcoa* [2008] VSCA 83 at [54] per Eames JA; *Mackie & Staff Pty Ltd v Glengollan Village for Aged People* [2007] VSC 201 at [11]-[14] & [30] per Habersberger J; *R v Dong Song Choi & Ors* [aka *In the Matter of the Pong Su (Ruling No. 19)*] [2005] VSC 66 at [29]-[30] per Kellam J; *R v Cox (Ruling No.1)* [2005] VSC 157 at [11] & (*Ruling No.2*) [2005] VSC 224 per Kaye J; *R v Rich (Ruling No.10)* [2009] VSC 10 at [26]-[34] per Lasry J; *MA v The Queen* [2013] VSCA 20 at [57]-[77] per Osborn JA & [89]-[100] per Redlich & Whelan JJA.

Whether or not a witness is qualified to give opinion evidence is a matter for the judge or magistrate who must determine:

1. whether the field of knowledge in which the witness professes expertise is a recognized and organized body of knowledge (*R v Anderson* (2000) 1 VR 1 per Winneke P at 22-3) which is outside the ordinary experiences of mankind (see e.g. *R v Smith* [1987] VR 907 per Vincent J; *Murphy v The Queen* (1989) 167 CLR 94 per Mason CJ & Toohey J at 110, Deane J at 126 & Dawson J at 130; *R v Perry* (1990) 49 A Crim R 243 at 249 per Gleeson CJ, citing *Clark v Ryan* (1960) 103 CLR 486); and
2. whether the witness has sufficient expertise in such field as would enable him or her to assist the court (*Grace v Southern* [1978] VR 75).

In *Baulch v Lyndoch Warrnambool & Anor (Ruling No. 3)* [2008] VSC 420 at [10]-[14] Forrest J – after citing many of the above cases – summarized the relevant principles as follows:

- (a) a party wishing to call an expert witness must clearly identify the field of specialized knowledge in respect of which it is said the witness can proffer an opinion;
- (b) a party must then identify the expertise of the witness in that field; it must be demonstrated that by reason of specialized training, study or experience the witness is truly an expert in that area;
- (c) the opinion expressed by the witness must be either wholly or substantially based on that specialist knowledge and not on the everyday knowledge of the common person;

- (d) the opinion must be based on clearly identified facts; and
- (e) the onus rests on the party calling the witness to satisfied the above criteria.

In *Re W and W: (Abuse allegations; Expert evidence)* [2001] FamCA 216 at [145]-[193] the Full Court of the Family Court of Australia:

- was very critical of a professional witness who "saw neither of the parties and none of the children and yet arrived at damaging conclusions about one of the parties, who happened to be on the opposite side to the party who commissioned him" (at [156]) and who had "stepped out of the role of an expert witness and assumed the role of advocate" (at [190]);
- recommended significant reforms in the area of expert evidence (at [192]-[193]).

Typical expert witnesses in the Children's Court include paediatricians, nurses, psychiatrists, psychologists, child protection or child welfare workers or persons working in the "helping professions" generally. From such professional witnesses it is usual for two types of evidence to be adduced:

- evidence of observed facts;
- evidence in the form of opinion and/or inference.

Most contested cases in the Family Division of the Court involve the receipt of evidence from one or more "expert witnesses". Indeed, in *Director-General of Community Services Victoria v Buckley & Others* [Supreme Court of Victoria, unreported, 11/12/1992], O'Bryan J. commented (at p.6) that it would be very difficult for a court to find that a child has suffered significant harm from emotional abuse "in the absence of credible expert evidence".

In *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 the trial judge had accepted the evidence of a child psychiatrist who was appointed by him as a Court expert to enquire into and report on:

- the nature and quality of the investigation into the allegations of child sexual abuse made in the case;
- whether and if so, in what ways (if any) the process of investigation may have affected the integrity of the information obtained through the investigation process; and
- any consequences arising therefrom.

That psychiatrist gave evidence that while he had some criticisms of the procedures followed, it was his view that on the balance of probabilities there was sufficient evidence to have significant concerns that the father had sexually abused his daughter. However, he had not seen either the parties or the children. At [37] a Full Court of the Family Court of Australia, comprising Kay, Holden & O'Ryan JJ, described the trial judge's reliance on the evidence of the psychiatrist as "particularly troublesome" and at [38]-[40] it concluded that the psychiatrist's "evidence concerning the probabilities of something untoward having occurred should have been given very little weight" especially as he had not seen the family members:

[38] "In *Re W Abuse Allegations; Expert Evidence* (2001) FLC 93-085 Nicholson CJ and O'Ryan J (with whom Kay J agreed on this point) warned of giving weight to expert evidence of a psychiatrist who had not seen the parties nor the children but had reviewed the material. Their Honours said at [147] '...there are grave dangers in reliance upon expert evidence given in such circumstances'.

[39] Whilst much of their Honours' rejection of the evidence of the psychiatrist in *Re W* appears to turn on the fact that he was retained by one side and must have brought unconscious bias to his task, in our view the criticism of relying upon an opinion about the ultimate issue from a witness who has not seen the parties nor the children remains just as valid when the witness is called by the court. If an expert witness still purports to give an opinion as to the ultimate issue then such opinion would be expected to be heavily qualified by the expert having regard to the fact that the expert had not seen the parties nor the children."

In *DOHS v Ms B & Mr G* [2008] VChC 1 Power M referred with approval to the above dicta from *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 in a section discussing the limitations of the expert evidence adduced in that case. Several clinical psychologists and an infant psychiatrist had been called to give expert evidence, part of which related to the ultimate issue, namely the frequency, duration and nature of contact between the family members. His Honour considered that "a major limitation of their evidence is that each of their observations involved only part of the overall factual matrix". Each of the experts had

met and assessed a sub-set of the family members. None had met and assessed the entire family. At pp.120-121 His Honour also commented on the weight to be given in any particular case to relevant general research and literature:

“Part of the evidence of Dr M and Dr P involved a discussion of the research and literature relating to infant development, with particular emphasis on the development of attachment in infants. I found this evidence particularly interesting and of general assistance to me in my role as a magistrate allocated to the Children’s Court. But it is important not to over-emphasize its usefulness when applied to any particular case. The research and the literature do have an important role. But it is not an independent role. It provides the framework which enables observations of the behaviour of a particular person or persons to be evaluated and predictions to be made about the likelihood of future patterns of behaviour. Absent subjective observations of a particular caregiver and/or parent and of a particular child, preferably over a period of time, the framework – standing alone – is much less useful for it exists in a factual vacuum. Absent observations or other relevant evidence of the quality of the particular interactions or the characteristics - including the resilience - of the particular individuals, prediction of risk of future harm and analysis of what is in the best interests of the particular child are inevitably much less certain...

An opinion about appropriate levels of contact between [the two older children] and their mother and siblings based on objective criteria – theoretical criteria - but made without knowledge of subjective evidence of the children’s behaviour must be treated with considerable caution. This conclusion also follows from the CYFA itself. Section 10 requires the Court to focus on – and treat as paramount – the best interests of the child, not children generally as a group but on the particular child the subject of each application.”

4.8.6 Attendance of child at Court

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

- (a) the child expresses a wish to attend; or
- (b) the Court orders that the child attend; or
- (c) the CYFA requires that the child attend.

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

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

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

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

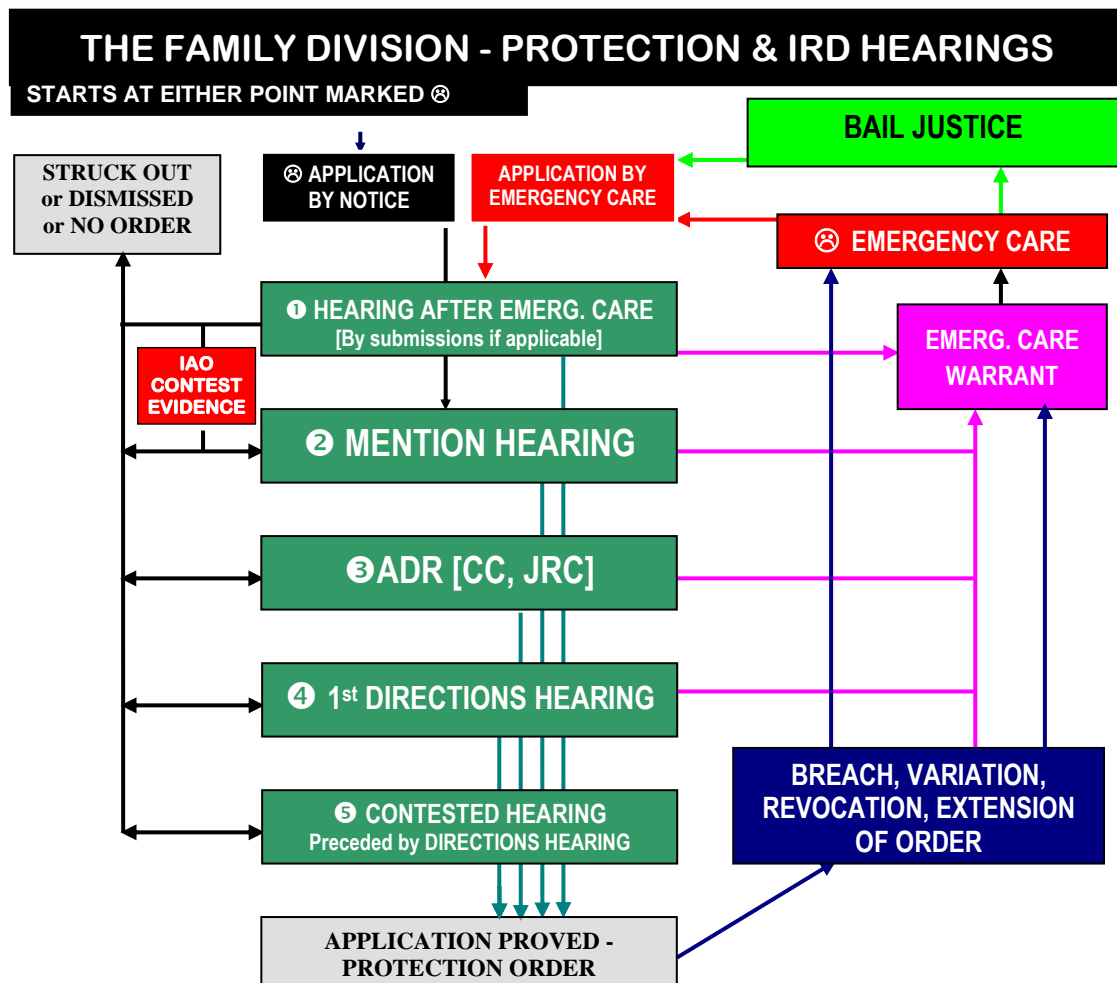
- **CYFA-s.235**: Application to Vary or Revoke a Temporary Assessment Order;
- **CYFA-ss.240(1), 240(3), 243**: Protection Application;
- **CYFA-s.252**: Application for a Therapeutic Treatment (Placement) Order;
- **CYFA-s.255**: Application for Extension of Therapeutic Treatment Order or Therapeutic Treatment (Placement) Order;
- **CYFA-ss.257-258**: Application to Vary or Revoke a Therapeutic Treatment Order or Therapeutic Treatment (Placement) Order;

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

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

4.9 Family Division Court hearings

The processing of each of the Family Division applications {other than applications for intervention orders, temporary assessment orders, therapeutic treatment orders & therapeutic treatment (placement) orders} involves one or more court hearings as this chart shows. The chart does not include Readiness Hearings introduced as a temporary COVID-19 measure.



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

- (a) personally; or
- (b) by a legal practitioner; or
- (c) by an authorized employee (whether or not a legal practitioner).

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

4.9.1 Apprehension – Hearing after child placed in emergency care

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

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

- (a) in an out of home care service;
- (b) if there is a substantial and immediate risk of harm to the child, in a secure welfare service; or
- (c) in other accommodation approved by the Secretary in accordance with the prescribed criteria (if any); this could include leaving the child in parental care.

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

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

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

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

4.9.2 Mention

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

4.9.3 Conciliation

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

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

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

4.9.4 First directions hearing & Directions hearing preceding a contest

If any party wishes to contest any aspect of the Department's recommended disposition, the case is usually adjourned for a First directions hearing. There are two major purposes of such a hearing:

- i. to give the parties a further opportunity to negotiate a resolution of the case without the need for a fully contested hearing;
- ii. to enable an informal conciliation to be conducted by a judicial officer with the aim of enabling the case to be resolved without a fully contested hearing; as this process often involves the judicial officer expressing strong views about the likely outcome of any contest, that judicial officer may declare that any ensuing contest will be heard by a different judicial officer.

If a case does not resolve at this stage, it is usually adjourned for a contest, preceded by a further directions hearing. There are three purposes of such a directions hearing:

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

4.9.4A Readiness Hearing

Practice Direction No.6 of 2020, commencing from 16/06/2020, introduced a new type of hearing – known as a **Readiness Hearing** – as a temporary measure necessitated by the COVID-19 pandemic for the management of proceedings in the Family Division. It applies to matters listed at Melbourne, Moorabbin or Broadmeadows Children's Court (including regional directions hearings and fixtures that are being case managed by Melbourne Children's Court) where-

- a Directions hearing, IAO contest or final contest has been adjourned for special mention in accordance with Practice Direction No.1 of 2020; or
- a matter has been listed for mention on or after 16/06/2020 and it has already had a conciliation conference or the Court considers it is not suitable for a conciliation conference.

A Readiness Hearing aims to explore the possible resolution of a matter by incorporating the features of a First directions hearing and a pre-contest Directions hearing as well as judicially led dispute resolution processes. If a matter does not resolve at a Readiness Hearing, the Court will explore whether it is feasible to hear a contested IAO or final hearing, facilitated through audio visual link or otherwise, in a manner that meets the requirements of fairness and justice and is also consistent with the safety advice of the Chief Health Officer. Priority is likely to be given to 1-3 day hearings.

4.9.5 Contested hearing

A contested hearing generally involves the calling of *viva voce* evidence and the tendering of professional reports, although on occasion the hearing may be restricted, almost always with the consent of the parties, to legal submissions based on a statement of facts.

4.9.6 Marram-Ngala Ganbu Program

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

- (a) is descended from an Aborigine or Torres Strait Islander; and
- (b) identifies as an Aborigine or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

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

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

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

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

- **A case management approach** in which the Koori Services Coordinator, the Koori Family Support Officer and DFFH’s (Child Protection) Practice Leader M-NG oversee each court case to ensure it continues to progress.
- **The emotional and practical support provided to families** by these three Court officers is of central importance to the Program and ensures that families are supported at each step of the process. Such support includes home visits when required, support to access services and comply with court orders (for example, helping parents enrol children in school) and encouragement to parents to attend court.

- **The informal nature of the hearings** – with everyone sitting at the bar table in an adapted court setting – encourages all the participants – parents, children, extended family members, child protection practitioners, family support services and lawyers – to speak freely with the judicial officer in a conversational manner. The judicial officer adopts an encouraging and empathetic approach to the conduct of hearings and to communication with families.
- **Fewer cases** (typically 10-12) are listed on a Marram-Ngala Ganbu court day than in a mainstream mention court (typically 30-50), allowing more time for each case, giving all participants a better opportunity to be heard and enabling hearings to be conducted in a way that is less adversarial and more collaborative. The hearings focus on finding mutually agreeable solutions and place high value on decisions reached in Aboriginal Family-Led Decision Making meetings and conciliation conferences.
- There is a strong emphasis on ensuring that families' needs and protective concerns are identified early and that referrals are made to appropriate Aboriginal-controlled services. Services working with families are also invited to participate in hearings and provide input about families' progress and needs.

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

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

Subject to the direction of the presiding judicial officer:

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

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

Between its launch on 25 August 2016 and 25 July 2019 the Marram-Ngala Ganbu Court dealt with 380 cases, comprising 16½% of all Family Division cases listed at Broadmeadows Children's Court in that period. The number of times a family came before MNG during each month in the financial year 2019/20 is shown in the table below"

July 2019 [5 sittings]	47	January 2020 [4 sittings]	47
August 2019 [4 sittings]	48	February 2020 [5 sittings]	52
September 2019 [4 sittings]	44	March 2020 [5 sittings]	64
October 2019 [5 sittings]	53	April 2020 [4 sittings]	30
November 2019 [3 sittings]	29	May 2020 [4 sittings]	21
December 2019 [3sittings]	27	June 2020 [4 sittings]	40

For further information see Practice Direction No.1 of 2021 – Koori Family Hearing Day – Broadmeadows and Shepparton Children's Courts

4.10 Alternative Dispute Resolution

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

- a Conciliation Conference ['CC']; and
- a Judicial Resolution Conference ['JRC'].

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

4.10.1 Conciliation Conferences

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

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

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

- requires conferences to be conducted at the earliest practical point in the process (the guidelines require the Court to use the second or third mention as the trigger point for consideration of referral to CC);
- makes more time available for discussion in an appropriate environment (at a venue away from the Court wherever possible unless there are identified security issues or a party is in custody);
- supports convenors to exercise appropriate authority;
- requires mandatory training and accreditation of convenors;
- requires pre-conference preparation by convenors and parties (including requiring information exchange by the parties prior to the conference);
- ensures that participants are better prepared for conferences;
- requires appropriate behaviour by all participants (including legal practitioners);
- requires that DFFH has a decision-maker in attendance;
- provides an appropriate process for those children who wish to attend and participate;
- reduces the time spent by families in adversarial court proceedings and by child protection practitioners in attending at Court; and
- reduces Court delay.

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

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

The Children's Court Conference staff consists of:

- 8 Conference Intake Officers and 13 convenors located in Melbourne; and
- 5 Conference Intake Officers and 5 convenors regionally based.

All convenors are nationally accredited mediators and are provided with ongoing training and professional development opportunities. All Conference staff are now required to be trained in the Common Risk Assessment Framework for assessing risk in cases involving Family Violence.

Funding received in 2012/13 also extended to the construction of a purpose-built off-site Children's Court Conference Centre which was officially opened in April 2013 and which accommodates the majority of CCs conducted in the metropolitan area. This is located on level 5 at 436 Lonsdale Street Melbourne.

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

4.10.2 Jurisdiction & Purpose of CC

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

Under the CYPA the Court had no power to order what was then called a “pre-hearing conference” in relation to any application other than a protection application. There was no bar to a pre-hearing conference being held in respect of any other application {e.g. breach, variation or extension} if all parties consented and this was usually what happened in practice. Under the CYFA the Court may refer any application under the CYFA to a CC. This is clearly broad enough to include irreconcilable difference applications and applications for permanent care orders as well as secondary applications such as breaches, variations or extensions of existing protection orders. It is also broad enough to allow the referral of applications for intervention orders which - although deriving from the Family Violence Protection Act 2008 (Vic) and the Personal Safety Intervention Orders Act 2010 (Vic) – are matters which fall within the jurisdiction of the Family Division: see s.515(2) of the CYFA.

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

- (a) to identify the issues in dispute; and
- (b) to consider alternatives; and
- (c) to try to reach an agreement as to the action to be taken in the best interests of the child.

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

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

4.10.3 Convenor

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

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

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

- (a) to chair the conference; and
- (b) to advise on and determine the process to be followed for the conference; and
- (c) to provide to the Court a written report of the conclusions reached at the conference.

4.10.4 Repeal of advisory conference provisions

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

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

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

4.10.5 Attendance at CC

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

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

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

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

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

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

- (a) permit any other person to attend the conference;
- (b) specify whether, or in what manner, the person may participate in the conference;
- (c) require the person to leave the conference at any time; and
- (d) require that any other specified person not attend the conference.

4.10.6 Guidelines & procedure

Section 220 of the CYFA requires a conciliation conference to be conducted in accordance with any guidelines issued from time to time by the Court. The guidelines for the current model of conciliation conferencing issued by the Court and effective from 09/09/2013 can be downloaded from the Court's website. These guidelines set out, *inter alia*-

- when the Court will order an CC;
- the preliminary process and the role of the Conference Intake Officer, including the conduct of a risk assessment for parties other than the children;
- information exchange requirements;
- the conference is to be conducted at a venue away from the Court unless there are identified security issues or a party is in custody;
- the purpose of an CC;
- the responsibilities of all participants in a CC;

- the roles of convenors, lawyers, child protection practitioners, family & community members; and
- the process for conducting the conference.

These guidelines specify [at p.5] that all those participating in a CC-

- must respect the authority of the convenor;
- must respect the roles and responsibilities of all other participants in an CC;
- must clearly state their point of view and listen to and discuss the views of others;
- must highlight the strengths within the family;
- must consider the options for resolving the protective concerns which gave rise to the application; and
- must consider the arrangements that are in the best interests of the child.

Annexed to these guidelines are a number of documents including:

- A. Information Exchange Documents to be filed and served by all parties or their lawyers prior to each CC
- B. A CC Addendum report to be filed and served by DFFH.
- C. Convenor's report form.

The roles of the various participants in a CC are discussed in the guidelines [at pp.6-9] and may be summarized as follows-

PERSON	ROLE
CONVENOR	As an independent chairperson <i>acting with the authority of the Court</i> , the convenor is responsible for controlling the proceedings and ensuring that each participant has the opportunity to participate fully. A convenor must adopt an independent and objective approach, free of bias. He or she should accept the participation of the parties in shaping decisions that are fair, practical and achievable and made in the child's best interests.
LAWYER	A lawyer is required to adopt a non-adversarial role while representing his or her client in facilitated negotiations that take place in a problem-solving environment. The lawyer must have an understanding of the CC process and should have participated in appropriate training.
CHILD PROTECTION PRACTITIONER	The protective worker is required to adopt a non-adversarial role and to promote the child's safety and best interests in facilitated negotiations that take place in a problem-solving environment. He or she must have an understanding of the CC process and should have participated in appropriate training.
FAMILY & COMMUNITY MEMBERS	A CC aims to encourage families and relevant community members to be involved and empowered in the decisions made about children. Family or community members may contribute to the resolution of protective concerns or act as a support to the child and/or the family. They are not to act as an advocate for one party against another.

The procedure adopted at CCs is set out in section 9 of the guidelines and may be summarized as follows-

1. **Commencing a CC:** After resolving any question that may arise regarding the appropriateness of a person's participation in the CC, the convenor explains her or his independent role, the way in which the conference will be conducted and circumstances in which the conference will be concluded. During this process the convenor explains to the parties that one purpose of the CC is to attempt to reach agreement about the resolution of the application(s) through the parties discussing their respective points of view and negotiating. However if agreement cannot be reached, it remains the purpose of a CC to identify what has been agreed and what are the points of disagreement.
2. **Statement of interests:** In discussion with the participants the convenor establishes what are-
 - the current application(s) before the Court;
 - the current situation regarding placement of the child(ren);
 - any current Court orders;

- the disposition and conditions sought by DFFH;
 - the position of each party in relation to the applications.
3. **Identifying and discussing key issues:** After assisting the participants to develop a list of key issues for discussing at the CC and leading a discussion identifying the strengths within the family, the convenor will encourage the parties to discuss the agreed list of key issues. Family members will be encouraged by the convenor to engage and express their views during the conference process wherever possible.
 4. **Identifying and generating options:** At this point DFFH will be given the opportunity to obtain legal representation if not already represented. The convenor will assist the parties to explore options for settlement. In this process, the convenor may give a 'court perspective' to help parties 'reality test' their respective positions.
 5. **Establishing agreements:** The convenor will work with the participants to reach an outcome that is in the best interests of the child(ren) and is one which the Court is empowered to order. In this process, the convenor will ensure that all parties appreciate that the agreement is accurate, fair, realistic and appropriate. If the agreement is to recommend a further CC, the convenor will identify with the participants the issues for a further conference. If the agreement is to proceed to a contested hearing, the convenor will identify with the parties any case issues which are not in dispute. The convenor ensures that minutes of proposed orders are prepared that accurately reflect the agreement reached at the CC.
 6. **CC report:** The convenor will provide to the Court a written report (in the form in Attachment C to the guidelines) of the conclusions reached at the CC.

4.10.7 Reports & Confidentiality

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

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

4.10.8 Court orders

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

4.10.9 Statistics

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

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

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

However, these figures do not reveal, nor should one under-estimate, the contribution of conciliation conferences to the subsequent settlement of cases. In particular, where CCs are part-heard or listed for mention or result in IPOs, a number of issues have been clarified and parties have agreed on a course of action in the best interests of the subject children. These cases frequently resolve without requiring a traditional evidence-based contest. And where a case has been adjourned for directions hearing & contest, the discussions at CC often result either in a subsequent settlement or in a narrowing of issues for resolution in a contest.

4.10.10 Judicial Resolution Conferences

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

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

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

- (i) mediation; or
- (ii) early neutral evaluation; or
- (iii) settlement conference; or
- (iv) conciliation.

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

Section 523(1) of the CYFA [as amended] provides that proceedings in the Court are, subject to s.523(2) & 527A, to be conducted in open court.

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

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

4.11 Children's Court & Family Court compared & contrasted

4.11.1 Public law versus private law

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

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

4.11.2 Responsibilities and obligations of the Family Court to children

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

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

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

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

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

4.11.3 Notification by the Family Court to State welfare authorities

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

4.11.4 Representation of children

See [4.7 Representation of children in the Family Division of the Court](#) and in particular [4.7.6 Child representation in Children's Court and Family Court compared](#). See also the website of the Family Court of Australia <http://www.familycourt.gov.au>.

4.11.5 Priority of orders

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

1. **State jurisdiction not fettered [s.69ZK(2)]**: Nothing in the FLA affects:
 - the jurisdiction of a court, or the power of an authority, under a child welfare law to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under a child welfare law; or
 - any such order made or action taken; or
 - the operation of a child welfare law in relation to a child.
2. **Federal jurisdiction subject to State jurisdiction [s.69ZK(1)]**: Subject to some minor exceptions, a court exercising jurisdiction under the FLA must not make an order under that Act in relation to a child who is under the care (however described) of a person under a child welfare law unless:

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

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

Recommendation 11

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

4.12 Relationship between attachment and child's emotional wellbeing

In cases in the Family Division of the Court there is often an issue as to whether or not a child has developed an appropriately secure attachment. Dr Sharne A. Rolfe, Developmental Psychologist (Senior Lecturer in Child Psychology in the Department of Learning and Educational Development at the University of Melbourne & Principal Consultant, Sharne Rolfe and Associates, Consulting Psychologists) said in a letter to the writer in February 2003:

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

In a learned Court report written in September 2007, Dr Rolfe said:

"The attachment relationship has two primary functions: the first, and most basic, is the protection of the child from danger, i.e. to keep the child safe. The second function concerns the psychological wellbeing of the child. Admittedly, this is related to the first function of safety, insofar as the ideal form of caregiving not only protects the child from danger, but does so in a way that is emotionally sensitive, responsive and consistent so that at the same time as the child is kept safe, the child's psychological wellbeing, positive sense of self and self esteem are also being nurtured."

In Court reports written in April 2002 & September 2003, Dr Rolfe discussed the relevant literature. Reproduced below is the latter (including minor additions from the former).

Attachment and development

1. The significance of secure attachment for psychological wellbeing

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

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

The nature of the attachment relationship is of major significance for a child's psychological wellbeing. This is because the view that children develop of

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

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

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

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

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

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

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

2.2 Immediate and short-term response to removal

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

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

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

2.3 Longer-term impacts of removal

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

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

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

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

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

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

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

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

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

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

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In August 2004 Allan & Unwin published a book by Dr Rolfe entitled *Rethinking Attachment for Early Childhood Practice: Promoting security, autonomy and resilience in young children*. In heated debates about whether childcare damages young children, attachment theory has been seen as 'anti-childcare'. Dr Rolfe rethinks this perception, demonstrating instead that understanding attachment is essential to good childcare practice. *Rethinking Attachment* offers a thorough explanation of attachment theory in 15 chapters:

Part 1: Introduction

Chapter 1: Introduction

Part 2: The significance of attachment relationships

Chapter 2: Attachment Theory

Chapter 3: Why interactions matter

Chapter 4: Quality of attachment

Chapter 5: Attachment and resilience

Part 3: Attachment through infancy and early childhood

Chapter 6: Infancy: Developing trust

Chapter 7: From one to three years: Becoming autonomous

Chapter 8: The pre-school years: Emerging instrumentality

Chapter 9: Attachment and cognitive competence

Part 4: Attachment Issues

Chapter 10: Separation experiences

Chapter 11: Adult attachment issues

Chapter 12: Cultural perspectives on attachment

Chapter 13: When attachment needs are unmet

Part 5: Conclusion

Chapter 14: rethinking attachment in early childhood policy and practice

In *DOHS v Mr M & Ms H* [Children's Court of Victoria-Power M, 11/05/2009] at section 25.1, the Court accepted the expert evidence of an infant mental health professional outlining the four different attachment styles which she labelled (1) secure; (2) anxious; (3) avoidant; and (4) disorganized and which she described in the following way:

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

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

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

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

The infant mental health professional also agreed with Dr Rolfe's opinions on attachment which are set out earlier in this section, in particular the importance of secure attachment as the foundation for appropriate development:

"The importance of secure attachment for infants and children is now well recognised. Increasingly attachment theories are used to provide a conceptual foundation for assessment and decision-making. In Victoria concepts related to attachment inform the Best interests case practice framework (DOHS, 2008). Secure attachment is associated with better interpersonal functioning including problem solving, confidence and interactions with peers...Establishing of secure attachment is now recognised as a foundational building block for the development of infants and children (Dozier *et al.*, 2001)."

However, although the Court accepted the expert's theoretical evidence, it did not accept her ultimate opinion that the infant in question – then aged 2y5m - had an "avoidant attachment style". Power M said at section 25.5:

"The vast bulk of the evidence of observations of [the child] both by professionals and by his carers during a period of over 2 years do not support the [expert's] proposition that [the child] is displaying an insecure style of attachment to his carers. Nor do the expert opinions of [two other professionals] support that proposition...

I do not accept on the balance of probabilities that [the child] has an attachment disorder or a disordered attachment style of any sort. To do so would be to accept the sort of 'mere suspicion, surmise or guesswork' castigated by Latham CJ in *Briginshaw v Briginshaw*. On the contrary, I am satisfied on balancing all of the evidence...that [the child] has a strong, secure and healthy attachment to his primary attachment figures".

That finding, read in conjunction with the opinion of Dr Rolfe on the "transfer" of attachment, led the Court to find at section 28.5 that:

"Paradoxically perhaps, the fact that [the child] has a secure attachment to his carers – his current primary attachment figures – is likely to make the transfer of that attachment to his parents a less traumatic experience for him."

Relevant literature focussing on insecure or disorganized attachment includes Angela Hobday (2001) *Timeholes: A Useful Metaphor when Explaining Unusual or Bizarre Behaviour in Children Who Have Moved Families*, Clinical Child Psychology and Psychiatry, V6(1), 41-47; Karlen Lyons-Ruth (1996) *Attachment Relationships Among Children with Aggressive Behaviour Problems: The Role of Disorganized Early Attachment Patterns*, Journal of Consulting and Clinical Psychology, V64, No.1, 64-73.

4.13 Shared care of a young child

In a case for which Dr Sharne Rolfe wrote a Court report in April 2002, care of a 3 year old child, C, had been extensively shared between four main caregivers: the mother, the father and the grandparents, particularly the grandmother. This arrangement was instituted within the first weeks after birth so from early infancy C had experienced a small number of carers within the biological family and regular contact with all these people on an ongoing basis. Dr Rolfe concluded that:

- the availability of C's grandparents at times of parental crisis had been "a critical 'protective' factor in [C's] life, enhancing his resilience in the face of ongoing exposure to the risk factor of parental domestic violence";
- the "shared and flexible arrangements" regarding C's care within his family had also "protected him from major disruptions to his relationship with his parents, as, for example, would be the case if foster care placements had occurred"; and
- "the case history is consistent with [C] forming attachments to the four caregiving figures available to him".

Although writing in a carefully qualified way, Dr Rolfe generally saw no threat to a child's emotional wellbeing from shared care between a small number of attachment figures provided that the child had developed a secure attachment, the transitions were appropriately managed and there was no psychological tug-of-war between the sharers:

"Generally speaking, shared care between a small number of attachment figures does not pose a threat to the child's emotional wellbeing (Goldberg, S. (2000) *Attachment and development*. London: Arnold). Indeed, as Goldberg notes, 'many infants have multiple figures to whom they can form attachments' (p.106). Nonetheless, she also presents evidence that most infants and young children form a preference hierarchy, with the attachment figure most preferred not necessarily the mother or even the person who spends most time with the child. The most likely factor influencing the formation of the child's preferences is the quality of the caregiving provided. Sensitivity, consistency, responsiveness and loving nurture and the feelings of safety and security that flow from these are likely implicated in who the child most prefers under shared care arrangements.

Finally, two further factors will likely impact on how shared care affects children in general, and [this child] in particular. One relates to the circumstances associated with the transitions between various caregiving figures. In [this] case,

it appears there have been transitions from [C's] parents' care to his grandparents' care that have been associated with high level domestic violence. Secondly, shared care can be highly detrimental to a child if it is accompanied by a psychological tug-of-war between the various adult carers. The experiences of divided loyalties to which this exposes a child are highly damaging, both emotionally and psychologically, and are accompanied by distress and confusion in the child."

In a report to the Children's Court in May 2000 about a very different case Dr Susie Allanson, Clinical Psychologist, was strongly critical of the shared care arrangement in that case and was unenthusiastic about shared care arrangements in general. The child, X, was aged 3¼ years. She had initially resided with her parents until they separated - in a maelstrom of domestic violence and drug use - when she was 21 months old. She had then lived with her mother for the next 12 months until her mother's drug use got the better of her. She was then placed in foster care for 3 weeks and with her father and paternal grandmother for the next 3 months. Then she was returned to her mother for 5 weeks. At the time of the assessment her care was being alternated weekly between her father (residing with the paternal grandmother) and her mother (residing with the maternal great grandparents). Dr Allanson criticised this arrangement in trenchant terms:

"Both current psychological opinion rooted in extensive research findings and clinical experience, and commonsense understandings of child development, are generally agreed that small children can only tolerate brief separations from their primary attachment figure. It is highly unusual, if not unheard of, for a very young child like [X], to be involved in a week-about shared care arrangement, even in the most positive circumstances. A phone conversation with the Director of Counselling at the Family Court...confirmed that such shared care arrangements for very young children are almost never entered into because of the devastating impact on the child's sense of security. According to [the Director], in very rare instances where this would be considered two conditions would need to be fulfilled: (i) an extremely high level of cooperation between the parents; and (ii) the parents live in close geographical proximity. These conditions would minimise the emotional dislocation experienced by the child, because the child's expressed need for either parent at any time would take precedence over any other demands. The presence of an older sibling may also be a facilitating factor. Sadly, although in [X's] case the parents live in geographical proximity, other facilitating conditions are not present."

It needs to be emphasised that X's case involved a very different shared care arrangement from the case on which Dr Rolfe reported and it may be that any perceived difference in the psychologists' views simply reflects the difference between the respective cases, rather than any significant difference in philosophy.

In *DOHS v Mr M & Ms H* [Children's Court of Victoria-Power M, 11/05/2009], the subject child – aged 2y5m – had been continuously in the care of a foster care couple – aged 56 & 60 respectively – since he was discharged from hospital at the age of 6 weeks. He had also had consistent contact with his parents although for only one hour each week. The child had been born four weeks premature and prenatally drug affected. However, it was conceded by DOHS that there were no current protective concerns in relation to the parents who were recovering heroin addicts. The Department had commissioned an assessment by an infant mental health specialist and a family therapist. The assessors postulated two options within the framework of Steinhauer's "shared child" (1991):

1. Enhanced status quo: The child would stay with the current carers and have expanded contact with parents and extended family (if possible).
2. More equally shared care: A movement towards the child being formally shared between his current caregivers and his parents or extended family.

They ultimately recommended the first option but left the second option open as something that might be worked towards.

The Court rejected the assessors' opinion that some form of "shared care" was "the least detrimental alternative" for the child. Power M said at section 28.4:

“Steinhauer outlined the following pre-requisites for his ‘shared child’ model to work:

- Foster parents and birth parents must not compete.
- Adults need to agree not to undermine the permanency of the placement.
- Adequate support must be provided to all parties.

[Steinhauer, P. 1991: *The Least Detrimental Alternative: A systemic guide to case planning and decision-making for children in care*, Toronto: University of Toronto Press, pp.161-163 cited in the assessment report at p.44].

Effectively Steinhauer & Rolfe are postulating the same pre-conditions for the ‘shared child’ model to be workable. They require commitment to the model from all four adults who must not engage in a psychological tug-of-war for the child.

This is the second major reason why I reject the assessors’ recommendations. Not only does the assessors’ option 2 require commitment from the four adults. So does option 1. Of course one must focus on the child but one can’t properly do this unless one focuses on the parents and carers in a realistic way as well. The reality is that there is no current heart-felt commitment from any of the four adults to the concept of ‘shared care’ whether in the skewed form of option 1 or the more equal form of option 2. Nor is true commitment to this proposed piece of social engineering likely to develop...

I am not nearly as sanguine as [the assessors] about the workability of the ‘shared child’ model. From my observations of the parents and carers in the witness-box and from what the evidence discloses of their personalities and their roles in [the child’s] life, I am not satisfied on the balance of probabilities that they – especially [the female carer] - will be able to avoid becoming embroiled in a psychological tug-of-war for the child if any sort of ‘shared child’ model is embraced...

There is no common ground between the lives and life experiences of carers on the one hand and the parents on the other except for [the child]. They come from parallel universes. Hence they are not very likely to ‘grow together’, to develop an abiding friendship, in the event that any sort of ‘shared child’ plan was to be implemented.

It is clear to me that – despite the undoubted love each of them has for [the child] – any form of ‘shared care’ was not a plan which either the parents or the carers wanted or felt comfortable with. Without heart-felt commitment from all four adults neither of the assessors’ options is workable. In my view their recommendations do not give sufficient weight to the views, wishes and inherent natures of the parents and the carers or to their readiness or capacity to ‘share’ [the child] in either of the ways envisaged.”

4.14 Frequency of contact between young child and parent

In ‘Contact Irregular’: a qualitative analysis of the impact of visiting patterns of natural parents on foster placements [(2002) *Child and Family Social Work*, 7, 35-45], D Browne & A Moloney said at p.36:

“The purpose of foster care is to provide a temporary safe home for a child because his or her parents are unable to do so, with the eventual aim of returning the child successfully to the family of origin. With this in mind it is important that the child continues to identify with his natural family.”

Section 10(3)(k) of the CYFA provides that in determining what decision to make or action to take in the best interests of a child, consideration must be given where relevant to contact arrangements between the child and the child’s parents, siblings, family members and other persons significant to the child. Sections 10(3)(b) & 10(3)(i) provide that the best interests of the child require consideration to be given, where relevant, to the need to strengthen, preserve and promote positive relationships between the child and parents, siblings and extended family members and to plan the reunification of the child with his or her family.

Paragraphs (b), (i) & (k) of s.10(3) effectively incorporate into domestic Victorian law Article 9.3 in Part I of the United Nations Convention on the Rights of the Child to which Australia is a signatory. Article 9.3 provides:

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

One of the most commonly disputed issues in Family Division cases is the frequency of contact between a non-custodial parent and a child. Such disputes are usually even more difficult to determine when the child is an infant.

4.14.1 “Baby on Board” and research cited therein

There have been relatively few Australian studies of the effects on infants or parents of different patterns and intensities of contact. Most of the research has been with older children in foster care or post-adoption. It was in an attempt to fill this gap that in February 2009 Professor Cathy Humphreys and Ms Meredith Kiraly published a report of an “Infants in Care and Family Contact Research Project”. The project, undertaken in the School of Nursing and Social Work of the University of Melbourne as independent research within the Alfred Felton Research Program, focussed on the frequency of family contact for infants in out of home care in the context of infants’ physical and psychological needs and on their attachment and neurological development. The following summary by Magistrate Peter Power is compiled from the report, which is entitled “Baby on Board”.

In recent years, there had appeared to the researchers to be an increasing number of high frequency parental contact arrangements for infants, usually involving infants being transported to the visit location. As a result, some indications of stress in infants have been reported, especially where the infants have health problems. The issue is complex. While high levels of parental contact are sometimes seen to be needed to maximise the chance of family reunification, infants also need safety, tranquillity and stability of care in order to thrive. These two factors may be in tension, particularly given the level of disruption involved for infants with travel and associated requirements. The question of the infant’s best interests was thus seen to require further exploration.

The background to the project was as follows. Infants under one year of age are over-represented in admissions to out of home care. In 2006/2007, 14% (408) of admissions in Victoria were for this group (*Child Protection Australia 2006-2007* – Canberra: Australian Institute of Health & Welfare {AIHW, 2008}, p.54). Many of these infants come into care in the first couple of months of life, often before they have had an opportunity to form an attachment to their mother and/or their father. The early months of life are the critical time in a child’s life for developing effective attachment relationships and for neurological development:

“These are critical periods during which the bonding experiences *must be present* for the brain systems responsible for attachment to develop normally. These critical periods appear to be in the first year of life, and are related to the capacity of the infant and caregiver to develop a positive interactive relationship’ [Perry B (2008) *Bonding and attachment in maltreated children: consequences of emotional neglect in childhood*].”

Stability of relationships is of the utmost importance to the infant’s well-being and development, whether achieved by family reunification or permanent care. Infants are also unique among children in their level of dependency and vulnerability, and inability to make their needs known unambiguously. Underscoring their vulnerability, it is noted that infants in the first year of life comprise the greatest percentage of deaths of children known to Child Protection (*Annual Report of inquiries into the deaths of children known to Child Protection 2008* – Melbourne: Victorian Child Death Review Committee, Office of the Child Safety Commissioner).

The project started from a presumption that, after safety, attachment is the key issue in ensuring the well-being of infants in care. The following assumptions were made:

- An infant’s primary attachment will be made with the person(s) doing the consistent, ongoing 24-hour care of the infant. This is usually the mother, but in out of home care would normally be the foster carer.

- Secondary attachments to other people occur (e.g. father, grandparents etc). Their strength will vary with the role of the person, including the amount of time spent caring, degree of active care and emotional engagement with the infant.
- If a primary attachment is well developed, it may be possible to retain this via regular contact during separation. The attachment is likely to attenuate during long separation, especially if the infant is very young and if separation is long.
- The infant's neurological development, including cognitive and emotional development, is intimately tied to the primary attachment relationship.
- Early experiences of trauma can create disrupted patterns of attachment with far-reaching and negative effects on infants' development and well-being.

The over-arching aim of the research was the development of a better understanding of infants' best interests in relation to intensive family contact during protective placements. Information on the extent and nature of family contact, and the perspectives of carers, professional staff and lawyers were sought to inform this understanding. The research involved:

- A case file audit of 119 cases of infants in care on 01/08/2007, in 40 of which high-frequency family contact (4-7 days per week) had been court-ordered.
- Discussions with 11 focus groups comprising 3 groups of foster carers and staff, lawyers engaged or employed by Victoria Legal Aid, lawyers employed by DOHS' Legal Services, professional staff of the Children's Court Clinic, the DOHS High Risk Infants state-wide team and 4 groups of DOHS Child Protection workers and case support workers selected from 2 metropolitan and 2 rural regions.
- A total of 30 brief case studies drawn from foster carers and case managers who had proactively contacted the researchers with case examples which had "raised significant concerns for them".
- The generation of a comprehensive literature review.

Unfortunately it was not possible to gain the views of parents in this research. Some of the limitations of the methodology are recorded frankly by the authors at p.11 of their report. However, it appears that – subject to the securing of funding - Stage 2 of this project will include some attention to the direct experience of infants and their mothers and fathers.

The research questions for Stage 1 and a summary of the relevant findings are as follows:

A. What are the current arrangements for infants' contact with their family members?

The key findings from the case file audit of the 40 high-frequency family contact cases (4-7 days per week) are detailed at p.38 of the report and were summarized as follows:

- Most infants in the sample were placed in out of home care within two months of birth. Most high frequency family contact orders were made when the infants were in the earliest months of their life.
- In most of the cases there had been at least one Court contest.
- Substance abuse featured in the overwhelming majority of cases, usually involving both parents. Domestic violence was also prominent.
- Approximately one third of the 119 cases (40 out of 119) had a high frequency family contact order at some stage.
- High frequency family contact orders were overwhelmingly a metropolitan phenomenon.
- A little over half (25) of the high contact orders were of two months or less in duration, 12 were of 4-8 months duration and three of 10-16 months duration or more.
- DOHS provided almost all contact visits ordered by the Children's Court. Visits were rarely cancelled by DOHS.
- In half of all high family contact orders, scheduled contact visits took place most of the time (75-100% of the time). However, in the other half of the cases, contact visits took place far less frequently.
- Wide variation was seen in both mothers' and fathers' capacity to tune in to their infants' physical and emotional needs, even when they attended most scheduled visits. Some tuned in well to their infants, while others were disengaged or unable to respond effectively.
- A range of venues was used for visits but most took place in DOHS offices. The visit environment appears to be associated with the rate at which ordered visits actually

occurred; higher implementation rates were clearly associated with rates other than DOHS offices.

- A period of court-ordered high frequency parental contact did not improve the rate of family reunification within the year studied. There was no significant difference between the numbers of infants who were living with their mother and/or father one year later who had had an interval of high frequency parental contact (23%) and those who had not (22%).

Magistrate Power notes that the sample of cases reviewed was fairly small and wonders whether it was sufficiently representative to be amenable to rigorous statistical analysis. While the finding that there was no significant difference between the reunification rates for the high-contact group and the non high-contact group accords with some of the research referred to in the report's literature review on the subject of "Family reunification and family contact", it is not on all fours with others. Magistrate Power considers that the jury is still out on the existence and/or nature of any causal link between frequency of parental contact and likelihood of reunification. However, Magistrate Power also queries whether there was too much emphasis in this study on the goal of reunification. Surely the ultimate aim of contact between a child and a non-custodial parent is to develop the best possible parent-child relationship whether reunification is ultimately achieved or not. On one view, that is what Article 9.3 of the United Nations Convention on the Rights of the Child and s.10(3) of the CYFA are all about.

B. What is the evidence of the impact on infants of family contact arrangements?

The themes which emerged from the focus groups and brief case studies were discussed at pp.39-64 of the report under the following headings and sub-headings:

- **Attachment and family relationships**
 - Promoting parental relationships*
 - Visits and distress*
 - Enabling foster care to meet the infant's needs*
 - High frequency family contact*
 - Multiple strangers*
 - Fathers*
 - Brothers and sisters*
- **Physical well-being**
 - Infant travel*
 - Disrupted routines*
- **Facilitators and barriers to good family contact**
 - Parents' travel*
 - Unsuitable physical environment*
 - Visits in kinship care*
 - Alternatives*
 - Purpose designed family contact centres*
 - Support and education for families during visits with infants*
- **Systems issues**
 - The adversarial Court system*
 - Timelines for the decision-making process*
 - DHS staff skill and communications*
 - DHS resources*
 - Foster carers*

It seems to Magistrate Power that this was by far the least satisfactory section of the "Baby on Board" report. It relied heavily on anecdotal material and opinions – to some extent unsolicited anecdotal opinions – provided by members of interest groups who could reasonably be expected to have had their own particular agendas. While it is true that there was consistency in most of the themes which emerged from most of the 11 focus groups, the Legal Aid lawyers (who act as advocates for many of the parents and children in the Children's Court) expressed a very different view on a large number of the issues discussed.

C. What are directions for good practice in this area?

The report lists at pp.66-67 a number of directions for good practice which may be summarized as follows:

1. A focus on quality rather than quantity of parental contact for infants is needed. In particular, the disruption to an infant's secure base
2. The focus of reform lies with the development of services for infants and vulnerable parents that situate family contact within services that support the infant-parent relationship, family strengthening and family reunification.
3. Kinship care is affirmed as avoiding many of the travel and associated problems for parental contact which occur in foster care. Consideration might also be given to exploring the possibility of a pilot foster care program for mothers and infants together, such as occurs in the United Kingdom.
4. Specialist, skilled staff are needed to supervise family visiting to provide support, to intervene therapeutically with disturbed infant-parent attachment relationships and to model parenting skills. This work should be separate from Child Protection but should inform decisions.
5. The infant needs personal support during parental visits, ideally from the caregiver. Where this is not possible, support should be from another one or two persons who are well-known to the infant providing him/her with a secure base for the visit. The involvement of multiple strangers in family contact arrangements is damaging to infants' development.
6. Infant travel needs to be significantly reduced. This may be done by finding venues for parental visits that are closer to the foster carer's home and by focussing on quality rather than quantity of visits, including the possibility of longer rather than more frequent visits in some circumstances.
7. Frequency of contact will still need to vary in line with plans for parental reunification or permanency with alternative carers.
8. Length of visits should be individually determined, developmentally informed and change as parenting capacity and the infant's needs changed. Longer visits would allow for a cycle of feeding, sleeping, infant care and play, all with support and education for parents provided.
9. A range of more family and child friendly venues for visits is needed. Venues need to be comfortable and supportive to parents and allow for infants' needs including sleeping, feed and play. There is a need to explore the possibility of more visits in the parents' home and relatives' homes. Exploring the possibility of using family contact centres within the Family Law jurisdiction is highly desirable. However, in general purpose built contact centres should not be the focus of reform although more suitably designed contact centres may be needed in specific locations in order to reduce infant travel.
10. The strongly adversarial approach to many decisions about family contact is not necessarily conducive to cooperative planning.
11. Particular attention is needed to ensure supportive family contact environments for Aboriginal and Torres Strait Islander infants who are not placed with kin. Cultural Support Plans for indigenous children in care need to be vigorously implemented to maximise quality contact with a range of family members which may at times include visits with more family members present rather than more separate visits.

D. Literature review

The report also contains at pp.12-26 a comprehensive literature review under the following headings:

- | | |
|--|---|
| ● Purpose of family contact | ● Attachment and family contact |
| ● Indigenous children and family contact | ● Family contact – in general |
| ● Attachment and infant development | ● Family reunification and family contact |
| ● Multiple attachments | ● Infants and car transport |
| ● Attachment and neurobiology | ● Support for infants and families during family visits |
| ● Disrupted attachments | |
| ● Attachment and indigenous families | |

4.14.2 Case law

In *DOHS v Ms B & Mr G* [2008] VChC 1, a case involving 4 children two of whom were twins aged 10 months who had been out of parental care since birth, a central issue was the frequency and duration of contact between the twins and their parents. Initially the parents had had daily contact in the hospital's special care nursery. When the twins were discharged at 4 weeks of age the Court heard a submissions contest and ordered supervised contact for 4 hours each day. When they were 11½ weeks old this regime was varied by consent – after the Court had heard *viva voce* evidence from Dr P, a highly respected consultant psychiatrist in the field of infant mental health – to 3½ hours on each of 5 days per week for the mother and 1 hour on each of 3 days per week for the father. When the twins were 6½ months old their mother's contact was suspended as a consequence of serious threats made by her to a protective worker. Six weeks later her supervised contact was reinstated for 1 hour on 1 day per week. When the twins were 9½ months old the writer heard evidence from a number of expert witnesses, including Dr P and three highly regarded clinical psychologists, Dr M, Dr SM & Dr W. It is no criticism of these excellent witnesses to say that there were very significant differences between them as to the optimal frequency and duration of contact even though there was a high degree of unanimity on the underlying theory of infant development.

When the twins were 2 months old, Dr M had been asked by DOHS to provide an expert opinion as to whether contact between the twins and the parents for several hours each day was appropriate. However she had not been given an opportunity to observe either the twins or their parents. It was her view that daily contact was not appropriate and she recommended a reduction to once weekly for the following reasons:

“Daily contact between infant and parents is something clinically advisable when there is a very clear reunification plan and clear evidence around the capacity of the parents to care and lay down foundations for secure attachment. I was concerned because there certainly hadn't been a thorough assessment of the capacity of the parents to do that with these infants. What inadvertently happens with these very frequent contact schedules is that infants are denied the opportunity to form security with anyone and particularly with the foster parents... It doesn't have anything to do with the supervision of the access. It's got to do with the disruption of the infants' schedule and the absence of the infants from their primary carer, in this case the foster parents. This is the sort of regime which when ongoing for several weeks or months can cause disorganized attachment in infants...One of the core truths about attachment security is in the critical period from 0-18 months it requires the regular, consistent, predictable, reliable and most importantly the responsive presence of the primary caregiver...There is no research I am satisfied with methodologically that shows us increased access from a visiting parent adds to attachment security. Research shows a nominal difference between infants who have access once per week and those who have access several times per week.”

Dr M went on to identify three levels of contact for a non-custodial parent:

1. Attachment-based contact: Where reunification is being pursued – up to 4 days per week leading to overnight.
2. Relationship-based contact: Where reunification is not on the cards but the parents have been assessed as able to contribute to the emotional development of the child – more like monthly.
3. Identity-based contact: Where reunification is not being pursued and the parents have a history of traumatized care – something of the order of 4 times per year or less.

At about the same time Dr P had also been asked by DOHS to provide an expert opinion on the optimal frequency of the twins' contact with parents who had a strong desire to assume their roles as parents but who were considered at that stage unable to provide the level of emotional consistency and absence of disruption and trauma necessary for optimal development. He too had not seen either the twins or their parents. His reported opinion about the then daily contact regime was that it was potentially disruptive of the twins' development:

“The fields of early childhood development and infant mental health have provided an increasing amount of powerful evidence that the very early

experiences of infants and young children can have profound effects upon their emotional, social and cognitive development. The very young infant from the moment of birth is alert and attuned to his environment. Necessarily, those people caring for the infant constitute his world. The very young infant is able to hear, see, feel and perceive with all senses the quality of care provided them by their immediate carers. The nature of this care provides the basis for the development of a stable sense of self and of attachment relationships. Babies are able to remember in their nonverbal memory (procedural memory) the things that happen to them, and the emotional context. The attuned and emotionally available caregiver helps the baby manage the ordinary ups and downs of life. Extreme disruption in the availability of a consistent and predictable caregiver may constitute a significant trauma in itself: see Schuder M & Lyons-Ruth K, "Hidden Trauma in Infancy, Attachment, Fearful Arousal and Early Dysfunction of the Stress Response System" in "Young Children and Trauma", ed. Osofsky J, NY, Guilford Press.

Babies in the first months of life have as their primary task the development of control of their own body, and self regulatory systems. Again, this task is facilitated by the presence of a consistent, emotionally available caregiver, who can read the baby's psychological and emotional signals regarding hunger, tiredness, needs to play and engage and needs to rest and settle. It is likely that being removed from their primary foster carer every day for a period of over four hours, by being taken by a worker and transported to and from their primary environment, constitutes a significant disruption or trauma in the process of establishing their own sense of self and self regulation. It may be that this also makes them less available to develop a relationship of attachment with their parents. It may be that the baby's parents will be able to engage and interact with them in a more productive and fruitful way, when they are consistently cared for with the minimum of disruption to their care by their foster carer. The babies when physiologically and emotionally contained and settled may be more available for sensitive and playful interaction with their parents, even if they have not been the primary moment to moment carers.

In a situation such as that described above, I would recommend that the frequency of and the amount of time that the babies have been away from the primary foster carer be reviewed such that their day-to-day experience with their primary carer becomes more predictable and contained. I believe that adequately meeting the emotional and developmental needs of infants in the first months of life is significantly important in the development of their current and later mental state."

When he first gave evidence about a month later – at which time the twins were 11½ weeks old - Dr P repeated the concerns he had earlier reported about disruption to the twins' routines:

"For young children as they are developing particularly in the first year of life the need for a stable consistent carer to provide regulation of their own environment is an important and critical thing and the scenario that was put before me [viz. daily contact] suggested that it would not be the ideal set-up for a young child to have so much disruption in their day to day routine, particularly when they are already beginning life premature with additional needs to get their regulation organised. Fifteen minutes each way from the carers to the place where the visit with their parents is going to occur and it's difficult to organise that each day in a way that meets the psychological and routine needs of each of the boys at the same time. So presumably there will be times when they would need to be woken, they might be hungry longer than they might otherwise have been if they were in the one constant situation.

The very young infant comes into the world with a lot of skills but they are dependent upon their primary carer for things like regulation of sleep, crying, level of activity, interest in the world and the primary carer is a critical person helping the baby develop a sense of time, of things evolving from one part of the day to the next, one day to the next, because that's not sort of built into the baby

at the very beginning. And if there are major disruptions to the baby's daily routine and the baby's experience of themselves and the world around them that can provide a disrupted or fractured sense of continuity in their own being, continuity in terms of what they are to expect in the next half hour, in the next two hours, how they manage their own hunger, distress, those sort of things depend on a predictability and a continuity in the care-giving environment for them.

There is no sort of standard rule about what's a reasonable disruption in routine that a baby can tolerate and that another baby can't tolerate. I think it is so much a thing that depends on the individual infant and caregiver. But in my experience it seemed that a period of four hours every day of the week would be a significant disruption to the sense of continuity that a baby might have in an otherwise primary care situation. So that there will be a range – from the baby's point of view – of different people responding when they are hungry, when they are distressed, when they want to play, when they want to smile and engage, and four hours out of the day plus travelling and plus handling by the strangers that inevitably would be involved in the transporting, I understand, would be enough to disrupt a baby's sense of self and continuity at this stage...

I don't know what literature there is on family care for infants in the first months of life. I don't think there is extensive literature, but there is quite a bit about infants who go out of home, out of family care, and certainly even at older ages you can demonstrate similar things to what I was mentioning about infants who have much more profound disruptions to their care, that there is a difference in the way their stress response works when they are cared for by a number of other people who aren't family who are closely involved in their day to day care. So there certainly is evidence that a prolonged period out of the care of your primary carer in the first months of life can be quite disruptive to your sense of self-organisation. If you had a situation where there was close family communicating, working closely together and usually in the same house...would that have a serious deleterious effect on the infant's development? I don't know. I think probably not if all things were working well, but it requires a lot of coordination from the two lots of carers to really know what's happening with the baby."

At the end of a series of questions by the Court seeking to convert Dr P's opinions about infant development into a concrete opinion about contact frequency and duration Dr P was asked: "So would five days a week be appropriate?" Dr P replied: "From first principles I would think that's possibly – that that would be reasonable. And then you'd test it, you'd see how that went. If that went well, that would be good. If the babies were more disrupted by that, then you would reconsider it. But I'd give it a period of trial." Giving evidence before the writer on a later occasion Dr P appeared regretful that he had been "pinned down" to his earlier answer, noting that he had been giving evidence in a factual vacuum and that his opinion had assumed an ideal context, namely that the parents & carers were attuned to the babies' needs, that travelling was not an issue and that the babies were not being exposed to a whole heap of strangers.

When the twins were about 8 months old – Dr P had briefly observed the interactions between them and their parents and between them and their carers. He said of this:

"There are different types of attachment relationships – broadly secure and insecure – and these attachment relationships apply to a specific dyad rather than just the child in all circumstances. I don't have sufficient data to say whether attachment relationships between the boys and the carers and between the boys and the parents are secure or insecure. I know there is a relationship but I don't know the precise quality. There is a particular set of procedures which one follows: the behaviour of the infant on reunion with the person after separation. This is the main piece of data one uses to see the quality of attachment. It is true to say I didn't see with the twins – with parents or carers – evidence of a severely disordered attachment relationship."

Giving evidence when the twins were 9½ months old, Dr P was advocating a much less frequent contact regime if the plan was for non-reunification. However, he also believed that it would be of benefit to each of the twins and their parents if contact was restructured "to provide **less frequent but longer periods of contact** for [the twins] in an environment which is as much like a family setting as is possible. A longer period of visiting would allow for the experience to be more positive and less disruptive for each of [the twins] and their parents." [emphasis added] Asked about the optimal duration of each of these longer contact visits Dr P said:

"It is a difficult question to answer in that there is not a lot of research in this area but my premise in making that point is for the parents to be actively engaged in the care of their infants and not just briefly visiting them for a period of 1 hour. The babies and parents would get to know each other better if it was a longer period: feeding, settling, responding to the infants' distress, things like changing nappies and feeding. My estimate is that 3 hours would be a reasonable period in the course of an infant's day where some of those things could be attended to. It is likely to be a better experience than a briefer period of about 1 hour. In the Infant Mental Health literature we talk of the importance of 'good enough parenting' which means in episodes of ordinary disruption to the infant's state - e.g. crying, being unsettled, being hungry, toddler crawling around who falls over and hurts himself - the parent responds and settles the toddler or [twin 1] crawls over [twin 2] and scratches him and [twin 2] is upset and the parents step in to provide some sense of repair and containment. The repair of those periods of distress is as important in developing a relationship as the time when things are going well...

I don't have incontrovertible evidence about optimal arrangements in any particular situation but looking at it in the longer term I'd have thought twice per week has the potential to be disruptive for the 18 months', 2-3 year olds' routine more so than once per fortnight and also has the potential to lead to confusion about where the primary caregiving response would come from, which is not to say that the child won't have a clear set of attachment relationships with the carers and the parents as well... Each child is different but I imagine from the perspective of the 18 months to 2 year old they would ask themselves '*Who are my parents? Who are the primary persons responsible for me? Why am I not with them? Why am I with foster carers?*' As a child gets more cognitively developed, the more likely the child is to ask."

However Dr P made it clear that in recommending 3 hours per fortnight – which he subsequently changed to 3-4 hours per fortnight - he was giving significant weight to the adverse history of the parents in this particular case. Hypothetically - in relation to children generally - he would have been looking at 3-4 hours per week.

Dr P also pointed out the importance of considering the impact of any contact regime on the children, the parents and the caregivers:

"I think one of the likely impacts, for example, of an increased frequency of access, where it is reduced and then increased again, is to build up an expectation for both parents and children this is going to lead to parents resuming full care and custody of children. If that were the decision, that is how one would approach the frequency of contact. Conversely if there is to be no reunification it is unfair to each of the parties – parents and children – to maintain access at that sort of level...

[Another factor] is the impact on foster carers..., their feeling of continuity and stability as well. For an infant to have a foster carer who feels no predictability from one day to the next is unfortunate for the child as well. That's another component to build into the process of deciding what is an optimal arrangement for a particular child. If the child is operating from a sense of secure emotional base and out of the care of their own parents, I think that gives them a stronger position to develop a fruitful relationship with their own parents than if they are in a situation where they are feeling insecure and anxious. If it is possible to provide some sense of consistency and predictability about a child's longer term care arrangements then that's in the interests of the child as well."

By contrast, Dr W did not see any particular reason to change the *status quo* for contact between the twins and their parents. Ultimately - balancing the large amount of evidence elicited in the case - the writer ordered that each parent have supervised contact with the twins once per week for a minimum of 3 hours. He also set a condition providing for increased contact for the mother after 4 months if the mother demonstrated a commitment to live separately and apart from the father.

Notwithstanding Dr M's opinion that there has been much greater precision on the issue of optimal contact frequency in the last 5-7 years, the writer believes that contact frequency remains a very inexact science. For example, Dr M was advocating contact once per week at the same time as Dr P was advocating 5 times per week. To her credit Dr M smilingly conceded that Dr P "would have advocated more" than she did, a clear acknowledgment of the subjective nature of their respective opinions. Dr P conceded that "in some scenarios 7 days would be right, in others 1 day would be right." He also acknowledged the lack of research in this area and often prefaced his answers with a comment that it was a difficult question to answer. For example, in answer to the question "Joint parental access for how many hours per week in the initial stages?" Dr P replied:

"You are pushing me to specifics. It's a hard question. We have a group putting forward a research proposal to see what works best for children of particular developmental ages because the scientific literature is fairly silent. What is best for the children is not well supported by facts. I'd be going from first principles in working with very young children and families."

4.14.3 American judicial guidelines 2009

It is clear from the quite diverse expert opinions expressed in the above extracts from *DOHS v Ms B & Mr G* [2008] VChC 1 that there is no clear unanimity of expert view in Victoria about the optimal frequency of contact between an infant and his or her non-custodial parents. There is no clear unanimity in the rest of the western world either. The authors of "Baby on Board" have one view. A diametrically opposite view appears in a recent publication: "Healthy Beginnings, Healthy Futures: A Judge's Guide" compiled in 2009 by a team of six professionals drawn from (i) the American Bar Association Center on Children and the Law, (ii) the National Council of Juvenile and Family Court Judges and (iii) the Zero to Three National Policy Center. This publication consists of 135 pages organized into five chapters:

1. Meeting the Needs of Very Young Children in Dependency Court
2. Promoting Physical Health
3. Addressing Early Mental Health and Developmental Needs
4. Achieving Permanency
5. A Call to Action: Improving the Court's Reponse.

In Chapter 3 at pp.72-73 the authors (Eva J Klain JD, Lisa Pilnik JD MS, Erin Talati JD MD, Candice L Maze JD, Kimberley Diamond-Berry PhD & Lucy Hudson MS) outline their philosophy on child contact:

Ensure frequent parent-child contact (This section includes excerpts from Smariga M, *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know*. Washington DC: American Bar Association Center on Children and the Law & Zero to Three Policy Center, 2007)

Professionals working with very young children in foster care often do not understand the extent of the child's distress over being removed from the parent and placed in a strange environment. Remember that very young children grieve the loss of a relationship. Even though the parent has maltreated the child, she or he is the only parent the child has known, and separation evokes strong and painful emotional reactions (Goldsmith, D.F., D. Oppenheim and J. Wanlass. "Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care". *Juvenile and Family Court Journal* 55(2), 2004, 1-13). The younger the child and the longer the period of uncertainty and separation from the primary caregiver, the greater the risk of harm to the child (American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care. "Developmental Issues for Young Children in Foster Care." *Pediatrics* 105(5), 2000, 1146). Maintaining

consistent contact between the child and his or her parents and siblings is critical unless visits would harm the child (American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care. "Developmental Issues for Young Children in Foster Care." {Policy Statement} *Pediatrics* 106(5), 2000, 1145-1150). In fact, parent-child contact is the number one indicator of reunification (Ginther, N.M. and J.D. Ginther, "Family Interaction: The Expressway to Permanency – Facilitating Successful Visitation" Presentation prepared for Western Training Partnership at the University of Wisconsin River Falls, 2005, 12-13). Family contact and interaction is important and the relationship between the foster family and biological family can be crucial.

Because physical proximity with the caregiver is central to the attachment process for infants and toddlers (Ohio Caseload Analysis Initiative, *Visitation/Family Access Guide: A Best Practice Model for Social Workers and Agencies*, 2005, 14), **an infant should ideally spend time with the parent(s) daily, and a toddler should see the parent(s) at least every two to three days** (Ginther and Ginther, 2005, 10, 21). [Emphasis added]. To reduce the trauma of sudden separation, the first parent-child visit should occur as soon as possible and no later than 48 hours after the child is removed from the home (Wright, Lois E. *Toolbox No. 1: Using Visitation to Support Permanency*. Washington DC: CWLA Press, 2001; Ohio Caseload Analysis Initiative, 2005, 16).

Visits should promote parent-child attachment and be an opportunity to model good parenting skills. The length and frequency of visits should reflect the child's developmental stages and gradually increase as the parent shows she is able to respond to her child's cues in consistent and nurturing ways, soothe her child, and attend to her child's needs. During the initial phase, limiting visits to one-to-two hours allows the parent to experience small successes without becoming overwhelmed. By the transition phase, as the family approaches reunification, unsupervised, all-day, overnight and weekend visits should be completed (Wright 2001; Ohio Caseload Initiative Analysis, 2005).

A young child's emotional dysregulation following a visit does not necessarily mean the parent did something harmful during the visit (Goldsmith *et al.*, 2004, 2; Wright, 2001, 28-32). Visitation can be extremely upsetting for children, and it is important to understand the developmental context of their feelings and behaviors. Very young children cannot understand the separation, and they tend to respond with bewilderment, sadness and grief. During visits, they may cling or cry, act out, or withdraw from their parent. At the end of a visit, when another separation is imminent, they may become confused, sad or angry. Following visits, infants and toddlers may show regressive behaviors, depression, physical symptoms, or behavioral problems. Foster caregivers may need information to help them understand and support young children who are distressed after a visit.

Parents also find visits to be a time of emotional upheaval, particularly during the first phase of placement. Parents often experience pain and sadness resulting from the separation. They may feel shame, guilt, depression, denial that there is a problem. Anger and/or worry about the child. During the first visits, the parent is likely to be awkward, tense, and uncertain. Visit coaches, caseworkers, and foster parents should help the parent process her emotions and help her interact with her child (Wright 2001, 23-28; Haight, W.L. *et al.* "Making Visits Better: The Perspectives of Parents, Foster Parents and Child Welfare Workers" *Child Welfare* 81(2), 2002, 173-202).

Ensure frequent sibling contact

The Fostering Connections to Success and Increasing Adoptions Act of 2008 addresses many issues that promote permanency and affect the health and wellbeing of very young children in foster care, including placing greater priority on keeping siblings together. While placements that can accommodate a very young child's siblings should be sought, it may be necessary to separate siblings due to the special needs or circumstances of the very young child. When

siblings are not placed together, the importance of siblings to the young child should not be minimized, especially if there is an established bond. Ensure frequent sibling visits and opportunities to maintain the sibling bond, especially for toddlers and preschools who may perceive their older siblings as caregivers.

It is important to note that these guidelines were not merely written by lawyers for lawyers. The guidelines were prepared by both lawyers and social scientists. In addition the project was overseen by an Advisory Committee consisting of some of the most respected American social scientists and judicial officers. These include Dr Joy D. Osofsky (Professor of Public Health, Psychiatry & Paediatrics at Louisiana State University Health Sciences Center), Dr Sheri L Hill (Early Childhood Policy Specialist Seattle, WA), Dr Brenda Jones Harden (Institute for Child Study, University of Maryland, College Park, MD), The Honorable Pamela L Abernethy (Marion County Circuit Court Salem, OR) and The Honorable Katherine Lucero (Superior Court, Santa Clara County, San Jose, CA). It is also important to note that operation of the guidelines is not simply confined to one small state. They are intended for application in the whole of the U.S.A. As Justice Abernethy says: "This guide helps to ensure that **as a nation**, we equip the bench to do better by babies every day. Judges can be key players in breaking the intergenerational cycle of abuse and neglect...Let's act now. Let's usher in a new future now, one baby at a time." [Emphasis added]

An electronic copy of the American judicial guidelines 2009 can be downloaded from the website of the American Bar Association www.abanet.org. The ABA - whose catchcry is "Defending Liberty, Pursuing Justice" - is the largest professional organization in the world and provides services, including educational services, to almost every area of the legal profession. The Zero to Three National Policy Center, whose website is www.zerotothree.org, is a non-partisan, research-based resource for American federal and state policymakers and advocates on the unique developmental needs of infants and toddlers. The eminent Dr Joy D Osofsky is the organization's President-Elect. The Policy Center brings to bear the organization's more than 30 years of research-based expertise on infant and toddler development to ensure that American public policies reflect best practices and current research in support of America's very young children. The name of the National Council of Juvenile and Family Court Judges speaks for itself. It is difficult to think of a more diverse and authoritative professional group than that which was responsible for the generation of the American judicial guidelines 2009.

4.14.4 Contact conditions are an integral part of a court order

Section 10(3) of the CYFA sets out 18 matters to which the Court must have regard in determining whether a decision or action is in the best interests of a child. As the writer has noted above, paragraph (k) of that sub-section provides that the Court must give consideration to "contact arrangements between the child and the child's parents, siblings, family members and other persons significant to the child".

It appears that recently DFFH has been championing a view that conditions relating to child contact should be determined administratively and should not be justiciable in the Children's Court. In the writer's view that would be unwise. There is no doubt that DFFH enthusiastically adopted the "Baby on Board" report. But "Baby on Board" is only one of a number of diverse views, a view moreover which is diametrically at odds with the modern American child developmental opinion upon which the American judicial guidelines 2009 are based. In addition, the proper determination of what is in the best interests of any child in the Children's Court requires a holistic determination, not just the determination of whether the child is in need of protection and/or the appropriate placement but determination of contact conditions in the event that a child is placed out of parental care. Section 10(3)(k) of the CYPA effectively provides a child with an inherent right to contact and provides a parent and a sibling with a consequential right, these rights having been recognized by the Victorian parliament in compliance with Australia's obligations under the United Nations Convention on the Rights of the Child. Even if expert opinion about the appropriate frequency of contact between a child and a family member was a non-controversial matter – which it absolutely is not – it is the writer's strong view that protection of these important rights requires judicial intervention and is manifestly not a matter that should be left for administrative determination.

4.15 Cumulative harm

Section 162(1) of the CYFA sets out six types of harm, any one of which is sufficient to justify a finding that a child is in need of protection. These grounds, which are in identical terms to those which were in s.63 of the CYPA, may be summarized as follows:

- (a) abandonment;
- (b) death or incapacity of parent;
- (c) physical abuse;
- (d) sexual abuse;
- (e) emotional/psychological abuse; and
- (f) neglect.

Grounds (c), (d), (e) & (f) may be proved on the basis of actual harm or likelihood of future harm or both.

Section 162(2) of the CYFA, which had no equivalent in the CYPA, provides that for the purposes of grounds (c), (d), (e) & (f) the harm may be constituted by a single act, omission or circumstance or accumulate through a series of continuing acts, omissions or circumstances. Although this statutory enactment of the principle of “cumulative harm” dates only from 23/04/2007, the concept of “cumulative harm” is not new. It has long been accepted and applied both by the Court and by DFFH.

The Department’s Victorian Risk Framework, which has been the risk assessment tool used by DFFH since 1999, has a section labelled “Pattern and history of harm” which is part of every intake investigation. For many years, the Department’s court reports have included a section listing the details of any earlier involvement which the Department had had with the subject child & family.

For its part, the Court has regularly taken into account the notions of cumulative harm and cumulative risk of harm, applying where appropriate dicta of Lord Nicholls of Birkenhead (with whom Lord Goff of Chieflly & Lord Mustill agreed) in *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at p.591:

“The range of facts which may properly be taken into account [in determining whether a child is in need of protection] is infinite. Facts include the history of members of the family, the state of relationships within a family, proposed changes within the membership of a family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child... **And facts which are minor or even trivial if considered in isolation, when taken together, may suffice to satisfy the court of the likelihood of future harm.**”
[emphasis by the writer]

Why, then, was it deemed necessary to include a specific statutory provision to deal with the issue of cumulative harm? The explanation given by Ms Robyn Miller at p.11 of her paper “Cumulative Harm: A Conceptual Overview” dated December 2006 is as follows:

“The intention of the previous Act was to respond to vulnerable children and families in respectful, appropriate ways using the minimum intervention required. One of the **unintended** consequences of the practice, which developed from the *Children and Young Persons Act 1989*, is that intake and initial investigations were increasingly based on episodic assessments, which were focused on immediate risk and safety, and less focussed on the developmental wellbeing of children, and patterns of abuse and neglect over time.”

It is not the experience of former Magistrate Power that in Court cases the Department’s focus was so restricted but it must be remembered that only a comparatively small percentage of reports of child abuse eventually find their way to a Court case and an even smaller percentage find their way to a contested Court hearing.

In her interesting paper Ms Robyn Miller defines cumulative harm as “the effects of patterns of circumstances in a child’s life, which diminish a child’s sense of safety, stability and wellbeing” resulting from “compounded experiences of multiple episodes of abuse or ‘layers’ of neglect”. She goes on to discuss various manifestations of cumulative harm and provides a conceptual

overview of the issue. The historical context is discussed, the theoretical underpinnings are explored and a range of relevant paradigms and research is presented under various headings, including:

- Culture
- The impact of cumulative harm on early brain development
- Cumulative harm and childhood trauma
- The impact of nurture on nature
- Cumulative harm and neglect
- The cumulative impact of family violence on development
- Early childhood development and cumulative harm
- Broad practice implications

While the paper presents an academic discussion of the issues relating to cumulative harm, its aim is to engage workers in the field with the experience of children and young people whose lives are dynamic, evolving and vulnerable to cumulative harm, particularly at the hands of those who are meant to care for and protect them.

In *DOHS v Mr D & Ms W* [2009] VChC 1 at pp.94-95, Power M discussed what he termed “The Misunderstood Concept of ‘Cumulative Harm’”:

“In their reports [the protective workers] have cut and pasted part of Robyn Miller’s paper ‘Cumulative Harm: A Conceptual Overview’, December 2006, p.3:

‘Cumulative harm refers to the effects of patterns of circumstances and events in a child’s life which diminishes a child’s sense of safety, stability and wellbeing. Cumulative harm is the existence of compounded experiences of multiple episodes of abuse or layers of neglect. The unrelenting daily impact on the child can be profound and exponential, covering multiple dimensions of the child’s life. Cumulative harm is experienced by a child as a result of a pattern of harmful events and experiences that may be historical, or ongoing with the strong possibility of the risk factors being multiple, interrelated and co-existing over critical developmental periods’ [emphasis by Power M]

They have also urged that the protection application be proved on [what was said to be] the ground set out in s.162(2) of the CYFA which provides:

‘For the purposes of sub-sections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.’

The concept expressed in s.162(2) is neither new nor revolutionary. For as long as I can remember this Court has regularly taken into account the notion of cumulative risk of harm, applying where appropriate dicta of Lord Nicholls of Birkenhead (with whom Lord Goff of Chieflly & Lord Mustill agreed) in *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563,591:

‘Facts which are minor or even trivial if considered in isolation, when taken together, may suffice to satisfy the court of the likelihood of future harm.’

And, of course, the less minor and less trivial the multiple facts, the more likely it is that their accumulation will suffice to satisfy the court to the requisite level.

But s.162(2) of the CYFA does not set out a separate ground for proof of a protection application. It is clear from its wording that it is no more than an evidentiary provision which may, in appropriate circumstances, make it easier for DOHS to prove one or more of the grounds set out in sub-sections (1)(c) to (1)(f).

Further, there is one thing in the above extract from Robyn Miller’s fine paper with which I disagree. That is the underlined word ‘is’. In my view it should read ‘may be’. To say that harm is experienced by a child as a result of harmful events and experiences ignores the reality of resilience and treats a child as a automaton. Some children may be harmed by exposure to relatively minor events. Other children may not be harmed by exposure to relatively traumatic events. It all depends on the resilience of the child. There is no evidence in this case that [any of the three children] have actually been physically harmed or

psychologically harmed as yet by exposure to life events. This suggests to me that they are probably rather robust, resilient children since their life experiences to date could fairly be described as somewhat chaotic. If they have not yet suffered harm, it makes no sense to speak of them having suffered cumulative harm. In algebraic terms $0 \times = 0$. The relevance of Robyn Miller's thesis to the present case is in relation to cumulative risk of harm, not to cumulative harm *per se*."

4.16 Effect on child of separation from primary attachment figure

The Court is indebted to psychologists Dr Carmel Fahey and Dr Oriella Cattapan of the Children's Court Clinic for providing much of this material on "separation distress" and some of the attached bibliography.

Clinical experience shows that children experience distress – sometimes severe enough to lead to a diagnosis of anxiety – for a number of reasons. Separation is one of these. The manifestation and degree of this distress varies with the child's age and resilience and with the particular circumstances of the separation. When the separation involves the removal of the child, other familiar adults can assist in soothing the child's distress. Remaining with siblings, remaining in a familiar environment, having familiar objects, having regular contact with familiar people (especially parents and other attachment figures) all have potential to reduce the distress of being separated. Separated children need to know what is happening to them and what is happening to their parents as knowledge of this can buffer the distress experienced by the child. The sophistication of the explanation depends on the cognitive development of the child.

Children of all ages are potentially affected by separation. It was previously thought that for infants prior to the age of six to nine months, the effect of separation from the mother was less detrimental because the infant had not reached the stage of "object permanence", a term coined by Piaget to relate to an infant's capacity to perceive the mother as a separate object. The empirical evidence in relation to the experience of very young infants when separated from the mother (who, it must be remembered, has carried the child through pregnancy) is continuing to emerge through measures of body chemistry: see, for example, Goldsmith, D.F., Oppenheim, D. & Wanless, J. (2004) Separation and reunification: Using attachment theory and research to inform decisions affecting the placements of children in foster care. *Juvenile and Family Court Journal*, 55, 1-14. Sensitive post-World War II child researchers such as John Bowlby and Mary Main identified and reported that the experience of separation between a young child and a parent care giver elicited great distress and despair in the child. The most accepted description of the distress has been formulated in attachment theory and the two main categories of secure attachment and insecure attachment. These categories relate to the child's experience of separation and the child's subsequent ability to find comfort in the return of the primary attachment figure. Ainsworth (1978) developed a way of recording the separation through the "Strange Situation". Initially the "Strange Situation" involved the child remaining with an unfamiliar therapist while the mother left the room for just three minutes. It is well-established that in young children even very short separations from a parent cause distress. Familiarity goes to the core of identity formation. Hence there is a real risk that separations – especially separations which have occurred in a traumatic situation as many apprehensions do – can have an impact on this. The quicker that a Court can determine whether ongoing separation from a primary attachment figure is in the best interests of a child, the less the risk of separation distress and the less the risk to the child's emotional wellbeing.

In the recent publication entitled "Healthy Beginnings, Healthy Futures – A Judge's Guide" (discussed in greater detail above in the section entitled "American judicial guidelines 2009") a number of comments are made about the effects of removing children from their parents, including the following opinion:

"Professionals working with very young children in foster care often do not understand the extent of the child's distress over being removed from the parent and placed in a strange environment. Remember that very young children grieve the loss of a relationship. Even though the parent has maltreated the child, she or he is the only parent the child has known, and separation evokes strong and painful emotional reactions (Goldsmith, D.F., D. Oppenheim and J. Wanlass.

“Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care”. *Juvenile and Family Court Journal* 55(2), 2004, 1-13). The younger the child and the longer the period of uncertainty and separation from the primary caregiver, the greater the risk of harm to the child (American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care. “Developmental Issues for Young Children in Foster Care.” *Pediatrics* 105(5), 2000, 1146).”

There is now an abundance of literature over four decades that describes the psychological impact on a child of separation from his or her primary attachment figure. A bibliography together with extracts from and comments on cited literature with particular relevance to the psychological impact of such separation follows.

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- “Bowlby (1969, 1973, 1980) identified early separations as significant threats to emotional development while working in a paediatric hospital during World War II. He observed how infants were severely traumatised when separated from mother, first calling out frantically and then eventually falling into long periods of despair. Bowlby hypothesized that extended separations undermine the emotional security infants or toddlers normally experience when they are closely attached to primary caregivers. Young children rely heavily on caregivers to be available, sensitive, and responsive to their needs, especially insofar as their own coping resources are developmentally immature. As such, separations from a parent are not just alarming in early childhood; that distress is compounded when infants and toddlers have limited ability to modulate potentially overwhelming emotions on their own. Subsequent research confirmed that childhood separations are associated with lasting attachment insecurity (Moss, Cyr, Bureau, Tarabulsy & Dubois-Comtois, 2005; Waters, Merrick, Treboux, Cromwell & Albersheim 2000). The link between insecure attachment and early separation is important, in turn, because insecure attachment is strongly associated with a wide range of psychopathology in young children, adolescents, and adults (see Milkulincer & Shaver, 2007, for a review).” [p.1014]

- “Insecure attachment plays an especially salient role in borderline personality disorder [BPD] (Agrawal *et al.*, 2004; Bartholomew, Kwong & Hart, 2001). As detailed in a recent interview (Levy, 2005), there is a robust link between BPD diagnoses and insecurely attached adults identified with the identified with the Adult Attachment Interview (AAI: George, Kaplan & Main, 1985), which elicits thoughts, feelings and memories about childhood attachment experiences with caregivers. BPD is also robustly associated with a different domain of attachment insecurity measured with self-report questionnaires assessing close relationships between adolescents or adults (Brennan & Shaver, 1998). However attachment insecurity is conceptualized or measured, it is closely linked with BPD and may even mediate associations between extended separations in childhood and subsequent personality disorder in adults. Attachment insecurity in adolescence and early adulthood also could maintain BPD symptoms at elevated levels during development when these symptoms normally subside.” [p.1014]

Eagle, R.S. (1990). Denial of access: Past, present, and future. *Canadian Psychology*, 31 (2), 121-131.

Eagle, R.S. (1994). The separation experience of children in long-term care: Theory, research, and implications for practice. *American Journal of Orthopsychiatry*, 64 (3), 421-434.

- “Young toddlers may react strongly to the mother’s absence because they experience it not as a finite separation, but as interminable abandonment (i.e., complete loss) and are at an age when children cannot sustain themselves without attachment. The very young child’s distress at such separation would therefore reflect the intensity and magnitude of dependency upon the mother as well as a developmentally determined lack of understanding that separation is not loss. (Bowlby claimed that older toddlers may also protest in an effort to prevent this loss, and their anger may express their frustration when this effort to keep or regain the person who is leaving has been unsuccessful.)” [p.428]

George, C., Kaplan, N., & Main, M. (1985) *The Berkeley Adult Attachment Interview*. Unpublished manuscript, University of California, Berkeley.

Goldsmith, D.F., Oppenheim, D., & Wanless, J. (2004). Separation and reunification: Using attachment theory and research to inform decisions affecting the placements of children in foster care. *Juvenile and Family Court Journal*, 55, 1-14.

- This article discusses how a child develops a secure attachment to a caregiver, the deleterious consequences associated with maltreatment and separation and how attachment theory and research can inform permanency decisions that are in the best interests of the child. [ABSTRACT, p.1] It looks at both removal and reunification through the prism of attachment theory from the point of view of the disruption in a child’s attachment consequent upon either type of change in the child’s care arrangements.
- “When children are removed from their homes due to physical abuse, neglect, or inadequate supervision, they may find relief in the protection offered by foster families. As a result of the separation, however, they simultaneously begin to experience grief over the loss of their caregivers. While the long-term risks of maltreatment have received extensive recognition by professionals, less recognized and often under-appreciated is the severe risk endured by the child as a result of separation from the caregiver, and the long-term effects of separation on the child. In keeping with the best interest of the child, decisions about child placement must look beyond maltreatment as a single risk factor, giving additional consideration to the emotional costs of separation on a child’s developing attachments and examining how system responses and legal decision-making may help or harm the child’s attachment system. Thus, both maltreatment and attachment concerns are critically important factors in child placement decisions which have long-term consequences for a child’s overall life adjustment.” [p.1]
- “Perhaps the most significant protective factor during the early years is a secure attachment to a stable, sensitive and supportive caregiver. (Weinfield *et al.*, 1999).” [p.8]

- “In our experience, expert witnesses frequently introduce the idea that very young children will not be able to recall trauma suffered in their early years. This belief is often extended to suggest that early attachment relationships are forgotten and thus should not be taken into consideration when making permanency decisions. Recent research suggests differently, however. Infants are capable of recalling experiences from the first days of life (Siegel, 1999). Early on, the recall is experienced through what is termed implicit memory. The memories are largely perceptual and are encoded through touch and sound. By the child’s second birthday, as language skills are developing, the memory is explicit and involves the ability to actually recall an event verbally (Siegel, 1999). Although the child’s early memory skills are obviously not fully developed, research demonstrates that even years following an event, though inaccessible to consciousness, the memory may still influence the child’s behaviour and psychological responses. For example, while children may not be capable of verbally recalling details of experience, physiological measures such as skin conductive tests demonstrate that memory is encoded nonverbally {Fox, N.A. & Card, J.A., (1999) Psychophysiological measures in the study of attachment. In J. Cassidy and P. R. Shaver (Eds) *Handbook of Attachment Theory: Theory, research and clinical applications* (pp.226-245). New York: Guilford Press}.” [p.8]
- “Because of its lasting impact on children’s abilities to form healthy relationships throughout life, the importance of a secure relationship with caregivers cannot be overestimated. Thus, the decision to return a child to his or her biological parents should begin to look beyond whether or not the child is in physical danger and carefully consider the child’s history and attachment status. To this end, it is critical that parents be given adequate support, treatment and respite to help them develop skills needed to provide security, nurturing, and psychological availability to their children.” [p.14]

Haight, W.L., Kagle, J.D., & Black, J.E. (2003). Understanding and supporting parent-child relationships during foster care visits: Attachment theory and research. *Social Work, 48* (2), 195-207.

Haight, W.L., Mangelsdorf, S., Black, J., Szewczyk, M., Schoppe, S., Giorgio, G., Madrigal, K., & Lakshmi, T. (2005). *Child Welfare, 84* (4), 459-481.

Holmes, J. (1993). *John Bowlby and Attachment Theory*. NY: Routledge.

Levy, K.N. (2005) The implications of attachment theory and research for understanding borderline personality disorder. *Development and Psychopathology, 17*, 959-986.

McWey, L.M., & Mullis, A.K. (2004). Improving the lives of children in foster care: The impact of supervised visitation. *Family Relations, 53* (3), 293-300.

Mennen, F.E., & O’Keefe, M. (2005). Informed decisions in child welfare: The use of attachment theory. *Children and Youth Services Review, 27*, 557-593.

Milkulincer, M. & Shaver, P.R. (2007). *Attachment in adulthood: Structure, dynamics and change*. New York: Guilford Press.

Moss, E., Cyr, C., Bureau, J.-F., Tarabulsy, G.M., & Dubois-Comtois, K., (2005). Stability of attachment during the pre-school period. *Developmental psychology, 41*, 773-783.

Newman, L. (2008). Attachment theory and personality disorder: approaches to high-risk families. *Communities, Children and Families Australia, 3* (2), 4-18.

- “Infancy refers to the crucial developmental period from birth to three years. Experiences in infancy, particularly the quality of care-giving relationships and socio-emotional interaction, are increasingly recognised as ‘foundational’ – that is, forming the basis of development in neurological, psychological and social domains (Schore, 1994; Siegel, 1999, Panksepp, 1998). From a neurodevelopmental viewpoint, infancy (0-3 years) is significant as it represents the period of most rapid brain growth across the lifespan (Dobbing & Sands, 1973), and the establishment of neural pathways and networks

underlying basic neuropsychological functions such as learning, memory, attention and the processing and regulation of emotional states. These capacities are central to later psychological and emotional health.” [p.4]

- “Neurodevelopmental and infant research over the last 20 years has been examining the interpersonal context of infant brain development – the way in which experience influences neurological functioning and brain architecture (Milner, Squire & Kandel, 1998). The quality of emotional interaction and input the infant brain receives from caretakers is held to directly affect brain growth, a process described as the ‘experience-dependent’ nature of brain development. **Traumatic experiences and disturbances of emotional interaction in infancy have potential long-term effects on psychological and emotional functioning.**” [pp.4-5]
- “Attachment Theory is arguably the most significant theoretical framework in developmental psychology. With broad-ranging influences including psychoanalysis, systems theory, cognitive theories and ethology, Bowlby (1969) provided an integrative account of human development, stressing the role of the attachment behavioural system as a homeostatic system regulating infant proximity seeking and contact maintaining behaviour. For Bowlby, the need for attachment is innate and life-long and is the equivalent in terms of a motivational system to other drive-behavioural systems such as feeding and exploration. Human development is seen as requiring, and occurring in the context of, relationships which can provide feelings of security and comfort. Early work in non-human primates, for example, demonstrated very clearly the significance of infants’ need for comfort, overriding even the need for food (Harlow, 1966). **Both Bowlby and Harlow noted the implications of early deprivation of care and separation from caregivers on adult functioning,** and subsequently on later parenting behaviour, challenging the notion that parenting behaviour is ‘instinctual’ and stressing the role of early experience in providing models for behaviour within relationships.” [p.5]
- Magistrate Power notes that neurodevelopmental research in the last 20 years or so has substantially validated the Bowlby-based theory of attachment although that research seems to suggest that the development of attachment commences at a much earlier stage in an infant’s life than the 6 months or so postulated by Bowlby, Main and others.

Quinton, D., Selwyn, J., Rushton, A., & Dance, C. (1999). Contact between children placed away from home and their birth parents: Ryburn’s ‘Reanalysis’ analysed. *Clinical Child Psychology and Psychiatry*, 4, 519-531.

Ryburn, M. (1999). Contact between children placed away from home and their birth parents: A reanalysis of the evidence in relation to permanent placements. *Clinical Child Psychology and Psychiatry* 4, 505-518.

Van der Horst, F.C., & Van der Veer, R. (2008). Loneliness in infancy: Harry Harlow, John Bowlby and issues of separation. *Integr Psych Behav* 42, 325-335.

- After giving an overview of the different studies in the 1940s and 1950s on the effect of separation and deprivation on infants – including Spitz’s 1947 film *Grief: A Peril in Infancy* where a baby placed in a foundling home developed within weeks from a happy and approachable child into a distant and withdrawn one and Robertson’s 1952 film *A Two-Year-Old Goes to Hospital* where a child admitted to hospital for 9 days for an operation for an umbilical hernia changed from “a ravishing little girl” to a silent and unresponsive one – the authors concluded: “Slowly but surely people – in hospitals, foundling homes, nurseries – were beginning to see the effects of separation and deprivation on young children. The evidence gathered in studies by Lowrey, Bakwin, Edelston, Goldfarb and Spitz on the effects of early hospitalization – both in Britain and U.S.A. – led people to believe that the physical and emotional separation from a familiar environment was detrimental to the child’s well-being.” [pp.332-333]
- Of course, modern child hospital nursing practice is totally different from that which was the subject of such strong criticism by Bowlby, Spitz *et al* in the 1940s & 1950s. Modern practice has very much taken into account the lessons drawn from the psychological studies of earlier times.

Waters, E., Merrick, S., Treboux, D., Cromwell J., & Albersheim, L. (2000) Attachment security in infancy and early adulthood: A twenty-year longitudinal study. *Child Development*, 71, 695-702.

For examples in which the writer has applied the above learning, see his judgments in:

- *DOHS v Ms McC [interim]* [Children's Court of Victoria-Power M, 05/04/2011] at pp.70-72.
- *DOHS v The D Children* [Children's Court of Victoria-Power M, 11/01/2012] at pp.130-1.

4.17 Family Drug Treatment Court

The Family Drug Treatment Court ['FDTC'] was launched by the Children's Court of Victoria in May 2014. It is based on a paper prepared by Magistrate Greg Levine OAM for the purposes of his Churchill Fellowship which details observations made by His Honour of similar 'problem-solving courts' operating in U.S.A. & England.

The FDTC is a program operating within the Family Division of the Children's Court. It engages parents whose substance misuse/dependence has played a significant part in their removal of their child/children from their care. Utilising intensive case coordination and therapeutic intervention to address issues of substance misuse/dependence, mental health, housing and deficits in parenting and financial management, amongst other things, the FDTC aims to achieve permanent, sustainable family reunification of children with their parents.

The FDTC comprises a dedicated multi-disciplinary team of professionals across a variety of government agencies and non-government organisations, led by a dedicated Children's Court judicial officer. By combining such a diverse range of professionals, the underpinning philosophy of collaborative practice is maintained and positive outcomes are more likely to be achieved.

Once a referral to the program has been made, the parent must undergo an eligibility screening conducted by the Court. This is followed by a clinical assessment to determine the parent's suitability and identify issues of substance misuse, mental and physical health and a variety of other factors that may have led to the removal of the parent's child/children. This assessment forms the basis for the parent's individual treatment plan whilst on the program.

Once an individual treatment plan has been formulated and treatment begins the parent is required to participate fully in the activities he/she has agreed to as part of his/her rehabilitation. These may include-

- regular court appearances to facilitate monitoring of progress by the FDTC judicial officer;
- participating in regular tests for the use of non-prescribed substances; and
- attending a range of treatment and case management services as well as parenting support programs.

Upon advice from the team, the FDTC judicial officer may impose a range of rewards or consequences according to positive or negative behaviours of the parent in relation to the treatment plan.

Once a parent has achieved significant progress in his/her recovery, the FDTC team will work with that parent to prepare for incremental reunification of the children with the parent. Parents fully graduate from the program once unconditional reunification of the family has been achieved. This process is generally expected to take approximately 12 months.

Parents who are unable to achieve unconditional family reunification at the end of their involvement in the FDTC program may have their children placed permanently in out of home care and any further court involvement with the family's case will be heard in the mainstream Family Division of the Children's Court.

In 2019 the FDTC received the Robin Clark 'Making a Difference' award at the Victorian Protecting Children Awards ceremony. The award recognises an individual, team or group within the child and family service sector that has made an exceptional contribution to directly improve the lives of children, young people and families in Victoria. It is the first time this kind of award has been conferred on a court-based program.

Magistrate Greg Levine OAM was the first head of the FDTC. In April 2015 he reached mandatory retiring age – although he has been reappointed as a Reserve Magistrate – and Magistrate Kay Macpherson is now head of the FDTC in his place. The FDTC operates only in respect of cases involving DFFH's Preston & Shepparton offices. It originally sat in Melbourne but since November 2015 it has sat at the new Broadmeadows Children's Court. It now also sits at Shepparton Children's Court.

In the Children's Court of Victoria 2018/19 Annual Report the following information is provided about the FDTC:

"Throughout 2018-19, the FDTC program received 65 referrals and worked with 56 parents of 85 children across Broadmeadows and Shepparton. It is too early into the program for meaningful outcome data from Shepparton but in the 2018-19 period 52% of the parents on the program achieved reunification with their children. A total of 80% of program participants who maintained engagement for at least 9 months of the 12 month program have achieved reunification with their children."

In the Children's Court of Victoria 2019/20 Annual Report the following information is provided about the FDTC:

"During the reporting period, the FDTC program received referrals for 62 parents of 118 children across both the Broadmeadows and Shepparton program locations, leading to the induction into the program of 30 parents of 59 children. Of the total number of FDTC participants (inclusive of those inducted prior to the commencement of the 2019-20 year) 57% achieved reunification with their children. There is a notable difference in the reunification rate between participants in Broadmeadows (71% reunification rate) and Shepparton (36%). The reunification gap can be attributed to the Broadmeadows FDTC program being delivered within a specialist Children's Court context, whereas the Shepparton FDTC program operates with more limited capacity.

Since the FDTC program moved online from March 2020, limited access to technology, and generally poorer internet connectivity compared with metropolitan Melbourne may also have reduced program efficacy in Shepparton."

4.18 Some other relevant papers

Copies of the following papers on various aspects of child & adult psychology, child development, child welfare and/or domestic violence - many of which were provided by the former Director of the Children's Court Clinic – are held by the Court Liaison Officer at Melbourne Children's Court.

F1

Are Children of Young Mothers Disadvantaged Because of Their Mother's Age or Family Background?

Ruth N. López Turley

Child Development, March/April 2003, Volume 74, Number 2, Pages 465-474

Using a national sample of children 3 to 16 years old, this study found that the lower test scores and increased behaviour problems of children born to younger mothers are not due to her age but to her family background. First, for non-firstborn children, maternal age at first birth has a significant effect on test scores, whereas maternal age at the child's birth does not. Second, this study replicated a controversial study by Geronimus, Korenmann and Hillemeier (1994) and found that the disadvantage of children born to younger mothers is greatly reduced when maternal family background is controlled through a comparison of children born to sisters. Third, maternal age is not an important predictor of children's test score rates of improvement over time. This evidence suggests that maternal age is not causal.

F2

Motherhood, intellectual disability and child protection: characteristics of a court sample

Daphne E. Glaun (Royal Children's Hospital) & Patricia F. Brown (Director, Children's Court Clinic)

Journal of Intellectual & Developmental Disability, Vol.24, No.1, pp.95-105, 1999

Attitudes still prevail in society that children of mothers who have an intellectual disability may be at increased risk of abuse or neglect. This small exploratory study retrospectively examined Children's Court Clinic case notes and records of 12 families before the Court on child protection grounds in which the mother had a documented intellectual disability. Predominantly neglect rather than abuse was alleged. These mothers did not typically show a pattern of deliberate physical harm to the child but rather demonstrated serious omissions in care. This may have influenced decision making by the magistrates, since half of the mothers were granted care under a supervision order. Mothers in this sample presented with multiple problems and had needs which went beyond the acquisition of parenting skills. They frequently had a history of deprivation, neglect or sexual abuse in their own childhoods. A high prevalence of co-morbidity, such as drug abuse, psychiatric or medical disorder, was also a significant finding. Fathers were often absent, but when involved many were ill equipped to help because of intellectual or health problems. Possible risk factors within the child were high levels of developmental delay and multiple handicap. Findings suggest that the cumulative weight of stressful emotional, physical and social factors, in combination with limited intellectual resources, had precipitated a crisis in the mother's child care. The mothers require social supports, particularly informal ones, together with specialist health care for themselves and their children and intensive but sensitively delivered professional support.

F3

Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?

Bruce J. Ellis, John E. Bates, Kenneth A. Dodge, David M. Fergusson, L. John Horwood, Gregory S. Pettit and Lianne Woodward

Child Development, May/June 2003, Volume 74, Number 3, Pages 801-821

The impact of father absence on early sexual activity and teenage pregnancy was investigated in longitudinal studies in the United States (N=242) and New Zealand (N=520), in which community samples of girls were followed prospectively from early in life (5 years) to approximately age 18. Greater exposure to father absence was strongly associated with elevated risk for early sexual activity and adolescent pregnancy. This elevated risk was either not explained (in the U.S. study) or only partly explained (in the New Zealand study) by familial, ecological, and personal disadvantages associated with father absence. After controlling for covariates, there was stronger and more consistent evidence of effects of father absence on early sexual activity and early teenage pregnancy than on other behavioural or mental health problems or academic achievement. Effects of father absence are discussed in terms of life-course adversity, evolutionary psychology, social learning and behaviour genetic models.

F4

Suggestibility of the Child Witness: A Historical Review and Synthesis

Stephen J. Ceci (Department of Human Development, Cornell University) & Maggie Bruck (Department of Psychology, McGill University)

The field of children's testimony is in turmoil, but a resolution to seemingly intractable debates now appears attainable. In this review the authors place the current disagreement in historical context and describe psychological and legal views of child witnesses held by scholars since the turn of the 20th century. Although there has been consistent interest in children's suggestibility over the past century, the past 15 years have been the most active in terms of the number of published studies and novel theorizing about the causal mechanisms that underpin the observed findings. A synthesis of this research posits three 'families' of factors - cognitive, social and biological - that must be considered if one is to understand seemingly contradictory interpretations of the findings. The authors conclude that there are reliable age differences in suggestibility but that even very young children are capable of

recalling much that is forensically relevant. Findings are discussed in terms of the role of expert witnesses.

F5

Psychosocial Adversities in Childhood and Adult Psychopathology

Michael Rutter, MD, FRS and Barbara Maughan, PhD (MRC Child Psychiatry Unit and Social, Genetic and Developmental Psychiatry Research Centre, Institute of Psychiatry, London)
Journal of Personality Disorders, 11(1), 4-18 (1997) © The Guilford Press

Numerous studies have reported statistical associations between adverse childhood experiences and psychopathology in adult life. A range of conceptual and methodological issues needs to be borne in mind in interpreting these findings. Methodological issues include implications of base rates of postulated risk and outcome measures, and the possibility of third variable effects. Conceptually, further evidence is needed on the aspects of early experience most likely to contribute to risk (acute vs chronic stressors: actively negative vs lack of positive experiences; and the implications of cognitive processing of events); the specificity of effects; possible mechanisms involved in mediating effects in childhood, and approaches to testing them; and factors involved in persistence into adult life. There are good reasons to assume that adverse early experience plays a contributory role in the genesis of personality disorder. However, at this stage, evidence is still limited on how this comes about.

F6

Retrospective Reporting of Childhood Adversity: Issues in Addressing Long-term Recall

Barbara Maughan, PhD and Michael Rutter, MD, FRS (MRC Child Psychiatry Unit and Social, Genetic and Developmental Psychiatry Research Centre, Institute of Psychiatry, London)
Journal of Personality Disorders, 11(1), 19-33 (1997) © The Guilford Press

Much evidence for associations between adverse experiences in childhood and personality disorder in adult life comes from retrospective accounts. This raises important questions over the reliability and validity of long-term recall. The strengths and limitations of different methods for assessing the accuracy and stability of retrospective reports are discussed. Evidence from cognitive psychology on memory and memory processes, and on the phenomenon of infantile amnesia, provides important background for assessing issues more specific to recall in studies of risk for psychopathology. Here, topics of particular concern include: memory for traumatic early experience; the effects of false mood state and symptomatology on recall; recovered or false memories; and the implications of mental representations of early experience for understanding psychopathology. Current evidence suggests that while adequately reliable accounts of many early experiences can be gained using appropriate techniques, further methodological studies are needed and investigations using retrospective methods would be wise to include corroborative evidence whenever feasible.

F7

Risk, Resilience and Recovery: A Life-Span Perspective

Emmy E. Werner, University of California, Davis, U.S.A.

Paper presented at a Symposium on Resilience, Risk & Salutogenesis, 14th IACAPAP Congress, 05/08/1998, Stockholm, Sweden

The Kauai Longitudinal Study is one of the few long-term studies in North America that has looked at the interplay between risk and protective factors on 'high risk' youngsters from birth to mid-life. Over four decades, a multi-disciplinary team of paediatricians, psychiatrists, psychologists and public health and social workers has monitored the impact of a variety of biological and psycho-social risk factors on the development of a multi-ethnic cohort of 698 individuals, born on the Hawaiian island of Kauai in 1955. The study population is predominantly of Japanese, Pilipino and Part-Hawaiian descent and has been followed, with relatively little attrition, from birth to ages 1,2,10,18,32, and most recently to age 40. About one-third of the group were designated as 'high risk' children because they were born into poverty, had experienced moderate-severe degrees of perinatal stress, and were reared in a family environment troubled by chronic discord and parental psychopathology. Two out of every three of the group who encountered 4 or more such risk factors by the age of 2 (N:173)

had delinquency records and/or serious mental health problems by the time they were 18. Yet one out of 3 of the high risk group (N:72) grew into competent adults who loved well, worked well and expected well. Three clusters of protective factors differentiated this resilient group from the other high risk youths who had become troubled teenagers: (1) at least average intelligence and temperamental attributes that elicited positive responses from both family members and strangers; (2) affectional ties with parent substitutes such as grandparents and older siblings; (3) an external support system (school, youth groups and/or church). Further, at mid-life the overwhelming majority of the "troubled" teenagers were also in stable marriages and jobs, were satisfied with their relationships with their spouses and teenage children, and were responsible citizens in their community.

F8

What the Literature Tells Us About Resilience as Well as Risk

Dr Patricia F Brown (Director, Children's Court Clinic)

Notes of a seminar for magistrates about the relevant literature

Theoretical discussions and studies of risk and insulating factors against harm have been growing over the past 15 years. There is a general assumption by psychologists that ongoing negative events or acute traumatic incidents in early life may be linked to later psychopathology. Though the logic is reasonable, the process by which later negative effects are produced remains largely unknown. Over the period the emphasis in risk research has seemed to shift from vulnerability to resilience, the latter a reference to successful adaptation despite the odds against good development. Results from longitudinal studies (especially the Kauai) have been instructive although the process or mechanism underlying resilience still remains largely unresearched. Dr Brown concluded that for a clinician assessing children who are most often from backgrounds of risk, the major message would seem to be to become equally thoughtful about notions of risk and notions of resilience and to accept a hypothesis of there being fluid interplay and changes over time.

F9

Developmental Catch-up, and Deficit, Following Adoption after Severe Global Early Privation

Michael Rutter and the English and Romanian Adoptees (ERA) study team (MRC Child Psychiatry Unit and Social, Genetic and Developmental Psychiatry Research Centre, Institute of Psychiatry, London)

J. Child Psychiatry, Vol.39, No.4, pp.465-476 (1998) Cambridge University Press

The extent of developmental deficit and catch-up following adoption after severe global early privation was examined at 4 years in a sample of 111 Romanian children who came to the U.K. before the age of 2 years, and compared with respect to their functioning at the same age to a sample of 52 U.K. adopted children placed before the age of 6 months. The measures at 4 years included height, head circumference, and general cognitive level (assessed on both the McCarthy and Denver Scales). The children from Romania were severely developmentally impaired at the time of U.K. entry, with about half below the third percentile on height, on weight, on head circumference, and on developmental quotient. Many were also in a poor physical state with recurrent intestinal and respiratory infections. The catch-up in both physical growth and cognitive level appeared nearly complete at age 4 years for those children who came to the U.K. before the age of 6 months, despite the fact that their background prior to U.K. entry was similar to the children who came to the U.K. when older. The developmental catch-up was also impressive, but not complete, in those placed after 6 months of age. The mean McCarthy General Cognitive Index was 92 compared with 109 for the within-U.K. adoptees. The strongest predictor of level of cognitive functioning at 4 years was the children's age at entry to the U.K. It was concluded that the remaining cognitive deficit was likely to be a consequence of gross early privation, with psychological privation probably more important than nutritional privation. A further follow-up at age 6 years will determine whether there is continuing recovery after 4 years.

F10

Attention Deficit Hyperactivity Disorder in Children: A Guide to Best Practice for Psychologists

Dr Alison Garton, Dr Vicki Anderson, Ms Janine Farrelly, Mr Ric Pawsley and Ms Jennifer Standish with additional expertise provided by Assoc Prof Ann Sanson
A Position Paper prepared for the Australian Psychological Society Ltd, June 1997

This Position Paper summarises evidence on the aetiology, prevalence, diagnosis and treatment of Attention deficit Hyperactivity Disorder (ADHD) and provides recommended practice advice to psychologists on the management and coordination of treatment and intervention for children, based on the differential diagnosis of ADHD. It is recommended that diagnosis should be based on multiple informants (parents/caregivers, teachers, medical and psychological professionals), in multiple contexts (home, school, playground) and on multiple methods (psychological test batteries, observation, completion of checklists by multiple raters). Assessment should also include daily functioning and the effect the behavioural difficulties are having on the child and other around him or her. Early identification permits early intervention, itself proven to enhance longer term outcomes. Management of ADHD includes sharing of information between relevant professionals and an understanding of how best to help each child. Educational, developmental, clinical and clinic neuro-psychologists all have roles to play in the assessment, diagnosis, treatment and intervention with ADHD children as well as in the evaluation of the effectiveness of any treatment or intervention. This Position Paper describes best practice for any psychologist working with, or advising on, children with ADHD.

F11

Neurofeedback and the Courts

Dr Moshe Perl (psychologist)

Notes of a seminar for magistrates held on 14/02/2002.

ADHD, a disorder characterised by impulsiveness, over-activity, short attention span and distractibility, is pervasive in the population served by the Children's Court. It is a significant risk factor for developing antisocial behaviour, with research suggesting that upwards of 75% of prison inmates may suffer from the disorder. Brainwave activity has been found to be useful in both the diagnosis and treatment of ADHD. EEG Biofeedback or Neurofeedback training often significantly reduces the symptoms of ADHD on a long term basis. EEG Biofeedback provides moment to moment information about the rhythmic electrical activity from various places in the brain (EEG) and challenges the brain to modify certain components of it. The treater is soon able to induce changes in brain wave patterns which lead to improved flexibility and stability of the brain waves in general which leads to improved flexibility and stability of behaviour in response to external demands on the person in the course of day to day activity. Neurofeedback is able to produce significant improvement in symptoms of epilepsy, ADHD and drug addictions. There is considerable evidence in clinical practice that it can improve a large variety of disorders, including anxiety and panic reactions, depression and sleep disorders.

F12

Caring for Child Victims of Domestic Violence

Anne Blanchard

Nandine Press 1999

Chapter 1: Introduction - The Effects of Domestic Violence on Children

- How Witnessing Domestic Violence Affects Children
- Post Traumatic Stress Disorder (PTSD)
- Child Abuse and Domestic Violence
- Long Term Effects
- Working with Traumatized Children
- The Focus on Children as Well as Women

Chapter 2: Children's Experience of Domestic Violence

- Children's Experience of Domestic Violence
- The Range of Violence
- What do Children Feel About the Violence?
- How Children Feel About Their Mothers and Fathers
- How Children Survive
- A Message for People Working with Traumatized Children

F13

Findings: Pre and Post Separation Abuse of Women & Children

Rendell, K, Rathus, Z & Lynch A. (2000)

An Unacceptable Risk: A Report on Child Contact arrangements where there is Violence in the Family.

This chapter presents research results about pre- & post- separation abuse of women & children

F14

Domestic Violence and Child Protection

Domestic Violence Resource Centre, Queensland

Critical Directions Monograph Series Vol.1, No.1 June 2001

This paper provides an overview of research into the interface between domestic violence and child protection and adopts a critical view of current intervention strategies. The paper asserts that the effective protection of children in violent families will be better achieved through appropriate intervention that both acknowledges and addresses the domestic violence. Finally the paper looks at a collaborative, coordinated response from both domestic violence and child protection workers. The paper is divided into the following sections:

- Direct Abuse of Children
- Who is the Perpetrator? Who should be held Accountable? Who pays the price under the current system of intervention?
- Effects of Domestic Violence on Women
- Effects of Domestic Violence on Children
- Mothers' Protective Behaviours for their Children
- When Women Separate from their Violent Partners
- What has been done to protect children? How can the response be improved?

F15

Potential Impacts of Domestic Violence at Different Developmental Stages

Linda L Baker & Peter G Jaffe (Centre for Children and Families in the Justice System); Steven J Berkowitz & Miriam Berkman (National Center for Children Exposed to Violence, Child Study Centre, Yale University)

Excerpts from: *Children Exposed to Domestic Violence: A Handbook for Police Trainers to Increase Understanding and Improve Community Responses*

How young people relate and think about their experiences changes dramatically as they mature. We can better understand how they may interpret and be affected by exposure to violence when we consider their stage of development.

F16

Why is Domestic Violence Relevant to Child Custody?

Peter G Jaffe, Ph D, Nancy K D Lemon, JD & Samantha E Poisson M Ed.

Excerpts from: *Child Custody and Domestic Violence: A Call for Safety and Accountability*

The authors' motivation to write this book grew out of their frustration that well-educated professionals working daily with families in crisis do not seem to understand the relevance of exposure to domestic violence on child adjustment.

F17

Family Violence and Homelessness - Removing the Perpetrator from the Home

Domestic Violence and Incest Resource Centre Discussion Paper No.3 2002

Women and children who are subjected to family violence are vulnerable to homelessness. The violence disrupts and violates their sense of safety and belonging in the home; and when they make the decision to leave, this usually requires that they literally flee their homes. A protracted experience of insecure and inappropriate housing often follows, with ongoing

disruption to employment and the schooling of children. Women can face isolation, emotional trauma and acute economic disadvantage as a result of their decision to leave. Fear of such devastating loss and social disadvantage may imprison them in violent relationships.

The traditional focus of social policy responses to family violence has been on supporting women and children to leave situations of family violence, through funding a network of emergency and transitional accommodation. More recently, there is increased policy interest in identifying strategies to assist victims of family violence to remain safely in their homes, while the perpetrator of the violence is removed. However despite the availability of legal mechanisms to remove perpetrators, women and children face significant obstacles in engaging legal protection and subsequently sustaining their housing.

This paper contributes to a better understanding of these issues. It presents suggestions as to how policy can be directed to removing violent men from the family home, evaluates the two main legal interventions that exist in Victoria to enable this to happen, and discusses obstacles typically faced by those who pursue these legal interventions. The Paper also explores some of the strategies and initiatives that have emerged elsewhere to address the problems identified, and recommends ways of making positive change.

F18

Battering and Couples Therapy: Universal Screening and Selection of Treatment Modality

Michele Bograd (Bedford, Mass.) & Fernando Mederos (Jamaica Plain, Mass.)

Journal of Marital and Family Therapy July 1999 Vol.25, No.3, 291-312

As family therapists begin to experiment with couples treatment models for batterers and their partners, a basic question is: Which couples can be safely treated with conjoint therapy? Following a definition of battering and a review of rationales for considering couples therapy in cases of domestic violence, a framework for assessment of domestic violence is outlined, including sample questions, criteria for excluding couples from conjoint therapy, how to conduct a lethality assessment, and how to conceptualise post-assessment treatment recommendations. This article also introduces families and couples therapists to domestic violence literature that is often not well integrated in family therapy theory and practice.

F19

Embracing the Controversy - A Metasystemic Approach to the Treatment of Domestic Violence

Wendy Greenspun

This work attempts to give an overview of the historical context of treatment within the domestic violence field, then outlines the current controversy about how best to intervene (the 'systemic' versus the 'feminist'). Finally, a comprehensive treatment approach is described, one that takes into account the various complexities inherent in the work.

F20

Commentary on the Child Protection Outcomes Project: Thoughts on the Issue of 'Fast Tracking'

Dr Patricia F. Brown (Director, Children's Court Clinic)

In this commentary the author unequivocally endorses a decided shift towards a family service model which is largely voluntary, where families in distress are treated with respect, nurtured early and in ongoing fashion, and with legal involvement becoming a last resort, a shift which in her view can only enrich a sense of community generally. Further, the emphasis in the Project on well trained persons offering family intervention is crucial.

This commentary focuses on the suggestion in the Project for the need to "provide permanence for children, with a clear intention to reduce time apart in out-of-home care". As the author says: "One would be hard pressed to find a person in the field who would not agree with the principle of this recommendation." But it is her strong view that while there is unequivocally a need to ensure that children are not in extended out-of-home care with numbers of carers, the fact that impermanence of care has proliferated is a system's problem

which the system needs to address. That problem has not been created by children and families but by those who have attempted to better the lot of children in dysfunctional families.

The author suggests that the State ensure the following: First, establish that very skilled remediation is currently generally available and, to that end, inquire into and regulate the industry. Second, before permanent care can be invoked, there be insistence through legislation on a package of very skilled family remediation first being attempted *where at all feasible*. Third, there be a creative re-thinking on possibilities for placing a child initially removed from home, with there also being carers engaged more numerous, who had already indicated that they had the flexibility for permanent care to retain children, if there were a failure by parents to implement needed change when skilled remediation has been offered.

Finally the author emphasises that the issue of **contact with** remains important and is endorsed by current psychological literature. The one area of change to law suggested by the author to be urgently required is that magistrates be given the power to order **contact** when a guardianship order is made so that attachment bonds are built upon, not broken.

F21

The Impact of Violence on Children

Dr Joy D. Osofsky (Professor of Public Health, Psychiatry & Paediatrics at Louisiana State University Health Sciences Center)

The Future of Children - DOMESTIC VIOLENCE AND CHILDREN - Vol.9, No.3 - Winter 1999, 33-49

Existing research on the effects of children's exposure to violence covers a broad range of community, family and media violence. This research is relevant and useful to an examination of domestic violence in two key ways. First, understanding how exposure to various types of violence affects children and what best enables them to cope can point to important considerations when trying to help children cope with exposure to domestic violence in particular. And second, many families experiencing domestic violence are exposed to other types of violence as well. Exposure to violence on multiple levels can affect the parents' behaviour and can compound the effects on children.

This article begins with an overview of the extent of children's exposure to various types of violence, and then examines what is known about the effects of this exposure across the developmental continuum. Key protective factors for children exposed to violence are examined. Research indicates that the most important resource protecting children from the negative effects of exposure to violence is a strong relationship with a competent, caring, positive adult, most often a parent. Yet, when parents are themselves witnesses to or victims of violence, they may have difficulty fulfilling this role. In the final section, directions for future research are discussed.

F22

Prevalence of Children's Exposure to Domestic Violence and Child maltreatment: Implications for Prevention and Intervention

Dr Joy D. Osofsky (Professor of Public Health, Psychiatry & Paediatrics at Louisiana State University Health Sciences Center)

Clinical Child and Family Psychology Review, Vol.6, No.3, September 2003, 161-171

The purpose of this paper is to review research on the prevalence of children's exposure to domestic violence, to consider the available literature on the co-occurrence of domestic violence and child maltreatment, and to gain more understanding about the impact of exposure on children. There is clear evidence indicating that both severe and moderate violence occurs frequently in homes among family members and that children are exposed to this violence. However, because of differing definitions of what constitutes domestic violence and variability in research methodologies for collecting the data, there are significant discrepancies in prevalence reports across studies. Of great concern is the immediate impact on the children and the long-term consequences for their later relationships. Fewer studies have been done on the co-occurrence of domestic violence and child maltreatment. However, it is likely that children who live in homes where domestic violence occurs are more likely to be abused and neglected. On the basis of the available research, there is little doubt

that vast numbers of children are exposed to domestic violence and that children's responses vary widely depending on their risk and vulnerability, as well as the structure of their environments. A developmental risk and protective factors framework will be used to integrate the information on children's exposure to violence.

F23

National comparison of child protection systems

Leah Broomfield (Senior Research Officer) & Daryl Higgins (Senior Research Fellow)
Australian Institute of Family Studies – National Child Protection Clearinghouse – Paper No.22 Autumn 2005

This paper is a national snapshot of Australian statutory child protection services. Data were collected in each state and territory via policy documents, procedure manuals and telephone interviews with relevant child protection personnel. Topics covered are: who is responsible for child protection; intake procedures; who notifies concerns to child protection services; and the process of providing child protection services in Australian states and territories (intake, risk assessment, investigation and case management). Similarities and differences across states and territories in each of these areas are highlighted. Despite different legislative frameworks and some operational differences, Australian state and territory statutory child protection services are providing very similar models of intervention. Implications are explored with regard to: competency standards, training and professional development, and cross-jurisdictional issues.

F24

Child protection Australia 2005-06

Paper Number 40 in the Child Welfare Series published by the Australian Institute of Health and Welfare, Canberra.

This excellent paper is based on three national children protection data collections:

- child protection notifications, investigations and substantiations;
- children on care and protection orders;
- children in out of home care.

These data are collected each year by the Australian Institute of Health and Welfare from the relevant departments in each Australian state and territory. Most of the data in the report cover the 2005-2006 financial year, although data trends in child protection are also included.

F25

The Child Protection Crisis in Australia – a Way Forward

Paper Number 40 in the Child Welfare Series published by the Australian Institute of Health and Welfare, Canberra.

This paper postulates that most of the statutory child protection systems in Australia are in crisis and that an overloaded child protection service, like an overloaded casualty department in a hospital, is very dangerous. It then puts forward suggestions as to how a Public Health Model of Child Protection, providing for prevention at three levels, is necessary to reform the current dangerous and unsustainable systems.

F26

Child Abuse and Neglect and the Brain – A Review

Dr Danya Glaser (Department of Psychological Medicine, Great Ormond Street Hospital for Children, London)

(2000) *J Child Psychology Vol.41, No.1, 97-116*

Developmental psychology and the study of behaviour and emotion have tended to be considered in parallel to the study of neurobiological processes. The review explores the effects of child abuse and neglect on the brain, excluding non-accidental injury that causes gross physical trauma to the brain. It commences with a background summary of the nature, context, and some deleterious effects of omission and commission within child maltreatment. There is no post-maltreatment syndrome, outcomes varying with many factors including nature, duration, and interpersonal context of the maltreatment as well as the nature of later intervention. There then follows a section on environmental influences on brain development,

demonstrating the dependence of the orderly process of neurodevelopment on the child's environment. Ontogenesis, or the development of the self through self-determination, proceeds in the context of the nature-nurture interaction. As a prelude to reviewing the neurobiology of child abuse and neglect, the next section is concerned with bridging the mind and the brain. Here, neurobiological processes, including cellular, biochemical, and neuropsychological processes, are examined alongside their behavioural, cognitive, and emotional equivalents and vice versa. Child maltreatment is a potent source of stress and the stress response is therefore discussed in some detail. Evidence is outlined for the buffering effects of a secure attachment on the stress response. The section dealing with actual effects on the brain of child abuse and neglect discusses manifestations of the stress response including dysregulation of the hypothalamic-pituitary-adrenal axis, and parasympathetic and catecholamine responses. Recent evidence about reduction in brain volume following child abuse and neglect is also outlined. Some biochemical, functional, and structural changes in the brain that are not reflections of the stress response are observed following child maltreatment. The mechanisms bringing about these changes are less clearly understood and may well be related to early and more chronic abuse and neglect affecting the process of brain development. The behavioural and emotional concomitants of their neurobiological manifestations are discussed. The importance of early intervention and attention to the chronicity of environmental adversity may indicate the need for permanent alternative caregivers, in order to preserve the development of the most vulnerable children.

F27

Emotional abuse and neglect (psychological maltreatment): a conceptual framework

Dr Danya Glaser (Department of Psychological Medicine, Great Ormond Street Hospital for Children, London)
(2002), *Child Abuse & Neglect* 26, 697-714

Emotional abuse and neglect is an under-recognized, but actually common, form of child abuse. Professionals in the field continue to find difficulty in recognizing and operationally defining it, and experience uncertainty about proving it legally. There are also questions about intervention and therapy to protect the child in the least detrimental manner. These difficulties have led to delays in recognition and protective intervention. Emotional abuse and neglect are defined as a carer-child relationship that is characterised by patterns of harmful interactions but requiring no physical contact with the child. Motivation to harm the child is not necessary for the definition. Unlike sexual abuse that is a secret activity, these forms of ill treatment are easily observable. The child's development is impaired in all domains of functioning but, not being specific to emotional abuse and neglect, cannot be regarded as diagnostic.

F28

Childhood Experience and the Expression of Genetic Potential: What Childhood neglect Tells Us about Nature and Nurture

Bruce D. Perry (The ChildTrauma Academy, Houston, TX)
(2002) *Brain and Mind* 3: 79-100

Studies of childhood abuse and neglect have important lessons for considerations of nature and nurture. While each child has unique genetic potential, both human and animal studies point to important needs that every child has, and severe long-term consequences for brain function if those needs are not met. The effects of the childhood environment, favourable or unfavourable, interact with all the processes of neurodevelopment (neurogenesis, migration, differentiation, arborization, synaptogenesis, synaptic sculpting, and myelination). The time courses of all these neural processes are reviewed here along with statements of core principles for both genetic and environmental influences on all of these processes. Evidence is presented that development of synaptic pathways tends to be a "use it or lose it" proposition. Abuse studies from the author's laboratory, studies of children in orphanages who lacked emotional contact, and a large number of animal deprivation and enrichment studies point to the need for children and young nonhuman mammals to have both stable emotional attachments with and touch from primary adult caregivers, and spontaneous interaction with peers. If these connections are lacking, brain development both of caring behaviour and cognitive capacities is damaged in a lasting fashion. These effects of

experience on the brain imply that effects of modern technology can be positive but need to be monitored. While technology has raised opportunities for children to become emotionally secure and literate, more recent inadvertent impacts of technology have spawned declines in extended families, family meals, and spontaneous peer interactions. The latter changes have deprived many children of experiences that promote positive growth of the cognitive and caring potentials of their developing brains.

F29

Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children: The Neurosequential Model of Therapeutics

Bruce D. Perry (The ChildTrauma Academy, Houston, TX)

Working with Traumatized Youth in Child Welfare (Ed. Nancy Boyd), Guilford Publications Inc., New York (2006)

This chapter examines therapeutic work with maltreated children from a neurodevelopmental perspective. The overarching premise of this perspective is that an awareness of human brain development and functioning provides practical insights to the origins of abnormal functioning seen following adverse developmental experiences (e.g. abuse, neglect and trauma), and further, that an understanding of how neural systems changes suggests specific therapeutic interventions.

F30

Mind, Body and Heart: Psychotherapy and the Relationship between Mental and Physical Health

Dr Matthew Bambling (Lecturer and Researcher at the School of Medicine, University of Queensland)

Psychotherapy in Australia, Vol.12, No.2 February 2006, 52-59

A mounting body of research confirms the clinical wisdom that mental health affects physical health. Recent psychophysiological research has unravelled some of the mechanisms by which mental health problems and general life stress may cause physical diseases such as coronary heart disease, cancer, diabetes and autoimmune disorders. Encouraging news for the mental health practitioner is that the sum of research findings suggests that psychological treatment not only improves psychological symptoms, but can have an independent effect on physical health and disease. The mind-body connection appears so significant that the use of psychological techniques can even reduce the risk of most major diseases. The author draws on recent research and behavioural medicine to illustrate how depression and anxiety influence physiological processes with particular reference to coronary heart disease. An evaluation is undertaken of how psychotherapy and psychological interventions can influence not only mental health, but also physical health through reduction of the stress response and associated endocrine function. The implications of these findings for clinical practice are explored.

F31

Coming Out of the Dark Age: Recognising Difference, Making a Difference

Dr Anthony Korner (Coordinator of the Master of Medicine (Psychotherapy) program of the University of Sydney at Westmead Hospital)

Psychotherapy in Australia, Vol.11, No.4 August 2005, 2-8

What do we do when confronted by patients who act in self-destructive ways or impinge upon us as therapists? There is a tendency to blame the patient and often the term 'personality disorder' is used in that way. This often masks the genuine suffering that affects these people and those around them. One way of understanding the situation may be to look at our reaction to 'difference' in the sense of the encounter with something unknown and unfamiliar. If this is looked at as an opportunity to know more about the other person it can become a path to therapeutic engagement rather than a trigger for therapeutic derailment.

F32

Placement with Substance-abusing mothers vs. Placement with other relatives: Infant Outcomes

Rachelle Tyler, Judy Howard, Michael Espinosa and Sarah Simpson Doakes
(1997), *Child Abuse & Neglect* 21, pp.337-349

Evaluating a subset of participants from a larger research project concerning comprehensive drug treatment services for pregnant substance-abusing women and their offspring, this investigation compared those mothers who retained custody of their infants following delivery with those who lost custody and whose infants were placed in the care of other relatives. There were no differences between the groups with respect to maternal demographics, substance abuse (as assessed by self-report prenatally and urine toxicology screens at birth), or mental health status, or with respect to newborn characteristics (including gestational age, birth weight, medical risk status). Further, caregiving behaviours of biological mothers and relative caregivers showed no significant differences at 6 months. Infants who remained in the care of their biological mothers, however, demonstrated better cognitive development than infants in the care of relatives at 6 months. There was also a discrepancy in terms of safety at 6 months, in that there were three deaths and two reported cases of suspected child abuse/neglect among infants in the care of their mothers, and no deaths and no reports of suspected child abuse among infants in relative foster care.

F33

In Search of How People Change – Applications to Addictive Behaviour

James O Prochaska (Cancer Prevention Research Consortium, University of Rhode Island),
Carlo C DiClemente (University of Houston)
John C Norcross (University of Scranton)
September 1992, American Psychologist, 1102-1114

How people intentionally change addictive behaviours with and without treatment is not well understood by behavioural scientists. This article summarizes research on self-initiated and professionally facilitated change of addictive behaviours using the key transtheoretical constructs of stages and processes of change. Modification of addictive behaviours involves progression through five stages – pre-contemplation, contemplation, preparation, action, and maintenance – and individuals typically recycle through these stages several times before termination of the addiction. Multiple studies provide strong support for these stages as well as for a finite and common set of change processes used to progress through the stages. Research to date supports a transtheoretical model of change that systematically integrates the stages with processes of change from diverse theories of psychotherapy.

F34

The Menace of the Internet

H.C. Alsop (Magistrate, Magistrates' Court of Victoria)
Paper presented at XVII World Congress of the International Association of Youth and Family Judges and Magistrates held at Belfast in August 2006

This excellent paper, presented in the presence of Justice Sandra Day O'Connor, recently retired justice of the U.S. Supreme Court, discusses the potential negative impact of the internet on children and young persons.

F35

Risk behaviours in maltreated youth placed in foster care: a longitudinal study of protective and vulnerability factors

Heather N Taussig (Department of Pediatrics, Kempe Children's Center, University of Colorado Health Sciences Center)
(2002), *Child Abuse & Neglect* 26, 1179-1199

Objective: Few studies have examined the impact of placement in foster care prospectively to determine what early responses might predict later functioning. The current study examined protective and vulnerability factors in a longitudinal study of youth placed in foster care.

Methodology: A cohort of 214 ethnically-diverse youth, ages 7-12, who entered foster care between May 1990 and October 1991 were recruited for the Time 1 study if they remained in foster care for at least 5 months. For the Time 1 study, youth and their caregivers were interviewed and assessed approximately 6 months following their initial placement. Six years later, as adolescents, the youth were re-interviewed regarding their involvement in four domains of risk behaviour.

Results: Bivariate analyses indicated that several Time 1 control variables (e.g. age, ethnicity, type of maltreatment, behaviour problems) and Time 1 psychosocial predictor variables (i.e. dimensions of social support and self-perception) were related to the Time 2 risk behaviour outcomes. Regression analyses with all variables accounted for between 33% and 46% of the variance, with the psychosocial predictor variables, as a group, significant over and above the control variables.

Conclusions: The results suggest that there are some modifiable protective and vulnerability factors present shortly after maltreated youth are placed in foster care that predict their engagement in adolescent risk behaviours 6 years later.

F36

The Independence of the Children's Court Clinic of Victoria: An indulgence or a necessity in the child forensic field?

Dr Patricia F Brown (Director, Children's Court Clinic of Victoria)

Paper presented at XVII World Congress of the International Association for Child and Adolescent Psychiatry and Allied Professions held at Melbourne in September 2006

This paper explains the present role and functioning of the Children's Court Clinic of Victoria and presents a strong argument for the necessity for its actual independence – and its perceived independence - from all of the parties in any proceedings in the Children's Court. Central to the paper is the author's view that the Court Clinic, being the clinical investigative arm of the Court, works only for the magistrates and judges of the Court and not for any party in Court proceedings. As such, it must be seen to be assiduously independent of all of the parties to maintain the Court's confidence in its impartiality.

F37

Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse

Patrick Parkinson

[1999] MULR 15

Child sexual abuse allegations cause great difficulties for the Family Court, not only because so often there is no corroborative evidence, but because of the way that lawyers approach the notion of proof, and restrict the evidence which may be used to support a finding that a parent has sexually abused the child. The High Court held in *M v M* (1988) that the Family Court could restrict or deny contact where there is an unacceptable risk of abuse. However, there are differences between judges of the court on the application of the test and, in particular, whether the assessment of risk needs to be based upon findings of fact from which that risk may be inferred. In assessing the risk to the child of abuse in the future, more attention needs to be paid to risk factors other than the contested accounts of past abuse, based upon which is known in the social science literature about intrafamilial child sexual abuse and, in particular, what is known about the way offenders 'groom' their child victims. This article proposes a four stage process for decision-making in the Family Court which will require the court to examine a range of possible risk factors, and also factors which may reduce the risk of abuse in the future. In this way, courts may be able to make findings based upon facts, even though the facts relied upon may not involve findings about past abuse.

F38

Neurodevelopmental impact of Maltreatment: Support materials

Bruce D. Perry (The ChildTrauma Academy, 5161 San Felipe, Suite 320, Houston, TX, USA)

This bundle of materials deals in point form with Brain Development, Brain Organization and Adaptive Responses to Trauma.

F39

Maltreatment and the Developing Child: How Early Childhood Experience Shapes Child and Culture

Bruce D. Perry (The ChildTrauma Academy, 5161 San Felipe, Suite 320, Houston, TX, USA)
Inaugural Lecture – The Margaret McCain Lecture Series

Human beings are complex creatures. While having the capacity to be humane, we also have the capacity to be cruel. Why? What determines whether a child grows up to be compassionate, thoughtful, and productive? Or Impulsive, aggressive, hateful, and non-productive? Is it genetic?

Likely not. Human beings become a reflection of the world in which they develop. If that world is safe, predictable, and characterized by relationally and cognitively enriched opportunities, the child can grow to be self-regulating, thoughtful, and a productive member of family, community, and society. In contrast, if the developing child's world is chaotic, threatening, and devoid of kind words and supportive relationships, a child may become impulsive, aggressive, inattentive, and have difficulties with relationships. That child may require special educational services, mental health or even criminal justice intervention.

The challenge for us is to help each child reach his or her potential to be humane. To better understand how, we must appreciate the remarkable malleability of our species and the unique role played by the human brain.

F40

Neurosequential Model of Therapeutics – Protocol for Core Elements of the Therapeutic Program in the Pre-school Setting

Bruce D. Perry (The ChildTrauma Academy, 5161 San Felipe, Suite 320, Houston, TX, USA)

The human brain develops from a small group of cells in early fetal life into a magnificent complexity of thousands of neural networks comprised of billions of neurons and glial cells and trillions of synaptic connections. This astounding construction occurs primarily in utero and in the first four years of life. Full understanding of neurodevelopment is well beyond the current capacity of the neurosciences; yet we do know the core principles underlying neurodevelopment.

The Neurosequential Model of Therapeutics uses a number of techniques from many sources. Each of these techniques is prescribed to give additional opportunities to master developmental issues, organized neural networks, and create permanent neural connections. This allows for organization, regulation, and development of neural networks needing enrichment. These techniques are prescribed as a result of a Neurosequential archaeological assessment completed on each child admitted to treatment by the treatment team.

F41

The Best Interests principles: a conceptual overview

Robyn Miller, Victorian Government Department of Human Services
Booklet in the Best interests series published by the Department of Human Services (2007)

This paper focuses on the Best Interests Principles of the *Children, Youth and Families Act 2005*.

F42

Cumulative harm: a conceptual overview

Robyn Miller, Victorian Government Department of Human Services
Booklet in the Best interests series published by the Department of Human Services (2007)

The writer discusses various manifestations of cumulative harm and provides a conceptual overview of the issue. The historical context is discussed, the theoretical underpinnings are explored and a range of relevant paradigms and research is presented under various headings.

A number of papers with relevance to child protection, child welfare and/or children's cases were delivered at the XVI World Congress of the International Association of Youth and Family Judges and Magistrates held at Melbourne in October 2002. The following papers are available in PDF format from the Court Liaison Officer at Melbourne Children's Court. Enquiries can be made by phone 8638-3399.

WCF16.1

Children's Court Clinics and Their Role in Informing Judicial Decision Making [2 PAPERS]

Dr Patricia F Brown (Director, Children's Court Clinic of Victoria)

Dr Gwenda Schreiber (Director, Children's Court Clinic, NSW)

A brief historical perspective is given by Dr Patricia Brown of the Victorian Children's Court Clinic. Emphasis is made on the need for independence of opinion, on a model of service which reflects the presenting problems of the court population and on where best to place such a service. The functions of the Clinic are discussed with its primary task of providing expert opinion in a family systems context and the priority given to teaching.

Dr Gwenda Schreiber illustrates the basic similarities of the two court clinics but also differences which relate to a new service needing more legal formalisation to forge a path and to the larger geographical and current demands in NSW.

WCF16.2

The Role of Experts in Assisting Courts in Children's Cases: A Judicial View

Justice Richard Chisholm (Family Court of Australia)

The Family Court benefits greatly from expert's reports in children's matters. Such reports are normally prepared by psychiatrists or psychologists with specialist qualifications or experience in child and family psychiatry. There are also 'family reports' prepared by counsellors attached to the Family Court. The authors of these reports are independent of the parties to the proceedings, in that they are either employed by the Court or engaged by it or by the child's representative. In addition, it is open to the parties to present their own expert evidence, subject to some restrictions. This paper discusses the preparation of such expert reports and the evidence given when the authors are cross-examined on them in court. It considers the way in which experts can most assist the court, and how they might deal with some of the problems they face. It suggests that many of the difficulties facing report writers can be addressed by considering three essential components of such reports: a body of information, a chain of reasoning, and the conclusions.

WCF16.3

The Children Act 1989 - England and Wales

District Judge (Magistrates' Courts) Nicholas Crichton

The Children Act 1989 distinguishes 'private law' (issues to be dealt with on the break-up of marriage/relationship) from 'public law' (child protection issues where the state intervenes). In all matters relating to children there are 3 basic principles:

1. The welfare of the child is paramount.
2. Delay is detrimental to the interests of the child.
3. The court should not make an order unless by doing so it can improve the child's circumstances.

This paper discusses some aspects of the public law, the newly created Children and Family Court Advisory Court Service and the President's Inter-Disciplinary Committee, as well as highlighting the increasing recognition of the need for specialization in family law, the Inner London Family Proceedings Court being the first discrete, specialised family proceedings court in England and Wales dealing solely with children's work.

WCF16.4

Alternative Futures of Families, Communities and Courts

Jim Dator (Department of Political Science and Hawaii Research Center for Futures Studies, University of Hawaii, Honolulu, HI, USA)

This paper briefly discusses what futures studies is and is not, reminds the reader of the dire present and problematic future of children and families but suggests that, as dire as the present might be, the condition of children and families is much better now than it ever was in the past. The paper concludes by suggesting how electronic, biological, and nano-technologies might over the span of the 21st century transform humans and human society into something without historical precedence.

WCF16.5

Judicial Management of Complex Child Abuse Cases

Justice Linda Dessau (Family Court of Australia)

Family law cases involving complex issues of child abuse are at the most difficult end of the spectrum of residence and contact cases. The difficulties are compounded where, as in Australia, there is some fragmentation of services and jurisdiction between child protection on the one hand and family law disputes on the other.

The paper highlights some of the complexities and showcases the special case management approach recently adopted by the Family Court of Australia in the "Magellan Project". At the heart of this project was a co-ordinated and co-operative approach between the Court and outside agencies including Legal Aid, Child Protection and Police; a judge-led team approach within the Court; and the investment of resources in the early stages of litigation.

WCF16.6

Juvenile Dependency Drug Treatment Court (focussing on parents with serious substance abuse problems who are willing to comply with strict treatment plans established by the Drug Court Team) [PAPER + 32 MINUTE FILM]

Judge Len Edwards (President, Santa Clara County Superior Court, California, USA)

The Santa Clara County Juvenile Dependency Drug Treatment Court is one of only a handful of such courts in the USA. Drug courts are very popular in the United States but most are located in the criminal or juvenile delinquency courts. This Drug Treatment Court is established in a dependency jurisdiction and involves the parents of children who have been abused or neglected. In most dependency courts in the USA substance abuse is the presenting problem for parents who have abused or neglected their children. This court brings together under the leadership of the court a team of professionals including the attorneys and social workers in dependency cases and substance abuse professionals. To this team the Santa Clara court has added domestic violence and mental health experts, a public health nurse, a housing expert, and a welfare to work representative. Over the past 4 years the team has developed protocols and policies which have refined the ways in which clients are assessed for substance abuse problems, the application process, regular case reviews before the Drug Treatment Court, rewards and punishments, and the relationship between progress in the Drug Treatment Court and the child welfare proceedings which are separate. The Drug Treatment Court has been evaluated and the results are promising.

WCF16.7

Children and Family Law - Paramount Interests and Human Rights

The Hon Justice Michael Kirby AC CMG (High Court of Australia)

This broad-ranging paper lists some profound changes to the social context upon which family law is required to operate today in many countries, including Australia and asks a number of questions. Why, when compared to the years and even centuries that went before, have we seen so many radical alterations? The increase in the breakdown of lifelong relationships? The increase in serial personal relationships? The reduction in the number of births within such relationships? The virtual disappearance of the stigma of illegitimacy and the unmarried state? The expended demands for recognition of new human relationships,

including those of de facto married opposite-sex couples and same sex couples? The suggested expansion of the concept of 'marriage' itself to include civil unions other than those between a man and a woman for life? The desire of single and infertile couples to secure children using the modern technology of human reproduction? Even the demand of some couples to have access to progeny produced by techniques of reproductive cloning?

The aspect of profound change to the social context of family law upon which the paper primarily focuses is the issue of relocation of a mother having custody of a child. Because of the growth of international travel, especially in countries like Australia with large immigrant populations, this would seem to be a problem likely to increase rather than to diminish. It is a problem which faces virtually every legal system.

Under the heading "The National Relocation Paradigm" His Honour discusses the case of *AMS v AIF* (1999) 199 CLR 160 in which the High Court dealt with a proposed relocation of the custodial parent from Perth to Darwin. Although distances were great, the move was within the one country. The High Court explored the issue of relocation and held that "a more relaxed attitude should be adopted to relocation within Australia than relocation overseas".

Under the heading "The International Relocation Challenge" His Honour discusses the case of *U v U* (2002) 191 ALR 289 in which the High Court was faced with a proposed relocation of the custodial parent (mother) from Australia to India. The trial judge had made a parenting order in favour of the mother but the order required her to live close to Sydney. Her appeal to the Full Court having been dismissed, the mother appealed to the High Court. By a majority of 5 to 2 the High Court dismissed the appeal. The issues of relocation were fully debated, the mother relying on a series of English cases culminating in *Payne v Payne* [2001] 2 WLR 1826. His Honour explains the views expressed in the case of *U v U* and identifies and discusses the difficult problems presented by cases of international relocation.

WCF16.8

The Challenge of the International Institute of the Rights of the Child [PAPER IN ENGLISH & FRENCH]

Judge Michel Lachat (President, Juvenile Court, Switzerland & Founding Member of the IDE [International Institute for the Rights of Children])

It has been 75 years since the League of Nations adopted the first Declaration of the Rights of the Child in 1924. We have come a long way since then, culminating in the Proclamation of the United Nations Convention on the Rights of the Child on 20/11/1989. The convention confers on the child a new, revolutionary status. He or she is no longer viewed as an inchoate adult but rather as a fully-fledged person who has rights that he or she can assert independently. Since then there has been a profusion of international treaties concerning children's issues, most notably:

- The African Charter on the rights and protection of the child (ACRPC) (1990)
- The Guiding Principles of Riyadh on the prevention of juvenile delinquency (1990)
- The Havana Rules on minors deprived of liberty (1990)
- The Convention of the Hague on international adoption (1993) which came into force on 01/05/1995
- The Interamerican Convention on International Trafficking of Minors (1994)
- Convention No.182 on banning the worst forms of labour and taking immediate action to eliminate them (1999).

The great challenge with regard to the rights of the child is to ensure that the conventions and treaties are effectively and tangibly enforced in the field. With this in mind, a small group of people who are knowledgeable in this field came up with the idea of establishing an "International Institute for the Rights of the Child" which would bridge the gap between theory and practical implementation of the most important treaties by:

- a) publicising the relevant international instruments;
- b) helping those who are called upon to enforce them to understand their practical significance;
- c) raising awareness of the rights of the child among those who are responsible for the protection of minors;
- d) providing inspiration to national legislators in all areas pertaining to children;
- e) fostering a "rights of the child" culture and consciousness.

This paper details some of the work of the Institute and its affiliated organizations.

WCF16.9

New Zealand Initiatives in Decision Making Around Child Protection Issues

Judge Patrick D Mahoney (Principal Family Court Judge, District Court of New Zealand)

The Children, Young Persons and Their Families Act 1989 and the Domestic Violence Act 1995 are examples of contrasting pieces of New Zealand legislation passed in response to different social pressures and needs within a six year period. The Acts embody two quite different approaches and reflect different societal expectations of Courts and the legal system.

This paper discusses in some detail the operation of both of these acts and concludes with some interesting questions and observations.

On the one hand the Children, Young Persons and Their Families Act shows a confidence in the ability of the family to deal with care and protection issues, supported by the State, with the legal process being managed by the Family Court, i.e. minimal intervention. Does this place reliance on the family too far ahead of care and protection of children? Put another way, can care and protection issues be adequately addressed by this process?

On the other hand, the Domestic Violence Act provides for legal intervention through Court orders, cutting across family connections and promoting children's safety ahead of family relationships. In the past the law had tended to be more passive than this. Which is the right approach?

These two statutes highlight the changing environment in which Family and Youth Courts works to promote fair and realistic outcomes for parties and their children. Against a background of change and conflicting expectations of Courts there is the paramountcy principle - the single overriding principle against which all other considerations must be measured. In each case the Court must look at the individualised circumstances of the family before the Court. This is the task and challenge facing our Courts.

WCF16.10

The Scottish Children's Hearing Systems: An Integrated Approach

Mr Alan D Miller (Principal Reporter, Scottish Children's Reporter Administration)

Since 1971, Scotland has pioneered a radical and integrated approach to care and justice for children. The key elements of the Scottish Children's Hearing Systems are:

- The same system deals with children who offend, children who are at risk, abused or neglected (often they are the same children).
- The focus of the system is on addressing both welfare needs and behaviour, in the context of the family and the community.
- Cases are screened by an independent public official, the Children's Reporter.
- Decisions about public intervention are made by a lay tribunal (the Children's Hearing) following round the table dialogue.
- The courts have specific roles restricted to adjudicating on disputed evidence and hearing appeals.

Recent developments in the system have focussed on:

1. managing the impact of international human rights obligations so as to maintain the ethos of dialogue at the heart of the system; and
2. improving the effectiveness of services, and of the system as a whole, at addressing youth offending.

International research evidence increasingly demonstrates the necessity of a joined-up approach to the "needs and deeds" of children and young people who are at risk or already offending. Active encouragement with the child and family is also critical to dealing effectively with youth crime and its causes. As it focuses increasingly on achieving better long-term outcomes for troubled and troublesome children, the aspiration for Scotland's Children's Hearings System is that it should become demonstrably world-class as a 21st century system of care and justice for children.

WCF16.11

Why Children's Participation in Decision-Making is Important

Ms Moira Rayner (Formerly Director, Office of the Children's Rights Commissioner for London; In October 2002 Acting Commissioner for Equal Opportunity)

This fascinating paper starts with a compelling illustration of its theme:

"I began legal practice 30 years ago. One of my first cases required an appearance in a Children's Court. I was instructed to prevent an order for care and protection being made with respect to a teenager whose response to her family breakdown had been to attempt suicide. Nobody represented her. She wasn't even in the court, though she was 15 years old. The Departmental social worker advised the court it was in the child's best interests. I acted for the mother who said it wasn't. The order was made and the child was placed in an institution from which she then ran away repeatedly for which she was repeatedly punished.

It was not until her case was well over that the fact and extent of my mother's condonation, connivance and collusion of her husband, the father's sexual exploitation of all of their six children became known. Neither the magistrate nor the social workers nor the lawyers for the respective parents, all claiming to be advocating the 'best interests' of the suicidal girl actually spoke to her. I found out the truth while preparing her mother's divorce petition (fault-based, in those days) and had to speak to the other children to establish the evidence (adultery). My client, the mother, expressed astonishment. The children insisted, 'We told you'. She honestly believed they never had.

It was a lesson that parents have various and fluctuating capacities to protect their children's rights, and sometimes-conflicting interests interfere with the children's. My client wanted to keep her marriage and so did not 'see' the monstrous behaviour of her husband. 'Natural' guardianship is not enough protection for children's rights.

This did not prevent my slipping into another lawyers' error. When I represented children directly in various courts I began to assume that I was an expert in assessing the 'best interests' of my clients, simply because I was so familiar with the courts and could predict what judges would probably do. After another catastrophic incident involving child abuse I realized I was no expert on what is good for another person. I was making things worse. So I resolved to work out a policy approach to the role of lawyers who represent and advise children."

The author then discusses her work as founding Director of the Office of the Children's Rights Commissioner for London, a non-government 'children's rights commissioner' and the fundamental principle which underpins it: the protection of children's rights, including the right to "participate". The author concludes:

"Involving children in adult decision-making is necessary because they learn to use the little power they actually have. Like talent, children's social and negotiation skills grow through use, and their judgment through trial, error, success and compromise. They become involved with their families, adults and society's rules. They learn that participation is a normal and useful social function. They learn that they can influence their own lives and create positive social change and they are far more likely to respect the rights of others.

The most important reason for children's participation is, as ever, an adult benefit. In respecting children's rights, we remind *ourselves* that children are important and that what matters for children is their lives, here and now. A rights-owner has to be taken seriously; participation implies respect and equality.

In the words of Korczak [who refused to leave his children in a Warsaw orphanage and went with them to Treblinka]:

'Children are not the people of tomorrow, but people today. They are entitled to be taken seriously. They have a right to be treated by adults with courtesy and respect, as equals.'"

WCF16.12

Juvenile Domestic and Family Violence: An Evaluation of a Specialized Juvenile Court Program

Dr Inger Sagatun-Edwards (Chair, Administration of Justice Department, San Jose State University, San Jose, California USA) & Hon Eugene M. Hyman (Juvenile Domestic and Family Violence Court, Superior Court, Santa Clara County, San Jose, California, USA)

Juvenile domestic and family violence has become a growing problem while courts have largely ignored the issue. This paper briefly summarizes relevant research and legislation, and then describes and evaluates an innovative juvenile court-based intervention program. In 1999 the Superior Court of Santa Clara County in California established the first Juvenile Domestic and Family Violence Court Program in the U.S., with a dedicated court calendar and probation unit, enhanced services for offenders and victims, and interagency collaboration. Here domestic violence refers to violence against a boyfriend/girlfriend, while family violence refers to violence against siblings and parents.

The juvenile and adult court records of the youth in the program and a comparison group were tracked over two years. We also recorded the minors' demographic background and history of child abuse and family violence. The data show more female domestic violence offenders than typically found for adult offenders. Among the family violence offenders, there were significantly more females, often with a history of mental violence. Most minors had a history of prior delinquency, and almost half came from homes with a history of child abuse and family violence. Within the intervention group, the offenders who completed the court-based program had significantly lower recidivism rates than those who did not. They also had fewer new DV/FV offences than the comparison group, but more new probation violations, due to the increased supervision in the court program. These data show the importance of a proactive juvenile court response to juvenile domestic and family violence.

WCF16.13

Child Abuse: Judicial Discretion in the Scottish Civil Courts

Sheriff A V Sheehan (Scottish Law Commission, UK)

The management of child abuse cases in Scotland is to some extent determined by the authority or agency to which the allegation of abuse is made. When the allegation arises in the course of a family or matrimonial dispute in the civil court, the sheriff or judge is given very wide discretionary powers as to how matters are to proceed. This flexibility of approach is a key feature of Scottish procedure which is based on the principle that the welfare of a child is paramount. It also ensures that the allegation can be investigated promptly and without undue delay.

In the first instance, the sheriff or judge has numerous options as to how the allegation is to be investigated, how the facts are to be established and how much weight is to be placed upon it. He may order a special hearing for evidence to be led; he may order an independent reporter to investigate the allegation; he may refer the matter to the Reporter to the Children's Hearing, a non-judicial authority specialising in child welfare; he may report the allegation to the Social Work Department; or he may order that it be brought to the attention of the public prosecutor. Thereafter, if the allegation is substantiated, the court has considerable discretion as to the most appropriate course of action to be taken and in reaching its decision, the views of the child must, if possible, be considered. In addition, the child may also become a party to the action by means of a *Curator ad litem*.

WCF16.14

How Can We Interpret What Children Say?

Ms Rosa Silvestro (Family Court Counsellor - Melbourne Registry)

Interviewing children can be a challenge even for the skilled professional. This stimulating paper presents an overview of the most important factors about which a professional needs to be mindful when interviewing or speaking with children and focuses on broadening our understanding of what children say so that they are heard as accurately and as well as possible so that subsequently we can respond appropriately to their needs. In interviewing children and making assessments, we apply theories which seek to explain human behaviour,

theories of child development, attachment, socio/linguistic development, moral development and so on. But we also need to:

- STOP: to get into the child's world, step into their shoes;
- LOOK with the eyes of the child; and
- LISTEN to what the child is saying.

The author then lists the 4 developmental stages-

1. THE BABY The Snuggler *Ability to grow and thrive*
2. THE TODDLER The Explorer *Attachment issues*
3. THE PRE-SCHOOL CHILD The Actor *Behavioural responses*
4. THE SCHOOL AGED CHILD The Builder *Loyalty conflicts*

and discusses the cues and pitfalls of communication with each but limiting the 4th category to children under 8.

The paper concludes with a bibliography of recommended reading:

- Myers, Goodman, Saywitz, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviewers and Courtroom Testimony*, 27 Pacific Law Journal 1, 26 (1996)
- M Aldridge & J Wood, *Interviewing Children: A Guide for Child Care and Forensic Practitioners*, Wiley & Sons (1998)
- Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective*, 2nd ed., American Bar Association (1999)
- K Budd, L M Poindexter, E D Felix & A T Naik-Polan, *Clinical Assessment of Parents in Child Protection cases: An empirical analysis*, Law and Human Behaviour 25, 93-108 (2001).

WCF16.15

Fortressing the developed world: Emerging trends in asylum procedures and detention practices and the impact on children and families fleeing persecution and war.

Paris Aristotle AM (Director, Victorian Foundation for Survivors of Torture)

It is often said that one of the first casualties of war is truth, but perhaps the most enduring casualty lies in the shattering of childhood innocence. In the madness of armed conflicts, persecution and abuse are commonplace and instead of hope, it is devastation and hopelessness that characterise the future of a young person. However, it is not only the act of war that defines this bit also the manner in which the international community responds to young people as refugees in countries of first asylum or as asylum seekers. The scale of this problem is enormous with more than 21 million people of concern to the UNHCR today of which an estimated 10 million are children.

The plight of refugees and asylum seekers has emerged as one of the most complex and controversial legal and public policy issues facing the international community. As developed nations increasingly fortress themselves from people seeking asylum and the activities of people smugglers, the fate and welfare of children takes a back seat in the planning and implementation of policy. Consequently, these attempts to keep the problems of poorer nations at a distance, have seen the spirit and meaning of various international human rights conventions eroded and a rise in xenophobia throughout the developed world.

WCF16.16

Reflections on a South African initiative: Empowering family law litigants in person

Elizabeth Baartman (Republic of South Africa)

The author of this interesting paper discusses in some detail the operation of her employer the PFLC, a not for profit company which provides family law services and whose primary aim is to increase access to justice by providing effective, affordable, accessible and professional services to clients in a self-sustainable manner. She also discusses the current provision of family court services - comprising maintenance, maintenance enforcement, domestic violence, divorce, contact and children's court proceedings - to citizens of South Africa and analyses the 5 pilot family courts established in 1997. While the author acknowledges that a

major failing of these pilots is that each of the areas of family law still operates in isolation - the author graphically describing the structure as "silos" - it is her view that one of the great successes demonstrated by the pilot courts is the emphasis placed on plain language and the interventionist role of the bench. She considers this approach to be critical in South Africa as over 85% of all people before the court are unrepresented and a large percentage of these are functionally illiterate and innumerate. She concludes by noting that currently members of the PFLC are assisting the Department of Justice and Constitutional Development to strengthen the five pilot family courts and to provide a framework for the establishment of permanent family courts in South Africa.

WCF16.17

Is Truancy a Child Protection Issue?

Peter Green (Department of Human Services, Victoria)

In Victoria the relevant legislation in relation to truancy is:

- the Education Act 1958 which states that children between the ages of six and fifteen must attend school; and
- the Community Services Act 1970 which places the responsibility for school environment and attendance on parents.

Truancy as a child protection matter needs to be examined in the context of the Children and Young Persons Act 1989 which mandates child protection intervention when a child is "in need of protection" from significant harm. Truancy in itself is not usually a cause of significant harm and would not often lead to a need for protection. However the effect of truancy on a child's intellectual development may, in combination with other factors, lead to an assessment that a child is in need of protection. Alternatively, truancy may result from an attempt to conceal evidence of abuse, or from a child being required to fulfil inappropriate care responsibilities for younger siblings, from parental neglect, or problems with adjustment to the school environment as a result of harm caused by abuse. Thus truancy may act as an indicator of abuse when viewed in the context of all the circumstances of a child's life.

WCF16.18

A Community Response to Truancy - A Model for New Zealand

Pat Harrison (Otago Youth Wellness Trust, New Zealand)

Seven years ago two studies were undertaken in Dunedin following a rise in recidivist juvenile offending in both frequency and seriousness, together with a significant rise in school truancy. One study was on youth health in the city, the other on how well young people were aware of services available to them. Focus groups of young people presented their views. The outcome of the studies was the formation of a trust - a Young Welfare Trust - charged with the responsibility of delivering a reduction in truancy, a reduction in juvenile recidivist offending, a reduction in unwanted teenage pregnancies, a reduction in youth suicide, a reduction in the number of young people taken into State care and a reduction in drug and alcohol abuse. Education was the indisputable key and reintegration to schooling a focus. Truancy allows for unstructured time and the growth of anti-social behaviour. It prevents the development of healthy social interaction, the acquisition of language skills, the application of reason and the growth of intellect. This paper looks at the progression and of the Trust from 70 young people referred from schools and Youth Aid in its first year to the 300 current referrals and speaks of some of its achievements.

WCF16.19

Children's Participation in the Inquisitorial System

Judge Herlinde Van de Wynckel (Juvenile Court, Belgium)

This paper summarises how the inquisitorial system works in Belgium and discusses minors as parties in legal proceedings under 3 heads:

1. Juvenile law, encompassing juvenile delinquency and child protection.
2. Civil proceedings.
3. Criminal proceedings against adults with minors as victims.

WCF16.20

The Rights of the Child and African Traditions

Judge Dieudonné Eyike-Vieux (High Court of Justice, Cameroon)

Africa is the cradle of humanity. It is also unfortunately a continent where some scourges like poverty, famine, wars and diseases reign supreme. Because of numerous external influences, Africa is equally sandwiched between modernism and its traditions. Some traditions which are said to be negative constitute an obstacle towards the protection and promotion of children's rights. Because of these obsolete traditions, a great number of African children live in vulnerable conditions.

What are those traditions? Can the justice system contribute to their eradication? If yes, how can it proceed? Those are some of the questions addressed in this paper.

The traditions that hamper the rights of the African child are:

- food restrictions (eggs are forbidden to children in some countries);
- apprehension vis-à-vis the school (emerging tradition); and
- abuse in respect of bride-price (young people cannot get married easily).

The girl is particularly penalised here. She is a victim of excision or 'infibulation' which involves a total or partial closure of the vagina (almost half the African countries practice this), early or forced marriages (the youngest grandmother on earth is 16 and she is Nigerian), discriminations of all kind especially in the domain of education and the right to inherit. The boy ensures the perpetuation of the family. The girl enriches someone else's family.

The law condemns those traditions in almost all African countries. Magistrates and judges more and more are making courageous decisions in that domain. But retrograde mentalities, unawareness of the laws and the influence of some traditional chiefs still prevail.

Hope lies in the new generation of magistrates and judges, the recent creation of the African Court of Human Rights and a growing consciousness at the international level.

A number of papers with relevance to parents, children and families were delivered at the 9th Australian Institute of Family Studies Conference in Melbourne in February 2005 and are available at <http://www.aifs.gov.au/institute/afrc9/papers.html>.

