

5 [new]. FAMILY DIVISION – CHILD PROTECTION

THIS CHAPTER APPLIES FROM 01/03/2016. SEE THE OLD CHAPTER 5 FOR CHILD PROTECTION LAW BEFORE 01/03/2016.

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

5.1 Child abuse

5.1.1 The four overlapping categories

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

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

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

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

5.1.2 Emotional/psychological abuse

"I've met so many kids dying of malnutrition of the soul."

Senior Constable Nick Tuitasi (Programme Director Community Approach - New Zealand)

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

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

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

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

- I. **Parental emotional unavailability, unresponsiveness and/or neglect of the child.** Possible causes include mental illness, health problems, post-natal depression, parental substance abuse {"Put simply, drug abuse and motherhood do not mix": *DOHS v BK* [CCV-Ehrlich M, 26/05/2008]}.
- II. **Negative or mis-attributions to the child, leading to rejection and harsh punishment.** Examples include denigration, scapegoating, characterisations like 'bad chip off the old block'.

- III. **Developmentally inappropriate or inconsistent expectations and/or impositions on the child.** Examples include:
- expectations which are significantly above or below a child's developmental capabilities;
 - exposure to confusing or traumatic events and interactions (especially including domestic violence between adults).
- IV. **Failure to recognise or acknowledge the child's individuality and psychological boundary. Using the child for the fulfilment of the parent's psychological needs.** These include a parent's inability or unwillingness to distinguish between a child's reality and an adult's needs and wishes. Using a child as a tool in a contact dispute with the other parent is a common example. The Munchausen by proxy syndrome is a high-water mark.
- V. **Failure to promote the child's social adaptation.** Examples include:
- actively promoting mis-socialisation (corrupting);
 - failing to promote a child's social adaptation (e.g. by isolating the child or by not ensuring the child attends school);
 - failing to provide adequate cognitive stimulation and opportunities for learning.

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

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

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

- Over the last decade, evidence has continued to accumulate about the strong association between childhood maltreatment and social, emotional, behavioural, and cognitive adaptational failure as well as frank psychopathology, both in later childhood and adulthood (e.g. Ciccheiti & Toth, 1995; Post, Weiss & Leverich, 1994).
- The process of early brain development is constantly modified by environmental influences. Child abuse and neglect constitute one aspect of these environmental influences, which present the maturing child's brain with experiences that will crucially – and potentially adversely – affect the child's future development and functioning. The younger the infant, the more these environmental factors are mediated by the primary caregiver(s).
- It is possible that event-type abuse, which is more likely to be traumatic in nature, leads to different effects on the brain than do chronic emotional neglect and abuse.
- There is considerable evidence for changes in brain function in association with child abuse and neglect. The fact that many of these changes are related to aspects of the stress response is not surprising. The neurobiological findings go some considerable way towards explaining the emotional, psychological, and behavioural difficulties which are observed in abused and neglected children. Hyperarousal, aggressive responses, dissociative reactions, difficulties with aspects of executive functions, and educational underachievement begin to be better understood.

- The findings from neurobiological studies of brain development dealing with experience-expectant periods lead to an assumption of a deficit model, in which the lack of input to the developing child at certain critical stages of development will result in delay or absence of development of certain skills.
- Changes in the family's social context and in the child's immediate caregiving relationships, as well as the child's own adjustment, all influence the later outcome for the child's development.
- Since brain development is integrally related to environmental factors, active early intervention offers the greatest hope for children's future. The evidence on the protective effects of secure attachment in the face of stress clearly indicates a target for concern and treatment. In support of family preservation, there is a tendency to continue to attempt to bring about changes in parent-child interaction. When these are ultimately declared ineffective, adoption is contemplated. A good prognosis for a successful adoption is inversely related to the age of the child at adoption.
- A history of childhood maltreatment in a parent's own past is now recognized as one important risk factor in the abuse of children (e.g. Widom, 1989). This is, however, not an inevitable outcome (Langeland & Dijkstra, 1995).

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

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

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

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

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

"There is a growing body of research indicating that exposure of children to domestic violence is a significant risk factor to their short and long-term psychological health. Domestic violence between parents in the presence of a child exposes the child to high level stress and trauma, elevated fear states and high arousal at a time when, by definition, the parents are unavailable to the child as figures of comfort, reassurance or emotional support.

Recent research and scholarly analyses have presented compelling evidence linking early experience, brain organisation and social-emotional development. Joseph (1999), *Environmental influences on neural plasticity, the limbic system, emotional development and attachment: A review..* Child Psychiatry and Human Development, 29, 189-208) for example, describes research on the limbic system, located in the forebrain, which includes the hypothalamus, amygdala, and hippocampus. It serves the experience and expression of emotions and is associated with social-emotional development, including attachment. Research has shown that to develop normally, the nuclei of the limbic system require appropriate stimulation of a social, emotional, perceptual, and cognitive nature during the early months and years. If such experiences are not forthcoming, or if

the environment is abnormal or repeatedly traumatic, the neurons and the connections between them are abnormal, or simply die in an accelerated fashion. According to Joseph, nuclei in certain areas of the limbic system are particularly vulnerable during the first three years. He states: 'If denied sufficient (emotional) stimulation these nuclei may atrophy, develop seizure-like activity or maintain or form abnormal synaptic interconnections, resulting in social withdrawal, pathological shyness, explosive and inappropriate emotionality, and an inability to form normal emotional attachments.' (p.189)

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

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

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

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

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

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

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

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

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

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

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

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

The difficult question for the Court is to determine at what point a parent's inability to respond to a child's needs and/or to maintain a child's emotional/psychological well-being crosses the ill-defined border of minimum standards and becomes abuse within the meaning of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA').

5.2 Parent, Parental responsibility, Custody & Guardianship

5.2.1 Custody & guardianship [abolished concepts]

Prior to 01/03/2016 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. The concepts were defined in s.5 & s.4 of the CYFA as follows:

- **Custody:** "A person (including the Secretary) who has, or under this Act is granted, custody of a child has-
 (a) the right to have the daily care and control of the child; and
 (b) the right and responsibility to make decisions concerning the daily care and control of the child."
- **Guardianship:** "A person (including the Secretary) who has, or under this Act is granted, guardianship of a child has responsibility for the long-term welfare of the child and has, in relation to the child, all the powers, rights and duties that are, apart from this Act, vested by law or custom on the guardian of a child, other than-
 (a) the right to have the daily care and control of the child; and
 (b) the right and responsibility to make decisions concerning the daily care and control of the child."

5.2.2 Parental responsibility & major long-term issue

On 01/03/2016 s.5 & s.4 were repealed and in lieu of the concepts of 'custody' and 'guardianship' the new terms 'parental responsibility' and 'major long-term issue' were introduced. In s.3(1) of the CYFA these new terms are defined as follows:

- **“Parental responsibility**, in relation to a child, means 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’.
- **“Major long-term issue**, in relation to child, means 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 issues that were previously characterized as ‘guardianship issues’.

In the absence of a court order to the contrary, the parents of a child have joint parental responsibility for the child. The central aspect of the work of the Family Division of the Children’s Court is the determination of whether the best interests of a particular child require any – and if so what – constraint or limitation on the exercise by the parents of their parental responsibility or any transfer of parental responsibility to some other person or agency.

5.2.3 Definition of ‘parent’

‘Parent’ is defined in broad terms in s.3(1) of the CYFA which provides:

“[P]arent, in relation to a child, **includes**–

- (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 01/03/2016 category (d) in the above definition read “a person who has custody of the child”. Although the definition of ‘parental responsibility’ is significantly broader than the previous definition of ‘custody’, encompassing elements of ‘guardianship’ as well, the writer doubts that this amendment will – or was intended to – result in any significant expansion in the number of people who fall within the definition of ‘parent’. 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 subject child as opposed to persons who are merely ‘looking after’ a subject child, even if for an extended period.

However, the above definition of ‘parent’ in s.3(1) of the CYFA must be read subject to–

- ss.10C & 10D of the Status of Children Act 1974 (Vic) which provide irrebuttable presumptions that–
 - the biological father of a child conceived by a fertilisation procedure (either artificial insemination or implantation involving donor semen) is not the father of the child; and
 - the domestic partner of the mother is the father of the child provided that he consented to the procedure, such consent to be presumed but rebuttable;
- s.10E which provides irrebuttable presumptions that where a child is conceived by an implantation procedure where a donor ovum is used–
 - the biological mother and the donor of any semen used who is not the donee’s domestic partner are not the mother and the father of the child; and
 - the donee is the mother of the child; and
 - the domestic partner of the donee is the father of the child provided that he consented to the procedure, such consent to be presumed but rebuttable;
- ss.13-16 which provide irrebuttable presumptions that if a woman with a female partner or without a partner undergoes a procedure as a result of which she becomes pregnant–
 - the woman is presumed, for all purposes, to be the mother of any child born as a result of the pregnancy; and

- the woman's female partner – if she has one – is presumed, for all purposes, to be a legal parent of any child born as a result of the pregnancy provided she consented to the procedure and was the partner when the woman underwent the procedure; and
- the man who produced the semen used in the procedure is presumed, for all purposes, not to be the father of any child born as a result of the procedure, whether or not the man is known to the woman or her partner; and
- if a donor ovum was used, the woman who produced the ovum used in the procedure is presumed, for all purposes, not to be the mother of any child born as a result of the pregnancy.

The above presumptions prevail over-

- any contrary presumption that arises under s.8 of the SCA, including any contrary entry in the Registry of Births, Deaths and Marriages; and
- any contrary declaration of the Supreme Court under s.10 of the SCA.

In *Masson v Parsons* [2019] HCA 21 the appellant had provided semen to the first respondent to conceive a child with the belief that he was fathering the child. He had an ongoing role in the child's financial support, health and education, general welfare and enjoyed an extremely close and secure attachment relationship with the child. The child's mother, the first respondent, had been a close friend of the appellant for many years and later entered a de facto relationship with the second respondent. In 2015 the respondents decided to move to New Zealand and take the child with them. The appellant responded by seeking parenting orders in the Family Court, *inter alia* conferring shared parental responsibility between himself and the first and second respondents; restraining relocation of the child from the child's current area of residence in New South Wales and providing for the child to spend time with the appellant in a fortnightly cycle.

At first instance the Family Court had found that the appellant was not a "parent" under s.60H of the Family Law Act 1975 (Cth) which, *inter alia*, provides rules in respect of the parenting of children born of artificial conception procedures but was a "parent" within the ordinary meaning of the word, having provided his genetic material for the express purpose of fathering a child whom he expected to help parent by financial support and physical care, which he had since done. Hence her Honour held that he was a parent for the purposes of the FLA and made relevant parenting orders.

The Status of Children Act 1996 (NSW) is in broadly similar terms to the Victorian Act and the Victorian Attorney-General was an intervenor in the High Court. Section 79(1) of the Judiciary Act 1903 (Cth) provides:

"The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory to which they are applicable."

On appeal the Full Court of the Family Court held that the appellant was not a parent of the child. Contrary to the primary judge's reasoning the Full Court held that s.79 of Judiciary Act picked up s.14 of the Status of Children Act 1996 (NSW) and as a result the appellant was irrebuttably presumed not to be the parent of the child.

The High Court unanimously allowed the appeal, holding at [39] & [41] that "ss.14(2) & 14(4) of the Status of Children Act 1996 (NSW) are not provisions to which s.79(1) of the Judiciary Act are capable of applying" and in any event "if ss.14(2) & 14(4) were properly to be conceived of as provisions which regulate the exercise of State jurisdiction [in matters arising under the Status of Children Act], they could not be picked up and applied [as a law of the Commonwealth] under s.79(1) of the Judiciary Act because the FLA has otherwise provided". The appeal to the Full Court of the Family Court was dismissed and accordingly the parenting orders made at first instance were reinstated.

Counsel for the respondents and for Victoria had also submitted that even if ss.14(2) & 14(4) of the Status of Children Act 1996 (NSW) were not picked up and applied by s.79(1) of the Judiciary Act and even if they do not apply of their own force as part of the single composite body of law operating throughout the Commonwealth, the High Court should hold that the ordinary, accepted English meaning of "parent" excludes a "sperm donor". Rejecting those submissions, Kiefel CJ & Bell, Gageler, Keane, Nettle & Gordon JJ said at [54]-[55]:

"[T]he ordinary, accepted English meaning of the word 'parent' is a question of fact and degree to be determined according to the ordinary, contemporary understanding of the word 'parent' and the relevant facts and circumstances of the case at hand. To characterise the biological father of a child as a 'sperm donor' suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial

conception procedure on the basis of an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure. Those are not the facts of this case. Here, as has been found – and the finding is not disputed – the appellant provided his semen to facilitate the artificial conception of his daughter on the express or implied understanding that he would be the child's parent; that he would be registered on her birth certificate as her parent, as he is; and that he would, as her parent, support and care for her, as since her birth he has done. Accordingly, to characterise the appellant as a 'sperm donor' is in effect to ignore all but one of the facts and circumstances which, in this case, have been held to be determinative.

It is unnecessary to decide whether a man who relevantly does no more than provide his semen to facilitate an artificial conception procedure that results in the birth of a child falls within the ordinary accepted meaning of the word 'parent'. In the circumstances of this case, no reason has been shown to doubt the primary judge's conclusion that the appellant is a parent of his daughter."

However, because of s.10C of the Status of Children Act 1974 (Vic) the biological father in *Masson v Parsons* would be conclusively presumed not to be the father of the child under s.3(1) of the CYFA, notwithstanding that he fitted within limbs (a) & (e) of the definition in s.3(1), given that a finding of fact had been made that the child had been "conceived by a fertilisation procedure" in which he provided the semen.

There is an additional thought-provoking dictum in the joint judgment in *Masson v Parsons* 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." [emphasis added]

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."

A quite different fact situation from *Re D* is *Re CMR* [2020] VChC 8. The child CMR, aged 5y1m, had been living in the care of her maternal grandparents for over 4 years, first under an interim accommodation order and subsequently under a family reunification order. The Department had initially filed an application for a care by Secretary order and later an application for a permanent care order. The protective concerns revolved around the parents' serious illicit drug use, mental health issues, criminal offending and – in the early days of DHHS' involvement – family violence perpetrated by the father against the mother. After detailing the protective concerns, her Honour said at [35]: "In some ways, the enormity of these protective concerns highlights even more starkly the extraordinary efforts the parents have now made to turn their lives around and address the protective concerns."

Although appearing to concede that a family preservation order for the return of CMR to their care was not presently supported by the evidence, the parents opposed the making of a permanent care order. Their alternative positions were:

1. that the case be adjourned and the family reunification order varied to provide more frequent contact; or
2. failing that, a family preservation order to maternal grandparents – on the basis that they are CMR's 'psychological parents' with plentiful contact for the parents; or
3. failing that, a care by Secretary order.

Hubble M. placed the child on a care by Secretary order. In rejecting the parents' alternative proposal of a family preservation order to the grandparents, her Honour said at [75]-[76]:

"The parents submit that the maternal grandparents are the psychological parents of CMR, and that I could therefore make a Family Preservation Order in their favour. Such an order would have the benefit of allowing the Court to include a condition providing for contact between CMR and her parents.

A Family Preservation Order is designed to preserve or maintain the relationship between a parent (or parental figure) and their child. In this case, CMR came into the care of the grandparents by virtue of the protective intervention and has remained in their care by virtue of court orders. The Act anticipates that, in such a case, the carer will become a long-term carer for a child under either a Long Term Care Order or a Permanent Care Order. There is little indication in the Act that a Family Preservation Order is an alternative order which can be made in favour of a suitable person who has become a parental figure over the course of a protective intervention. In any event, my view is that the reunification of CMR into the care of her parents remains a possibility, and that contact between CMR and her parents should be progressed over the coming years. In light of these considerations, an order which is focused primarily on the preservation of CMR's relationship with her grandparents does not have the correct focus. As such, I have decided not to make a Family Preservation Order to the maternal grandparents, and will not express an opinion on whether the grandparents are 'parents' under the Act."

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5.3 Jurisdiction & Applications

The Family Division of the Court has jurisdiction to hear and determine each of the following applications relating to the protection of children. Most of these are listed in s.515(1) of the CYFA but several appear to have been accidentally omitted from that section.

5.3.1 Primary Applications

Proceedings involving the protection of a child are initiated in the Family Division of the Court by filing – pursuant to s.214 of the CYFA – one of five primary applications on the relevant prescribed form [contained in the Children, Youth and Families (Children's Court Family Division) Rules 2017 [S.R. No.20/2017] with the appropriate registrar:

	PRIMARY APPLICATION	CYFA SECTIONS	FORM
1	Application for temporary assessment order	515(1)(g), 228-229	1
2	Protection application	515(1)(b), 162, 240-243	10
3	Irreconcilable difference application	515(1)(c) & 259-261	11
4	Application for permanent care order	515(1)(d) & 320	33
5	Application for therapeutic treatment order	515(1)(e) & 246	4

5.3.2 Secondary Applications

There are twelve types of secondary applications which can be initiated in the Family Division by filing the application with the appropriate registrar [s.214 of the CYFA]:

	SECONDARY APPLICATION	CYFA SECTIONS	FORM
1	Application for an interim accommodation order	515(1)(a) & 262	---
2	Application for care by Secretary order	515(1)(ca) & 289(1A)	23
3	Application for a long-term care order	515(1)(cb) & 290(1A)	25
4	Application for a therapeutic treatment (placement) order	515(1)(f) & 252	6
5	Application to revoke:		
	• a therapeutic treatment order	515(1)(h)(i) & 258	8
	• a therapeutic treatment (placement) order	515(1)(h)(ii) & 258	8
	• a temporary assessment order	515(1)(h)(iii) & 235	3
	• an undertaking – protective intervention	273	18
	• an undertaking – protection order	279	19
	• a family preservation order or a family reunification order	515(1)(j) & 304	28
6	Application to revoke:		
	• a care by Secretary order	515(1)(l) & 305	30
	• a long-term care order	515(1)(l) & 306	31
	• a permanent care order	515(1)(j) & 326	35
7	Application for leave to make an application to vary or revoke a permanent care order	515(1)(j)(iii) & 326(1)(b)	36
8	Application to vary:		
	• a temporary assessment order	515(1)(h)(iii) & 235	3
	• an interim accommodation order	515(1)(i) & 268	15
	• an undertaking	273 & 279	19
	• a supervision order, custody to third party order, supervised custody order, custody to Secretary order or interim protection order	515(1)(j) & 300	28
	• a permanent care order	515(1)(j) & 326	33
	• a therapeutic treatment/TT(placement) order	515(1)(h)(i)/(ii) & 257	8
8	Application to breach:		
	• an interim accommodation order	515(1)(m) & 269	16 17
	• a family preservation order	312-316	37
9	Application for a new interim accommodation order	515(1)(a) & 270	14 15

10	Application to extend:		
	• an interim accommodation order	515(1)(a) & 267	---
	• a family preservation order, a family reunification order or a care by Secretary order	515(1)(k) & 293	27
	• a therapeutic treatment order or therapeutic treatment (placement) order	255	9
11	Application for an order regarding the exercise of any right, power or duty vested in a person as a person with joint parental responsibility for a child	515(1)(n) & 283(3), 325	---
12	Application for an order arising out of a child protection proceeding transferred to the Count under an interstate law	515(1)(o) & Schedule 1	---

5.3.3 No inconsistency between *Migration Act 1958* (Cth) & CYFA provisions

The case of *The Secretary of the Department of Health and Human Services v AA and AB* [2017] VSC 34 involved the determination by Cavanough J of a special case stated by Judge Chambers under s.533 of the CYFA. The questions reserved were:

1. Is s.241 of the CYFA invalid pursuant to s.109 of the *Commonwealth Constitution*, to the extent that it authorised the Secretary to take the child into emergency care while the child was an unlawful non-citizen and the subject of residence determination under s.197AB of the *Migration Act 1958* (Cth)?
2. Is s.267 of the CYFA (when read with ss.262 and 263 of the CYFA) invalid pursuant to s.109 of the *Commonwealth Constitution*, to the extent that it authorises the Children's Court to extend the 5th IAO while the child is:
 - (a) an unlawful non-citizen; or
 - (b) the subject of residence determination?
3. Is s.280 of the CYFA (when read with ss.262 and 263 of the CYFA) invalid pursuant to s.109 of the *Commonwealth Constitution*, to the extent that it authorises the Children's Court to make a protection order in relation to the child while the child is:
 - (a) an unlawful non-citizen; or
 - (b) the subject of residence determination?

Cavanough J answered all three questions “No”, holding that there was no inconsistency between the relevant provisions of the CYFA and the relevant provisions of the *Migration Act 1958* (Cth) and hence there was no inconsistency (whether ‘direct inconsistency’, ‘covering the field inconsistency’ or ‘operational inconsistency’) between the State and the Commonwealth legislation. Accordingly the relevant provisions of the CYFA were not invalid. At [157]-[159] Cavanough J said:

[157] “As to Question 1 in particular, s 241 of the CYFA is not invalid to the extent inquired after, in short because there is nothing in the *Migration Act* inconsistent with s 241 itself and because, so far as action was taken by the Secretary’s delegate to place AB in emergency care pursuant to s 241, the Commonwealth authorities took no step to interfere with that action. Hence there was and is no ‘operational inconsistency’ vis-à-vis the administration of the *Migration Act*. It is unnecessary to decide whether there are other reasons why s 241 is not invalid to the extent inquired after.

[158] As to Question 2, s 267 of the CYFA (when read with ss 262 and 263 of the CYFA) is not invalid to the extent inquired after, in short because, once again, there is nothing in the *Migration Act* inconsistent with s 267 (as so read) itself, and because the power of the Children’s Court to make an order extending the fifth interim accommodation order is completely unaffected by the fact that AB is an unlawful non-citizen and completely unaffected by the fact that she is ‘the subject of the residence determination’. Nothing in the material before the Court gives the slightest indication that there is likely to be any clash between an order for the extension of the fifth interim accommodation order and the administration of the *Migration Act* in relation to AB. Nor is there any basis for considering that the putting into effect of an extension of the fifth interim accommodation order would or might involve ‘operational inconsistency’ vis-à-vis the administration of that Act. It is unnecessary to decide whether there are other reasons why s 267 of the CYFA (read with ss 262 and 263) is not invalid to the extent inquired after.

[159] As to Question 3, s 280 of the CYFA is not invalid to the extent inquired after, in short because, yet again, there is nothing in the *Migration Act* inconsistent with s 280 and because

the power of the Children's Court to make a supervision order (or, now, a family preservation order) is completely unaffected by the fact that AB is an unlawful non-citizen and completely unaffected by the fact that she is 'the subject of the residence determination'. Yet again, there is nothing in the material before the Court to give the slightest indication that there is likely to be any clash between the making of a supervision order (or, now, a family preservation order) in respect of AB and the administration of the Migration Act in relation to AB. Nor is there any basis for considering that the putting into effect of a supervision order/family preservation order in respect of AB would or might involve 'operational inconsistency'. It is unnecessary to decide whether other reasons lead to the same result."

5.4 Temporary assessment order

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

5.4.1 Application

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

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

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

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

5.4.2 Procedure for hearing of application

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

5.4.3 Matters to be considered by the Court

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

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

5.4.4 Pre-conditions for making of TAO

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

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

5.4.5 What TAO may provide for

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

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

5.4.6 Report

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

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

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

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

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

5.4.7 Duration

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

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

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

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

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

5.4.9 Appeal

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

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

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

If the Court makes an order dismissing an application by the Secretary for leave for the *ex parte* hearing of an application for a TAO, the Secretary may appeal to the Supreme Court against that dismissal [s.239(2)]. The powers of the Supreme Court on the appeal are in ss.239(3) & 239(4).

5.4.10 Statistics

There have been comparatively few applications for temporary assessment orders. From 01/10/2007 – when the order first became available – to 30/06/2019 there were 120 TAOs made. For the financial year ending 30/06/2020 there were 16 TAOs made.

5.5 Protection application

The principal way in which a case involving allegations of child abuse is commenced in the Court is by a protection application being filed with the Court by a protective intervener. In *DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 at [185] Bell J described protection applications as “statutory proceedings for the best interests of the child, akin to that of the traditional *parens patriae* jurisdiction and not for the resolution of the private legal rights of those involved. Such proceedings are neither *inter partes* nor adversarial in the ordinary sense that judicial proceedings usually are.”

Section 181 of the CYFA provides that the following persons are protective interveners:

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

Notwithstanding this provision and an identical provision in s.64(2) of the Children and Young Persons Act 1989 (Vic) [‘the CYPA’], a protocol has been in place since 1992 between the Department of Health & Human Services and Victoria Police, the effect of which is that only delegates of the Department act as protective interveners in Victoria.

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

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

- **Notice:** A notice is served on the parent and, if the child is at least 12 years old, on the child stating that a protection application in respect of the child will be made to the Court [ss.240(1)(a) & 243].
- **Apprehension and placement in emergency care:** The child is placed in emergency care by the protective intervener, either with or without a warrant, pending the hearing of a protection application [ss.240(1)(b) & 241-242]. In such a case the Court must hear an application for an interim accommodation order as soon as practicable and in any event within one working day after the child was placed in emergency care. Unless the Court hears such an application within 24 hours after the child was placed in emergency care, a bail justice must hear an application for an interim accommodation order in respect of the child as soon as possible within that period of 24 hours.

PERCENTAGE BY EMERGENCY CARE	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
	51.8%	54.8%	62.7%	64.3%	66.7%	64.0%	67.6%	67.8%
	2013 /14	2014 /15	2015 /16		2019 /20			
	71.5%	71.3%	72.1%		81.7%			

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

5.5.1 Grounds for initiating protection proceedings

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

CYFA/s.162(1)		PRE-REQUISITES
(a)	Abandonment:	The child has been abandoned by his or her parents and after reasonable inquiries: (i) the parents cannot be found; and (ii) no other suitable person can be found who is willing and able to care for the child.
Note: All 3 pre-requisites must be made out before a finding can be made on this ground. It is not sufficient that the child has been abandoned if there is another suitable person willing and able to care for the child.		
(b)	Death or Incapacity:	The child's parents are dead or incapacitated and there is no other person willing and able to care for the child.
Note: Both pre-requisites must be made out before a finding can be made on this ground. Incapacity is frequently a consequence of the custodial parent being admitted to a psychiatric hospital as an inpatient or having a drug overdose.		
(c)	Physical abuse:	The child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.
(d)	Sexual abuse:	The child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.
<ul style="list-style-type: none"> In relation to a finding of unacceptable risk of sexual abuse see <i>M v M</i> (1988) 166 CLR 69. In relation to proof of sexual abuse, see <i>Re W (Sex Abuse: Standard of Proof)</i> [2004] FamCA 768; <i>Re W Abuse Allegations; Expert Evidence</i> (2001) FLC 93-085; <i>DHHS v County Court</i> [2018] VSC 322 The meaning of 'sexual abuse' is discussed further in section 5.5.6. 		
(e)	<u>Emotional/psychological abuse:</u>	The child has suffered, or is likely to suffer, significant emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.
(f)	Neglect:	The child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.
Note: Most cases involving a failure to provide basic care involve chronically filthy homes. Cases of failure to provide appropriate medical &c. care are fairly uncommon and sometimes involve a parent with a moral or religious objection to contemporary medical procedures.		

5.5.2 Actual or likely harm

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

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

New s.162(2) provides that for the purposes of ss.162(1)(c) to 162(1)(f) the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.

The rationale for this two-limbed system [i.e. (1) past or present harm or (2) likely future harm] is clear and was explained in the Second Reading Speech for the CYPA [08/12/1988, p.1152] as follows:

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

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

5.5.3 Determination whether a child is in need of protection

The question of whether any of the grounds under s.162(1) of the CYFA are established “is to be determined objectively” – as opposed to deciding whether such risk or harm was intended by the parent(s)’ actions: *MS & BS v DOHS* [County Court of Victoria, unreported, 18/10/2002] per Judge Cohen at p.18. Judge Cohen also held that the question of whether any of the grounds are established “is to be determined as at the time the protection application was made”.

In *Mr & Mrs X v Secretary to DOHS & Anor* [2003] VSC 140 Gillard J dismissed two applications by the parents for judicial review of Judge Cohen’s decisions and orders. The grounds to which Judge Cohen and Gillard J referred are those in s.63 of the CYFA which are in identical terms to the grounds now in s.162(1) of the CYFA. Although upholding Judge Cohen’s decisions and orders, Gillard J preferred the view – without formally deciding – that **determination of the grounds of a protection application is not confined to the date when the protection application was taken out but could take into account any relevant matters up to the time when the determination was actually made.** At [66]-[68] Gillard J said [emphasis added]:

[66] “At p.18, the learned judge [Cohen] said–

‘On my reading of s.63, the question of whether grounds are established is to be determined objectively ... and is to be determined as at the time when the protection application was made. In this case, although more than 15 months has passed in the meantime, I am to consider whether sub-parts (e) and/or (f) are established as at 30 June 2001, being the approximate date on which the respondent made the protection application.

I have reached the conclusion that each of the grounds in s.63(e) and s.63(f) is established in respect of A.’

[67] The learned judge posed the same question in relation to the child B. See p.29 of reasons.

[68] In my view, whether or not the children required protection as at the date when the interim order was made on 30 June 2001, or whether the children required protection on 31 January 2002 being the date of the Children’s Court orders, are not the questions on the appeal. However, it is important to consider the learned judge’s reasons as a whole. **It is very clear that the learned judge considered and determined the question in light of all the evidence adduced in the appeal in September 2002.** I refer in particular to p.10 dealing with A’s schooling, and p.17 et seq relating to her health. In respect to B, I refer in particular to p.27 et seq. **It is clear from her reasons given under the heading “Appropriate Disposition” (p.30) and her conclusion (p.37 et seq) that her Honour did consider the facts as at the date of the appeal and came to the view that she should make a protection order in respect of each child based on the circumstances then existing.”**

This issue arose before Hubble M in the case of *DHHS v C1, C2 & C3* [2020] VChC 7 in the following way. C1 (born 08/08/2005), C2 (born 01/12/2005) and C3 (born 21/04/2012) are the daughters of the father F and the mother. On 05/03/2019 the Department had filed protection applications by emergency care for each of the three children, alleging that they had suffered or were likely to suffer physical, sexual and emotional harm pursuant to ss.162(1)(c), 162(1)(d) & 162(1)(e) of the CYFA.

The protective concerns relied on by the Department in filing the protection applications related to disclosures made by C1 and C2 to police in December 2018 that F had, for some time, been subjecting them to unwanted sexual attention. These disclosures also prompted the police to file an application for an intervention order against F under the *Family Violence Protection Act 2008*. After a contested hearing before Hubble M in October 2019 her Honour found that it was more likely than not that F did commit family violence against C1 and C2, and that the girls should be protected by an intervention order until 07/11/2021. This order contained two conditions:

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

Subsequently, on or around 27/05/2020, a further protective concern arose when the Department received a report that C1 had been subjected to physical abuse by F. This gave rise to the question whether evidence of this abuse – which occurred nearly 15 months after the filing of the protection application – could ground an independent determination under ss.162(1)(c) & 274 that C1 was in

need of protection from actual physical harm caused by F. In the event Hubble M held that it could, saying on 11/12/2020 at [17]-[19]:

[17] "The question of whether any of the grounds under s.162(1) of the Act are established is to be determined objectively. It has also been said that the question is to be determined as at the time when the protection application was made: see *MS & BS v DOHS* [County Court of Victoria, unreported, 18/10/2002] per Judge Cohen at p.18. **In my view, it is by no means clear that the decision of Judge Cohen on the timing of 'proof' is correct. In fact, I lean towards the view that the court can take into account events which post-date the filing of a protection application in determining the question whether a child is in need of protection.** The grounds set out in section 162 simply provide the statutory criteria for a finding that 'a child is in need of protection'. The question whether a child is in need of protection arises in several contexts. First, a protective intervenor who has reasonable grounds for a belief that a child is in need of protection may file a protection application under the Act pursuant to sections 240 and 241. Secondly, a finding that a child is in need of protection enlivens the court's jurisdiction to make a protection order by virtue of section 274 of the [CYFA which is in virtually identical terms to s.84 of the CYP A]. The terms of the power conferred on the court differ from the terms of the power conferred on the protective intervenor in one material respect – the protective intervenor need only have reasonable grounds for their belief that a child is in need of protection at the time a protection application is filed. By contrast, **under section 274, the court is required to consider whether a child *is* in need of protection before going on to make a protection order. This means first that the court is not required to embark on an inquiry whether the grounds relied upon by the protective intervenor were reasonably held at the time the protection application was filed. Secondly, the use of the present rather than past tense in section 274 points towards a consideration of the protective concerns at the time the court is contemplating the making of a protection order. The purposes of the Act, which include the protection of children [see s.1(b)], are promoted by such an interpretation. It would be a nonsense if the court is required to disregard protective concerns which arise subsequent to the filing of a protection application when the court is considering the question whether a child is in need of protection for the purposes of making a protection order.**

[18] It is also well established that proof that a child is in need of protection may be based on either actual harm or a likelihood of harm.

[19] In *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at 585 Lord Nicholls of Birkenhead (with whom Lord Goff of Chieflly & Lord Mustill agreed) held that in the similar provision in s.31(2)(a) of the *Children Act 1989 (Eng)*, the phrase 'likely to suffer' means a real possibility that cannot sensibly be ignored having regard to 'the nature and gravity of the feared harm in the particular case'. [emphasis added]

Hubble M determined that as a consequence of the incident in May 2020 C1 had suffered actual physical harm from F, her Honour saying at [20]:

"I have previously found that the father engaged in sexualised behaviour towards C1 in the manner disclosed by her to the police when she participated in the VARE. There is little doubt in my mind that C1 has suffered significant emotional harm due to the unwanted sexual attention of the father, and the consequences that flowed from her disclosure of that abuse, which include being subject to duress and hostility by family members. I heard evidence from [Ms X], a Registered Psychologist...who assessed and counselled C1 between May and July 2019. She administered psychometric testing to C1 and reported that C1 experienced clinically significant levels of depression, anxiety, anger and disruptive behavior, and significant disruption to her primary attachment relationships. C1 also reported recurrent thoughts of self-harm. I am satisfied that C1 has suffered significant harm as a result of sexual abuse, and accordingly ground 162(1)(d) is made out. **I am also satisfied that the father physically assaulted C1 on or around 24 May 2020, and that the physical assault caused C1 significant harm as a result of a physical injury**, noting that in *Director-General of Community Services Victoria v Buckley & Others* [Supreme Court of Victoria, unreported, 11/12/1992] O'Bryan J. said: "The word 'significant' means 'important', 'notable', 'of consequence'." While there was no medical evidence tendered to the Court, the photographs disclosed significant bruising on C1 and at least one abrasion. **Accordingly, ground s162(1)(c) (physical injury) is proven on the basis of actual harm.** I am also satisfied, on the basis of the evidence given by [Ms X], that ground s162(1)(e) is proven on that the basis that C1 suffered emotional or psychological harm which has significantly damaged her emotional development." [emphasis added]

With respect the writer agrees with the interpretation of ss.162(1) & 274 preferred by Hubble M, consistent as it is with the dicta of Gillard J in *Mr & Mrs X v Secretary to DOHS & Anor* at [68].

In *DHHS and Sakin (a pseudonym)* [2020] VChC 4, Parkinson M conducted a detailed forensic analysis of the evidence in the course of her finding that allegations that the father had subjected the mother and the 3 children to ongoing family violence were not made out. Accordingly her Honour dismissed the protection applications for the children and the police applications for intervention orders in relation to the mother and the children.

It is no defence to an allegation of child abuse that the impugned conduct is honestly believed by a parent to be culturally appropriate. In *DHHS v A* [Broadmeadows Children's Court-Power M, 13/12/2018] the writer found protection applications for four children of Samoan parents proved on the physical and emotional abuse grounds, saying at p.35:

"In my view it is more likely than not that the litany of reports of physical discipline underpinning this case has a cultural genesis. However, no person disciplining a child in Victoria is entitled to claim immunity from Victorian law on the basis of contrary cultural considerations. Any parent who physically disciplines a child in Victoria is at significant risk of falling foul of s.162(1)(c) and likely of s.162(1)(e) as well."

In *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35, A2 was the mother of two young girls who had been subjected to a "female genital procedure" called "khatna" by the second respondent. All 3 respondents belong to the Dawoodi Bohra community, whose members adhere to Shia Islam. The third respondent is the spiritual leader of the community. "Khatna" involves causing injury to a young girl's clitoris by cutting or nicking it. The procedure was said to be intended to suppress the development of a girl's sexuality as she attains puberty. The Crown did not suggest that the procedure has a basis in religion but rather suggested that it is cultural in nature. All three respondents were found guilty at trial of two counts of female genital mutilation contrary to s.45(1) of the Crimes Act 1900 (NSW). The trial judge's charge on the meaning of "mutilation" was upheld by the majority of the High Court. At [67] Kiefel CJ & Keane J said [emphasis added]:

"The approach of the trial judge to the construction of s 45(1)(a) is to be preferred as one which promotes the purpose of s 45(1)...[T]hat purpose was to prohibit all forms of **injurious female genital mutilation**, procedures which, the FLC Report [*Family Law Council, Female Genital Mutilation*: A Report to the Attorney General prepared by the Family Law Council (June 1994)] had observed, are not generally carried out by surgeons or with any precision. This context and purpose does not suggest an intention that any narrow or technical meaning be applied so as to exclude anatomical structures that are closely interrelated with the labia majora, labia minora or clitoris."

Although this is a criminal case based on NSW legislation, it has significant relevance to child protection proceedings throughout Australia, Kiefel CJ & Keane J saying at [23] [emphasis again added]:

"The FLC Report advised that female genital mutilation mostly occurs when a female child is between three and eight years of age [2.13]. It is not, the report stressed, a religious practice [2.15]. **The practice undoubtedly constitutes child abuse** [6.37]. The report identified a number of international instruments as relevant to the practice of female genital mutilation, including the Convention on the Rights of the Child [and also the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Declaration on the Elimination of Violence Against Women and the 1951 Convention and 1967 Protocol relating to the Status of Refugees]."

See also their Honour's judgment at [24], [46] & [55].

Section 215A of the CYFA – which replaced s.215(1)(c) in 2013 – provides that the "standard of proof of any fact in an application under [the CYFA] in the Family Division is the balance of probabilities". By this is meant proof of any **past** fact [compare s.162(3) of the CYFA in relation to the test for finding the likelihood of future harm].

In *DHHS v County Court* [2018] VSCA 223 at [65] Ginnane J held that the 'best interests' principles in ss.8 & 10 of the CYFA played no part in the determination of whether or not impugned conduct was or was not sexual abuse:

"I do not consider that in determining whether conduct is sexual abuse for the purposes of s.162(1)(d), that the court can take into account whether the best interests of the child principle contained in s.10 would support one answer or another. I do not consider that ss.8 and 10 require that the term sexual abuse in s.162(1)(d) is to be interpreted by any means other than the usual principles of statutory interpretation. That is because the determination of whether conduct is sexual abuse involves the application of those words in the statute to the facts found. However, if the court decides that any of the grounds in s.162(1) is established,, its jurisdiction to make protective orders is enlivened and in deciding the terms of any such orders, then it must apply the best interests principles contained in s.10.

His Honour's dicta would appear to apply equally to the other grounds in s.162(1) of the CYFA.

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

There is a strong distinction to be drawn between a finding that abuse has occurred in the past and a finding that there is an unacceptable risk of it occurring in the future. That is clear from s.162(3) of the CYFA which provides:

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

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

Hence the balance of probabilities test in s.215A does not apply to the determination of the likelihood or unlikelihood of the occurrence of a future event for the purposes of proof of a protection application.

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

"Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not...[L]ikely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case." [p.585]

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

"A decision by the Court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom....[A] court's conclusion that the threshold conditions are satisfied must have a factual base, and...an alleged but unproved fact, serious or trivial, is not a fact for this purpose. Nor is judicial suspicion, because that is no more than a judicial state of uncertainty about whether or not an event happened." [pp.590-591]

"The range of facts which may properly be taken into account is infinite. Facts include the history of members of the family, the state of relationships within a family, proposed changes within the membership of a family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, when taken together may suffice to satisfy the court of the likelihood of future harm." [p.591]

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

5.5.5 Meaning of 'significant damage' & 'significant harm'

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

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

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

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

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

"There are any number of reasons why this might have been the case other than the inference that [the child's] observed irritability was a symptom of psychological harm. It may have been simply a consequence of his removal from the care of the mother with whose body he had become familiar over the previous 9¼ months. It may have been an example of so-called '**PURPLE** crying'. The acronym '**PURPLE**' stands for **P** (peak pattern), **U** (unpredictable), **R** (resistant to soothing), **P** (pain-like look on face), **L** (long bouts of crying), **E** (evening crying). For further information about this phenomenon see, for example, the website of the Columbus Regional Hospital www.crh.org. The evidence that it peaked at the age of about 6 weeks is not inconsistent with the research into the phenomenon of '**PURPLE** crying', a phenomenon about which [the social worker] had never even heard. It may have had any number of other aetiologies. It is no disrespect to [the witnesses called] to say that they do not have the expertise to express an opinion about the cause of [the child's] irritability nor in fact did they purport to do so on their own behalf. Moreover, even if his irritability was evidence of psychological harm, there is no evidence that [the child's] emotional or intellectual development has been significantly damaged for the symptom disappeared after a few weeks."

5.5.6 Meaning of 'sexual abuse'

In *DHHS v County Court* [2018] VSC 322 the Children's Court had found that children EF [aged 14] & GH [aged 13] were in need of protection under ss.162(1)(c) & 162(1)(e) of the CYFA but did not find any actual or likely harm for either child as a result of sexual abuse under s.162(1)(d). The Department appealed to the County Court where, after a *de novo* hearing taking many days, the Judge reached findings similar to those of the Children's Court. The Judge rejected the father's evidence that he had not touched EF's bottom since she was very young and only to apply medicinal cream and that he had minimised his behaviour in his evidence. She accepted that the father's touching of EF's bottom had occurred and that it was unwarranted, at least by the time she had left the family home in July 2016 if not before. At [20]-[23] Ginnane J summed up the Judge's other findings as follows:

- the touching had occurred as referred to in EF's VARE, namely that her father had touched her on the bottom and had done so since she was young and it is now unwanted;
- the context of the touching was not sexual and that there was no grooming or escalation of the conduct;
- on the evidence available, the touching of EF's bottom was more likely a reflection of the father's desire to exercise power and control and a failure on his part to recognize that EF was uncomfortable with his conduct;
- the father had not touched GH's bottom or posed a risk of doing so; and
- the father should not be banned from the family home and that the risks to the children would be ameliorated by the stringent conditions attached to the family preservation orders.

Ginnane J held that the Judge applied an incorrect interpretation of the term 'sexual abuse' in s.162(1)(d). He quashed the family preservation orders and referred the cases back to the Judge to be reconsidered in accordance with law and with his reasons, saying further that the Judge could rely on the existing evidence and any other evidence she considers relevant: see [100] & [102]. At [46] & [49]-[53] Ginnane J stated:

[46] "Ground 1A alleges that the Judge erred in interpreting the term 'sexual abuse' in s.162(1)(d) of the CYFA as requiring proof that the father's conduct was motivated by a sexual intention and as not applying where the abuse was a way of exercising power or control...

[49] The Judge noted that the expert doctor confirmed that she did not have enough information to reach conclusions as to the father's motivation for touching EF. She accepted that it was plausible that such touching reflected a significant lack of sound judgment. She referred to the doctor's evidence that EF no longer wished to acquiesce in her father's conduct. But, she was not satisfied that the father's touching of EF's bottom was sexual abuse given the difficulties in assessing the exact circumstances and the father's intention.

[50] The Judge stated that no person could pinpoint the exact truths from any embellishments or exaggerations that may have occurred. As there was some uncertainty as to the context of the touching, she considered that some assessment of the father's motivation would also need to form part of such a positive finding.

[51] I consider that it is important to note that there was no evidence that the father's touching of EF was accidental and he did not explain his actions, but denied that he had touched EF's bottom in the manner she alleged.

[52] Ground 1A turns on the proper interpretation of the CYFA and the term 'sexual abuse'. That task begins with a consideration of the text of s.162(1)(d) itself and the meaning of that text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it seeks to remedy: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27.

[53] An important purpose of the CYFA is to provide for the protection of children: s.1(b) and s.10 – the best interests principle. Protection applications have been described as:

'[s]tatutory proceedings in the Children's Court are statutory proceedings for the best interests of the child, akin to that of the traditional *parens patriae* jurisdiction and not for the resolution of the private legal rights of those involved. Such proceedings are neither *inter partes* nor adversarial in the ordinary sense that judicial proceedings usually are: *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221 at 261 [185]."

At [66]-[71] Ginnane J stated [emphasis added]:

[66] "It is inappropriate to attempt a complete definition of the term 'sexual abuse', but only to interpret it for the purposes of its application to the facts that the Judge found. That is because other circumstances may arise that require an addition to, qualification or modification of a definition previously adopted.

[67] In my opinion, for the purposes of consideration of the facts that the Judge found, **the term 'sexual abuse' in s.162(1)(d) means conduct engaged in towards another person of a sexual nature without their consent, including touching a private part of their body, when the touching was not accidental and has no legitimate purpose such as a medical purpose.**

[68] The Judge did have to be satisfied on the balance of probabilities...that EF had suffered...significant harm as a result of sexual abuse. If the evidence had raised a possible innocent explanation for the touching, the context and any evidence of the purpose of the touching would have been relevant, for instance to exclude accidental conduct or touching for some legitimate purpose. But that was not this case on the facts that the Judge found. Therefore, I do not consider that the father's motivation had to be identified, as there was no evidence suggesting he had touched the child accidentally or for a legitimate purpose.

[69] In my respectful opinion, the Judge by stating that the intention and motivation of the father's touching were relevant adopted an incorrect interpretation of the term 'sexual abuse' in s.162(1)(d). **There was no requirement that the evidence established that the father had a motivation or intention to sexually abuse. Moreover, the father's**

conduct did not fall outside the term ‘sexual abuse’ because his touching of EF was more likely to reflect his desire to exercise power and control, and a failure on his part to recognise that EF was uncomfortable with the conduct. A desire to exercise power and control can be part of sexual abuse.

[70] The Judge accepted EF’s account of her father’s conduct and did not accept his denials. The father did not suggest any innocent explanation for touching EF’s bottom. There was no need for the Judge to require evidence of the father’s motivation.

[71] ...On the facts found by the Judge, the father’s intention and motivation did not have to be proved to establish the sexual abuse ground in s.162(1)(d). Rather, the issue was whether the father’s repeated touching of his daughter’s bottom in the manner found proved was sexual abuse within the meaning of s.162(1)(d).”

5.5.7 Statistics

In the following tables the figures for “Melbourne” ** include applications filed at Moorabbin Justice Centre and at Broadmeadows Children’s Court.

In 2000/01 3,081 protection applications were issued in the state. In 2001/02 2,527 protection applications were issued. This represented a decline of 18% state-wide although the number of protection applications issued at Melbourne Children’s Court increased by 6%. In 2002/03 the number of protection applications issued state-wide declined by a further 8%. However, in 2003/04 it increased by 3.5% to 2,399. In 2005/06 the number of protection applications filed state-wide increased by 12% over the previous year, in 2006/07 there was an increase of 6% and in 2007/08 a further increase of 8%. The trend was reversed in 2008/09 with a decline of 9.5%, most of which was in Melbourne and Barwon SW. In 2010/11 there was a 9% increase, fuelled by Melbourne, Grampians & Gippsland. In 2011/12 there was a massive 18% increase, fuelled by a 39% increase in Loddon Mallee and a 23% increase in Melbourne (including Moorabbin). The trend was briefly reversed in 2012/13 with a small 2.8% decrease but since then there have been significant increases each year until 2015/16: 14.8% in 2013/14, 13.5% in 2014/15 & 9.2% in 2015/16. In 2016/17 there was a small decrease, primarily due to large decline in Grampians which had had a one-off spike in 2015/16. However, in 2017/18 there was an increase of 8.1%, primarily in regional areas and in 2018/19 an increase of 10.7%, primarily in the Melbourne metropolitan area.

COURT REGION	PROTECTION APPLICATIONS ISSUED								
	2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13
Grampians	245	264	252	291	297	167	237	161	224
Loddon Mallee	214	225	270	242	253	360	283	393	367
Barwon SW	167	142	162	205	165	295	269	318	381
Melbourne **	1,464	1,800	1,843	1,997	1,658	1,616	1,855	2,282	2,093
Gippsland	283	238	313	347	360	263	341	396	370
Hume	231	247	261	271	301	303	285	296	302
TOTAL	2,604	2,916	3,101	3,353	3,034	3,004	3,270	3,846	3,737

COURT REGION	PROTECTION APPLICATIONS ISSUED									
	2013 /14	2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20			
Grampians	294	290	499	283	280	336	352			
Loddon Mallee	384	398	566	592	718	644	583			
Barwon SW	388	431	494	449	532	578	549			
Melbourne **	2,410	2,776	2,750	2,841	2,957	3,275	3,311			
Gippsland	416	443	513	534	643	545	599			
Hume	398	531	494	430	437	488	487			
TOTAL	4.290	4.869	5.316	5.129	5.567	5.866	5.881			

The majority of protection applications in Victoria are taken out on the grounds set out in ss.162(1)(c) & 162(1)(e) of the CYFA. A significant proportion of these have chronic domestic violence as an underlying cause. The breakdown of the grounds on the **5,881** protection applications issued in 2019/20 is shown below. No breakdown is available for actual harm compared with risk of harm.

S.162(1) CYFA	(a) Abandon	(b) Dead/Incap.	(c) Physical	(d) Sexual	(e) Emotional	(f) Neglect
2019/20	88	48	4,319	514	5,632	1,365

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

5.6 Irreconcilable difference application

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

- a person who has parental responsibility for a child [s.259(1)]; or
- a child [s.259(2)]-

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

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

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

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

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

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

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

5.7 Application for permanent care order

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

Under s.320(1) of the CYFA, an application for a permanent care order [Form 33] is made by the Secretary to the Department of Health & Human Services in relation to a person who is, or persons who are, approved by the Secretary as suitable to have parental responsibility for the child in lieu of the parents.

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

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

A therapeutic treatment order ['TTO'] and a therapeutic treatment (placement) order ['TTPO'] are orders of the Family Division of the Court which have been available since 01/10/2007 but have only been available for children aged 15-17 since 29/03/2019. A TTO requires a child aged 10-17 who has exhibited sexually abusive behaviours to participate in an appropriate therapeutic treatment program. The relevant statutory provisions are in ss.244-251, 255-258 & 349-355 of the CYFA.

A therapeutic treatment (placement) order grants parental responsibility to the Secretary for a child in respect of whom a TTO is in force. The relevant statutory provisions are in ss.252-258 of the CYFA.

5.8.1 Applications only by the Secretary – Referral by the Court to the Secretary

If the Secretary is satisfied on reasonable grounds that a child aged 10-17 is in need of therapeutic treatment for sexually abusive behaviours, the Secretary may by notice direct-

- (a) the child to appear; and
- (b) the parents to produce the child before the Court-
for the hearing of an application for a TTO [s.246(1)].

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

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

No person other than the Secretary has power to apply to the Court for either a TTO or TTPO. Nor does the Court have power to make a TTO or a TTPO on its own initiative. However, s.349(2) empowers the Criminal Division of the Court to refer the matter of an application to the Secretary for investigation if-

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

Section 349(3) sets out the following matters the Court must consider in deciding whether or not to refer a matter to the Secretary under s.349(2):

- (a) the seriousness of the child's sexually abusive behaviours; and
- (b) any previous history of sexually abusive behaviours of the child and how those behaviours were addressed; and
- (c) the particular characteristics and circumstances of the child; and
- (d) any other matters the Court considers relevant.

5.8.2 Therapeutic Treatment Board

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

- (a) to evaluate and advise the Minister on services available for the treatment of children in need of therapeutic treatment who are aged 10-17 and who have exhibited sexually abusive behaviours; and
- (b) to provide advice to the Secretary under ss.244-254 of the CYFA.

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

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

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

about sexually abusive behaviours exhibited by a child aged 10-17, the Secretary must refer the matter to the TTB for advice, *inter alia* as to whether it is appropriate to seek a TTO in respect of the child. If the Secretary receives a report from any other person under s.185, the Secretary may refer the matter to the TTB for such advice. If a matter is to be referred to the TTB, s.245(5) requires it to be referred before the Secretary applies for a TTO.

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

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

But prior to 01/03/2016 a difficulty with the narrow interpretation of "ensure" sometimes adopted by the TTB was that it sometimes led to a gross injustice for a child with a good parent who was prepared to commit the child to treatment voluntarily. The reason was this. If the child has been charged with one or more criminal offences which have led the Court to refer the matter to the Secretary under s.349(2) and a TTO is subsequently made, the Court must stay the criminal proceedings (if not completed) for a period not less than the period of the TTO. Ultimately if the child has attended and participated in a therapeutic treatment program under the TTO, s.354(4) requires the Court to discharge the child without any further hearing of the related criminal proceedings. It follows that a TTO acts as a shield preventing a child from acquiring a criminal record for the related criminal offences. Prior to 01/03/2016 there was no such shield available for a child who was voluntarily participating in a privately arranged therapeutic treatment program. As from 01/03/2016 new s.354A gives the Court the same power to discharge a child without any further hearing of the related criminal proceedings if the child has attended and participated voluntarily in a privately arranged therapeutic treatment program albeit not under a TTO.

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

5.9 Service of applications

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

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

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

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

5.9.2 Application for temporary assessment order on notice

Section 228(4)(b) of the CYFA provides that notice of an application for a TAO must be served, in accordance with s.594, on-

- (a) the child's parent; and
- (b) the child, if he or she is of or above the age of 12 years.

It is clear from ss.228(1) & 228(2) that it is the Secretary who is responsible for serving the notice.

5.9.3 Protection application

Sections 240(1)(a), 243(1) & 243(2)(c) of the CYFA make it clear that if a protective intervener decides to initiate a protection application by notice, he or she must serve the protection application on-

- (a) the child's parent; and

(b) the child, if he or she is of or above the age of 12 years-
in accordance with s.594 of the CYFA.

5.9.4 Irreconcilable difference application

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

5.9.5 Permanent care application

Section 320(4) of the CYFA requires the Secretary to cause notice of the application to be served on-

- (a) the child;
- (b) the parents;
- (c) the proposed permanent carer(s); and
- (d) such other persons as the Court directs.

The mode of service detailed in s.320(5) is identical to that in s.594.

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

Sections 246(2)(c) & 252(3)(c) of the CYFA require notice of an application for a TTO or TTPO to be served, in accordance with s.594, on-

- (a) the child's parent; and
- (b) the child.

It is clear from ss.246(1) & 252(2) that it is the Secretary who is responsible for serving the notice. There is a potential conflict in the legislation as to the time frame in which service of application for a TTPO must be effected. Section 594 sets out specific time frames. By contrast, s.252(2) merely requires notice of the application for a TTPO to be served a reasonable time before the hearing of the application.

5.9.7 Secondary applications

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

- the variation of an undertaking or any conditions thereof or the revocation of an undertaking;
- the variation or revocation of a family preservation order or a family reunification order;
- a care by Secretary order or a long-term care order;
- the revocation of a care by Secretary order or a long-term care order;
- the extension of the period of a family preservation order, a family reunification order or a care by Secretary order; or
- an order in respect of a failure to comply with a family preservation order or an interim accommodation order.

5.9.8 Default service provisions

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

5.9.9 Substituted service

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

5.9.10 Proof of service

Section 595 of the CYFA provides that:

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

5.9.11 Dispensation with service

Section 531(1) of the CYFA enables the Secretary to apply to the Family Division for an order dispensing with service on a specified individual of an application, document or order or all applications, documents and orders that is or are required, or that may be required, to be served on that person-

- (a) in respect of a specified child; or
- (b) in relation to proceedings in the Family Division in respect of a specified child.

Section 531(2) empowers the Court to make the order sought dispensing with service if satisfied by evidence, whether oral or by affidavit, of the Secretary that-

- (a) the specified individual cannot be located after the Secretary has made reasonable efforts to discover his or her location; or
- (b) there are exceptional circumstances.

The writer is not aware of any case law relating to these two sections.

5.9.12 Consequence of failure to serve a relevant party

In *M v Director-General, Department of Health and Community Services (Victoria)* [Supreme Court of Victoria, unreported, 18/08/1993], Nathan J held that:

- the Department, itself a creature of statute, must comply with the statutes which delineate and enumerate its powers;
- the service provisions are unequivocal and mandatory in their terms and cannot be avoided by reliance on s.82 of the CYPA;
- the Department had failed to serve the protection application on the child's step-father in compliance with CYPA/s.70 and accordingly any subsequent order was improperly obtained.

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

In *Re Andrew (No.2)* 32 Fam LR 386; [2004] NSWSC 842, a decision of the Supreme Court of NSW - Common Law Division, Wood CJ at CL took the opposite view in relation to the service of an application to the Children's Court of NSW under the Children and Young Persons (Care and Protection) Act 1998 (NSW), legislation which in relation to this issue is not easy to distinguish from the Victorian Act. The issue for determination in this case was one of law confined to whether or not the Children's Court of NSW had a discretion to dispense with service upon a parent in care proceedings. His Honour quashed the decision of the Children's Court magistrate that he did not have the power under the NSW Act to authorise the applicant not to serve the father or to excuse or ignore non-service and that the only permissible exception to service was if reasonable efforts to effect service had been made and had failed. At [54]-[56] Wood CJ at CL said:

"[54] I have come to the conclusion that the Children's Court should be found to have an implied power to dispense with service of a care application upon a parent. In summary, that finding depends upon the following combination of circumstances:

- (a) the jurisdiction of the Children's Court to entertain a care application is conferred under a statute that has the objects and the guidelines as to its application which are spelled out in ss.8 and 9 [see ss.1 & 87(1)(h) of the CYPA], in which it is made clear that the interests of a parent are subservient to the interests attaching to the safety, welfare and well-being of the child;
- (b) the court has an implied jurisdiction that extends to those matters that are incidental to, or necessary for, the proper discharge of the jurisdiction which is imposed on it by statute;
- (c) the procedural requirements set out in s.64 [see ss.68(2) & 70(2) of the CYPA] are to be regarded as directory or regulatory rather than mandatory;
- (d) it is accepted that the rules of natural justice do need to give way where their application would frustrate the purpose or objects of the legislation by which jurisdiction is conferred;
- (e) the court is able to make such orders, including interlocutory orders as it thinks appropriate in relation to matters within its jurisdiction...

[55] Of some assistance for my conclusion is the observation of Lord Evershed, in the decision in *Re K* cited by Brennan J in *Lieschke*, to the effect that the procedure and rules

applicable to this area of jurisdiction 'should serve and not thwart its purpose'. Similarly, some support can be found in the decision of Stuart-White J in *Re X* [1996] FLR 186 where the court excused service of the notice of care proceedings upon a father because of the potentially catastrophic results, to the family and to the child, of his involvement, although this was a case where the Family Proceedings Rules (UK) conferred a discretion.

[56] I am, however, satisfied that it is only in exceptional circumstances that the power to dispense with service could be exercised, that is, where service upon, or participation of, the parent in the proceedings, would unacceptably threaten the safety, welfare and well-being of the child. The power must be read in a way that reflects the need, in this context, to balance the interests of natural justice and those of the child. Moreover before it is exercised it would seem to be appropriate, if not essential, for a separate representative of the child to be appointed, who might place before the court any matter in opposition to the effective exclusion of the father from the proceedings."

5.10 Decision-making principles for Family Division matters

Section 9(1) of the CYFA provides that the principles in Part 1.2 are intended to give guidance in the administration of the Act.

5.10.1 Principles governing the Court's decision-making

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

- s.10 – the 'best interests' principle [see 5.10.3 & 5.10.4]; and
- ss.13-14 – additional decision-making principles for Aboriginal children [see 5.10.5]-

in making any decision or taking any action under the CYFA. However, s.8(4) provides that s.8(1) does not apply in relation to any decision or action under Chapter 5 [Children and the Criminal Law] or Chapter 7 [The Children's Court of Victoria] in relation to any matter under Chapter 5: see also s.9(2).

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

- *DOHS v Ms T & Mr M* [Children's Court of Victoria-Power M, 12/10/2009] at pp.18-20 & 93-96;
- *DOHS v Ms D & Mr K* [Children's Court of Victoria-Power M, 15/06/2009] at pp.19-20 & 37-46;
- *DOHS v Ms K & Mr L* [2009] VChC 3 per Power M at pp.13-16;
- *DOHS v Mr M & Ms H* [Children's Court of Victoria-Power M, 11/05/2009] at pp.32-34 & 121-125;
- *DOHS v Mr O & Ms B* [2009] VChC 2 per Power M at pp.39-40 & 44-45;
- *DOHS v Mr D & Ms W* [2009] VChC 1 per Power M at pp.90-91 & 97-98;
- *DOHS v Mr D & Ms B* [2008] VChC 2 per Power M at pp.51-52 & 100-106;
- *DOHS v Ms B & Mr G* [2008] VChC 1 per Power M at pp.28-29 & 117-119;
- *DOHS v Mr & Mrs B* [2007] VChC 1 per Power M at pp.19-20 & 41-47.
- *DOHS v The D Children* [Children's Court of Victoria-Power M, 11/01/2012] at pp.21-23, 48-49, 124,138, 148-149, 174 & 176.
- *DHHS v Ms McE & Mr B* [Children's Court of Victoria-Power M, 20/04/2017] at pp.53-59.
- *DHHS v Ms H & Mr McL* [Children's Court of Victoria-Power M, 16/05/2017] at pp.62-63 & 65-68.

5.10.2 Principles governing decision-making by the Secretary & a community 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' principles [see 5.10.3 & 5.10.4]; and
- s.11 – additional general decision-making principles [see 5.10.6]; and
- ss.12-14 – additional decision-making principles for Aboriginal children [see 5.10.5 & 5.10.6]-

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(4) provides that 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: see also s.9(2).

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

5.10.3 'Best interests' principle – 'The paramountcy principle'

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

Section 10(2) requires a decision-maker, in determining whether a decision or action is in the best interests of a child, to consider always the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development). This is in very similar terms to the consideration in s.87(1)(aa) of the CYPA – described in s.87(1A) as the paramount consideration – that the Court must have regard to the need to protect children from harm and to protect their rights and to promote their welfare. Curiously, the matters in s.10(2) are not expressed to have priority over those in s.10(3).

Section 10(3) lists 18 other matters to which consideration must also be given, where relevant, in determining what decision to make or action to take in the best interests of a child. They are not entirely easy to reconcile. Some of the matters are identical or in similar terms to the nine other matters previously contained in s.87(1) of the CYPA which although expressed to apply to a Court determining what finding or order to make on a protection application or irreconcilable difference application had in fact been given a wider interpretation: see e.g. the decision of Beach J in *F v C* [Supreme Court of Victoria, unreported, 28/01/1994] which held that s.87(1)(j) – in similar terms to s.10(3)(g) save that it spoke ambiguously of removal of the child from his or her “family” – was relevant to the determination of an IAO application.

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

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

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

(c)	Aboriginal culture	The need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community.
(d)	Child's views & wishes	The child's views and wishes, if they can be reasonably ascertained, should be given such weight as is appropriate in the circumstances.
(e)	Cumulative harm	The effects of cumulative patterns of harm on a child's safety and development.
(f)	Stability of care	The desirability of continuity and permanency in the child's care.
(fa)	Delay	The desirability of making decisions as expeditiously as possible and the harmful effects of delay in making the decision or taking the action.
(l)	Child's individuality	The child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity

(m)	Culture generally	Where a child with a particular cultural identity is placed in out of home care with a care giver who is not a member of that cultural community, the desirability of the child retaining a connection with their culture.
(n)	Support for child	The desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities.
(o)	Uninterrupted education, employment	The desirability of allowing the education, training or employment of the child to continue without interruption or disturbance.
(r)	Anything else	Any other relevant consideration.

In *Secretary to DHHS v Children's Court of Victoria, Rosa Darcy (A Pseudonym) & Walter Ronny (A Pseudonym)* [2018] VSC 183 Zammit J said at [21]:

"Authorities from the Children's Court acknowledge that it is not uncommon to find cases where the matters listed in s.10(3) may be in direct conflict and difficult to reconcile: *DOHS v Mr D & Ms W* [2009] VChC 1,88. In any event, the considerations in s.10(3) are not hierarchical and should not be treated as such; rather, where they are in conflict, the [Court] must determine which considerations should be prioritised based on all the circumstances of the case: see e.g. *DOHS v Ms K & Mr L* [2009] VChC 3,15."

In *DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 at [11]-[15] Bell J traced the aetiology of the 'best interests' principle – labelled by him the "paramountcy principle" – and discussed its relationship with the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the United Nations Convention on the Rights of the Child:

[11] "Children are ends in themselves and not the means of others. They form part of the family, the fundamental group unit of society. Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in relation to matters affecting them. Children are especially entitled to protection from harm, and to human development. Those values are inherent in the best interests of the child which is the foundational principle of the *Children, Youth & Families Act*. That principle is the cardinal consideration in protection proceedings in the court, including the making and revoking of custody to secretary orders. The legislation contains a detailed scheme for identifying and protecting the child's best interests which it is the responsibility of the secretary to administer and the jurisdiction of the court to enforce.

[12] The best interests of the child is a long-standing principle of the *parens patriae* jurisdiction of the courts. The history of that jurisdiction was examined extensively by Lord Guest in *J v C* [1970] AC 668, 692-700, which concerned 1925 guardianship legislation. His Lordship said (at p.697) the 'dominant consideration has always been the welfare of the child' and (at p.700) cited with approval this statement by Danckwerts LJ in the case of *In re Adoption Application 41/16* [1963] Ch 315, 329: 'there can only be only one "first and paramount consideration", and other considerations must be subordinate.'

[13] The High Court of Australia has described the origin of the principle of the best interest of the child in the same way. For example, in *ZP v PS* (1994) 181 CLR 639, 647 Mason CJ, Toohey and McHugh JJ said that, in the *parens patriae* jurisdiction, the 'Court of Chancery has always been guided by the principle that the welfare of the minor is the first and paramount consideration'. In *Northern Territory v GPAO* (1999) 196 CLR 553, 584 Gleeson CJ and Gummow J said the best interests of the child was an 'important and salutary principle of substantive law, adopted by courts exercising *parens patriae* jurisdiction for more than a century'.

[14] The paramountcy principle is now specified as a human right in s 17(2) of the *Charter of Human Rights and Responsibilities Act 2006*, which provides that every child has the right 'to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. In s 17(2), the Charter also specifies the human right to protection of the family.

[15] Lastly, the paramountcy principle is expressed in international declarations and conventions to which Australia has subscribed, including the *International Covenant on Civil and Political Rights* [Opened for signature 16 December 1966, 999 UNITS 171 – entered into force 23 March 1976] (see articles 23(3) and 24(1)) and the *Convention on the Rights of the Child* [Opened for signature 20 November 1989 – entered into force 2

September 1990]. The convention specifies the basic human rights that children everywhere have without discrimination, including the right to survival, to development of their full human potential, to protection from harm, abuse and exploitation and to participate fully in family, cultural and social life. In reference to the best interests of the child, this is art 3:

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

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

In *Cardell (a pseudonym) v Secretary DHHS* [2019] VSC 781 the 2 year old child had been removed from the care of his mother – who had a history of drug and alcohol abuse – a few days after his birth. The Children’s Court duly found that the child was in need of protection on the basis that he was likely to suffer emotional or psychological harm. He was placed on a family reunification order (‘FRO’) under which formal responsibility for his care was conferred on the Department. For 1¼ years the child was in the care of Ms C and her partner Ms K who had informed the Department that they were not in a position to care for the child permanently. Subsequently the carers separated and Ms C informed the Department that she wanted to be the child’s permanent carer. The Department conducted an assessment of Ms C as a potential sole carer and determined that the proposed arrangement would not be in the child’s best interests. The child was removed from Ms C’s care and placed in home-based care. Two weeks later the child’s mother filed an application to revoke the FRO and sought that the child be returned to Ms C’s care with a proposed undertaking by the mother not to remove the child from Ms C’s care. The Department filed an application for a care by Secretary order. Hubble M refused the mother’s application to revoke the FRO and granted the Department’s application for a care by Secretary order. Ms C appealed, submitting that the magistrate had misdirected herself by substituting a ‘protective concerns’ test for the ‘best interests’ test prescribed by the CYFA. Maxwell P dismissed the appeal, describing at [26] the appellant’s submissions as drawing “a false dichotomy between ‘protective concerns’ and ‘best interests’”. At [27]-[30] his Honour held:

[27] “As counsel for the appellant properly conceded, the legislature has thus identified protective concerns — the need to protect the child from harm — as central to any assessment of the best interests of the child. By express statutory provision, the latter includes the former. In other words, when the magistrate addressed herself to what she called ‘protective concerns’, she was — by definition — addressing herself to the best interests of the child.

[28] The considerations which may be relevant to an assessment of ‘best interests’ extend well beyond the need to protect from harm. Section 10(3) of the Act makes this clear. But, in the circumstances of the present case, it is unsurprising that protective concerns were to the forefront of the Children’s Court’s assessment.

[29] As counsel for the appellant again properly conceded, her Honour was bound to pay careful attention to issues of protection, given the Children’s Court’s finding in January 2018 that [the child] was in need of protection on the basis that he was ‘likely to suffer emotional or psychological harm’: CYFA s.162(1)(e). As her Honour noted, the need to protect [the child] from harm was ‘a critical matter to consider, particularly in light of the protection history in respect of [the child]. [He] has been subject to court orders almost since birth.’

[30] It follows, in my view, that her Honour’s conclusion with respect to the revocation application is unimpeachable. It was expressed in these terms: ‘[T]he protective concerns have not resolved to a degree that permits me to make a finding that ... it is in his best interests for the FRO to be revoked.’ Not only was her Honour expressly applying the ‘best interests’ test but she was doing so by reference to the very matter which s 10(2) makes central to the evaluation of best interests. She had earlier set out, fully and accurately, all of the matters said by the parties to be relevant to the assessment

of [the child's] best interests. It is apparent, therefore, that all of those matters were taken into account in arriving at the decision."

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

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

Section 10(3)(g) of the CYFA – in apparently mandatory terms – provides that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child. Although it is hidden away as the seventh in a list of 18 considerations in s.10(3), it appears to the writer to be the central consideration in most, if not all, cases.

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

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

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

Although the outcome in the case proved to be rather unfortunate, an analogy in criminal law to s.10(3)(g) is the decision of Kellam J in *Mokbel v DPP (No.3)* [2002] VSC 393. The Mokbel bail saga is detailed in section 9.4.2 of these Research Materials. In summary, having refused bail twice on the basis that Mokbel was an unacceptable risk, Kellam J granted a third bail application. After reiterating at [6] that "*whether or not [the] risk is unacceptable requires to be balanced against the period that the applicant will otherwise spend in custody awaiting trial*" and after taking into account "*the precautionary measures that can be taken by way of conditions*" – his Honour found that the balance had changed. Kellam J was satisfied that if bail was not granted the applicant would have been incarcerated for a period of at least 18-19 months before committal and there was a high probability that he would not come to trial in less than 3 years from his arrest. His Honour accordingly found that the risk was no longer unacceptable and released the applicant on bail with sureties to a total value of \$1 million and stringent conditions, including reporting to a police station twice each day.

In *Robinson v R* [2015] VSCA 161 Priest JA, concurring "after considerable hesitation" with the judgment of Maxwell P & Redlich JA, cited with approval at [84] dicta of Redlich J (as he then was) in *Haidy v DPP* [2004] VSC 247. In that case Redlich J himself cited with approval at [18] the following dicta of Kellam J in *Mokbel v DPP (No.3)* at [10]:

"The issue of detention by reason of unacceptable risk is an issue which must be balanced with the likelihood the allegations against an accused man then brought before a court in the near future. The question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is, **although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay.**" [emphasis added]

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

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

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

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

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

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

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

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

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

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

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

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

In *Secretary to DHHS v Children's Court of Victoria, Rosa Darcy (A Pseudonym) & Walter Ronny (A Pseudonym)* [2018] VSC 183 Zammit J dismissed the Department's appeal against an IAO placing an 8 day old infant in the care of the mother on stringent conditions which ensured "close supervision by DHHS". Referring to s.10(3) of the *CYFA*, her Honour said at [22]:

"I note, however, the significance of s.10(3)(g). That paragraph is framed in absolute terms and only applies where a child is to be removed from the care of its parents. A plain English reading of s.10(3)(g) suggests that a court cannot remove a child from the care of its parents unless unacceptable risk has been established. As such, with direct relevance to the appeal before me, I consider that it is for the Secretary to satisfy me that there is an unacceptable risk of harm. While other factors will be relevant – as I have said, risk of harm is not the only consideration, all the factors that bear on the best interests of the child must be considered – without this the Court will not be empowered to remove the child from its parents: *DHHS v DR* [2013] VSC 579 [54] (Elliot J)."

At [24]-[32] her Honour discussed the meaning of 'unacceptable risk of harm' in s.10(3)(g) and in particular the tests formulated in *DPP v Haidy* [2004] VSC 247, *DOHS v DR* [2013] VSC 579 and *Nigro v Secretary to the Department of Justice* [2013] VSCA 213. At [31]-[32] her Honour concluded:

[31] "Putting aside the question of standard of proof, which is obviously different in a statutory appeal under s.271 of the *CYFA*, these passages indicate that 'unacceptable risk' involves two substantive considerations. Firstly, what is the likelihood of the risk and is it a 'real likelihood' (which is a lower standard than more probable than not); and secondly, what will the severity of the consequences be should the risk come to pass (bearing in mind the strong emphasis in the *CYFA* on the paramountcy of the 'best interests' of the child and the need to protect it from the aforementioned risks of harm).

[32] It is clear from the language of the *CYFA*, assisted by these passages, that for the purposes of s.10(3)(g) the Court is 'required to assess, in the particular circumstances of the case, the likelihood of the conduct in question occurring in the future, together with the nature and extent of any risks of harm to the child associated with the conduct in the event it were to occur': *DOHS v DR* [2013] VSC 579 at [61]. And, as I have said, in making this assessment as to 'risk' it is not necessary for the Secretary to actually prove the allegations with cogent evidence. The Court is required to accept the evidence 'at its highest' in the manner set out above: see [16] above. And where there is a conflict – unless other evidence refutes that evidence on the balance of probabilities – the Court must prefer the evidence of the Secretary: see [17] above."

In dismissing the Department's appeal, Zammit J concluded at [46]-[48]:

[46] "In my opinion, it is in the best interests of the child to remain with its mother. In reaching that conclusion I gain considerable comfort from the conditions the Magistrate imposed upon her. It is well established that a risk that might otherwise be unacceptable can be made acceptable by the imposition of conditions, whether this be in the context of granting bail, or in the context of an interim accommodation order: *Robinson v The Queen* (2015) VR 226, 240 [49] (Maxwell P and Redlich JA); see also *MacBain v DPP* [2002] VSC 321 [17] (Nettle J). I note that if the mother breaches any of these conditions the child will likely be taken from her. I wish to emphasize to the mother (and father) that if she does not comply with these conditions, and there is any risk of harm to the child, it is very likely the child will be taken from her.

[47] Significantly, while the evidence was troubling, I was not persuaded that there was an unacceptable risk of harm to the child. I have formed this view chiefly on the fact that the father has agreed not to live with the mother (and to have supervised contact with the child), the additional evidence of the child's birth weight and APGAR scores, the assistance and supervision of the grandmother and, most of all, the experience of the Magistrate and the stringency of the conditions imposed by him as part of the impugned order.

[48] I have decided this appeal on the material that was before me on the evening of the appeal. I have carefully considered it. I have taken into account that much, if not most, of the evidence is untested. I have taken into account that some of it is contested but am nevertheless satisfied that the learned Magistrate did not make any error. In my view, a different interim order should not be made. The requirement of s.271 is not made out.

In the course of argument I raised whether or not the conditions could be tightened, but counsel for the Secretary did not consider it necessary.”

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

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

A central issue in *DHHS v Ms JA* [Children’s Court of Victoria-Power M, 25/11/2015] involved an analysis of whether the two teenage boys were at unacceptable risk of harm if returned to the care of their mother. At pp.38-39 his Honour said:

“[A]pplication of the coincidence evidence principles and the common law on similar fact evidence leads me to find that on the balance of probabilities it is the same unidentified arsonist – [not the mother] – who is targeting the family. As [the older child] said within the hearing of the neighbour Mr [N]: ‘Somebody is trying to kill us.’ That then leads to the question whether the boys are at unacceptable risk of harm in living in the same house as their mother until the [police] investigation is completed.

This is a balancing exercise. There is no doubt on the evidence that I have heard that the boys are pining for their mother. I use the strong word ‘pinning’ deliberately. To keep them away from their mother’s care is to subject them to significant risk of ongoing emotional harm. It is clear from s.10(3)(g) of the *CYFA* that they must be returned to the care of their mother unless to do so would place them at unacceptable risk of harm.

In the unusual and tragic circumstances of this case the two things that in my view convert an unacceptable risk of harm into an acceptable risk are—

☐ firstly, the very kind offer of the maternal cousin to reside in the house with the mother and the boys; and

☐ secondly, the fact that there is a workable smoke alarm in the mother’s house.

I am satisfied that those two circumstances – which will be encapsulated into conditions on the [family preservation] order – are sufficient to accord with the fundamental principle in s.10(3)(g) of the *CYFA* and are also supported by the propositions in ss.10(2), 10(3)(a) and 10(3)(b) as well. It follows that the order that is in the best interests of both [boys] requires their immediate reunification with their mother.”

In Victoria a State of Emergency was declared on 16/03/2020 as a consequence of the health risks associated with the COVID-19 pandemic. Pursuant to this declaration, the Chief Health Officer has imposed various requirements – including what has been called “social distancing” – and various restrictions – including significant limitations on leaving one’s home. A consequence of this is likely restrictions on or cessation of face to face contact between parents and their children who are out of their care. That may in some cases change judicial balancing of ‘unacceptable risk’ in s.10(3)(g) of the *CYFA*: “[A] child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child”.

The COVID-19 pandemic adds a new dimension to the issue of unacceptable risk. To paraphrase Kellam J in *Mokbel v DPP (No.3)*, although the risk might be objectively the same as it was before the State of Emergency, the question of unacceptability must be relative to all the circumstances, including the issue of no parental and/or sibling contact for many, perhaps most, such children.

The majority of protection applications are based on likelihood of future harm. Anecdotally the writer believes that at least 80% fall into this category. Of these, the overriding concern in the majority is the risk of significant emotional or psychological harm as defined in s.162(1)(e) of the *CYFA*. And, of these, a significant percentage involve risk of such harm by reason of exposure to family violence. With this sort of case in particular, another way of analysing the balancing process is whether the risk to the child of suffering emotional harm from being exposed to family violence is greater than the risk

to the child of suffering emotional harm from being removed from any contact with family. The potential negative effect on many children of such a removal is discussed in Chapter 4:

- Section 4.12: Effect on a child of separation from the child's primary attachment figure;
- Section 4.16: Relationship between attachment and a child's emotional wellbeing.

A number of cases during the COVID-19 State of Emergency, including the following, have demonstrated the balancing exercise involved in the determination of whether a risk of harm to a child remaining in a parent's care can be said to be an acceptable risk in circumstances where if removed from the parent's care a child may be unable to have any face-to-face contact with the parent for a significant period of time.

- In *Secretary DHHS v Children's Court of Victoria & Emily Powell (a pseudonym)* [2020] VSC 144 the Department contended that the 17 month old child Emily was at unacceptable risk of harm in the care of her mother [L] because of six significant risk factors: (a) unexplained injuries to Emily's face; (b) exposure to family violence; (c) Emily's age and vulnerability; (d) her mother's substance abuse; (e) isolation and transience of mother and child; and (f) a firearms incident.

The Children's Court had placed Emily on an IAO in the care of her mother with conditions. On the DHHS' appeal pursuant to CYFA/s.271 John Dixon J also placed Emily on an IAO in the care of her mother, holding at [45] that "appropriate amelioration of risk for Emily to an acceptable level can be achieved by the implementation of five separate categories of special condition."

In particular his Honour noted at [13] that the mother had left Emily in her partner's care while she was making accommodation arrangements. When she returned she discovered the injury to Emily's face and called an ambulance. Police also attended, it being normal protocol for the ambulance to call police in response to a dog bite or scratch to a child's face. Police members observed the injury to Emily's face and also saw the dog. Police took no further action as their observations of the injury and the dog and the mother's account of the events all matched. His Honour held at [16]: "The incident that primarily sparked the application has been explained, and once seen in a new light, does not of itself warrant the order that the Secretary sought from the Children's Court." At [22] his Honour held: "There is no proper basis to be confident that [L] is engaging in substance abuse. Even the anecdotal evidence of it is thin." At [23] his Honour held:

"Significantly, when AHCPEs conducted its protective assessment, the assessing workers noted that [L] was able to detail a good normal routine for Emily, including appropriate food and mix of other daily activities and routines. She appeared to have a good understanding of Emily's needs as a small child, and apart from the recently inflicted injury, Emily was observed to appear to be in relatively good health. Emily has only ever known her mother as her carer, following her discharge from hospital after a difficult period prematurity and with medical disabilities and complications. These matters tend to mitigate the implication that Emily is in imminent risk of significant harm."

At [32]-[36] his Honour focussed on the mother/daughter bond and the potential for its fracture if Emily was to be placed in foster care during the COVID-19 pandemic [emphasis added]:

[32] "Counsel submitted that [L] has successfully been Emily's carer since birth until their separation last Sunday, and that she desperately wants her daughter returned to her. **The existence of a strong mother/daughter bond was not contested. Fracture of such a bond should be avoided, unless the balance of immediate risk outweighs the likely damage to welfare.** Counsel stated that [L] is willing to, and interested in, cooperating with the Secretary, and submitted that there will be many opportunities for the Secretary to provide assistance to [L] and Emily in their own home without unacceptable risk to Emily's welfare. [L] is particularly interested in access to childcare to enable her to find employment.

[33] **Another relevant consideration that I must take into account is the present COVID-19 pandemic and the restrictions that have been imposed on the community in response to it.** The Secretary now faces substantial restrictions in face-to-face contact with families. Such contact is now being limited to emergency circumstances. The Secretary is attempting to continue to provide services through reliance on technology such as telephone and video communication. On the one hand, these restrictions will limit the opportunities for the Secretary to provide important services to [L] and Emily as a family unit in their own home, but regular contact and supervision is not being completely excluded. It will just be more difficult

for such contact to be effectively conducted using alternative communication technology.

[34] On the other hand, if Emily is placed in out-of-home care, the opportunities for [L] to have access visits with Emily will be illusory. Such visits would also have to be conducted by either telephone or video conferencing. It seemed to be accepted in argument that a telephone visit was out of the question, given that Emily is 17 months old. I was invited to accept that video contact could be effective.

[35] I have grave reservations about doing so. It is not usual practice for foster parents to arrange and supervise contact between children in care and their parent. Such contact is usually arranged by the Department. Under the current restrictions, that seems impractical. How the foster parent will be involved in video communications between Emily and [L] was not explained. How such contact could be effective and meaningful for Emily and [L], assuming the foster parent was involved, was also not explained. I have no confidence that meaningful contact can occur by any video medium between a mother and a 17 month old baby. In practical terms, there will be no access and mother and baby will be subjected to significant isolation, possibly for a substantial period of time.

[36] The prospect of fracturing the mother/daughter bond in this way itself may cause very significant harm to Emily's best interest, and I cannot contemplate imposing that risk of harm by compulsion of law, save where Emily's circumstances clearly demonstrate unacceptable risk to her best interests, unless that risk of fracture of the bond is confronted."

Finally at [43]-[44] his Honour concluded:

"I am satisfied that the accumulative contribution of the risk factors upon which the Secretary relies ultimately cannot be regarded as unacceptable when assessing where Emily's best interests lie, when regard [is] had to the conditions that [L] is willing to accept...Further, the conditions involve mutual obligations and the Secretary is required to have regard to best interest principles in making any decision, taking any action, or providing any service to children and families under the Act. That role is not discharged by obtaining an order for out-of-home placement and delegating care responsibilities to a foster parent. I should not be taken as suggesting that this was the Secretary's intention. Rather, I wish to stress that there is an obligation on both parties to ensure that then interests of Emily remain paramount."

- The case of *DHHS v TH & CH* [2020] VChC 1 [Melbourne Children's Court-Parkinson M, 02/04/2020] involved an application for a new IAO in circumstances where the placement of children with an aunt was no longer available. The parties had agreed that the children be placed on an IAO in the care of the paternal grandfather. The contested issue was parental contact. The previous contact condition was for the children to have face-to-face contact with the parents twice per week at times and places as agreed with the parents, carers, supervisors and the Department. On the new IAO the Department proposed that all contact be suspended in view of the COVID-19 pandemic notwithstanding that the family had been supervising contact. Counsel for the mother assured the Court that the grandfather remained prepared to supervise parental contact and did not hold concerns about it posing a health risk. The Department's management prohibited its court officer from making enquiries of the grandfather about his preparedness to supervise contact notwithstanding the magistrate's request for the Department to do so. Counsel for mother provided a draft contact condition. The Department made no submission in this regard. Noting at [12] that paragraph 7(1)(b) of Part 3 of the Chief Health Officer's directions appeared to permit persons to leave premises for child contact purposes, Parkinson M at [17] ordered the following contact conditions for mother and father:

"Mother/father may have supervised contact with the children twice per week at times and places as agreed between the parties and the carer for a maximum of 6 hours on each occasion. The contact may occur at the parent's home. Both parents may be present for the contact. Department is to be kept informed. Paternal Grandfather, Maternal Grandfather and Maternal Grandmother are suitable supervisors. The supervisor of contact is entitled to end the contact if he/she considers it appropriate."

- In an IAO submissions contest at Broadmeadows Children's Court on 27/03/2020 Magistrate Kune held (in an oral judgment) that although the delay and the lack of face-to-face service availability would increase the risk to a 6 week old baby with unexplained – or poorly explained – injuries as there would be fewer professional eyes on the baby, COVID-19 tipped the balance in favour of allowing the parents to live with the carers because of the lack of supports to work towards reunification and the risks of contact being cancelled if they did not reside together.

Finally, it is important to note that under s.10(3)(g) the test to determine a child's placement is not whether a non-parent can provide a better quality of care than a parent. In *DHHS v Ms McE & Mr B* [Children's Court of Victoria-Power M, 20/04/2017], further details of which are set out in section 5.10.8 below, his Honour said at p.54:

"The test in this Court to determine a child's placement is not whether one or other of the children's parents can provide a better quality of care than the children's grandmother. If that were the test grandma would be hard to beat. She has done an amazing job for these children and I have no doubt she would continue to do so – even for [C3] despite the difficulties he has posed – had I been persuaded that placement with a parent posed an unacceptable risk of harm to any of the children."

On this issue it is also important to note dicta of Latham CJ in the family law case of *Storie v Storie* (1945) 80 CLR 597 at 603:

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

On the issue of "parent versus stranger" see also section 5.11.4 below.

5.10.5 'Aboriginal Child Placement Principle'

Under s.3 of the CYFA, 'Aboriginal person' means a person who:

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

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

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

The criteria in s.13(2) are-

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

The principles in s.14 deal with-

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

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

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

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

Sections 11 & 12 of the CYFA list the following additional 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-

- [s.11(a)] parents should be assisted and supported in reaching decisions and taking actions to promote the child’s safety and wellbeing;
- [s.11(b)] out of home carers should be consulted and given an opportunity to contribute to the decision-making process;
- [ss.11(c), (d) & (e)] the decision-making process should be fair and transparent, the views of all persons directly involved in the decision should be taken into account and decisions are to be reached by collaboration and consensus, wherever practicable;
- [s.11(f)] the child and all relevant family members (unless their participation would be detrimental to the safety or wellbeing of the child) should be encouraged and given adequate opportunity to participate fully in the decision-making process;
- [ss.11(g) & (h)] persons involved in the decision-making process should be provided with sufficient information, in a language and by a method they can understand, to allow them to participate fully in the process, given a copy of any proposed caseplan, given sufficient notice of any meeting proposed to be held and given an opportunity to involve other persons to assist them to participate fully in the process;
- [s.11(i)] if the child has a particular cultural identity, a member of the appropriate cultural community chosen or agreed to by the child should be permitted to attend meetings held as part of the decision-making process;
- [s.12(1)] in the case of an Aboriginal child:
 - (i) opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views;
 - (ii) a meeting should be held convened by an Aboriginal convenor approved by an Aboriginal agency and attended by child, parent, extended family and other appropriate members of the Aboriginal community as determined by the parent; and
 - (iii) in making a decision to place the child in out of home care, an Aboriginal agency must first be consulted and the Aboriginal Child Placement Principle must be applied.

In *AA v DHHS & Ors* [2020] VSC 400 the subject children, aged 5y5m & 3y6m, had been in the care of their maternal grandparents for over 2 years, initially pursuant to interim accommodation orders and family reunification orders. During a case plan meeting on 07/08/2019 the permanency objective of family reunification was changed to permanent care and was communicated to the parents and grandparents. Subsequently on 15/11/2019 the Court placed the children on care by Secretary orders [CBSOs] and they remained in the care of the grandparents. Thereafter the following things occurred, the conduct of the Department being described by Incerti J (at [3], [238] & [250]) as “egregious”:

- (1) **TRIO OF DECISIONS LEADING TO THE CHILDREN BEING PLACED WITH THE FATHER:** On 06/01/2020, following an internal review, the Department changed the permanent care case plan to one of reunification with the father. At a case plan meeting on 17/01/2020 it formally advised the grandparents of the changed case plan for the first time, a case note dated 06/01/2020 stating: “[The Principal Practitioner] recommended the case plan meeting occur with the grandparents on the Friday and provide them the weekend to digest the news and then reunification to occur on the Monday. Do not want to provide the grandparents too much time to scare or alter reunification plans.” On 20/01/2020 DHHS placed the children in the father’s care and on 21/01/2020 – contrary to what Incerti J described at [29] as DHHS’ “general practice...to monitor the success of the reunification and to plan for a transitional reunification rather than an immediate formal change to a family preservation order [FPO]” – it made direction notices pursuant to CYFA/s.289A directing that the father resume parental responsibility for the children.
- (2) **THE INTERNAL REVIEW:** The grandparents sought an internal review under s.331 of the CYFA. The internal review, conducted by no less than the Assistant Director of Child Protection in the Brimbank-Melton Area, was completed on 01/05/2020 and concluded that the Secretary’s own delegates had not complied with the ‘best interests’ principles in ss.10 & 11 of the CYFA in making its decisions on 06, 20 & 21/01/2010. The author of the s.331 report purported to

'overturn' the reunification case plan and endorsed the permanent care plan for the children to be placed into the grandparents' care permanently.

- (3) **CHILDREN PLACED BACK WITH GRANDPARENTS DESPITE FPOS BEING IN EXISTENCE:** On 06/05/2020, without prior notice to the father of the outcome of the internal review, the Department placed the children back in the care of the grandparents notwithstanding the existence of the FPOs deemed to have come into effect on 21/01/2020 by operation of CYFA/s.289A(1)(c) and notwithstanding that "there was no evidence or suggestion by the Secretary that the children were not well cared for or were in any way at risk while in his care". At [241] Incerti J said of this: "It is astonishing that the people responsible...could proceed in the manner they did on 6 May, particularly given the strained relationships, the Children's Courts orders, and having only a few months before that removed the children from the Grandparents' care without any notice."

The judgment of Incerti J – holding that all of the Department's decisions were contaminated with jurisdictional error and quashing the s.289A direction notices – may be summarized as follows:

THE INTERNAL REVIEW PROCESS

- At [97+101]: The decision to undertake an internal review, on a plain construction of the Act, is provided to the Secretary on a discretionary basis, as long as such review must implement procedures adopted by the Secretary. In this case, there was an issue as to whether the grandparents had an entitlement to an internal review and the implications of any such entitlement as to the determination of whether the grandparents were denied procedural fairness and/or whether the Secretary breached its obligations under ss.10 and 11 of the Act.
- At [122+131]: Counsel for the father was correct in highlighting that the grandparents did not have an express statutory right of an internal review pursuant to s 331. Section 331 states that it is only for the Secretary to prepare and implement procedures for the review. Section 331(2) requires the Secretary to give a copy of the procedures to the child, to the parent, but not the grandparents or anyone with whom the children happens to be placed under an order. This did not, however, preclude the grandparents from requesting an internal review. The grandparents did seek a review, consistent with the Secretary's processes as outlined in the Secretary's Policy in Respect of Reviews of Case Planning Decisions (01/03/2016 - https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/caseplanning/internal-review-decisions#h3_2). That webpage states that "internal review process is available to people directly affected by a child protection decision and who have a significant relationship to a child" and states that 'kinship carers', like the grandparents, may access the internal review process.

THE RELEVANT S.11 DECISION-MAKING PRINCIPLES ARE MANDATORY, NOT DISCRETIONARY

- At [75]-[78]: The Act is clear that, according to s 8, the Secretary must have regard to the principles set out in ss.10 & 11. Counsel for the father invited the Court to interpret s.9 to mean that Parliament did not intend to condition the exercise of powers under the Act on compliance with each and every decision-making principle in every case. It was submitted that the intention, as set out in s.9 (role of principles), is for these principles to provide guidance, which results in the application of the s.11 decision-making principles to be context specific and non-obligatory. Further, the Court was invited to interpret the expression in s.10(1) that 'the best interests of the child must always be paramount' as meaning that the s.11 decision-making principles yield to the best interests of the child. Incerti J disagreed with this approach, holding that "it is clear that the consideration of the s.11 principles, which is mandatory ('must'), informs the ultimate decision or action that the Secretary takes." "This interpretation of the Act is reinforced in *Certain Children v Minister for Families and Children & Ors (No 2)* (2017) 52 VR 441, 455 [27]." "The mandatory regard to the s.11 decision-making principles ensures that decision makers frame their decision-making through the prism of these principles. Though regard must be had to the s.11 principles when making decisions, the applicability of each of the principles will be context dependent."

THE DEPARTMENT'S FAILURE TO AFFORD THE GRANDPARENTS PROCEDURAL FAIRNESS

- At [126]-[128]: The CYFA evidences an intention that procedural fairness should be afforded in connection with the exercise of powers by the Secretary or a delegate, including the power in s.289A. The provisions in Part 1.2 of the CYFA make it clear that the Act does not exclude the requirement to afford procedural fairness. The decision-making principles set out in s.11 put a clear emphasis on the requirement for the Department to consult in relation to decisions, **including in s.11(b) consultation with people who have the care of children in out of home care in relation to whom decisions are being made.** The Secretary was required to afford the

grandparents procedural fairness in connection with the exercise of the power under s.289A of the Act in relation to the children. The grandparents' interests were affected.

- At [161]-[162]: Consistent with the judgment of Gageler & Gordon JJ in *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326, 343–4 [62]-[67], the Secretary denied the grandparents procedural fairness, not only in relation to the s.289A(1)(c) direction notice of 21/01/2020 (as claimed by the grandparents) but also with regard to the Trio of Decisions in January 2020 (as claimed – in what Incerti J described at [172] as a “slightly quixotic state of affairs” – by the Secretary). At [162] her Honour said:

“The Department had the power to determine under the CBSO to place the children in the father’s care and take the CBSO to be an FPO. What is important, however, is the recognition of the significance and importance for the children of that power and the requirement that it been done in accordance with the principles in ss.10 and 11 and in accordance with the general principles of procedural fairness. Objectively, it cannot be said in the circumstances of this case that the Grandparents were provided adequate notice and were not afforded an opportunity to be heard about the decisions: *Salas v Minister for Immigration and Multicultural Affairs* [2006] FCA 1807, [31].
- At [165]-[166]: The grandparents still had to establish that if the Secretary had afforded them procedural fairness, it could possibly have resulted in the Secretary making a different decision in relation to the Trio of Decisions it made in January 2020. The outcome of the internal review demonstrated that there was that possibility of a different outcome in the case.

THE DEPARTMENT’S FAILURE TO COMPLY WITH OTHER OBLIGATIONS UNDER S.11

- At [179]-[182]: The CBSO is used sparingly and only where there are grave concerns for a child. It follows that the administrative decision-making process by the Secretary to issue the s.289A direction notices, which brought the operation of the CBSOs to an end, must also be undertaken rigorously. **The Secretary or her delegates must satisfy themselves that the decision is in the best interests of the child. This reinforces the need for the Secretary or her delegates to comply with the obligations under s.11 when they are undertaking such significant administrative decision-making. The Secretary wields tremendous power and responsibility in relation to the CBSO regime. It is a power that must be exercised with rigour and consistency. Given her Honour’s conclusion that the s.11 principles operate as mandatory considerations underpinning any decisions and actions by the Secretary, the Secretary’s conduct also amounted to breaches of ss.11(c), (d), (f), (g) & (h). This is separate from the Secretary’s failure to afford procedural fairness to the grandparents at common law.** As the High Court (Brennan, Deane, Toohey, Gaudron and McHugh JJ) stated in *Craig v South Australia* (1995) 184 CLR 163, 177, a decision-maker falls into jurisdictional error when she “disregards the nature or limits of [her] functions or powers”. Even though this conduct is largely the same as the Secretary’s conduct in relation to procedural fairness, the focus of this ground of jurisdictional error is more squarely on the Secretary’s obligations under the CYFA. Common sense suggests that the grandparents, having cared for the children for more than two years, were in a unique position to provide information and support and could help prepare the children for any transition of care to the father. The fact that the grandparents were not appropriately consulted reveals that the Secretary failed to consider the principles in ss.10 & 11 of the Act. In such circumstances, proper consideration (with input from the grandparents) was itself in the best interests of the children. It would appear that, had these principles been considered, as is mandated by the Act, the unfortunate events which have transpired in this case would have been avoided.

ORDERS CONSEQUENT ON THE DEPT’S JURISDICTIONAL ERRORS IN JANUARY 2020

- For the above reasons her Honour concluded that the Secretary’s Trio of Decisions in January 2020 were contaminated with jurisdictional error. On this basis her Honour made at [253]:
 - (a) an order of certiorari quashing the s.289A direction notices made by the Secretary; and
 - (b) a declaration that the CBSOs made on 15/11/2019 remain in force.

THE EFFECT OF THE FLAWED S.289A DIRECTION NOTICES

- At [226]-[227]: The Children’s Court did not and could not make an order declaring the s.289A direction notices to be effected by jurisdictional error or quashing the direction notices. Considering the Act and its construction, there is no basis to imply that the Secretary had the authority to make a unilateral determination based on a review under s 331 of the Act undertaken by the Secretary’s delegate that the direction notices were effected by jurisdictional error, then remove the children from the father and reinstate the CBSO.

- At [232]: It would be a slippery slope to allow a public servant, such as a delegate of the Secretary, to have the authority to consider a direction which has the force of a court order and determine that it is a nullity because they believe the correct decision making process was not followed. The Secretary's delegate is ill-placed to make such a determination and there is the real danger that third parties could put pressure on the delegate to reverse the decision. The impact that orders under the Act, and particularly protective orders, have on the child is so significant that to allow their lives to be uprooted, as was done in this case, without the determination of a court, such as is envisaged by the Act to protect their best interests, cannot be permitted.
- At [234]: Although the s.289A direction notices were profoundly flawed, it is only in the rarest of cases that the Court will imply in the statute a power of administrative reconsideration beyond simple administrative mistakes. Further, and critically, to do so would authorise the Secretary and/or her delegates as members of the Executive to take for themselves the judicial function for oversight of administrative decision-making, regardless of how bad the error that they or their colleagues have committed.
- At [236]: **As the s.289A direction notices had some legal effect notwithstanding that they were made in jurisdictional error and the Secretary did not have the power to reconsider them, the FPOs remained in place unless and until they were set aside by the Supreme Court or the Children's Court varied or revoked the FPOs in accordance with the Act.** The Secretary could not unilaterally decide that the s.289A direction notices were of no effect and act as if the CBSOs were still in place. It follows that the 06/05/2020 removal decision and action were not authorised by the Act and were beyond power.

DHHS' BREACH OF S.11 & FAILURE TO AFFORD THE FATHER PROCEDURAL FAIRNESS

- At [244]: "[T]he failure to provide the s.331 report to the father, and the actual implementation of the new case planning decision culminating in the removal of the children from the father's care, constituted a breach of procedural fairness and the decision-making principles in s.11. It would be anathema for the Court to hold otherwise."

ORDERS CONSEQUENTIAL ON DHHS' JURISDICTIONAL ERRORS IN MAY 2020

- For the above reasons her Honour made at [253]:
 - (c) a declaration that the action of the Secretary in the 06/05/2020 removal decisions was contrary to the FPOs (which until quashed by her Honour's certiorari order remained in force), was not authorized by the CYFA and was beyond power; and
 - (d) a declaration that the Secretary did not afford the father procedural fairness and/or comply with the principles in ss.10 & 11 of the CYFA in removing the children from his care on 06/05/2020.

AND FINALLY

Incerti J also ordered that the father's costs and the grandparents' costs of their respective proceedings be paid by the Secretary. As an incidental consequence of her Honour's orders the father's applications currently before the Children's Court for revocation of the CSBOs remain on foot pending determination by that Court.

5.10.7 The United Nations Convention on the Rights of the Child

The above decision-making principles are squarely based on the Convention on the Rights of the Child which sets out the undertakings of the international community in recognizing children as independent persons with their own integrity and human rights. The Convention was adopted by the United Nations and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20/11/1989. It entered into force on 02/09/1990 in accordance with Article 49. Of all the United Nations' Human Rights instruments, the Convention on the Rights of the Child is the most widely ratified, having been accepted by 197 state parties. The only notable exception is the United States of America. Australia became a signatory on 22/08/1990. For further information, see "Myths & Facts Concerning the Convention on the Rights of the Child in Australia" by Ms Melinda Jones: www.aifs.gov.au/institute/afrc6papers/jones.html. See also www.earlychildhoodaustralia.org.au.

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

The Convention also states, *inter alia*, that:

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

The last-mentioned point is contained in Article 12 of the Convention which states:

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

The Convention was referred to in general terms by Bell J in *DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 at [15]. Article 12 in particular was discussed at [209] where His Honour commented:

“It is unquestionably important for the voice of a child to be heard in matters affecting them. As I have said, children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should therefore be obtained and given proper consideration.”

In *BE v LH & MH* [Children's Court of Victoria, unreported, 04/06/2000] the primary issue for determination was whether or not LH who was aged 6 years 5 months and MH who was aged 5 years 2 months should be represented by a legal practitioner in the contested hearing of a protection application. In the course of the hearing, reliance was placed on Article 12 of the Convention, an article which was not wholly consistent with Victorian law in operation in 2000 and which remains not wholly consistent with s.524 of the CYFA. Magistrate Power held that the children should not be legally represented, and refused to exercise a discretion based on the Convention which was not in accordance with domestic Victorian law. At p.13 he said:

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

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

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”

Article 9.3 states:

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

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

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

5.10.8 Application of 'best interests' principles where there are multiple siblings

In *DHHS v Ms McE & Mr B* [Children's Court of Victoria-Power M, 20/04/2017] the Court had to decide on placement of 4 siblings, C1 [10y], C2 [8y], C3 [7y] & C4 [5y] who had been living in South Australia with their father and paternal grandmother. It was ultimately common ground that C3 could no longer

live with the father and paternal grandmother and should be returned to live with the mother in Victoria. Magistrate Power placed C1 & C2 on family preservation orders to live with their father in South Australia and C3 & C4 on family preservation orders to live with their mother in Victoria. At p.54 his Honour said:

- “Despite the multiplicity of factors to be considered, application of the ‘best interests’ principles [in s.10 of the CYFA] is relatively easy where there is only one child. It becomes more complicated when one is dealing with a sibling group where sometimes a decision which is in the best interests of one child has negative consequences for another. When there is such a ‘best interests’ conflict it then becomes a question of balance, in a sense a question of what is the least worst option for each child which leads to the best interests of the group as a whole.
For example it is likely that C1 & C2 will both miss C4 and vice versa if she is moved to Victoria. Even with regular contact such a separation is likely to cause some sadness, possibly emotional harm, to all three children. But given the evidence of C4’s wish to live with her mother, leaving her in South Australia is also likely to cause her emotional harm. The question for me then is which is the least worst option for each and what conditions can be put in place to ameliorate any such harm.”
- “I have never really understood why Parliament has drafted [the ‘sibling togetherness’ provision in] s.10(3)(q) of the CYFA as a consideration to be applied when children are placed in out of home care. In my view it is an important consideration wherever children are placed, no less important if they are in parental care than if they are in out of home care. But unfortunately in this case it is not achievable.”

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5.11 Interim accommodation order

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

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

5.11.1 Power of the Court to make an IAO

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

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

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

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

Section 262(5A) of the CYFA prohibits an IAO being made in respect of the child if the Court is satisfied that-

- (a) a protection order could be made in respect of the child under Part 4.9; or
- (b) a permanent care order could be made in respect of the child under s.319.

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

5.11.2 Power of Bail justice to make an IAO (Temporarily suspended by COVID-19 legislation)

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

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

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

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

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

5.11.3 Placement of child under an IAO

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

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

Note: This type is rare and is clearly only appropriate for an older adolescent child.
- (b) **Parent:** The release of the child into the care of a parent until the adjourned date.

Note: If placement with a parent does not put a child at unacceptable risk of harm, the child is generally placed with the parent rather than out of home: see s.10(3)(g) of the CYFA.
- (c) **Suitable person:** The release of the child into the care of one or more suitable persons until the adjourned date.

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

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

Note: The fact that a child does not have adequate accommodation is not by itself a sufficient reason to place a child in a secure welfare service [s.263(5)]. There are two secure welfare services in Victoria, both operated by the Department: a 10 bed facility for boys at 259 Ascot Vale Rd, Ascot Vale and a 10 bed facility for girls at 26-32 Bloomfield Ave, Maribyrnong. A secure welfare placement is usually only ordered in a case where a child has a serious psychiatric/psychological condition or a serious drug dependence which places him or her at substantial and immediate risk of harm.
- (f) **Declared hospital:** Placement of the child in a declared hospital until the adjourned date upon the provision of a statement in the prescribed form [Form 13] by or on behalf of the chief executive of the hospital that a bed is available for the child at the hospital.
- (fa) **Disability service provider:** Placement of the child with a disability service provider within the meaning of the Disability Act 2006 (Vic) if the child is the recipient of disability services under that Act.
- (g) **Declared parent and baby unit:** Placement of the child in a declared parent and baby unit until the adjourned date upon the provision of a statement in the prescribed form [Form 13] by or on behalf of the chief executive of the unit that a place is available for the child at the unit.

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

5.11.4 Parent versus stranger

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

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

5.11.5 When placement may be undisclosed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"However, at the point in that passage at which His Honour refers to the **form** of the order he states that the order should **give effect to the interests of the child.** At [17] His Honour states:

'In deciding what to do on an application for an interim accommodation order, the **well being of the child** and **any risk to the physical or mental well being of the child** are matters of substance which must be carefully considered and determined. It is the immediacy and gravity of any risk of harm which is important on such an application. Is there an unacceptable risk if the children are left with the mother? Is there the likelihood of some harm?' [Bold emphasis added]."

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

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

5.11.7 Conditions

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

In *ZD v DHHS* [2017] VSC 806 Osborn J dismissed an appeal against the decision of a magistrate of the Children's Court to include on IAOs a condition allowing for three children aged 5, 3 & 2 placed in foster care to be immunised against measles. Such immunisation was also a condition precedent to the two younger children being able to attend child care. Osborn J held at [11]:

"In summary:

- (a) the plain meaning of the relevant provision is that the Court is given a wide discretion governed by the overriding principle of the best interests of the child;
- (b) that principle reflects the paramount consideration under the Act: see s.10(1);
- (c) limitations imposed by the Act upon the Secretary's administrative powers [see e.g. s.175A(2)] cannot found an implication concerning the powers of the Children's Court;
- (d) the interim nature of the order does not prevent the imposition of a condition of the type in issue;
- (e) such condition related directly to the circumstances of the accommodation of the children;
- (f) the condition is valid;
- (g) the action proposed pursuant to the condition is authorised in any event by other conditions of the IAO;
- (h) where the intention of the provision is clear there is no scope for the *Charter of Human Rights and Responsibilities Act* 2006 ('the Charter') to affect its construction, but in any event, properly understood, the provisions of the Charter support the above conclusions."

His Honour also held:

[59]-[60] "The condition in issue goes to the health and welfare of the children whilst in that [foster care] placement. It also goes directly to factors affecting the capacity of the foster parents to utilise child care facilities and to care for the older child who is subject to being sent home from school in the event of any perceived threat that he may contract measles or other diseases against which vaccination guards. All of these matters support the view that the condition is one directly and reasonably relating to the basis on which the children are accommodated during the IAO."

[64]-[65] "[T]he power to impose conditions is constrained by the purpose of an IAO and the terms in which it is granted. But...I am not persuaded the condition in the present case goes beyond the purpose of seeking to ensure the best interests of the children during the operation of the IAOs by reference to a consideration which bears directly on the capacity to accommodate the children safely and appropriately."

The appellant mother had argued that the relevant power under s.263(7) to include conditions on an IAO was not broad enough to include a condition which would impact on parental responsibility with respect to major long-term issues referred to in ss.175A-C of the CYFA. One such 'major long-term issue' is defined in s.3 as "an issue about the care, wellbeing and development of the child that is of a long-term nature [including] an issue of that nature about the child's health". Osborn J rejected this argument on the basis of the plain words and context of s.263(7) and the purpose and objectives of the CYFA. His Honour held at [71]-[79]:

- [71]: The plain words of s.263(7) extend to 'any' conditions that the Court considers should be included in the best interests of the child; the word 'any' should be given full force and effect: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[71] and the cases there cited.
- [72]: The CYFA distinguishes from the outset between the making of administrative decisions by the Secretary and decision-making by the Court; as the Secretary submitted, because the powers of each are distinct, no implication can be drawn from the Secretary's powers with respect to the extent of the Court's powers.
- [73]: The fact that the power of the Secretary under an IAO to give directions with respect to day-to-day decisions is expressly conditioned by reference to the notion of major long-term issues [see e.g. s.175A(2)] whereas the relevant power of the Court is not expressed to be so conditioned supports the view that the Court's power is relevantly unconstrained.
- [74]: The plain intention of s.263(7) is to give the child's best interests primacy over other considerations in fixing conditions included in an IAO. There is no reason to conclude that the notion of best interests under s.263(7) is narrower than that provided for in s.10. When the CYFA is read as a whole, it is plain that it is not.

- [75]-[76]: The notion of best interests is specifically required by s.10(3)(n) of the CYFA to include considerations of the desirability of the child being supported to gain access to appropriate health services. This provision reflects article 24 of the United Nations Convention on the Rights of the Child which requires state parties to recognize the right of a child to the enjoyment of the highest attainable standard of health.
- [77]-[79]: The core objective of best interests “is itself also conditioned by notions of proportionality and the need to have regard to the relationship between parent and child”, noting that ss.10(3)(a) & 10(3)(b) of the CYFA address the importance of the family unit. However, “the overriding consideration of the child’s best interests will itself limit parental power to control decisions with respect to the appropriateness of medical procedures: *Secretary for the Department of Health and Community Services v JWB (‘Marion’s Case’)* (1992) 175 CLR 218, 240 (Mason CJ, Dawson, Toohey & Gaudron JJ).” Further, the exercise of the power to impose conditions in the best interests of the child is subject to appeal on the merits to the Supreme Court, which is itself the repository of the *parens patriae* power to make orders with respect to medical treatment in the best interests of a child and contrary to the wishes of a parent: *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 [12]; *Re Beth* [2013] VSC 189 [115]-[127].

At [80] Osborn J warned that the construction question raised in *ZD v DHHS* “should not be viewed entirely through the prism of the immunisation issue which triggered the present proceeding”. His Honour continued:

[80] “[T]he circumstances which provide the basis for an IAO may be an application based upon the fact that a child is in need because a parent refuses to allow medical treatment. In turn, the magistrate has, amongst other options, the power to place a child on an IAO in a hospital or with a disability provider or within the care of persons other than the child’s parents. It would be anomalous if the magistrate could not impose conditions facilitating medical treatment as part of an integrated order in circumstances which arise out of health issues (including those resulting from a failure by parents to give consent to treatment) particularly where the magistrate orders a placement which is intended to provide for medical treatment.

[81] Likewise, it is very difficult to attribute an intention to the legislation to limit the power of a magistrate to provide for treatment during the term of an IAO by reference to decisions with respect to major long-term issues. Obvious difficulty would arise with respect to decisions relating to children suffering from severe chronic illnesses such as Type 1 diabetes, epilepsy, neurological conditions affecting movement, kidney or liver disease. The long-term well-being and development of the child may require recurrent appropriate decision-making in such cases. It cannot sensibly be the intention of the legislation that the magistrate’s power to impose conditions with respect to the safe accommodation of a child suffering from such conditions is limited by the application of the suggested criteria.”

Discussing the interim nature of an IAO Osborn J made the following points at [84]-[86]:

[84] “It is true that an IAO is by definition preliminary in nature, but that does not logically of itself mean that a requirement to resolve issues with long-term consequence may not arise during its currency. After all, a child may be in need within the terms of the statute, precisely because of a risk to health or development.

[85] Moreover, there is no relevant statutory time limit upon the length of the term of an IAO and there is a power for its ongoing extension so that the IAO may last for some material period of time.

[86] The fact that the IAO is an interim order only is a factor which might logically bear upon the exercise of the Magistrate’s discretion in a particular case, but it does not give rise to a necessary implication that the range of conditions which may be imposed in the best interests of a child will necessarily be confined to matters having short-term consequences only.”

5.11.8 Duration

- An IAO made by a bail justice only remains in force until the application is heard by the Court on the next working day, i.e. the next day on which the offices of the Court are open [ss.3 & 264(3)].
- There is no limit to the duration of an IAO made by the Court which is of type (a) {child release}, (b) {placement with parent}, (c) {suitable person} or (d) {out of home care} [s.264(1)].

- An IAO made by the Court which is of type (e) {secure welfare}, (f) {declared hospital} or (g) {declared parent and baby unit} remains in force for a period of not more than 21 days beginning on the day on which the order is made [s.264(2)]. The use of the words “beginning on the day on which the order is made” – read in conjunction with s.44(1) of the Interpretation of Legislation Act 1984 (Vic) [No.10096] – means that in the calculation of the 21 day period the first day of the IAO is not counted even though the IAO commences on that day.
- Despite the above, an IAO made by the Court in a case where an application for conciliation counselling is lodged with the Secretary only remains in force until an irreconcilable difference application has been made to the Court or for 21 days (beginning on the day on which the order is made), whichever is the shorter [s.264(4)].

Note: In the unlikely event that-

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

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

5.11.9 Extension

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

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

5.11.10 Statistics

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

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

	2013 /14	2014 /15	2015 /16	2016 /17	2017 /18	2018 /19*	2019 /20*		
IAOs MADE	7663	8559	9554	8771	9823	14121	15955		
IAOs EXTENDED	12529	15540	17913	17897	19204	16573	15405		

*Due to changes in the Court's recording system variations of IAOs are now included as IAO's made rather than IAOs extended.

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

5.11.11 Hearings [evidence-based or by submissions]

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

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

Whether or not an application for an IAO has already been heard by a bail justice, if an application for an IAO is made to the Court at a time when the Court is able to deal with it, the Court will hear the application on the same day. The cut-off time for arrival at the registry of Melbourne Children's Court, Moorabbin Justice Centre and Broadmeadows Children's Court is 1.00pm on any working day with the exception of secure welfare related placements which may be filed up until 2pm. Further, any submissions contest arising out of the filing of any such application must be in a position to proceed by 3pm. See Practice Directions 5/2013, 6/2014 & 6/2015. Lest this be the source of ill-informed criticism, it is important to understand that the reason for fixing 1.00pm is that experience shows that the parties in such cases are unlikely to be ready to commence within two hours of the application being made to the registry and thus it is not uncommon for IAO contests to finish after 5.00pm.

If any of the parties wish to contest the Department's proposal for an IAO and/or associated conditions, the Court will hear an IAO contest forthwith or within a very short period. Usually this is by submissions from the parties or their legal representatives rather than by the hearing of evidence. The lawful justification for a submissions contest in such circumstances appears from the following dicta of Beach J in *G v H [No 2]* [Supreme Court of Victoria, unreported, 10/08/1994]:

"[I]f a magistrate had a Protection Application before him which he was then unable to hear because of the unavailability of sufficient court time, or other sound reason, and it was necessary in the interests of children the subject of the application that he make an Interim Accommodation Order as a matter of urgency, that order to run for a short period of time until the magistrate could hear the protection application or a full contested Interim Accommodation Application, then it was no denial of natural justice to the parties to make an Interim Accommodation Order which could, perhaps, be described as a holding order, without hearing evidence in relation to the matter, but simply relying on the submissions of practitioners for the parties". [p.9]

"If a magistrate makes as a matter of some urgency an Interim Accommodation Order in what is clearly a contested case, it is not essential the matter come back for a full hearing within a matter of hours of the making of the original order, but it should come back before the magistrate or some other magistrate within a reasonable time to enable the matter to be fully investigated." [p.10]

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

"It could not be thought, in my opinion, that it was desirable for the learned Magistrate to determine the application simply in reliance upon unrecorded submissions from the Bar table. That is so despite s.82(1) of the [CYPA, now s.215 of the CYFA]. Nonetheless, it must be recognised that in urgent circumstances a course may be followed which is far from ideal; though having said that, the problems when an appeal is brought from an Order made in such circumstances become very considerable."

In light of this dicta all submissions contests at all Children's Courts are now recorded. In *P v RM & Ors* [2004] VSC 14 Gillard J, while agreeing with Ashley J that the procedure was "unusual", said at [19]: "I do not for one minute criticize it as being an inappropriate procedure." See also *CJ v Department of Human Services* [2004] VSC 317 at [10]-[11] per Habersberger J; *DOHS v SM* [2006] VSC 129 at [4] per Hansen J; *DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 at [119]-[126] per Bell J; *DOHS v Children's Court of Victoria & Ors* [2012] VSC 422 at [22]-[27] per Dixon J. See also the discussion in section 4.8.3 in relation to submissions contests in cases other than IAOs.

Section 10(2) of the CYFA provides that when determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development...must always be considered." In the urgent circumstances in which submissions contests are inevitably heard, the Children's Court is very rarely in a position immediately to hear evidence from parties and allow it to be tested by other parties. Accordingly, in order to maximise the safety of the subject child, the Court generally accepts the Department's case 'at its highest'. In *Secretary to DHHS v Children's Court of Victoria, Rosa Darcy (A Pseudonym) & Walter Ronny (A Pseudonym)* [2018] VSC 183 at [16]-[17] Zammit J discussed what this means and at [32] summarized the relevant test of 'unacceptable risk' for submissions contests:

[16] "[I]t is convenient to say something about the procedural requirement that this Court accept the Secretary's case 'at its highest', as this phrase is commonly used in the

Children's Court. Some guidance as to what this means is offered by the observations of Magistrate Power in the matter of *Re AS* (unreported, Children's Court of Victoria, 05/06/2012); see also *Secretary, DHS v Children's Court of Victoria* [2012] VSC 422 [19]-[25] (Dixon J). That too was a 'submissions hearing' in relation to a contested application for an interim accommodation order. As his Honour explained it in the course of oral argument:

'[I]t isn't really a question of automatically and blindly taking the Department's case at its highest. It has to be subjected to some scrutiny but where we've got factual assertions, and where you've got the Department making a factual assertion which if true would put the child at risk of harm, and where you've got a parent denying the basis of that factual assessment, in those circumstances it seems to me that s.10(2) does require the Court to act on the basis of the Department's factual allegations unless they are allegations which ought on their face be given very little weight.

I think that you're right at one level in saying that the rule of thumb is that in submissions contests the Department's case has to be taken at its highest but it really does need to be explained that the Court is not obliged to give weight to something which the Court considers to be not deserving of weight (at [14]-[15]).'

[17] The following passages from his Honour's ruling are also illuminating:

'The Court must – as part of its decision-making process – analyse what weight is to be given to allegations and counter-allegations. However, in the absence of sworn evidence it is not possible for the Court to disregard factual allegations made by the Department which appear on their face to be rational...

So in this situation where the welfare of a child is at stake, a rational assertion by the Department about a fact which raises issues of child protection must be accepted by the Court...

In submissions contests this is not usually a major issue, because usually there is a sub-stratum of facts that are not really disputed and it is a question of deciding which opinion based on those common facts is in the best interests of the child. However, this case is different. Here there are serious allegations made by the police...and there are denials or explanations given by [the father of the child]. So on the balance of probabilities, if that is a test I can appropriately apply in submissions contests, I prefer the Department's factual case insofar as there is a dispute between some elements of it and the father's factual case (at [21]-[23]).'

[32] "For the purposes of s.10(3)(g) the Court is 'required to assess, in the particular circumstances of the case, the likelihood of the conduct in question occurring in the future, together with the nature and extent of any risks of harm to the child associated with the conduct in the event it were to occur': *DOHS v DR* [2013] VSC 579 at [61]. And...in making this assessment as to 'risk' it is not necessary for the Secretary to actually prove the allegations with cogent evidence. The Court is required to accept the evidence 'at its highest' in the manner set out in [16] above. And where there is a conflict – unless other evidence refutes that evidence on the balance of probabilities – the Court must prefer the evidence of the Secretary: see [17] above."

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

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

5.11.12 Variation of IAO

Section 268 of the CYFA gives the Court power to vary the conditions attached to an interim accommodation order upon application [Forms 14 | 15]:

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

5.11.13 Breach of IAO

If a protective intervener is satisfied on reasonable grounds that there has been a failure to comply with an interim accommodation order or any condition attached to it, he or she may initiate breach proceedings [Forms 16 | 17]: see ss.269(1) to 269(4) of the CYFA. Such proceedings – which are not uncommon – may be initiated either by notice or by apprehension of the child, the same two mechanisms as for initiation of protection applications.

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

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

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

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

5.11.14 New IAO

Section 270 of the CYFA gives the Court or a bail justice power to make a new IAO upon application [Forms 14 | 15]:

- by a child or parent if:
 - he or she was not legally represented at the hearing of the application for the original IAO; or
 - new facts and circumstances have arisen since the making of the IAO; or
- by a protective intervener if:
 - new facts and circumstances have arisen since the making of the IAO; or
 - the protective intervener is satisfied on reasonable grounds that the child is living in conditions which are unsatisfactory in terms of the safety and wellbeing of the child.

5.11.15 An additional statutory consequence of an IAO

Section 262(7) of the CYFA provides that if an IAO is made as a result of an alleged breach of a family preservation order, that order is suspended on the making of the IAO and remains suspended for the period of operation of the IAO but the period of the family preservation order is not extended by the suspension. In *The K Siblings* [Children's Court of Victoria-Power M, 21/06/2016] his Honour agreed with the Department's submission – in the context of an IAO made in proceedings for breach of a supervised custody order – that the SCO was suspended for all purposes by the making of the IAO. The suspension was not limited to the issue of placement but also applied to suspend the operation of conditions on the SCO. In *DHHS and K* [2016] VChC 2 Magistrate Bowles took a very different view, holding at [48] that the SCO would become a FRO on 01/03/2016 and an IAO could not then subsist.

5.11.16 Appeal

If the Court makes an IAO or dismisses an application for an IAO in respect of a child:

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

may appeal to the Supreme Court against the order or dismissal: s.271(1) of the CYFA.

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

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

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

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

[16] "It seems to me, considering [ss.116 + 117] as well as s.80B [of the CYPA], that what the latter contemplates is an appeal which should ordinarily be conducted upon material adduced before the Children's Court, but with an opportunity of adducing additional material in particular, if not necessarily special, circumstances. Concerning what was then s.79 of the [CYPA], Eames J said this is in *M v The Secretary* [Supreme Court of Victoria, unreported, 28/10/1994]:

"In my view, the breadth of the power given to the Supreme Court under s.79, and the nature of the proceedings, being concerned with the protection of children, are such that if the Court, in an appropriate case, thought that, although there was no apparent error of law in the conduct of the hearing before the Magistrate, the Order which was made was inappropriate, then it might interfere and substitute such order as it saw fit, and may do so either on the material provided to the Magistrate or on such information as was provided to the Court by way of affidavit. Furthermore, it does not seem to me that the Court would be precluded from hearing oral evidence, if thought appropriate. But it would, in my view, be exceptional for the Court to do so."

Ashley J continued:

[17] "As I see it, his Honour took a view to the ambit of what is now s.80B which is compatible with my perception of its intended operation. Probably his Honour's approach would lead to the receipt of material not before the Children's Court more readily than I would contemplate; but having regard to the importance of the welfare of the child in a case such as this, some lenience may be thought reasonable.

[18] All in all, it seems to me that if an appeal is brought on swiftly from the Children's Court, and if the material placed before that Court is capable of being reduced to a form upon which this Court can rely, then the appeal ought be dealt with upon that material and not otherwise. But if the material before the Children's Court is incapable of being reduced to a form upon which the Court can rely (though that should not be the case), or if between the order being made and the appeal coming on new circumstances have developed, or perhaps if important circumstances were not brought to the attention of the Children's Court, this Court should not be left uninformed when dealing with a s.80B appeal."

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

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

expressed by Eames J. If the Court considers another order should have been made then it is bound to set aside the order."

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

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

In *Secretary to DHHS v Children's Court of Victoria, Rosa Darcy (A Pseudonym) & Walter Ronny (A Pseudonym)* [2018] VSC 183 Zammit J preferred the position adopted by Hansen J in *DOHS v SM* [2006] VSC 129 at [13]-[14]. Her Honour concluded at [14]:

"[W]hile the Magistrate's decision carries considerable weight because of the specialised nature of the jurisdiction, it is not necessary for this Court to identify error – in the widely understood sense of *appealable* error [see generally *House v The King* (1936) 55 CLR 499] – to overturn the Magistrate's decision. This Court may form the view that the decision of the Magistrate was one that was reasonably open to him or her but nevertheless conclude that a different order should be made."

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

"[64] This court has repeatedly recognised that the Children's Court is a specialist court: *Hien Tu v DOHS* (Supreme Court of Victoria, unreported, 23/02/1999, Beach J) at [21]; *P v RM* [2004] VSC 14 at [27] (Gillard J); *CJ v DOHS* [2004] VSC 317 at [21]-[22] (Habersberger J); *DOHS v Sanding* [2011] VSC 42 at [28] (Bell J); cf. *DOHS v Children's Court of Victoria* [2012] VSC 422 at [32] (Dixon J). Magistrates are only assigned to the Children's Court after regard has been had to the experience of the magistrate (or reserve magistrate) in matters relating to child welfare: s.507(2) of the CYFA.

[65] In those circumstances due weight should be given to decisions made in the Children's Court, mindful of the processes imposed under the [CYFA] as to the manner in which proceedings are required to be conducted: see ss.215(1), 522, 530(8)-(11). With respect I agree with the comments of Gillard J in *P v RM* [2004] VSC 14 at [28] to the effect that it is not necessary for an appellant to establish that 'it is abundantly clear that some significant error has been made' before an appeal is allowed: Contra *Hien Tu v DOHS* (Supreme Court of Victoria, unreported, 23/02/1999, Beach J) at [21]. To impose such a threshold would be to act contrary to the obligations imposed on this court pursuant to s.271 of the [CYFA]. This must be particularly so in an appeal such as this where significant fresh evidence is before the court."

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

- "[A]n appeal under s.271 (like its predecessor) is in the nature of a re-hearing on the material before the magistrate and any on any other relevant material placed before the court hearing the appeal: *P v RM & Ors* [2004] VSC 14 at [25];
- for an appeal to succeed, it is not necessary for the Supreme Court to identify any error in the decision made by the magistrate – that is, a view may be taken that the decision of the magistrate was open, but nonetheless the Supreme Court thinks that a different order should have been made: *DOHS v SM* [2006] VSC 129 at [30];

- although the view of an experienced Children’s Court magistrate should be afforded respect, and weight given to it, nevertheless it is ultimately the appellant court’s responsibility to form its view on all the relevant facts and circumstances: *P v RM & Ors* [2004] VSC 14 at [28]; *DOHS v SM* [2006] VSC 129 at [14];
- although a child is only to be removed from the care of a parent if there is an unacceptable risk of harm, the existence of an unacceptable risk of harm is not the only matter to be considered – all the circumstances relevant to the paramount interests of the child must be considered: *P v RM & Ors* [2004] VSC 14 at [32];
- when considering, on an appeal concerning an IAO, whether there is an unacceptable risk of harm, it is neither necessary nor usually appropriate for a court to attempt to make findings of fact about events of past alleged harm; and
- analogously to hearings for interlocutory injunctions, the court is to weigh the evidence concerning the conduct in question, consider the likelihood of it occurring in the future, consider the nature and extent of the risk of harm to the child associated with the conduct were it to occur or re-occur, and consider whether that risk is unacceptable having regard to the paramount interests of the child: *P v RM & Ors* [2004] VSC 14 at [31]; *DOHS v DR* [2013] VSC 579 at [61].”

In *Secretary DHHS v Children’s Court of Victoria & Emily Powell (a pseudonym)* [2020] VSC 144 at [37] John Dixon J cited and applied the above principles.

In *GG v Secretary to DHHS* [2020] VSC 740 Forbes J – in allowing an appeal by the paternal grandmother GG of a 9-year-old child BB against an IAO placing BB in the care of her mother LL – also cited and applied the above principles. GG had been the primary caregiver of LL since her birth and in 2017 Federal Circuit Court orders were made by consent providing that BB live with GG and spend time with LL and with BB’s father. Because of those orders GG is a ‘parent’ of BB within the definition of ‘parent’ in s.3(1) of the CYFA. Despite that she had not been served with the protection application which had been taken out by the Department after advice from Victoria Police that BB’s father had been bailed on 2 charges of rape to live with his mother GG. In the previous 1½ years BB had been with GG 50% of the time and the other 50% with LL. Holding that the Department’s “summary provided to the Magistrate was either wrong or misleading in a number of important aspects”, Forbes J set aside the IAO to LL and made a new IAO placing BB with GG. In so doing, Forbes J rejected at [24] a submission by the Department that if the original IAO was set aside, the child should nevertheless remain on an IAO to LL unless an unacceptable risk of harm was shown.

In *ZD v DHHS* [2017] VSC 806 at [5]-[6] Osborn J unequivocally stated:

“[5] Section 271 provides for an appeal on the merits. In this regard, it is to be contrasted with a raft of other provisions in the legislation of this State (including s.430P of the CYFA) which provide for an appeal to the Supreme Court from decisions of magistrates on questions of law only.

[6] It is accepted that, on the hearing of appeals pursuant to s.271 of the CYFA, the evidence before the magistrate may be supplemented by further evidence bearing on the best interests of the child: *Purcell v RM* [2004] VSC 14 [22]; *The Secretary, Department of Human Services v Merigan* [2006] VSC 129; *Department of Human Services v DR* [2013] VSC 579; *Secretary to the Department of Human Services v Children’s Court of Victoria* [2014] VSC 609 [24].”

See also *CJ v DOHS* [2004] VSC 317 at [21]-[23] per Habersberger J; *R v DOHS* [Supreme Court of Victoria, unreported, 16/07/2008] at p.5 per Hansen J; *Edwards (a pseudonym) v DHHS & Anor* [2018] VSC 716 per McMillan J; *PR v DHHS* [2019] VSC 326 per Ginnane J; *DHHS v Children’s Court of Victoria* [2020] VSC 527 per Ginnane J.

5.12 Findings leading to a protection order

5.12.1 Conditions precedent to making a protection order

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

- that a child is in need of protection; or
- that there is a substantial and irreconcilable difference between a child and the person who has care of the child-

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

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

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

In *DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 at [40] Bell J noted that “this requirement does not expressly apply when the court revokes a custody to Secretary order”.

In *DHHS v Mrs SG* [Children’s Court of Victoria, unreported, 08/06/2016] Magistrate Power was satisfied on the balance of probabilities that the Department had taken all reasonable steps pursuant to s.276(1)(b) of the CYFA to provide the services necessary in the best interests of the mother’s 4 oldest children. He was not satisfied that it had done so in relation to the mother’s fifth child. In particular he found that all reasonable steps had not been taken by the Department-

- to seek a residential admission for the child and mother to a parent and baby unit or to make a referral to the Together Again program or the Stronger Families program; or
- to identify other support services required in the child’s best interests.

In *The C & K Siblings* [Children’s Court of Victoria, unreported, 23/04/2018, pp.36-37] Magistrate Power was satisfied on the balance of probabilities that all reasonable steps had been taken – some by C’s carer, some by his maternal grandmother and some by the Department – to provide the services thus far necessary for the child C whose disabilities were such that he is likely to require the ongoing provision of multiple services. His Honour said: “A reading of s.276(1)(b) without a proper focus on the word ‘reasonable’ might result in the Court never being able to place a child like [C] on a protection order at all because his requirement for the provision of services is ongoing and dynamic. That could not possibly be the intention of Parliament.”

5.12.2 Restrictions on removing parental custodial rights

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

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

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

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

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

“The subsection is on its face prescriptive, and prevents the Court from making an order that removes children from a parent’s custody unless the disposition report has addressed the issue and the court is satisfied that all such reasonable steps have been taken. However, the wording of the provision read this way assumes that there will always be services that exist which are capable of enabling children to stay with their parents. This assumes that the perceived risk to a child’s welfare can be averted by provision of services, whereas it is not hard to postulate examples of where this will not be so. [Counsel for the father] conceded that there will not always be such services, but submitted that that impossibility should be overcome by a disposition report that states that consideration has been given to whether there are any such services and sets out the reason why none would avert the risk to the child. The problem with that argument is that if read strictly the words of the sub-section would still not permit an order removing the child from the parents even in the most dire circumstances. In my view it is also possible to interpret the section as if after the words ‘provide the service’ there were inserted ‘(if any exist)’.

I consider that it is appropriate in approaching the interpretation of this provision, to prefer an interpretation that promotes the purpose and object of the Act (or of the Family provisions of it) to one that does not [Interpretation of Legislation Act 1984 s 35(a) and (b)(i)] and I take into account that one of the purposes of the Act is to provide for the protection of children and young persons [s.1(b)].

The purpose of the protection provisions is to enable the Court to make orders to protect children from the risks set out in the grounds under s 63, and in my view it would be out of keeping with the whole tenor of these provisions and of the paramount considerations to which regard must be had under s 87(1A), that a child cannot be removed from a parent's custody because no services exist capable of averting or minimising the risk of harm to the child."

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

Section 86(2)(b) of the CYPA was also discussed in the Children's Court in the case of *DC* [unreported, 18/03/1999, case PA860/98]. This was a very different case from that dealt with by Judge Cohen for - far from there being protective concerns about a parent which no services could rectify - there were indeed no protective concerns about the father at all. In *DC* the 3½ year old boy had been found to be in need of protection, partly as a result of multiple bruising to his face and body while in the care of his mother and her former boy-friend. The father and mother had separated when the boy was 5½ months old. Thereafter the mother had been the primary caregiver until 7 months before the hearing when the boy had been placed with his paternal grandmother, with whom the father resided. DOHS, while acknowledging that it held no protective concerns about the father, was seeking a custody to Secretary order as a vehicle for a staged reunification of the boy with his mother. In its disposition report the Department did not comply with s.49(c). Indeed it could not have complied, given its view that no services were necessary in relation to the father. It was argued on behalf of the Department that s.86(2) did not apply because 'custody' in s.86(2)(b) meant care and control: the father had not had the care and control of the boy for years and the mother lost the right of care and control either under the IAO made by a bail justice or the IAO made and extended by the Court. It was argued on behalf of the father that 'custody' in s.86(2) had the same meaning as 'custody' in s.5 and while both parents had lost *de facto* care and control of the boy, their right to have daily care and control of him had never been removed. Mr Power, M held-

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

In the case of *DHHS v M(K)S* [Children's Court of Victoria, unreported, 09/05/2016] the Department argued that s.276 was not applicable to a child who had already been removed from a parent's care on an IAO. At [64] Magistrate Parkinson disagreed:

“The making of a final order is not merely the ‘continuation’ of the IAO (an interim order) and thus the ‘continuation’ of the placement out of the parent’s care. It is a new and distinct order which operates to give independent legal effect to the ‘removal’ of the child from the parent’s care. I am satisfied that the effect of a final order in the nature of a Family Reunification Order is to remove the children from the care of the parent for a period of time. The only way that the children can remain lawfully out of the care of the parent without [the parent’s] consent is by the operation of a protection order. Unless the children were to be reunited with the parent by a Family Preservation Order, any of the remaining final orders would have the effect of removing the children. To approach the section in a merely temporal manner is to ignore the context in which the section operates and the remainder of the Division in which it is set.”

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

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

5.12.3 Matters to be considered in determining Family Division applications generally

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

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

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

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

As and from 01/03/2016 s.276A requires the Court to have regard to certain advice from the Secretary in determining whether to make a protection order:

- s.276A(1) requires the Court, in determining whether to make a protection order, to have regard to advice from the Secretary as to—
 - (a) the objectives of any case plan prepared in relation to the child; and
 - (b) the arrangements in place for the care of any siblings under the age of 18 years; and
 - (c) the age of the child and the period that the child has spent in out of home care during the child’s lifetime (whether or not as a consequence of a court order).
- s.276A(2) requires the Court, in determining whether to make a protection order that has the effect of conferring parental responsibility for a child on the Secretary, to “have regard to advice from the Secretary as to—
 - (a) the likelihood of a parent permanently resuming care of the child during the term of the protection order; and
 - (b) the outcome of any previous attempts to reunify any child with the parent; and

- (c) if a parent has previously had another child permanently removed from his or her care, the desirability of making an early decision about the future permanent care arrangements for the current child; and
- (d) the benefits to the child of making a care by Secretary order to facilitate alternative arrangements for the permanent care of the child [curiously there is no reference to a long-term care order] if–
 - (i) the child is in out of home care as a result of an order under this Part and has been in out of home care under such an order for a cumulative period of 12 months determined in accord with s.287A(4); and
 - (ii) there appears to be no realistic prospect of the child being able to safely return to the care of the parent within a further period of 12 months; and
 - (iii) there are no permanent care arrangements already available for the child; and
- (e) the desirability of making a permanent care order, if the child is placed with a person who is intended to have permanent care of the child.”

Neither of these sub-sections require the Court to accept the advice from the Secretary in any particular case for to do so would probably violate the constitutional prohibition against administrative interference in the exercise of judicial power: see e.g. *H A Bachrach Pty Ltd v The State of Queensland & Others* (1998) 195 CLR 547 at 562-3; see also *Liyanage v The Queen* [1967] 1 AC 259; *Nicholas v The Queen* (1998) 193 CLR 173; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. There is no case law directly on s.276A from any source.

5.13 Protection orders

Listed in s.275(1) of the CYFA are the five protection orders defined in s.3(1). The table below shows each order, the sections in the CYFA which now empower and define it, the relevant prescribed form under the Children, Youth and Families (Children's Court Family Division) Rules 2017 [S.R. No.20/2017] and the names of each of these orders prior to 01/03/2016.

	PROTECTION ORDER		CYFA	FORM	NAME PRIOR TO 01/03/2016
(a)	Undertaking	UTK	ss.275(1)(a) & 278	19	Undertaking
(b)	Family preservation order	FPO	ss.275(1)(b) & 280	21	Supervision order
(c)	Family reunification order	FRO	ss.275(1)(c) & 287	22	Custody to Secretary order
(d)	Care by Secretary order	CBS	ss.275(1)(d) & 289	24	Guardianship to Secretary order
(e)	Long-term care order	LCO	ss.275(1)(e) & 290	26	Long-term guardianship to Secretary order

Prior to 01/03/2016 there were 3 additional protection orders which have since been abolished:

- interim protection order [former ss.291-292];
- custody to third party order [former s.283];
- supervised custody order [former s.284].

Under the transitional provisions in Schedule 5 to the CYFA:

- any interim protection order or custody to third party order in force immediately before 01/03/2016 continued in force for all purposes until its expiry;
- any supervised custody order in force immediately before 01/03/2016 was thereafter taken to be a family reunification order; and
- any custody to Secretary order in force immediately before 01/03/2016 was thereafter taken to be–
 - (a) a family reunification order only where the child had been under a custody to Secretary order for less than 24 months on 01/03/2016; or
 - (b) a care by Secretary order where the child had been under a custody to Secretary order for 24 months or more on 01/03/2016 in which care any conditions on the former order lapse.

The following table lists the numbers of protection orders made state-wide from 2008/09 to 2019/20:

PROTECTION ORDER	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13	2013 /14	2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20
Undertaking [s.278]	175	127	140	130	219	201	196	263	204	252	284	275
Supervision order	1859	1747	1906	2016	2296	2153	2516	1946	↓CHANGED↓			
Family preservation order	↑FORMERLY NAMED SUPERVISION ORDER↑							1129	3159	3389	3713	3559
Custody to third party order	12	4	4	7	8	7	13	4	ABOLISHED			
Supervised custody order	202	233	289	330	453	579	737	616	ABOLISHED			
Custody to Secretary order	1288	1353	1227	1332	1412	1389	1658	1076	↓CHANGED↓			
Family reunification order	↑FORMERLY CUSTODY TO SECRETARY ORDER↑							798	2270	2094	2174	1772
Guardianship to Secretary order	260	225	273	288	239	261	313	179	↓CHANGED↓			
Care by Secretary order	↑FORMERLY GUARDIANSHIP TO SEC ORDER↑							375	1339	1080	952	954
Long-term g'ship to Secretary order	43	49	47	45	53	46	40	31	↓CHANGED↓			
Long-term care order	↑FORMERLY LONG-TERM G'SHIP SEC ORDER↑							91	322	219	330	277
Interim protection order	893	795	871	881	920	1131	1218	662	ABOLISHED			
TOTALS	4732	4533	4757	5029	5600	5767	6691	7170	7294	7034	7456	6837

The total number of protection orders increased from 2006/07 to 2008/09, declined in 2009/10 but came back to 2008/09 levels in 2010/11, substantially increased from 2011/12 to 2018/19 but decreased in 2019/20, probably as a consequence of the COVID-19 pandemic. The number of custody to third party orders remained insignificantly small. The number of supervised custody orders increased as a result of amendments introduced by the CYFA – significantly so up to 2014/15 – but were abolished as and from 01/03/2016. In the last twelve years there has been a significant increase in the number of supervision orders/family preservation orders.

Section 275(2) of the CYFA provides that a protection order may continue in force after a child attains the age of 17 years but ceases to be in force when the child attains the age of 18 years. Section 275(3) of the CYFA – introduced on 16/03/2016 – provides that a care by Secretary order or 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. It appears to the writer that s.275(3) has the effect of expanding the meaning of 'child' in paragraph (b) of the definition in s.3(1).

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

The only protection orders which could be extended under the CYPA were custody to Secretary orders and guardianship to Secretary orders. Under the CYFA family preservation orders, family reunification orders and care by Secretary orders are able to be extended. The table below shows the number of orders extended state-wide from 2007/08 to 2018/19. There was a gradual increase in the number of orders extended from 2008/09 to 2014/15 and a small decrease in 2015/16. The large decreases in extensions in 2016/17 & 2017/18 are partly explainable by the introduction as and from 16/03/2016 of applications for a care by Secretary order [s.289(1A)] or for a long-term care order [s.290(1A)] as an alternative to an application to extend a family reunification order.

EXTENSIONS OF PROTECTION ORDERS												
PROTECTION ORDER	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13	2013 /14	2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20
Supervision order	286	303	293	375	457	393	380	219	↓CHANGED↓			
Family preservation order	↑FORMERLY NAMED SUPERVISION ORDER↑							150	495	498	552	446
Supervised custody order	52	72	87	107	126	194	231	172	ABOLISHED			
Custody to Secretary order	1201	1326	1335	1401	1430	1498	1543	1027	↓CHANGED↓			
Family reunification order	↑FORMERLY CUSTODY TO SECRETARY ORDER↑							168	664	578	546	505
Guardianship to Secretary order	423	374	366	356	362	346	380	231	↓CHANGED↓			
Care by Secretary order	↑FORMERLY G'SHIP TO SECRETARY ORDER↑							309	499	245	624	410
TOTALS	1962	2075	2081	2239	2375	2431	2534	2276	1658	1321	1722	1361

5.14 Undertaking

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

As a protection order, the Court may make an order requiring:

- (a) the child; or
- (b) the child's parent(s); or
- (c) the person with whom the child is living-

to enter into an undertaking in writing [Form 19] to do or refrain from doing the thing(s) specified in the undertaking for a period of up to 6 months or, if there are special circumstances, up to 12 months. What constitutes 'special circumstances' is not defined. Row (i) in the first table in paragraph 5.13 lists the numbers of such undertakings ordered from 2008/09 to 2019/20.

5.14.2 Undertaking under s.272(1) of the CYFA & 'common law undertaking'

In a case involving a protection application or an irreconcilable difference application, without finding the application proved, the Court may make an order requiring:

- (a) the child; or
- (b) the child's parent(s); or
- (c) the person with whom the child is living-

to enter into an undertaking in writing [Form 18] to do or refrain from doing the thing(s) specified in the undertaking for a period of up to 6 months or, if there are special circumstances, up to 12 months. What constitutes 'special circumstances' is not defined.

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

The following table shows the numbers of:

- s.278 undertakings;
- s.272 undertakings plus common law undertakings given in cases which were either struck out or dismissed or in which the Court refused to make a protection order after expiry of an IPO.

UNDERTAKINGS	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13	2013 /14	2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20
Section 278	175	127	140	130	219	201	196	263	204	252	284	275
Section 272 + Common law	199	159	196	327	252	206	302	317	343	407	385	547
TOTALS	374	286	336	457	471	407	498	580	547	659	669	822

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

5.14.3 Conditions

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

5.14.4 Consent mandatory

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

5.14.5 Departmental withdrawal

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

5.14.6 Variation/Revocation of undertaking

On application [Form 20] by:

- (a) the child; or
- (b) the child's parent(s); or
- (c) the person with whom the child is living-

the Court may vary the undertaking or any of its conditions [ss.273(3)(a) & 279(2)(a)] or may revoke the undertaking [ss.273(3)(b) & 279(2)(b)]. The legislature has given the Secretary no standing to make an application to vary or revoke an undertaking made either under s.272(1) or s.278(1) of the CYFA.

5.14.7 Breach

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

5.15 Family preservation order [formerly supervision order]

5.15.1 Effect of a family preservation order

A family preservation order/supervision order [Form 21] was the most common protection order made in each year between 2008/09 & 2019/20. It gives the Secretary to the Department of Health & Human Services responsibility for the supervision of the child but does not affect a person's parental responsibility for the child.

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

It is clear from s.281(2)(b) of the CYFA that a family preservation order may permit a “shared care” arrangement in which a child lives “as far as possible for an equal amount of time with each parent if the parents do not live in the same household”.

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

See *DHHS and C siblings* [2019] VChC 6 for a case discussing some factors relevant to the placement of 3 children made subject to family preservation orders, the factors including the parenting styles and mental health of both parents and the children’s express wishes.

5.15.2 Direction if family preservation order is longer than 12 months

If the order is longer than 12 months, the Court is required by ss.280(3) to direct the Secretary to review the operation of the order before the end of the first 12 months.

Following such review, the Secretary may, with the agreement of the child (if aged 10 years or older) and the child’s parent, determine that the family preservation order should end [s.280(4)]. Section 280(5) requires the Secretary to notify the Court of a determination under s.280(4).

If notice is given to the Court under s.280(5), the family preservation order ends at the end of 12 months after the order is made or on the date that notice is given, whichever is the later [s.280(6)]. Section 280(7) provides that the Secretary must notify the child (if aged 10 years or older), the child’s parent and any other persons that the Court directs if the family preservation order ends in accordance with s.280(6).

5.15.3 Conditions on a family preservation order

Under s.281(1) of the CYFA, a family preservation order may include conditions to be observed by–

- (a) the child; or
- (b) the child's parent(s).

Under s.281(1A) conditions that may be included on a family preservation order are conditions that the Court considers–

- (a) to be in the best interests of the child; and
- (b) are reasonably capable of being carried out by each person who will be subject to the condition; and
- (c) promote the continuing care of the child by a parent of the child.

However, under s.281(2) a family preservation order must not include any condition as to where the child lives, unless the condition relates to–

- (a) the child living with a specified parent; or
- (b) the child living as far as possible for an equal amount of time with each parent if the parents do not live in the same household.

The genesis of s.281(2) is s.92(2) of the CYPA which provided that a supervision order must not include any condition as to where the child lives, unless the condition relates to the child living with a specified parent.

A question which not uncommonly arises is whether it is contrary to s.281(2) to include a condition that the child must live with parent X and parent X must live with person Y and/or at address Z. There is no superior court authority on the question. It is the author’s view that such a condition would not fall foul of s.281(2). There is certainly no express bar in s.281(2) against including two conditions on an FPO: (1) Child must live with parent X. (2) Parent X must live with person Y and/or at address Z. The worst that could be said of that is that is impliedly barred by s.281(2). But it is clear from s.280(1) that a primary role of an FPO is to enable the child to be in the day to day care of one or both of the child’s parents. The postulated condition does not derogate from that role. On the contrary, in appropriate cases it enhances it. So there is no basis for inferring a bar. Finally, if there are two competing interpretations of s.281(2), it is clear from s.10(1) that the Court should adopt the one that promotes the best interests of the subject child. This would, at the same time, best accord with ss.281(1A)(a) & 281(1A)(c). Accordingly, the author considers that a condition expressly or impliedly requiring a child to live at a certain place can be ordered on an FPO provided that the condition also expressly relates to the child living with a parent at that same place.

Nor is there any superior court authority on the question whether, notwithstanding s.281(2), a family preservation order may contain a condition allowing for the child to be in unspecific respite care from time to time even if the periods of respite are not so great as to constitute an effective change in the child's care arrangements. The issue arose in a very limited way in *DOHS v Mr O & Ms B* [2009] VChC 2. In that case the mother had twice returned from Tasmania with her young child (born in September 2007) to live with the child's father and paternal grandmother in Melbourne. Her first return was contrary to an undertaking which the mother had given under s.272 of the CYFA that she would not have any contact or allow the child to have any contact with the child's father. The Court was satisfied to the requisite level that:

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

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

"Counsel for DOHS made a submission – from which counsel for the parents did not demur – that there were two alternative mechanisms open in law:

'A respite condition as specific as identifying the time or event at which a child would then go back into the care of the mother would fall foul of the provision in s.281(2). It might be that the Court could make a general condition for respite as agreed between the parties with some sort of notation to the effect that it has been agreed between the parties that respite occur until [the mother] leaves the jurisdiction. However, in a situation such as this where DOHS maintains its application for a custody to Secretary order, that option becomes even more difficult to achieve. If the Court was minded to make an order in the terms canvassed, the Court could extend the interim accommodation order and recall the matter for a mention at the time a supervision order can be made that would allow [the child] to be in her mother's care from that time forwards.'

...Given that it is only the space of a long weekend that [the child] needs to remain out of her mother's care and given the additional costs of legal representation which would be incurred by Victoria Legal Aid and possibly by the Department in listing a mention for next Tuesday morning, I preferred to adopt the first alternative. However, had there been any significantly greater delay in [the mother] returning to Tasmania, I would have adopted the second alternative."

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

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

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

'the contact of a child with a person who does not have care of the child by way of-

- i. 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
- ii. communication with that person by letter, telephone or other means- and includes overnight contact.'

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

At p.109 of his judgment the writer concluded:

"Because of s.281(2) of the CYFA, I doubt that I could include a respite condition on a supervision order which nominates a specific person other than a parent to be the respite carer. I have therefore included a general respite condition which does not name any particular person as respite carer but makes the choice of carer the subject of agreement between the mother and DOHS:

'If requested by the mother for reasons associated with her physical or mental health or for any other reason approved by DOHS, the child may have respite as agreed between the mother and DOHS.'

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

5.15.4 Powers of Secretary

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

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

The prescribed form of notice of direction is Form 6 in Schedule 2 of the Children, Youth and Families Regulations 2017 [S.R. No.19/2017]: see reg.17.

5.15.5 Extension of family preservation order

Under the CYPA a supervision order could not be extended. However, the CYFA provides in ss.293, 294, 296(1) & 298 a procedure which enables a family preservation order to be extended from time to time by up to 2 years after the extension or additional extension is granted. A direction under s.298 must be given if the extension is for more than 12 months. The 'notification requirements in s.298 are effectively the same as for the making of a family preservation order longer than 12 months: see section 15.5.2 above.

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

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

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

5.15.6 Variation/Revocation of family preservation order

On application [Form 28] by:

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

- **vary** the order or any of the conditions included in the order or add or substitute any condition(s) included in the order but must not extend the period of the order [ss.300 & 301(a)]; or
- **revoke** the order [ss.303(a), 304(1) & 307].

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

Commencing on 01/03/2016 s.301 was amended to empower the Court, on an application for variation, to vary **the order** as well as any of the conditions included in the order. This amendment appears to have been designed to enable the substitution of one carer for another in an appropriate case.

5.15.7 Breach of family preservation order

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

- there has been a failure to comply with any condition of the order; or
 - there has been a failure to comply with a direction given by the Secretary under s.282(2); or
 - the child is living in conditions which are unsatisfactory in terms of his or her safety and wellbeing-
- the Secretary may initiate breach proceedings [Form 37]: see ss.312-314 of the CYFA.

Breach proceedings - which are not uncommon - may be initiated either by notice or by apprehension of the child, the same two mechanisms as for initiation of protection applications. The initiation of breach proceedings keeps the family preservation order in force until the matter is determined by the Court: see s.316. However, if an IAO is made as a result of an alleged breach of a family preservation order, that order is suspended on the making of the IAO and remains suspended for the period of operation of the IAO but the period of the family preservation order is not extended by the suspension [s.262(7)]. In *The K Siblings* [Children's Court of Victoria-Power M, 21/06/2016] his Honour agreed with the Department's submission – in the context of an IAO made in proceedings for breach of a supervised custody order – that the SCO was suspended for all purposes by the making of the IAO. The suspension was not limited to the issue of placement but also applied to suspend the operation of conditions on the SCO. There is no logical reason why this dicta should not equally apply to breaches of family preservation orders.

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

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

Under the CYFA [unlike the CYPA], the only restriction on the length of any new supervision order made in breach proceedings pursuant to s.318(3) is the same as that in s.280(2) for the original supervision order, namely 12 months or in special circumstances 2 years.

5.16 Custody to third party order & supervised custody order [abolished]

The power to make these two protection orders – which were previously governed by the now repealed ss.283-284 and ss.285-286 respectively – was abolished as and from 01/03/2016. The transitional provisions in Schedule 5 of the CYFA provide that-

- any custody to third party order in force immediately before 01/03/2016 continued in force for all purposes until its expiry;
- any supervised custody order in force immediately before 01/03/2016 was thereafter taken to be a family reunification order.

A custody to third party order and a supervised custody order each granted sole or joint custody of a child to a person who was not:

- the Secretary of the Department in his or her official capacity; or

- a person employed by a community service in his or her official capacity; or
- a parent of the child.

They did not affect the guardianship of the child.

Under repealed s.284(4) of the CYFA reunification was the ultimate objective of a supervised custody order. In *DOHS v Ms D & Mr K* [Children's Court of Victoria, 15/06/2009], Power M considered it was too early to make a finding that reunification was a viable option and hence was not able to make the supervised custody order sought as a fall-back position by two of the parties.

The most significant differences between these two orders were that-

- under a custody to third party order the Department had no further involvement with the child or family while under a supervised custody order the Department continued involvement with the child, parent and custodian; and
- a custody to third party order could not be extended but a supervised custody order could be extended.

These differences made custody to third party orders unpopular [only 13 made in 2014/15] but supervised custody orders very popular [737 made in 2014/15]. The abolition of supervised custody orders has removed a valuable tool for settling disputed cases for it was quite common for a parent to be prepared to settle a case where he/she acknowledged a current inability to parent a child safely but required the certainty of the child's placement in the period that a supervised custody order provided. It also provided the carer and child with the certainty/stability that a family reunification order does not.

5.17 Family reunification order [formerly custody to Secretary order]

5.17.1 Effect of a family reunification order

A family reunification order/custody to Secretary order was the second most common protection order made in each year between 2001/02 & 2019/20.

A custody to Secretary order [abolished on 01/03/2016] granted sole custody of a child to the Secretary to the Department of Health & Human Services but did not affect the guardianship of the child. Under the transitional provisions in Schedule 5 to the CYFA any custody to Secretary order in force immediately before 01/03/2016 was thereafter taken to be-

- a family reunification order where the child had been under a custody to Secretary order for less than 24 months on 01/03/2016; or
- a care by Secretary order where the child had been under a custody to Secretary order for 24 months or more on 01/03/2016, in which case any conditions on the former order lapse.

Under s.287(1) of the CYFA a family reunification order [Form 22]-

- (a) confers parental responsibility for the child on the Secretary to DFFH; and
- (b) confers responsibility for the sole care of the child on the Secretary to DFFH.

However s.287(2) provides that a family reunification order "does not affect the parental responsibility of any other person for the child in relation to making decisions about major long-term issues except as provided for under the CYFA or by an order of the Court". A 'major long-term issue' is defined in s.3(1) 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 the child's-

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

The powers of the Secretary when exercising parental responsibility for a child are set out in Division 2 of Part 4.3 of the CYFA and in particular in ss.172 & 173. Under a family reunification order the Secretary has the sole right to decide where a child lives from time to time during the currency of the order. Under ss.173(1)(a) & 173(2) the Secretary may place a child for whom the Secretary has parental responsibility in any of the following ways-

- (a) in an out of home care service;
- (b) in a secure welfare service for a period not exceeding 21 days (and, in exceptional circumstances, for one further period not exceeding 21 days) if the Secretary is satisfied that there is a substantial and immediate risk of harm to the child;

- (c) [NOT RELEVANT FOR A FAMILY REUNIFICATION ORDER];
- (d) in any other suitable situation as circumstances require [this is usually with a relative of the child].

The duties of the Secretary in deciding where to place a child under s.173 of the CYFA are set out in s.174 and include-

- (a) to have regard to the best interests of the child as the first and paramount consideration; and
- (b) to make provision for the physical, intellectual, emotional and spiritual development of the child in the same way as a good parent would; and
- (c) to have regard to the fact that the child's lack of adequate accommodation is not by itself a sufficient reason for placing the child in a secure welfare service; and
- (d) to have regard to the treatment needs of the child.

Prior to 01/03/2016 s.287(2) of the CYFA required the Court to have regard to advice from the Secretary as to whether or not the Secretary is satisfied that the making of a custody to Secretary order is a workable option. This requirement is no longer in the CYFA, having been replaced by the broader provisions in s.276A, discussed in section 5.12.3 above.

For a discussion of some of the principles relevant to the making of a family reunification order see *DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 at [37]-[44] per Bell J. The circumstances leading to the making of the custody to Secretary orders in that case are detailed at [51]-[83].

5.17.2 Reunification is the ultimate objective of a family reunification order

It appears that generally, although not inevitably, the ultimate objective of a custody to Secretary order was reunification of the child with a parent. However, there was no provision in the CYFA which replicated the reunification direction in repealed s.284(4) of the supervised custody order provisions.

Since 01/03/2016 the CYFA has been somewhat clearer in relation to the ultimate objective of a family reunification order [FRO]. Not only does the name of the order give some guidance but-

- **s.167(1)(b)** requires a case plan to include a permanency objective which – in the case of a FRO – is to ensure that a child who has been removed from the care of a parent of the child is returned to the care of a parent;
- **s.167(3)** states that a permanency objective of family reunification would be appropriate if the child has been in out of home care for a cumulative period of less than 12 months and the safe reunification of the child with a parent is likely to be achieved;
- **s.276(2)(a)** states that in determining whether to make a protection order that has the effect of conferring parental responsibility for a child on the Secretary, the Court must have regard to advice from the Secretary as to the likelihood of a parent of the child permanently resuming care of the child during the term of the protection order;
- **s.287(1)(d)(iii)** states that the Court may include any conditions on a FRO that promote the reunification of the child with a parent of the child; and
- **s.287(1)(e)** requires a FRO to provide that if, while the order is in force, the Secretary is satisfied that it is in the child's best interests, the Secretary may in writing direct that a parent of the child is to resume parental responsibility for the child to the exclusion of the Secretary [as to the associated change of order provisions see s.288A discussed in section 5.17.5 below].

However, while **s.294A(1)(a)** prohibits the Court from extending a FRO unless "there is compelling evidence that it is likely that a parent of the child will permanently resume care of the child during the period of the extension", there is no equivalent provision in the CYFA that needs "to be satisfied when making an initial or original FRO": see *DHHS v Brown* [2018] VSC 775 at [58] per Beach JA.

In practice a family reunification order is usually confined to circumstances where-

- there is presently an unacceptable risk of harm to the child if placed in the family home; or
 - neither parent is presently willing or able to have the child in the home-
- but where there are good prospects for reunification of a child with a parent in the relatively short term.

In *DHHS v Brown* [2018] VSC 775 the trial Magistrate had placed the child on a family reunification order, at least partly to enable the existing maternal contact regime – which appeared to have been mainly positive – to continue at the same level in the hope that the 19-year-old mother would be able to 'redeem herself' over the period of a 12-month order. The underlying circumstances which led to the Department's involvement were summarized by Beach JA at [2]-[4] as follows:

“The child was born in July 2017. He was premature and was required to remain in hospital to receive care. In August 2017, he was discharged into the care of his mother. In September 2017, at about the age of 10 weeks, he required admission to hospital, being distressed, dehydrated and having significant swelling to his right leg. At the time, he was observed to have scratches on his chin and neck, a graze on his left thigh, swelling of his scrotum and grazing over the left knee. An initial x-ray confirmed that he had suffered a fractured femur. Subsequent radiological investigations identified a total of 24 fractures, including a fracture to his jaw, his arm and multiple fractures to his ribs, legs and feet. Investigations excluded medical causes for the infant’s fractures. Ultimately, it was concluded that the child had almost certainly been subjected to multiple episodes of significant physical trauma. Child protection was recommended and police became involved.”

At the trial the parents had conceded proof and did not give evidence. The issue was whether the child should be placed on a care by Secretary order [CBSO] as the Department recommended or a FRO as the parents contended in order to allow for the possibility of the child being reunified into his 19-year-old mother’s care. The Department’s contention was that there was credible information that the parents had committed frequent assaults on the child; they had failed to provide an adequate explanation for the child’s injuries and there was no realistic possibility that the child could be safely reunified into the care of either parent during the period of a FRO. The parents’ contention was that neither of them had caused the child’s injuries or had any knowledge of how those injuries were sustained. Further, the mother had attended contacts with the child consistently which had been mainly positive and that she had engaged with services positively.

Beach JA allowed the Department’s appeal, set aside the Magistrate’s FRO and made a CBSO in lieu. The crux of his Honour’s reasoning was that there could be no family reunification so long as the parents refused to engage about the abuse perpetrated on their son. At [62]-[64] & [69] his Honour said:

“The Children’s Court is a busy specialist jurisdiction that deals day in day out with cases involving the wellbeing of children. It is frequently called upon to resolve matters of great complexity where there may be significant competing considerations that must be taken into account in the resolution of its proceedings. Accordingly, in an appeal of the present kind, the views of the magistrate who has conducted a lengthy and detailed proceeding must be accorded significant weight. There is no occasion for this Court to substitute its view for the view of the magistrate in a case where reasonable minds might legitimately disagree.

That said, and giving all due weight to the magistrate’s decision in the present case, the result [the magistrate] arrived at was, with respect, simply not open...When all of the circumstances and all of the evidence are properly considered the only result that was open to the magistrate was to accede to the Secretary’s application, and make a CBSO. The evidence and the findings by the magistrate that the parents know how the child’s serious injuries occurred but refused to divulge this information required a conclusion that the best interests of the child mandated the making of a CBSO.

The submission by counsel for [the mother] that the mother should now be given a chance to try to ‘properly engage with services’ before a CBSO is made must be rejected. First, the Act contains no provision mandating such an approach. Secondly, the circumstances of this case (which include the parents not acknowledging the circumstances of abuse known to them) makes any such conclusion not open. While the child’s mother continues to refuse to engage about the abuse perpetrated on her son, it is not possible to see how there can be any family reunification. The position might be different in the future if one or either parent engages frankly with authorities on the issue, and shows real willingness to address whatever it was that brought about the abuse of the child...

The case before the magistrate concerned the question of what type of protection order should have been made by the Children’s Court, in all of the circumstances of the case, having regard to the paramountcy of the best interests of the child. That question had to be answered on a background of the mother’s refusal to divulge information about her son’s abuse and injuries, notwithstanding the obvious, blatant and horrific abuse shown to have been perpetrated on the child, and the knowledge the magistrate found (correctly) that the mother possessed about those matters.”

5.17.3 Conditions on a family reunification order

Under s.287(1)(d) of the CYFA – applicable from 01/03/2016 – a family reunification order may include any conditions that the Court considers-

- (i) to be in the best interests of the child; and
- (ii) are reasonably capable of being carried out by each person who will be subject to the condition; and
- (iii) promote the reunification of the child with a parent of the child.

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

“[35] [T]he matter having been debated, I will indicate my provisional view. It is, first, that the condition to which the application to vary was directed was not a condition which the Magistrate either needed or had any jurisdiction to impose.

[36] It will be recalled that the condition was in terms that the child reside as directed by [DOHS]. It is I think perfectly clear from the definition of ‘custody’ in s.5 of the Act [identical to s.5 of the CYFA] – the meaning of which term is given context by s.124(1) [effectively identical to s.173 of the CYFA], bear in mind also the impact of s.99(1)(a) [identical to s.287(1)(a)] – that there was simply no occasion to impose the condition in respect of which variation was sought. That being so, it is doubtful indeed that his Worship should have contemplated varying a condition which ought never to have been imposed in the first place.

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

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

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

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

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

[16] Finally, in relation to Aboriginal children (the H children), the Secretary, in making a placement decision, is also required to consider the need to protect and promote the cultural and spiritual identity and development of Aboriginal children by, wherever possible, maintaining and building their connections to their Aboriginal family and community [(s 10(3)(c)]. When making a decision for the placement of Aboriginal children in out of home care, the Secretary (or a community service) must consult an Aboriginal agency and the Aboriginal Child Placement Principle must be applied [s 12(1)(c)]. The Principles for placement of an Aboriginal child in out of home care are specifically detailed in sections 13 and 14 of the Act. In making such a placement, the Secretary must have regard to the advice of a relevant Aboriginal agency, the criteria in s 13(2) and the principles in s 14. Clearly, these sections recognise that the placement decision for an Aboriginal child in out of home care is always one for the Secretary. The two sections provide detailed guidance as to how the Secretary must exercise that power. This acknowledges the role of the Secretary as custodian of the child. The court does not have, for example, the power to make it a condition of a CTSO that an Aboriginal child be placed with an Aboriginal family. In the case of an Aboriginal child on a CTSO, the decision as to placement is for the Secretary alone to determine in accordance with the relevant legislative principles. In making the placement decision for an Aboriginal child, the Secretary is bound by best interest principles – including the need to consider the desirability of placing siblings together – and must apply the Aboriginal Placement Principles in s 13 and 14 of the Act. Again, these principles may be in conflict and the Secretary cannot be limited in the application of the Aboriginal Placement Principles by a condition requiring siblings to be placed together. If it is correct that the court is unable to order Aboriginal children be placed with an Aboriginal family as a condition of a CTSO, it must also be the case that the court cannot order siblings be placed together as a condition of a CTSO. It would be a strange result if it were permissible in one case (siblings) and not in the other."

5.17.4 Maximum length of a family reunification order

The maximum length of a FRO detailed in this section is currently subject to a temporary increase of up to 6 months in the circumstances detailed in [section 5.17.4/6](#).

Section 287(1)(c) of the CYFA provides that subject to ss.287A & 296, the maximum length of a family reunification order is 12 months. Sections 287A & 296(2)-(3) are new provisions substantially affecting the determination of the period of respectively an original and an extended family reunification order. They apply to any child who has been in out of home care as a result of-

- (a) an interim accommodation order;
- (b) a family reunification order;
- (c) a care by Secretary order;
- (d) a long-term care order;
- (e) a therapeutic treatment (placement) order.

They provide as follows-

✧ **Child in out of home care for a total of X days [X < 365]:** **Sections 287A(2) & 296(3)** provide that the period specified in the family reunification order must not have the effect that child will be placed in out of home care for a cumulative period that exceeds 12 months commencing on the date the child is first placed in out of home care under the first of those orders.

✧ **Child in out of home care for a total of X days [365 =< X < 730]:** **Sections 287A(3) & 296(4)** provide that the period specified in the family reunification order must not have the effect that child will be placed in out of home care for a cumulative period that exceeds 24 months commencing on the date the child is first placed in out of home care under the first of those orders.

✧ **Periods of out of home care must be disregarded for the purposes of determining a cumulative period** in the circumstances set out in **section 287A(4)** [see also s.296(5)]:

- (a) any period under a child care agreement under Part 3 or under a private arrangement made by a parent is to be disregarded;
- (b) any period that child is being cared for by a parent under an interim accommodation order, an undertaking or a family preservation order under Part 4.9, including after that order or undertaking ceases to be in force, must be disregarded;
- (c) any period that the child was in out of home care must be disregarded if the child has subsequently been in the care of a parent without the child being subject to any protection order under Part 4.9.

The formulations in ss.287A(2) & 287A(3) – and ss.296(3) & 296(4) – appear to lead to a strange anomaly. If a child has been in out of home care under one or more of the relevant orders for a period totalling 330 days it would appear that under s.287A(2) the maximum period of a family reunification order is 35 days. However if the child has been in out of home care for a period totalling 390 days it would appear that under s.287A(3) the maximum period of a family reunification order is 340 days. The writer does not understand the rationale for this seemingly anomalous result.

In *DHHS v Brown* [2018] VSC 775 – the facts of which are detailed in section 5.17.2 above – the circumstances under which a judicial officer could appropriately adjourn a case so that the length of a subsequent family reunification order could be governed by s.287A(3) rather than s.287A(2) was a central issue. At the conclusion of the hearing on 17/08/2018 the Magistrate had adjourned the matter, saying an attempt would be made to provide a decision by 13/09/2018. On that day the Magistrate again adjourned the matter to 03/10/2018 for decision. On 03/10/2018 the Magistrate made a FRO until 29/09/2019 with 11 conditions, including conditions in relation to contact between the child and the parents and maternal grandmother. Had the Magistrate made a FRO on 13/09/2018, s.287A(2) of the CYFA would have limited its period to 29/09/2018. By virtue of the adjournment to 03/10/2018 s.287A(2) ceased to have operative effect and the maximum length of a FRO was then governed by s.287A(3), meaning it could be made until 29/09/2019. In the circumstances of this case Beach JA disapproved that decision. However, his Honour fell short of holding that an adjournment for the purpose of circumventing ss.287A(2) & 294A(1)(a) could never be appropriate, saying:

[57] “In the present case, far from there being ‘compelling evidence’ that it was likely that one of the parents of the child would permanently resume care of the child during the period 30/09/2018 to 29/09/2019, the evidence was completely to the contrary.

[58] The ‘compelling evidence’ requirement for an extension of a FRO was not (and is not) a requirement that needed to be satisfied when making an initial or original FRO. That is, for the making of an original or initial FRO, there is no equivalent provision to s.294A(1)(a) of the Act.

[59] The Secretary submitted that it is plain from what the magistrate said during the hearing that [the magistrate] had intended to give judgment on 13/09/2018 if a CBSO was to be made. On the other hand, if [the magistrate] wanted to make a FRO for the next 12 months then, in order to avoid the operation of s.294A(1)(a) of the Act, the magistrate had to make the order after 29/09/2018...

[60] Counsel for the [mother] submitted that I should not find that the magistrate had engaged in some artifice for the purpose of avoiding a provision of the Act. He submitted that the Act gave the magistrate wide powers and discretions to conduct the proceeding as he thought fit in the best interests of the child.

[61] There is obvious force in the Secretary’s submissions. Generally speaking, a Children’s Court magistrate should not conduct protection proceedings, or take a step in such proceedings, with a view to avoiding the operation of a section of the Act. I say ‘generally speaking’ only because in the unique, varied and difficult circumstances that are capable of arising given all of the myriad of differing fact situations in relation to families and children, I cannot exclude the possibility of a rare or exceptional case where the paramount interests of a child might require some unusual or unorthodox procedural step to be taken by a Children’s Court magistrate. The present case, however, is not such a case.”

There is no provision in s.287A which specifically applies if a child has been in out of home care for a total period that is 24 months or longer. Does the Court have power to make a family reunification order of up to 12 months duration in such a case pursuant to s.287(1)(c) or can a family reunification order not be made at all? There appears to be no authority on this issue which the writer discussed –

without formally deciding – in *The K Children* [unreported, Children's Court of Victoria-Power M, 21/06/2016] and in the following extract from *The C & K Siblings* [unreported, Children's Court of Victoria-Power M, 23/04/2018, pp.38-39]:

"[C] has been in out of home care for just under 2½ years. It is commonly believed that since the amendments to the CYFA made on 01/03/2016 this Court has no power to make a family reunification order for a child who has been in out of home care for 24 months or more. I am not convinced that the amendments have had that effect. In the case of *The K Children* on 21/06/2016 I had discussed – without deciding – whether or not there was any bar on the making of a FRO in circumstances where s.287A of the CYFA did not apply. In that case the submissions of Mr Kune on behalf of the Department were clearly based on an implication from the time limits for FROs which are set out in new s.287A of the Act. Clearly and appropriately foreshadowing a possible expanded argument on this issue on a later date, Mr Kune said:

'I accept there is no express provision in the legislation – none that I have been able to find – which says that an FRO can't be made if a child is out of parental care for 2 years or more but the intention of Parliament is that such an order should not be available in those circumstances given the nature of the orders and the considerations to be had and the general purpose of the amending Act. I acknowledge there is a gap in the express sense of the legislation which could have been dealt with by a sentence or two. There have been comments about this by various judicial officers. It will be submitted by DHHS that it is not open on the basis of the overall purpose of the amending Act [to make an FRO where a child has been out of parental care for 2 years or more].'

So Mr Kune conceded that there is no express provision in the amended Act which expressly bars the making of an FRO where a child has been in non-parental care for 24 months or more. Ms Cullen [counsel for DHHS] made the same concession in C's case. Section 287A(2) sets time limits for an FRO where a child has been in non-parental care for less than 12 months. Section 287A(3) sets time limits for an FRO where a child has been in non-parental care for 12 months but less than 24 months. It is impossible to see any pattern between these two sub-sections or any rationale for the surprising result that if a child has been in non-parental care for 11 months, the maximum period of an FRO is 1 month whereas if a child has been in non-parental care for 13 months, the maximum period of an FRO is 11 months. So I am unable to imply from these two limbs of s.287A that Parliament must have intended that no FRO could be made where a child has been in non-parental care for 24 months or more. To do so would be to engage in the kind of judicial legislating which a Full Court of Appeal was not prepared to do in relation to 'baseline sentencing' in the case of *DPP v Walters (a pseudonym)* [2015] VSCA 303. It is certainly no less arguable that there is actually no gap at all, that Parliament did not intend to bar a FRO in a case where a child has been in non-parental care for 24 months or more. Ms Cullen referred me to the Second Reading Speech which says 'Although a FRO cannot be made beyond 2 years it doesn't necessarily preclude family reunification in the event that circumstances change.' But can Hansard be used as a tool for statutory interpretation where there is no express gap at all, no ambiguity as such? And how can this be reconciled with further passages in Hansard which state that 'a FRO will be made when a child is placed in out of home care and there is an intent to reunify the child with the parent...and the focus of FROs will be to mobilize supports and services to assist parents to resume permanent care of their child within one year'? That is exactly the situation in C's case. By contrast Hansard says that 'a CBSO will be made where the objective is to make arrangements for the permanent or long-term care of the child.' That is exactly what the present situation in C's case is not.

However, although I would have given serious consideration to placing C on a FRO if the plan was for him to remain in Victoria, there is a significant issue about making an FRO in circumstances where it is planned for him to live in Queensland. The problem is what I believe is the impossibility of transferring a FRO either judicially or administratively to Queensland...My experience from several other cases is that the Queensland Department of Child Safety, Youth & Women will not accept either a judicial or an administrative transfer of a FRO from the Department in Victoria under Schedule 1 of the CYFA. In order to give the greatest possible assistance to the mother and maternal grandmother in the process of reunification I think it is unarguable that this case should be transferred to the Queensland Department as soon as possible. In those circumstances it is not in C's best interests to place him on a FRO even if I had power to do so."

5.17.4/6 Temporary increase in maximum length of FRO/FRO extension by COVID-19 legislation

Section 600OA of the CYFA was introduced by the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* as a response to the COVID-19 pandemic. It commenced operation on 21/10/2020 and is scheduled to be repealed on 26/04/2021. It allows for the maximum length of the period of an FRO or an FRO extension to be increased by up to 6 months if certain pre-conditions are met.

MODIFICATION OF THE PERIOD OF A FAMILY REUNIFICATION ORDER [FRO] OR EXTENSION

The Court may specify a period in a FRO, or extend a FRO by a period, that will have the effect that the child will be placed in out of home care for a longer cumulative period than would otherwise be permitted under ss.287A(2) or (3) or 294A(1)(b) or 296(3) or (4) if-

- (a) the Court is satisfied that the progress of a parent of the child towards reunification has been impeded as a result of the COVID-19 pandemic;
- (b) the Court is satisfied that it is in the best interests of the child to do so;
- (c) the additional period specified does not exceed the period for which the parent's capacity to make progress towards reunification has been impeded as a result of the COVID-19 pandemic; and
- (d) the additional period of the FRO or the extension thereof will not have the effect that the child will be placed in out of home care for a cumulative period that is more than 6 months longer than would otherwise have been permitted under ss.287A(2) or (3) or 294A(1)(b) or 296(3) or (4).

Notes: 1. This section does not prevent periods being specified in increments under a particular provision, up to a total of 6 months.

- 2. Making or extending a FRO as permitted by this section can never have the effect that a child will be placed in out of home care for a cumulative period that is more than 30 months.

Commentary by Peter Power

It appears that this amendment has introduced an unintended ambiguity into s.287(1)(c). This sub-section provides, in relation to the **making** of an FRO, that a "*FRO, subject to this Division, remains in force for the period (not exceeding 12 months) specified in the order*". Prior to s.600OA ss.287A(2) & 287A(3) always operated to **reduce** that 12 months maximum period by the period that the child had already been in out of home care as defined in ss.287A(1) & 287A(4) [OHC]. For example-

- if the child had been in OHC for 5 months, the maximum length of the FRO under s.287A(2) was $12-5=7$ months; whereas paradoxically
- if the child had been in OHC for 14 months, the maximum length of the FRO under s.287A(3) was $24-14=10$ months.

However, when read in conjunction with s.600OA there may be instances in which ss.287A(2) & 287A(3) operate to **increase** the 12 months maximum period set by s.287(1)(c). For example, provided that the pre-conditions in paragraphs (a), (b) & (c) of s.600OA(2) are met, if the child has been in OHC for 5 months the maximum length of the FRO under s.287A(2) read in conjunction with s.600OA(2)(d) is $12-5+6=13$ months.

Is it intended that this 13 month period is then to be reduced to 12 months to comply with s.287(1)(c) which expressly states that the period of a FRO is "*(not exceeding 12 months)*"? On the other hand, s.287(1)(c) is said to be "*subject to this Division*" and Division 6 includes s.287A. Which phrase is to take precedence? The writer considers the question to be moot.

However, this ambiguity does not arise in the case of the **extension** of an FRO since extensions are not governed by s.287(1)(c). When read in conjunction with s.600OA there may be instances in which ss.296(3) & 296(4) unambiguously operate to authorise an extension of a FRO for more than 12 months. For example, provided that the pre-conditions in paragraphs (a), (b) & (c) of s.600OA(2) are met, if the child has been in OHC for 14 months the maximum length of a FRO extension under s.296(4) when read in conjunction with s.600OA(2)(d) is $24-14+6=16$ months.

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5.17.5 Administrative reunification with parent during period of family reunification order

Old s.286 empowered the Secretary to change administratively a supervised custody order into a supervision order by directing that the child was to return to a parent. There was no such provision enabling a change to the nature of a custody to Secretary order. As from 01/03/2016 new s.288A provides for a family reunification order to be administratively converted to a family preservation order if the Secretary directs that a parent or parents of a child are to resume parental responsibility for the child to the exclusion of the Secretary.

- ✱ Sections 288A(1) & (2) provide that from the date of such a direction (a copy of which the Secretary must give to the Court, the child and the parent)–
 - (a) the Secretary ceases to have parental responsibility for the child; and
 - (b) the parent resumes parental responsibility for the child as specified in the direction; and
 - (c) the family reunification order is taken to be a family preservation order giving the Secretary responsibility for the supervision of the child and placing the child in the day to day care of the parent or parents who have parental responsibility for the child; and
 - (d) the conditions of the family reunification order continue to apply as conditions of the family preservation order; and
 - (e) Division 3 of Part 4.9 applies to the order; and
 - (f) the order ceases to be a family reunification order for the purposes of the CYFA.
- ✱ Section 288A(3) empowers the Secretary to apply to the Court to determine that the family preservation order is to include conditions [Form 32]. On such application s.288A(4) provides that the Court may determine that the family preservation order is to include conditions of the type referred to in s.281 without requiring the parties to attend, or be represented at, the proceedings.

5.17.6 Extension of family reunification order

The CYFA provides in ss.293, 294, 294A(1), 296 & 298 a procedure which enables a family reunification order to be extended. The maximum period of extension is governed by ss.296(2) & 296(3) which are in substantially the same terms as the anomalous s.287A discussed in section 5.17.4 above.

The maximum length of a FRO extension detailed in this section is currently subject to a temporary increase of up to 6 months in the circumstances detailed in [section 5.17.4/6](#).

An application for extension must be made to the Court while the order is still in force: see s.293(2). The application [Form 27] is made to the Court when it is filed with the appropriate registrar: see s.214 of the CYFA [formerly s.81 of the CYP A].

The initiation of extension proceedings keeps the family reunification order in force until the application is determined by the Court [s.293(3)]. If the application is not filed prior to the expiry of the order, the order lapses and cannot be revived by a subsequent application to extend: see the judgment of Beach J. in *Secretary to the Department of Health and Community Services v VPP & BC* [Supreme Court of Victoria, unreported, 24/01/1994].

Under ss.294, 294A(1) & 296 on an extension application the Court may extend a family reunification order if satisfied that this is in the best interests of the child. However it must not extend a family reunification order unless satisfied that–

- (a) there is compelling evidence that it is likely that a parent of the child will permanently resume care of the child during the period of the extension; and
- (b) the extension will not have the effect that the child will be placed in out of home care for a cumulative period that exceeds 24 months calculated in accordance with s.287A.

If an extension application was granted under the CYP A, the Children's Court as a matter of practice backdated the extended order to commence on the day after the previous order would have expired had it not been kept alive by operation of law. However, in the appeal of *M v H* [County Court of Victoria, unreported, 1716/1998], Judge Harbison decided that the legislation did not require her to backdate the extended order. The Children's Court has since proceeded on the basis that it is not required to backdate the extended order to commence on the day after the previous order would have expired had it not been kept alive by operation of law.

Former s.295 has been repealed. Amongst other things, it listed matters which the Court was required to take into account in determining an application to extend a custody to Secretary order. It has been replaced by the generic s.276A, discussed in section 5.12.3 above.

Former s.297 has been repealed. It authorised the Court to grant a limited extension of a custody to Secretary order in conjunction with a direction to the Secretary to take steps to ensure that at the end of the period of the extended order a person other than a parent applies to a court for an order relating to the custody or the custody and guardianship of the child. While it may seem strange that a provision giving the Court power to expedite permanency for a child has been deleted by amendments said to be designed to promote permanency, s.297 was rarely used in practice as the factual circumstances in which it was applicable rarely arose. For judicial discussion of former s.297(1) – and in particular s.297(1)(f) – see *DOHS v The D Children* [Children's Court of Victoria-Power M, 11/01/2012].

Section 298 provides that if the extension is for more than 12 months-

- the Court must direct the Secretary to review the operation of the order before the end of the period of 12 months after the making of the extended order; and
- the Secretary must notify the Court, the child (if the child is aged 10 years or over), the parent(s) and any other persons that the Court directs if the Secretary determines that the order is to end after the first 12 months or on the date that notice is given by the Secretary, whichever is the later.

5.17.7 Suspension/Lapse/Revival

Section 288(1) of the CYFA provides that a family reunification order:

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

Section 288(2) of the CYFA provides that a family reunification order that has been suspended under s.288(1) revives if-

- (a) the application for the order sought under the Family Law Act 1975 (Cth) is withdrawn; or
- (b) the order sought is refused.

5.17.8 Variation & interim variation of family reunification order

Sections 300 & 301 of the CYFA provide that on application [Form 28] by-

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

the Court may **vary, add or substitute** any condition(s) of a family reunification order but must not-

- extend the order; or
- make any change in the conferral of parental responsibility for the child.

Section 300A empowers the Secretary to apply to the Court for a variation of the conditions of a family reunification order without serving notice under s.277 [Form 29] if the Secretary is satisfied on reasonable grounds that-

- (a) there has been an unexpected change in circumstances; and
- (b) the application is necessary for the safety and wellbeing of the child.

Sections 302(1) & 302(2) provide that on an application under s.300 or 300A the Court may **vary, add or substitute** any condition(s) on an interim basis pending the final determination of the application but must not-

- extend the order; or
- make any change in the conferral of parental responsibility for the child.

Any such variations have effect until the final determination of the appeal [s.302(3)]. There is no longer any requirement that there be exceptional circumstances before the Court may make an interim variation of the conditions of a family reunification order.

5.17.9 Revocation of family reunification order

On an application to revoke a family reunification order [Form 28] pursuant to s.304 of the CYFA by-

- (a) the child; or

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

s.308 provides that the Court-

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

For a discussion of some of the principles relevant to the revocation of a family reunification order see:

- *DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 at [45]-[50] per Bell J; the circumstances leading to the revocation of the custody to Secretary orders in that case are detailed at [85]-[112]
- *Cardell (a pseudonym) v Secretary DHHS* [2019] VSC 781 per Maxwell P dismissing an appeal against a decision of Hubble M in *DHHS and Oliver (a pseudonym)* [2019] VChC 5.

Section 310(3) of the CYFA provides that if the Court revokes a family reunification order under s.308, it may, if satisfied that the grounds for a finding under s.274 still exist-

- order an undertaking or make a family preservation order; or
- if satisfied that the changed circumstances justify it in doing so, make a care by Secretary order or a long-term care order in respect of the child.

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

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

An application by the Secretary to revoke a custody to Secretary order and replace it with a guardianship to Secretary order – usually in tandem with an application for extension – was a relatively common event where a child had been out of parents' care for a significant time and the Secretary considers that there is no reasonable likelihood of reunification. Since 16/03/2016 the more usual applications made by the Secretary in such circumstances are either under s.289(1A) for a care by Secretary order [Form 23] or under s.290(1A) for a long-term care order [Form 25].

5.17.10 No breach of family reunification order

There are no provisions relating to breach of a family reunification order. A consequence of a breach by a parent or child of conditions or case plan may sometimes be an application by the Secretary to revoke the order and replace it with a care by Secretary order or alternatively an application by the Secretary for a care by Secretary order or a long-term care order.

5.18 Care by Secretary order [formerly guardianship to Secretary order]

5.18.1 Effect of a care by Secretary order

A guardianship to Secretary order [abolished on 01/03/2016] granted custody and guardianship of a child to the Secretary to the Department of Health & Human Services to the exclusion of all other persons. Under the transitional provisions in Schedule 5 to the CYFA-

- any guardianship to Secretary order in force immediately before 01/03/2016;
- any custody to Secretary order in force immediately before 01/03/2016 in a case where the child had been under a custody to Secretary order for 24 months or more as at 01/03/2016- was thereafter taken to be a care by Secretary order.

Under s.289(1)(a) of the CYFA a care by Secretary order [Form 24] confers parental responsibility for the child on the Secretary to the exclusion of all other persons. The powers and duties of the Secretary when exercising parental responsibility for a child are set out in Division 2 of Part 4.3 of the CYFA and are discussed in [section 5.17.1](#) above.

A care by Secretary order is identical in effect to a guardianship to Secretary order which existed prior to 01/03/2016 and the statutory provisions relating to both orders are similar. Both orders resemble the old 'wardship' order under the legislation repealed in 1991. A care by Secretary order is an order of last resort, usually confined to cases where the child is considered to be at unacceptable risk of harm in the care of a parent and the prospect of reunification with a parent within a reasonable time is zero or slight. See also *AA v DHHS & Ors* [2020] VSC 400 at [82]-[83] where Incerti J said:

“A CBSO...is made ‘where the objective [is] to make arrangements for the permanent or long-term care of the child when reunification is not possible.’ The powers of the CBSO, with its origins in the wardship system, represents ‘a major form of State or public intervention into the affairs of private citizens.’...Section 10(3)(a) requires the Court to ensure that intervention into the relationship between parent and child is limited to that necessary to secure the safety and wellbeing of the child. Since this intervention is coupled with prioritising family preservation as the highest ranking permanency objective under s.167(1) of the Act, the powers contained within a CBSO should be applied sparingly.”

The period of a care by Secretary order made on or after 01/03/2016 is a fixed 2 years [s.289(1)(b)] in contrast with the legislation prior to 01/03/2016 which provided that the maximum initial period of a guardianship to Secretary order was 2 years. Section 275(2) of the CYFA provides that a protection order may continue in force after a child attains the age of 17 years but ceases to be in force when the child attains the age of 18 years. In s.3(1) of the CYFA paragraph (b) of the definition of ‘child’ provides that for proceedings in the Family Division (other than intervention order proceedings and therapeutic treatment proceedings) ‘child’ means “a person who is under the age of 17 years or, if a protection order...or an interim order...continues in force in respect of him or her, a person under the age of 18 years”. Section 275(3) of the CYFA – introduced on 16/03/2016 – provides that a care by Secretary order or 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. It appears to the writer that s.275(3) has the effect of expanding the definition of ‘child’ in paragraph (b) of the meaning in s.3(1).

A care by Secretary order ceases to be in force when the child attains the age of 18 years or marries, whichever happens first [ss.275(3) & 289(1)(c)].

Sections 289(2)-(6) of the CYFA provide that-

- the Court must direct the Secretary to review the operation of the order before the end of the period of 12 months after the making of the order; and
- the Secretary must notify the Court, the child (if the child is aged 10 years or older), the parent(s) and any other persons that the Court directs if the Secretary determines that the order is to end prematurely after the first 12 months or on the date that notice is given by the Secretary, whichever is the later

5.18.2 Non-reunification is the usual basis for a care by Secretary order

It is clear from s.167(4) of the CYFA – the current version of which came into operation on 01/03/2016 – that a permanency objective of adoption, permanent care or long-term out of home care would be appropriate if-

- (a) the child has been in out of home care for 12 months and there is no real likelihood for the safe reunification of the child with a parent in the next 12 months; and
- (b) except in exceptional circumstances, the child has been in out of home care for a total of 24 months.

Further, s.276A(2)(d) requires the Court, in determining whether to make a protection order that has the effect of conferring parental responsibility for a child on the Secretary, to “have regard to advice from the Secretary as to the benefits to the child of making a care by Secretary order to facilitate alternative arrangements for the permanent care of the child [curiously there is no reference to a long-term care order] if-

- (i) the child is in out of home care as a result of an order under this Part and has been in out of home care under such an order for a cumulative period of 12 months determined in accord with s.287A(4); and
- (ii) there appears to be no realistic prospect of the child being able to safely return to the care of the parent within a further period of 12 months; and
- (iii) there are no permanent care arrangements already available for the child”.

It follows that non-reunification is now the usual basis for a care by Secretary order.

5.18.3 No conditions on a care by Secretary order

There was no provision in the CYPA authorizing conditions on a guardianship to Secretary order. This may be compared with the 5 other protection orders where specific provision is made for conditions [ss.89(2), 92, 96(1)(e), 98(1) & 99(1)(d)]. Hence it was believed that the Court had no power to place conditions on a guardianship to Secretary order. In *MS & BS v DOHS* [County Court of Victoria,

unreported, 18/10/2002] at p.40, Judge Cohen described this as "regrettable", a sentiment with which the writer entirely concurs. This remains the case under the CYFA, where specific provision is made for conditions on 3 of the 4 other protection orders [UTK-s.278(3), FPO-s.281, FRO-s.287(1)(d)] and on a permanent care order [s.321(1)] but not on care by Secretary orders or long-term care orders. In *DHHS v Children's Court of Victoria & Ors* [2020] VSC 520 McMillan J said at [47]: "Section 275(d) of the Act specifically grants jurisdiction to make a care by secretary order. Such an order grants sole custody of a child to the Secretary of the DHHS, and may include conditions in the best interests of the child: *ibid* s289. The purpose of a custody to secretary order [sic] is protective...". While the writer wishes that her Honour's dicta was correct, regrettably he remains of the view that the CYFA does not confer a court with power to include conditions on a care by Secretary order or a long-term care order.

5.18.4 Applications upon which a care order by Secretary can be made

Prior to 16/03/2016 the mechanisms which could lead to the Court making a long-term guardianship to Secretary order were-

- proof of a protection application [s.162] or a irreconcilable differences application [s.259] and a related finding that the child remains in need of protection [274(a) & 275(1)(d)] or that irreconcilable differences still remain [s.274(b) & 275(1)(d)]; or
- revocation of another protection order – either in breach proceedings [s.318(2)(c)+(3)] or certain revocation proceedings [s.310(3)(c)+(6)(c)] – and making a guardianship to Secretary order in lieu.

These mechanisms are still applicable to the Court making a care by Secretary order. However, as and from 16/03/2016 there is an additional pathway. New s.289(1A) provides that subject to Division 1 of Part 4.9, a care by Secretary order may be made on the application of the Secretary [Form 23]. In the writer's strong opinion s.289(1A) is not intended to by-pass the initiating procedures of a protection application [s.162] or an irreconcilable differences application [s.259]. Although s.289(1A) was introduced to cover circumstances where there was a family reunification order which was unable to be extended due to the 'time in out of home care' provisions contained in ss.287A & 296, it is broad enough to cover any circumstance in which there is already a protection order in force. The writer's opinion is reinforced by s.289(1B): "A protection order applying to a child at the date of an application for a care by Secretary order in relation to the child continues in force until the application is determined.

5.18.5 Other orders can be made on an application for a care by Secretary order

On an application by the Secretary for a care by Secretary order under s.289(1A), the Court is empowered by s.289(1C)-

- if it decides not to make a care by Secretary order; and
 - if satisfied that the grounds for a finding under s.274 still exist [i.e. the child is still in need of protection or irreconcilable differences still exist between child and carer]-
- to make-
- (a) an order requiring a person to give an undertaking under Part 4.9; or
 - (b) a family preservation order; or
 - (c) a family reunification order; or
 - (d) a long-term care order; or
 - (e) an order extending a protection order that is in force in respect of the child.

5.18.6 Administrative reunification with parent during period of care by Secretary order

The case plan which the Secretary is required by s.168(2)(b) to prepare within 8 weeks after the making of a care by Secretary order rarely contemplates reunification of the child with a parent. However, as from 01/03/2016 new s.289A provides for a care by Secretary order to be administratively converted to a family preservation order if the Secretary directs that a parent or parents of a child are to resume parental responsibility for the child.

- ✪ Sections 289A(1) & (2) provide that from the date of such a direction (a copy of which the Secretary must give to the Court, the child and the parent)-
 - (a) the Secretary ceases to have parental responsibility for the child; and
 - (b) the parent resumes parental responsibility for the child as specified in the direction; and
 - (c) the care by Secretary order is taken to be a family preservation order giving the Secretary responsibility for the supervision of the child and placing the child in the day to day care of the parent or parents who have parental responsibility for the child; and
 - (d) Division 3 of Part 4.9 applies to the order; and
 - (e) the order ceases to be a care by Secretary order for the purposes of the CYFA.

- ✪ Section 289A(3) empowers the Secretary to apply to the Court to determine that the family preservation order is to include conditions [Form 32]. On such application s.288A(4) provides that the Court may determine that the family preservation order is to include conditions of the type referred to in s.281 without requiring the parties to attend, or be represented at, the proceedings.

In *AA v DHHS & Ors* [2020] VSC 400 the subject children, aged 5y5m & 3y6m, had been in the care of their maternal grandparents for over 2 years, initially pursuant to interim accommodation orders and family reunification orders. During a case plan meeting on 07/08/2019 the permanency objective of family reunification was changed to permanent care and was communicated to the parents and grandparents. Subsequently on 15/11/2019 the Court placed the children on care by Secretary orders [CBSOs] and they remained in the care of the grandparents. Thereafter the following things occurred, the conduct of the Department being described by Incerti J (at [3], [238] & [250]) as “egregious”:

- (1) **TRIO OF DECISIONS LEADING TO THE CHILDREN BEING PLACED WITH THE FATHER:**
On 06/01/2020, following an internal review, the Department changed the permanent care case plan to one of reunification with the father. At a case plan meeting on 17/01/2020 it formally advised the grandparents of the changed case plan for the first time, a case note dated 06/01/2020 stating: “[The Principal Practitioner] recommended the case plan meeting occur with the grandparents on the Friday and provide them the weekend to digest the news and then reunification to occur on the Monday. Do not want to provide the grandparents too much time to scare or alter reunification plans.” On 20/01/2020 it placed the children in the father’s care and on 21/01/2020 – contrary to what Incerti J described at [29] as DHHS’ “general practice...to monitor the success of the reunification and to plan for a transitional reunification rather than an immediate formal change to a family preservation order [FPO]” – it made direction notices pursuant to CYFA/s.289A directing that the father resume parental responsibility for the children.
- (2) **THE INTERNAL REVIEW:** The grandparents sought an internal review under s.331 of the CYFA. The internal review, conducted by no less than the Assistant Director of Child Protection in the Brimbank-Melton Area, was completed on 01/05/2020 and concluded that the Secretary’s own delegates had not complied with the ‘best interests’ principles in ss.10 & 11 of the CYFA in making its decisions on 06, 20 & 21/01/2010. The author of the s.331 report purported to ‘overturn’ the reunification case plan and endorsed the permanent care plan for the children to be placed into the grandparents’ care permanently.
- (3) **CHILDREN PLACED BACK WITH GRANDPARENTS DESPITE FPOS BEING IN EXISTENCE:**
On 06/05/2020, without prior notice to the father of the outcome of the internal review, the Department placed the children back in the care of the grandparents notwithstanding the existence of the FPOs deemed to have come into effect on 21/01/2020 by operation of CYFA/s.289A(1)(c) and notwithstanding that “there was no evidence or suggestion by the Secretary that the children were not well cared for or were in any way at risk while in his care”. At [241] Incerti J said of this: “It is astonishing that the people responsible...could proceed in the manner they did on 6 May, particularly given the strained relationships, the Children’s Courts orders, and having only a few months before that removed the children from the Grandparents’ care without any notice.”

For the reasons summarized in section 5.10.6, Incerti J ultimately held that all of the Department’s decisions were contaminated with jurisdictional error and quashed the s.289A direction notices. In relation to s.289A her Honour said at [88]-[90]:

[88] “The nature of s.289A is unique; it empowers the Secretary to create, in effect, a new FPO from a previously existing CBSO imposed by an order of the Children’s Court. Once the FPO (having the nature of a court order) is created, different legislative provisions apply detailing the new FPO’s operation, content and repeal. On its face, this power sits uneasily with the rest of the Act. This is because the rest of the Act provides a clear pathway for the Children’s Court to oversee the creation of protection orders.

[89] The relationship between s.280(2) (which envisages an FPO to be ordered by a Court) and s.289A (which allows for the *Secretary* to direct that a CBSO is to be taken as an FPO) is uncertain. The former section envisages either an FPO operating for a 12 month period, or a Court satisfying itself that conditions exist enabling an FPO to operate for a period in excess of 12 months. However, in the present circumstances, the Direction Notice under s.289A creating the impugned FPO did not stipulate a timeframe.

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excess of 12 months. However, in the present circumstances, the Direction Notice under s.289A creating the impugned FPO did not stipulate a timeframe."

Her Honour's judgment in relation to the status of the FPOs may be summarized as follows:

THE EFFECT OF THE FLAWED S.289A DIRECTION NOTICES

- At [226]-[227]: The Children's Court did not and could not make an order declaring the s.289A direction notices to be effected by jurisdictional error or quashing the direction notices. Considering the Act and its construction, there is no basis to imply that the Secretary had the authority to make a unilateral determination based on a review under s 331 of the Act undertaken by the Secretary's delegate that the direction notices were effected by jurisdictional error, then remove the children from the father and reinstate the CBSO.
- At [232]: It would be a slippery slope to allow a public servant, such as a delegate of the Secretary, to have the authority to consider a direction which has the force of a court order and determine that it is a nullity because they believe the correct decision making process was not followed. The Secretary's delegate is ill-placed to make such a determination and there is the real danger that third parties could put pressure on the delegate to reverse the decision. The impact that orders under the Act, and particularly protective orders, have on the child is so significant that to allow their lives to be uprooted, as was done in this case, without the determination of a court, such as is envisaged by the Act to protect their best interests, cannot be permitted.
- At [234]: Although the s.289A direction notices were profoundly flawed, it is only in the rarest of cases that the Court will imply in the statute a power of administrative reconsideration beyond simple administrative mistakes. Further, and critically, to do so would authorise the Secretary and/or her delegates as members of the Executive to take for themselves the judicial function for oversight of administrative decision-making, regardless of how bad the error that they or their colleagues have committed.
- At [236]: **As the s.289A direction notices had some legal effect notwithstanding that they were made in jurisdictional error and the Secretary did not have the power to reconsider them, the FPOs remained in place unless and until they were set aside by the Supreme Court or the Children's Court varied or revoked the FPOs in accordance with the Act.** The Secretary could not unilaterally decide that the s.289A direction notices were of no effect and act as if the CBSOs were still in place. It follows that the 06/05/2020 removal decision and action were not authorised by the Act and were beyond power.

ORDERS CONSEQUENTIAL ON THE DEPARTMENT'S JURISDICTIONAL ERRORS

- Her Honour made at [253]:
 - (a) an order of certiorari quashing the s.289A direction notices made by the Secretary; and
 - (b) a declaration that the CBSOs made on 15/11/2019 remain in force.
 - (c) a declaration that the action of the Secretary in the 06/05/2020 removal decisions was contrary to the FPOs (which until quashed by her Honour's certiorari order remained in force), was not authorized by the CYFA and was beyond power; and
 - (d) a declaration that the Secretary did not afford the father procedural fairness and/or comply with the principles in ss.10 & 11 of the CYFA in removing the children from his care on 06/05/2020.

5.18.7 Extension of care by Secretary order

The CYFA provides in ss.293, 294, 294A(2)+(3), 296(6) & 298 a procedure which enables a care by order to be extended from time to time by a period of 2 years after the extension or additional extension is granted.

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

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

Under ss.294 & 294A(2)+(3) on an extension application the Court may extend a care by Secretary order if satisfied that this is in the best interests of the child. However unless there are exceptional circumstances it must not extend a care by Secretary order if it is satisfied that—

- (a) firstly, a permanent care order is not appropriate in the circumstances; and
- (b) secondly, a long-term care order is not appropriate in the circumstances.

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

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

Former s.295 has been repealed. Amongst other things, it listed matters which the Court was required to take into account in determining an application to extend a guardianship to Secretary order. It has been replaced by the generic s.276A, discussed in section 5.12.3 above.

Former s.297 has been repealed. It authorised the Court to grant a limited extension of a guardianship to Secretary order in conjunction with a direction to the Secretary to take steps to ensure that at the end of the period of the extended order a person other than a parent applies to a court for an order relating to the custody or the custody and guardianship of the child. While it may seem strange that a provision giving the Court power to expedite permanency for a child has been deleted by amendments said to be designed to promote permanency, s.297 was rarely used in practice as the factual circumstances in which it was applicable rarely arose. For judicial discussion of former s.297(1) – and in particular s.297(1)(f) – see *DOHS v The D Children* [Children's Court of Victoria-Power M, 11/01/2012].

On or after 01/03/2016 the period of extension of a care by Secretary order is a fixed 2 years [s.296(6)] in contrast with the legislation prior to 01/03/2016 which provided that the maximum period of extension of a guardianship to Secretary order was 2 years. However, a care by Secretary order ceases to be in force when the child attains the age of 18 years or marries, whichever happens first [s.289(1)(c)].

Section 298 provides that if the extension is for more than 12 months-

- the Court must direct the Secretary to review the operation of the extended order before the end of the period of 12 months after the making of the extended order; and
- the Secretary must notify the Court, the child (if the child is aged 10 years or over), the parent(s) and any other persons that the Court directs if the Secretary determines that the extended order is to end after the first 12 months or on the date that notice is given by the Secretary, whichever is the later.

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

"Section 122 of the CYPA confers jurisdiction on VCAT for the review of administrative decisions of DOHS if a party chooses to use that forum for such a review. The review jurisdiction of the Tribunal is contained in s.48 of the Victorian Civil and Administrative Tribunal Act (Vic). Section 52 of that Act purports to limit the jurisdiction of the Supreme Court and Magistrates' Courts in relation to the exercise of powers under planning legislation in certain circumstances. No like provision has been made with respect to the jurisdiction of the Children's Court in its Family Division.

That VCAT has jurisdiction to review a decision of the Secretary of DOHS is no basis to assert that has any impact whatsoever on the Children Court of Victoria's power and obligations to exercise its complete statutory jurisdiction under the Children and Young

Persons Act. There is no basis to assert that the capacity to review an administrative decision by the Secretary ousts the jurisdiction or curtails the jurisdiction in the Children's Court in the exercise of its statutory functions. The logical conclusion of such an assertion is that the court would be bound by every case planning decision of DOHS.

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

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

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

5.18.8 Suspension/Lapse/Revival

Section 288(1) of the CYFA, in conjunction with s.289(7), provides that a care by Secretary order-

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

Section 288(2) of the CYFA, in conjunction with s.289(7), provides that a care by Secretary order that has been suspended under s.288(1) revives if-

- (a) the application for the order sought under the Family Law Act 1975 (Cth) is withdrawn; or
- (b) the order sought is refused.

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

- when the child turns 18; or
 - when the child marries-
- whichever happens first.

5.18.9 Revocation of care by Secretary order

Section 305 provides that an application for revocation of a care by Secretary order [Form 30] may be made to the Court by-

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

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

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

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

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

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

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

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

5.18.10 No variation or breach of care by Secretary order

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

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

5.19 Long-term care order [formerly long-term guardianship to Sec order]

5.19.1 Effect of a long-term care order

A long-term care order [Form 26] confers parental responsibility for the child on the Secretary to the Department of Health & Human Services to the exclusion of all other persons: ss.290(1)(a). A long-term care order may be made as a protection order in its own right or may be made instead of extending a care by Secretary order [s.290(1)(c)].

The powers and duties of the Secretary when exercising parental responsibility for a child are set out in Division 2 of Part 4.3 of the CYFA and are discussed in section 5.17.1 above.

Under the transitional provisions in Schedule 5 to the CYFA any long-term guardianship to Secretary order in force immediately before 01/03/2016 was thereafter taken to be a long-term care order.

In s.3(1) of the CYFA paragraph (b) of the definition of 'child' provides that for proceedings in the Family Division (other than intervention order proceedings and therapeutic treatment proceedings) 'child' means "a person who is under the age of 17 years or, if a protection order...or an interim order...continues in force in respect of him or her, a person under the age of 18 years". Section 275(3) of the CYFA – introduced on 16/03/2016 – provides that a care by Secretary order or 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. It appears to the writer that s.275(3) has the effect of expanding the definition of 'child' in paragraph (b) of the meaning in s.3(1).

A long-term care order ceases to be in force when the child attains the age of 18 years or marries, whichever happens first [ss.275(3) & 290(1)(c)].

For the reasons stated in section 5.18.3 above in relation to care by Secretary orders, the writer believes that the Court has no power to place conditions on a long-term care order.

A long-term care order is identical in effect to a long-term guardianship to Secretary order which existed prior to 01/03/2016 but the statutory provisions – particularly the pre-conditions to the making of a long-term care order – are significantly different. In particular, s.290(1) of the CYFA allows a long-term care order to be made for a child of any age. Unlike a long-term guardianship to Secretary order it is not restricted to a child of or over the age of 12 years.

5.19.2 Pre-conditions for making a long-term care order

It is clear from s.167(4) of the CYFA – the current version of which came into operation on 01/03/2016 – that a permanency objective of adoption, permanent care or long-term out of home care would be appropriate if-

- (a) the child has been in out of home care for 12 months and there is no real likelihood for the safe reunification of the child with a parent in the next 12 months; and

- (b) except in exceptional circumstances, the child has been in out of home care for a total of 24 months.

It follows that non-reunification is the usual basis for a long-term care by Secretary order.

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

- (a) there is a person or persons available with whom the child will continue to live for the duration of the order; and
- (b) the person or persons referred to in paragraph (a) will not consent to the making of a permanent care order; and
- (c) the Secretary consents to the making of the order; and
- (d) if the child is of or over the age of 10 years, the child does not oppose the making of the order [cf. the situation prior to 01/03/2016 which required the child's consent]; and
- (e) the making of the order is in the best interests of the child.

5.19.3 Secretary must review operation of order annually

Sections 290(3)-(7) of the CYFA provide that-

- the Court must direct the Secretary to review the operation of the order before the end of each period of 12 months after the making of the order; and
- the Secretary must notify the Court, the child (if the child is aged 10 years or over), the child's parent(s) and such other persons as the Court directs if the Secretary determines that the order is to end after the first 12 months or on the date that notice is given by the Secretary, whichever is the later.

5.19.4 Applications upon which a long-term care order can be made

Prior to 16/03/2016 the mechanisms which could lead to the Court making a long-term guardianship to Secretary order were-

- proof of a protection application [s.162] or a irreconcilable differences application [s.259] and a related finding that the child remains in need of protection [274(a) & 275(1)(e)] or that irreconcilable differences still remain [s.274(b) & 275(1)(e)]; or
- revocation of another protection order – either in breach proceedings [s.318(2)(c)+(3)] or certain revocation proceedings [s.310(3)(c)] – and making a long-term guardianship to Secretary order in lieu; or
- instead of extending a guardianship to Secretary order [former s.290(1)(d), now s.290(1)(c)].

These mechanisms are still applicable to the Court making a long-term care order. However, as and from 16/03/2016 there is an additional pathway. New s.290(1A) provides that subject to Division 1 of Part 4.9, a long-term care order may be made on the application of the Secretary [Form 25]. In the writer's strong opinion s.290(1A) is not intended to by-pass the initiating procedures of a protection application [s.162] or an irreconcilable differences application [s.259]. Although s.290(1A) was introduced to cover circumstances where there was a family reunification order which was unable to be extended due to the 'time in out of home care' provisions contained in ss.287A & 296, it is broad enough to cover any circumstance in which there is already a protection order in force. The writer's opinion is reinforced by s.290(1B): "A protection order applying to a child at the date of an application for a long-term care order in relation to the child continues in force until the application is determined.

5.19.5 Other orders can be made on an application for a long-term care order

On an application by the Secretary for a care by Secretary order under s.290(1A), the Court is empowered by s.290(1C)-

- if it decides not to make a long-term care order; and
 - if satisfied that the grounds for a finding under s.274 still exist [i.e. the child is still in need of protection or irreconcilable differences still exist between child and carer]-
- to make-
- (a) an order requiring a person to give an undertaking under Part 4.9; or
 - (b) a family preservation order; or
 - (c) a family reunification order; or
 - (d) a care by Secretary order; or
 - (e) an order extending a protection order that is in force in respect of the child.

5.19.6 Suspension/Lapse/Revival

Sections 288(1) of the CYFA, in conjunction with s.290(8), provides that a long-term care order-

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

Section 288(2) of the CYFA, in conjunction with s.290(8), provides that a long-term care order that has been suspended under s.288(1) revives if-

- (a) the application for the order sought under the Family Law Act 1975 (Cth) is withdrawn; or
- (b) the order sought is refused.

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

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

whichever happens first.

5.19.7 Revocation of long-term care order

Sections 306(1) & 306(3) of the CYFA provide that an application for revocation of a long-term care order [Form 31] may be made to the Court by-

- (a) the Secretary; or
- (b) the child; or
- (c) the parent but if the order has been in force for 12 months only with the leave of the Court.

Section 306(2) of the CYFA obliges the Secretary to apply for revocation if the Secretary has become aware that-

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

On an application for revocation, the Court may revoke the order if it is satisfied that it is in the best interests of the child to do so [s.309]. However, in *DHHS and Oscar (a pseudonym)* [2019] VChC 4, Bowles M determined that DHHS' application to revoke a LTCO should be by evidence contest rather than by submissions and accordingly that s.262(6) prohibited the making of an IAO in the interim.

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

5.19.8 No variation or breach of long-term care order

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

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

5.20 Interim Protection order [abolished]

Prior to 01/03/2016 s.291 of the CYFA empowered the Court to make an interim protection order ['IPO'] for a period of 3 months if it was satisfied that-

- (a) a child was in need of protection or irreconcilable differences exist; and
- (b) it was desirable, before making a protection order, to test the appropriateness of a particular course of action.

Under the transitional provisions in Schedule 5 to the CYFA any IPO in force immediately before 01/03/2016 continued in effect for all purposes as if the amending Act had not been enacted. Subject to this, s.291 and all associated provisions were repealed as and from 01/03/2016. Prior to their abolition, IPOs were relatively common, a short testing period often being useful after a child had been found to be in need of protection. The vast majority of interim protection orders were for the maximum period of 3 months' duration. The relevant statistics are as follows:

ORDER	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13	2013 /14	2014 /15	2015 /16
Interim protection order	973	891	893	795	871	881	920	1131	1218	662
Refusal to make protection order on expiry of IPO	118	77	98	74	87	65	88	134	129	86

The abolition of interim protection orders has had little impact on the Court. If the Court considers it is in a child's best interests to test the appropriateness of a particular course of action before either making or refusing to make a protection order, it can still do so by ordering an interim accommodation order and adjourning the case. Nothing in ss.10, 262(5A) & 530 prevents the Court from doing so.

5.21 Consent orders

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

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

5.22 Permanent care order

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

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

In the Second Reading Speech for the CYFA [27/10/2005], the Minister, in emphasising that a critical theme of the CYFA was to improve the stability of care of children and young people, foreshadowed less attempts at reunification of children with parents and hence a greater emphasis on stability of out of home care placements and on permanent care orders:

"An absolutely critical theme of the Act is to improve stability of care of vulnerable children and young people. We now know more about the lasting impact of early experiences on the development of young children's brains. Children who do not experience stable relationships in early childhood are at greater risk of significant developmental delay, learning difficulties, behavioural problems and difficulties in forming meaningful relationships throughout their lives."

Time frames for the preparation of stability plans will therefore create a lever to ensure that child protection assesses whether continued attempts at reunification are in the best interests of the child. Our reforms will therefore help to prevent the additional harm that is caused by multiple failed attempts at reunification.”

5.22.1 Effect of a permanent care order

Section 319 of the CYFA empowers the Court to make a permanent care order, an order which has substantially the same effect as an adoption order. A permanent care order [Form 34]–

- i. confers parental responsibility for a child on person(s) other than the parent(s) or the Secretary to the exclusion of all other persons [s.321(1)(a)]; or
- ii. in special circumstances confers parental responsibility for a child jointly on the person(s) named in the order and the child's parent(s) if satisfied that the Secretary, the child and the nominated carer(s) have agreed on the terms of the order [s.321(1)(b)].

It is very unusual for the Court to make a permanent care order of type (ii), granting parent(s) joint parental responsibility with carers. Almost all permanent care orders leave the birth parents with no residual parental rights save a right to very limited contact, a maximum of 4 visits per year.

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

- when the child turns 18; or
 - when the child marries–
- whichever happens first.

A protection order applying to a child at the date of an application for a permanent care order continues in force until the application is determined [s.320(6)]. On the making of a permanent care order, any protection order then in force in respect of the child ceases [s.321(2)].

5.22.2 Application for a permanent care order

Only the Secretary to the Department of Health and Human Services may make an application for a permanent care order [s.320(1) of the CYFA]. The application [Form 33] must be issued out of the Court by the appropriate registrar and must set out the grounds on which the application is based [s.320(5)]. The Secretary must cause notice of the application [Form 33] to be served on the child, the parent(s), the proposed carer(s) and such other person(s) as the Court directs [ss.320(4) & 320(5)(c)].

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

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

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

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

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

Subsequently s.320(2) has been included in the CYFA which provides that, with the leave of the Court, the proposed permanent carer(s) may appear, and be legally represented at, the hearing of the application and may call and examine or cross-examine witnesses and make submissions.

5.22.3 Pre-conditions for and restrictions on making a permanent care order

Section 320(1A) of the CYPA prohibits the Secretary from approving a person as suitable to have parental responsibility for a child under a permanent care order unless the Secretary is satisfied that the person will comply with the conditions to be included in the permanent care order under s.321(1)(ca).

Section 319(1) of the CYFA sets out six pre-conditions, all of which must be satisfied before the Court can make a permanent care order—

- (a) the child's parent or, if the child's parent has died, the child's **surviving** parent has not had care of the child for a period of at least 6 months or for periods that total at least 6 of the last 12 months; and
- (b) the Court is satisfied that-
 - i. the parent is unable or unwilling to resume parental responsibility for the child; or
 - ii. it would not be in the best interests of the child for the parent to resume parental responsibility the child; and
- (c) the Court is satisfied that the proposed permanent carer(s) is/are suitable having regard to the matters contained in reg.18 of the Children, Youth and Families Regulations 2017 [S.R. No.19/2017] and any wishes expressed by the parent(s) in relation to those matters; and
- (d) the Court is satisfied that the proposed permanent carer(s) is/are willing and able to assume responsibility for the permanent care of the child by having parental responsibility for the child; and
- (e) the Court is satisfied that, so far as is practicable, the wishes and feelings of the child have been ascertained and due consideration has been given to them, having regard to the age and understanding of the child; and
- (f) the Court is satisfied that the best interests of the child will be promoted by the making of the order.

For the purposes of s.319(1)(c)(i) of the CYFA the matters prescribed in reg.18 of the Children, Youth and Families Regulations 2017 [S.R. No.19/2017] in relation to each proposed carer are as follows—

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

In the case of *JS* [Melbourne Children's Court, unreported, 30/10/2003, case 3102/2002], a child aged 11 had been abandoned by his mother on 08/10/2002. She had left him a letter saying that she would not be returning home. She later gave her consent for the child to live with his godparents. She died of a drug overdose on 16/05/2003. The identity of the child's biological father was not known and the child had never been in his care. There was no other person who was a "parent" within the meaning of s.3 of the CYPA. All of the child's extended family lived in New Zealand. On 30/10/2003 Power M.

made a permanent care order granting guardianship and custody of JS to his godparents to the exclusion of all other persons. His Worship was persuaded to make this order notwithstanding that JS had not been out of the care of his deceased mother for a period of at least 2 years or for periods that totalled at least 2 of the last 3 years. His Worship accepted a submission by counsel for the Department that the pre-condition in s.112(1)(a) of the CYPA ought properly to be read as imposing a requirement that the **surviving** parent has not had care of the child for a period of at least 2 years or for periods that total at least 2 of the last 3 years. To remove any ambiguity which might prevent an order being made in such circumstances, the word “**surviving**” has now been added to s.319(1)(a) of the CYFA.

Section 322 of the CYFA sets out three further restrictions on the making of a permanent care order. The Court must not make a permanent care order—

- unless it has received and considered a disposition report;
- if a protection order is in force in respect of the child but an application to the Court to revoke it has been made but not yet determined;
- if there is a current proceeding under the Family Law Act 1975 (Cth) commenced by a person who is not a parent of the child seeking an order (on the terms of which the parties to that proceeding have agreed) with respect to the parental responsibility for the child.

Section 323 sets out further pre-conditions before the Court can make a permanent care order for an Aboriginal child:

- Section 323(1) prohibits the making of a permanent care order placing an Aboriginal child solely with a non-Aboriginal person or persons unless the disposition reports states that—
 - (a) no suitable placement can be found with an Aboriginal person or persons; and
 - (b) the decision to seek the order has been made in consultation with the child, where appropriate; and
 - (c) the Secretary is satisfied that the order sought will accord with the Aboriginal Child Placement Principle.
- Section 323(2) prohibits the making of a permanent care order in respect of an Aboriginal child – irrespective of the Aboriginality or otherwise of the proposed carer(s) – unless—
 - (a) the Court has received a report from an Aboriginal agency that recommends the making of the order; and
 - (b) a cultural plan has been prepared for the child.

The definition of an ‘Aboriginal person’ in s.3(1) of the CYFA is three-limbed. It 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 Island community.”

In the case of *AW* [Melbourne Children's Court, unreported, 03/07/2017] Magistrate Levine held that it was not necessary for the Department to obtain a report from an Aboriginal agency referred to in s.323(3)(a) because although the 16 year old *AW* satisfied limb (a) of the definition of ‘Aboriginal person’ in s.3(1) of the CYFA, he was satisfied that she did not fall within limbs (b) or (c).

In *Re CMR* [2020] VChC 8 the child *CMR*, aged 5y1m, had been living in the care of her maternal grandparents for over 4 years, first under an interim accommodation order and subsequently under a family reunification order. The Department had initially filed an application for a care by Secretary order and later an application for a permanent care order. The protective concerns revolved around the parents’ serious illicit drug use, mental health issues, criminal offending and – in the early days of the Department’s involvement – family violence perpetrated by the father *FR* against the mother. After detailing the protective concerns, her Honour said at [35]: “In some ways, the enormity of these protective concerns highlights even more starkly the extraordinary efforts the parents have now made to turn their lives around and address the protective concerns.”

Hubble M. placed the child on a care by Secretary order, rejecting the Department’s position that the child should be placed on a permanent care order and the parents’ position that the child should be placed on a family preservation order. Her Honour said at [66]-[74] [emphasis added]:

“I have given due regard to the ‘best interests’ principle which emphasises the parent and child as the fundamental group unit of society (s10(3)(a) of the Act). However, I also have to give careful consideration to the protective concerns, and to *CMR*’s emotional wellbeing, especially in the context of her special needs.

The protective concerns relating to the parents were extremely serious and spanned a considerable period of time. It is also my view that those protective concerns when they were at their worst, fundamentally impacted on the parents' ability to provide adequate care to their children. While there was substantial evidence before me that those concerns have been addressed by the parents and that they would currently be able to provide good care to CMR, any relapse by them could have a most serious impact on CMR's wellbeing. FR has experienced mental health concerns and substance use issues intermittently for a significant part of his adult life. I also think he has more work to do on his emotional regulation and communication skills. Both of his former partners who gave evidence commented on his domineering and somewhat arrogant persona. Indeed, in this hearing I noticed FR become visibly agitated a number of times, and on one occasion his demeanour became quite aggressive and I had to stop the hearing and ask that he compose himself. Even making allowances for the distress FR was feeling about the evidence in the contest, his inability to remain composed during the hearing concerned me. While the evidence before me indicates that he is currently able to regulate himself perfectly well when he is around loved ones, and I am not of the view that the risks are so great that they would stand in the way of him having unsupervised contact with his children, including CMR, I do think that he has more work to do to address the domineering side of his personality.

Further, the evidence before me establishes that CMR's primary attachment is to the maternal grandparents. Dr LS gave evidence that, at the current time, CMR's relationship with the maternal grandparents is her 'main relationship'. He stated that, while the parents are not emotional strangers completely, any transition to the care of the parents would have to be gradual.

At this present time, the relationship between CMR and her parents is only beginning to develop. While I accept the evidence that CMR enjoys contact with her parents and there is considerable affection between them, CMR has only had limited contact with her parents. It is as yet unclear whether CMR's primary attachment will shift from the grandparents to the parents. In those circumstances it would not be in CMR's best interests to disturb the current care arrangements. Given CMR's vulnerabilities and the difficulty she experiences in coping with change or transitions, my view is that her best interests currently require stability and a settled placement with her primary attachment figures, the maternal grandparents.

The Act was amended in 2014 to introduce a raft of changes designed to improve the timeliness of decision-making with respect to children in care, and to promote the permanency of arrangements as well as stability for children: *Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014*, second reading speech, Ms Mary Woolridge, 7 August 2014. Essentially, the permanency amendments enacted a time-limited approach to reunification. The court, in my view, must give a high priority to the value of permanency when children have been out of their parents' care for an extended period of time: s.10(3)(f). Section 276A(2)(e) of the Act directs the court to consider the desirability of making a permanent care order, if a child is placed with a person who is intended to have permanent care of the child.

Section 319(1) of the Act relevantly provides that the court may make a permanent care order in respect of a child if the statutory requirements set out therein are satisfied. **In my view, the requirement that the order be in the child's best interests is a primary consideration.**

Counsel for the parents submitted that I cannot be satisfied as to the matters set out in section 319 of the Act. For example, Mr RB from the Department conceded in evidence that there had been insufficient observations of CMR in the care of the maternal grandparents. In addition, it was submitted that the grandparents will not facilitate adequate contact between CMR and her parents, or progress contact with CMR's paternal siblings/extended paternal family or facilitate CMR's connection to her QQQ cultural heritage. These matters are required to be considered by virtue of regulations 18(f) and 18(g) of the *Children, Youth and Families Regulations 2017*.

In relation to the need for further observations of CMR with her maternal grandparents, there is sufficient evidence before me that CMR is provided with an abundance of love and good care in her placement. Dr LS of the Children's Court Clinic is of the view that the grandparents are her primary caregivers, the base of her security and represent her psychological parents. Secondly, while I accept that CMR will be more closely linked to paternal family and culture should she be in the care of her parents, I accept the evidence of the grandparents that they are willing to increase CMR's connection to paternal relations.

However, while I accept that the maternal grandparents would provide CMR with a loving and stable home, and that they will provide her with the structure, routine and calm that she needs to thrive, **I am concerned that it is not in CMR's best interests to determine her care arrangements for the next fifteen years. CMR's relationship with her parents is just starting to develop, and her feelings about contact with her parents will be made known over time.** CMR is only five years old. I accept that the maternal grandparents are her psychological parents at the moment, but I am unsure if that situation will endure until her adulthood - there are just too many uncertainties ahead. I have, therefore, determined that a Permanent Care Order is not in CMR's best interests."

5.22.4 Conditions on a permanent care order

A permanent care order-

- [s.321(1)(ca)] must include a condition that the carer must, in the best interests of the child and unless the Court otherwise provides, preserve-
 - i. the child's identity and connection to the child's culture of origin; and
 - ii. the child's relationship with the child's birth family.
- [s.321(1)(d)] may include conditions that the Court considers in the best interests of the child concerning contact with the child's parent which may provide for contact up to 4 times a year.
- [s.321(1)(e)] may include conditions that the Court considers to be in the best interests of the child concerning contact with the child's siblings and other persons significant to the child.
- [s.321(1)(f)] in the case of an Aboriginal child, may include a condition incorporating a cultural plan for the child.

Section 327(2) of the CYFA provides that the limit on parental contact imposed under s.321(1)(d) does not apply to a variation of a contact condition of a permanent care order if the variation is made more than 12 months after the making of the order.

Section 321(1A) provides that a condition referred to in ss.321(1)(d) or 321(1)(e) does not prevent additional contact being arranged from time to time by agreement in the child's best interests.

Section 321(1B) requires the Court – before including a condition referred to in ss.321(1)(d), 321(1)(e) or 321(1)(f) – to have regard to the primacy of the child's relationship with the child's permanent care family and whether the condition–

- (a) is necessary to protect the child or support the permanence of the placement; and
- (b) is necessary to promote the child's continuing connection to the child's parents, siblings or culture; and
- (c) is sufficiently flexible to accommodate the child's changing developmental needs over time; and
- (d) is reasonable in the context of the child's permanent care family's life; and
- (e) is necessary given the capacity of the person caring for the child to meet the condition referred to in s.321(1)(ca).

Section 321(1C) provides that a permanent care order may contain a condition that the child may not have any contact with a parent, sibling or other person.

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

"I am satisfied that neither the CYFA nor the predecessor, the CYP, empower the Court to require DOHS to supervise, monitor or provide services for a child who is the subject of a permanent care order. Under s.321(1)(a) of the CYFA a permanent care order grants custody and, subject to s.321(1)(b), guardianship of the child to the carers to the exclusion of all other persons. Under s.321(2) any protection order in respect of a child ceases to be in force on the making of a permanent care order. Neither the CYFA nor the CYP give DOHS any express rights, duties, powers or responsibilities in respect of a child on a

permanent care order. This is in stark contrast to the rights, duties, powers and responsibilities of DOHS in respect of all protection orders other than an undertaking and a custody to third party order. {See for instance the responsibilities of DOHS under a supervision order [ss.280(1)(a) & 282], a supervised custody order [ss.284(1)(f), 284(4), 285 & 286], a custody to Secretary order [ss.287(1)(a)], a guardianship to Secretary order [s.289(1)(a)], a long-term guardianship to Secretary order [s.290(1)(b)] and an interim protection order [s.291(3)(a)].} It might be thought that the lacuna is unfortunate because there are many children who might otherwise be the subject of permanent care orders but who require the provision of ongoing, sometimes intensive, services of one form or another. However, I am satisfied that the lacuna is deliberate. I agree with counsel for DOHS that "Parliament clearly intended and the effect of both the CYPA and the CYFA is that permanent care orders are in substance similar to adoption orders". It is true that DOHS is the only body which has standing to apply for a permanent care order {See s.320(1) of the CYFA. This was in identical terms to s.112(2) of the CYPA which had been amended in 1992 by s.14(6) of Act No.69/1992. Prior to 1992 only proposed carers had standing under s.112(2) of the CYPA to apply for a permanent care order.} Along with child, parents & carers it also has standing to apply for the variation or revocation of a permanent care order {s.326(1) of the CYFA}. However, in my view, the power to make an application does not enable me to infer an obligation on DOHS to do anything once the application is granted where such an obligation is inconsistent with the purpose and features of a permanent care order or with the clear intention of Parliament. The detailed contrary submissions of counsel for [two of the children] are highly relevant to the question of whether or not the Court should exercise its discretion to make a permanent care order but do not persuade me of the existence of a power to impose an obligation on DOHS to have any form of ongoing connection with a child who is the subject of a permanent care order."

5.22.5 Other orders can be made on an application for a permanent care order

On an application by the Secretary for a care by Secretary order under s.320(1), the Court is empowered by s.320(7)–

- if it decides not to make a permanent care order; and
- if satisfied that the grounds for a finding under s.274 still exist [i.e. the child is still in need of protection or irreconcilable differences still exist between child and carer]–

to make–

- (a) an order requiring a person to give an undertaking under Part 4.9; or
- (b) a family preservation order; or
- (c) a family reunification order; or
- (d) a care by Secretary order; or
- (e) a long-term care order; or
- (f) an order extending a protection order that is in force in respect of the child.

5.22.6 Suspension/Lapse/Revival

Section 324(1) of the CYFA provides that a permanent care order–

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

Section 324(2) of the CYFA provides that a permanent care order that has been suspended under s.324(1) revives if–

- (a) the application for the order sought under the Family Law Act 1975 (Cth) is withdrawn; or
- (b) the order sought is refused.

5.22.7 Administrative conversion of permanent care order to care by Secretary order

Section 325A of the CYFA requires the Secretary to notify the Court if the Secretary is informed that each person conferred parental responsibility for the child under a permanent care order has died.

On and from the date that such notice is given by the Secretary to the Court–

- (a) the Secretary is taken to have sole parental responsibility for the child; and
- (b) the permanent care order is taken to be a care by Secretary order; and
- (c) Division 7 of Part 4.9 applies to the order; and
- (d) the order ceases to be a permanent care order for the purposes of the CYFA.

The Secretary must notify the person who has care of the child, the child (if aged 10 years or over) and the parent(s) of the child of a change of order under s.325A.

5.22.8 Variation/Revocation/Breach of permanent care order

Sections 326(1) & 327 of the CYFA provide that on application [Forms 35 & 36] by:

- (a) the child; or
- (b) a permanent care parent; or
- (c) another person who is a parent of the child but only with leave of the Court; or
- (d) the Secretary-

the Court may, if satisfied it is in the best interests of the child to do so–

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

Section 327(2) of the CYFA provides that the limit on parental contact imposed under s.321(1)(d) does not apply to a variation of a contact condition of a permanent care order if the variation is made more than 12 months after the making of the order.

Section 326(1A) empowers a sibling to make an application to the Court for the variation of a permanent care order as of right.

Section 326(1B) provides that an application by a person who is a parent of the child (other than a permanent care parent) to vary a permanent care order made before the end of the first 12 months of the order may only be made on the basis that a contact condition on the order has not been complied with.

Section 326(1C) provides that in determining whether to grant leave to a person who is a parent of the child (other than a permanent care parent) under s.326(1)(c) to vary or revoke a permanent care order, the best interests of the child are the paramount consideration and the Court must–

- (a) first have regard to the current circumstances of the child; and
- (b) have regard to the matters in s.321(1B); and
- (c) have regard to the potential disruption to the child's permanent care placement and the child's relationship with the permanent care family; and
- (d) in the case of an application to vary, have regard to whether–
 - (i) it appears that a party has not complied with any condition of the order; or
 - (ii) there has been a significant change in the circumstances of the parent or the child since the original permanent care order was made; and
- (e) in the case of an application to revoke, have regard to whether the circumstances of the parent have changed significantly to the extent that the parent can demonstrate he or she would be able to permanently fulfil the responsibilities and duties of parenthood, including the capacity to provide adequately for the emotional, intellectual, educational and other needs of the child.

Sections 326(1D), 326(1E) & 326(1F) empower the Court to request a report from the Secretary to assist in determining whether to grant leave, whether to vary a contact condition or whether to revoke the permanent care order.

Section 326(2A) provides that if a parent of the child (other than a permanent care parent) requires leave of the Court to bring an application to vary or revoke a permanent care order, notice of the application must **not** be served on the child or the carer unless that leave is granted.

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

There are no legislative provisions relating to breach of a permanent care order. If a carer relinquishes the care of child who is the subject of a permanent care order, DFFH usually issues a protection application.

5.22.9 Statistics

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

2008 /09	2009 /10	2010 /11	2011 /12	2012 /13	2013 /14	2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20
233	223	202	250	292	318	305	535	485	438	457	376

5.23 Therapeutic treatment & therapeutic treatment (placement) orders

A therapeutic treatment order ['TTO'] requires a child aged 10-17 who has exhibited sexually abusive behaviours to participate in an appropriate therapeutic treatment program ['TTP'].

A therapeutic treatment (placement) order ['TTPO'] grants parental responsibility to the Secretary for a child in respect of whom a TTO is in force.

5.23.1 Rationale

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

"[T]he bill provides a new basis for intervening earlier with young people who exhibit sexually abusive behaviour to help prevent ongoing and more serious sexual offences. For children aged 10-14, the criminal justice system does not provide a reliable pathway into treatment.

For this age group, it is often difficult to prove the necessary mental intent to secure a conviction.

The bill therefore provides two new Children's Court orders...The court will be able to order a child into therapeutic treatment and, where necessary for that treatment, to place the child in out-of-home care. This is an important early intervention if we are to stop these children from becoming adult offenders. This reform is intended to supplement, not replace, voluntary access to treatment. It will always be preferable for parents to connect a child exhibiting sexually abusive behaviour to treatment voluntarily and avoid exposing them to any court process."

The TTO & TTPO regimes were extended to 15-17 year old children as and from 29/03/2019.

5.23.2 Power of the Court to make a TTO

Sections 244 & 246 of the CYFA empower the Secretary, if satisfied on reasonable grounds that a child – who is of or above the aged of 10 years and under the age of 18 years when the order is made – is in need of therapeutic treatment to apply [Form 4] for a TTO. This is one of the very few applications in which the CYFA requires the child to attend Court.

Under s.248(1) of the CYFA the Court may make a TTO in respect of a child – who is of or above the age of 10 years and under the age of 18 years when the order is made – if the Court is satisfied-

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

Section 248(2) provides that in deciding whether or not to make a TTO, the Court must consider-

- (a) the seriousness of the child's sexually abusive behaviours; and
- (b) any previous history of sexually abusive behaviours of the child and how those behaviours were addressed; and
- (c) the particular characteristics and circumstances of the child; and
- (d) any other matters the Court considers relevant.

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

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

- (a) a condition directing the parent of the child or any person who has care of the child to take any necessary steps to enable the child to participate in a TTP; and
- (b) a condition directing the child to permit reports or his or her progress and attendance at the TTP to be given to the Secretary; and
- (ba) a condition requiring the Secretary to report to the Court, at the time or times specified by the Court, of the child's progress and attendance at the therapeutic treatment program; and
- (c) any other conditions that the Court considers appropriate.

The addition of s.249(2)(ba) as and from 29/03/2019 appears to give the Family Division of the Court an implied power to conduct judicial monitoring of the progress of a child on a TTO.

Section 250 of the CYFA provides that a TTO remains in force for the period (not exceeding 12 months) specified in the order even if the child attains the age of 18 years after the order is made.

Prior to 29/03/2019 it was not entirely clear from the legislation whether the 10-14 age limits then set out in ss.244(a) & 248 of the CYFA applied to the age of the child at the time the application was made or at the time a TTO was made. Since 29/03/2019 that ambiguity has been resolved, paragraph (ad) of the definition of 'child' being amended to read: "in the case of a person in respect of whom a TTO or TTPO may be made, a person who is of or above the age of 10 years and under the age of 18 years when the order is made".

5.23.3 The meaning of 'sexually abusive behaviours'

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

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

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

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

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

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

[11] "On balance, the evidence suggests that it is likely that Jonathon himself was exposed to the sexualised behaviours of one or more of the other children in the Unit, and then became involved in a culture or secret game of collusion in which they all participated. I accept that on a number of occasions Jonathon sought out the sexual activity, however the evidence does not support a positive finding that he used bullying behaviour, power or control to enable it to occur. Only D made this specific allegation, and it is equally likely that D said this in an attempt to understand his own behaviours in the Unit. In all the circumstances, to classify Jonathon as the sexually dominant child, the controller of sexual activity, or the aggressor, is to demonise him and fails to acknowledge the dynamics that existed between the children in the Unit.

[12] As the only child of the age of criminal responsibility, Jonathon has been charged with criminal offences and treated as an offender. It is my firm view that he should have been regarded (and treated) as much as a victim as the other children in this very disturbing series of events.

[13] The acts of fellatio and attempted anal sex engaged in by the children were types of sexualised behaviours that went well beyond the bounds of normal sexual development for them, and had great potential to place all the children at risk of harm, including harm of a cumulative nature. It is imperative that Jonathon and his co-residents are given the opportunity to process what occurred for them in the Unit and to learn from it so that,

individually, they can go on to have sexually appropriate relationships in the future. The issue for the Court is whether a TTO should be made to achieve this therapeutic outcome for Jonathon.”

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

[18] “If this working definition were adopted by the Court as a complete description of the phrase, Jonathon would not be found to have exhibited sexually abusive behaviours, as he has not used his power, authority or status. I would be surprised and troubled by such an outcome, given the views I have expressed in paragraph [12] herein, and consider it would be contrary to the expressed purpose for which the Court was given power to make TTOs.

[19] In her evidence, Ms W from the Australian Childhood Foundation (the agency responsible for providing counselling services to children on TTOs in the region closest to Jonathon’s home) said that she understood the word ‘abusive’ in the phrase described the harmful effect of the behaviours on the young person and/or others rather than a description of the young person exhibiting the behaviour. She also explained that the context in which the sexual behaviours took place was vital in determining whether fell within the ambit of the phrase. I found her evidence of great assistance.

[20] I am satisfied that Jonathon has exhibited sexually abusive behaviours. This is not because he has used any power, authority or status to engage the others in the Unit in sexual activity. Nor is it because I view him as an abuser. It is because I consider that the behaviours he engaged in with his co-residents were abusive to himself and to the others, and he would benefit by engaging in therapeutic treatment. I would have also found that the other children in the Unit (perhaps with the exception of C) had exhibited sexually abusive behaviours, however only Jonathon was of an age that brings him within the ambit of such a finding for the purposes of a TTO.”

5.23.4 Power of the Court to make a TTPO

Under s.252(1) of the CYFA the Court, on the application of the Secretary [Form 6], may make a TTPO in respect of a child – who is of or above the age of 10 years and under the age of 18 years when the order is made – if-

- (a) the Court makes or has made a TTO in respect of the child; and
- (b) the Court is satisfied that the TTPO is necessary for the treatment of the child.

Under s.253 of the CYFA a TTPO-

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

The parental responsibility of the Secretary under a TTPO is of a similar nature and scope to that conferred under a family reunification order. It includes the sole right to care of the child pursuant to s.172(2)(a) and also medical powers pursuant to s.597. As with FROs, decisions about matters that are not “major long term issues” [as defined in s.3(1)] may be made by the Secretary without the agreement of the parent of the child: see s.175C(5). However, decisions about “major long term issues” must not be made without agreement of the parent of the child: see ss.175C(1)(b) and (3).

Under s.254 of the CYFA a TTPO remains in force for the period specified in the order but not exceeding the period of the TTO to which it relates. However, as and from 29/03/2019 new s.254(2) makes it clear that even if a TTO remains in effect after a child has attained the age of 18 years, any associated TTPO ceases to be in force if the child attains the age of 18 years or marries, whichever happens first.

5.23.5 Variation/revocation of TTO/TTPO

On application [Form 8] by:

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

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

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

5.23.6 Extension of TTO/TTPO

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

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

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

Section 256(1) empowers the Court to extend a TTO for a period not exceeding 12 months if it is satisfied that the child is still in need of therapeutic treatment. Section 256(1A) provides that s.256(1) applies even if the child has attained the age of 18 years before the TTO is extended or will attain the age of 18 years during the period of extension.

There were 6 extensions of TTOs in each of the periods 2014/15, 2015/16, 2016/17 & 2019/20 and 3 extensions in 2017/18 & 2018/19.

Section 256(2) empowers the Court to extend a TTPO for a period not exceeding the period of the TTO to which it relates if it is satisfied that the TTPO is still necessary for the therapeutic treatment of the child. However, s.256(4) provides that despite the extension of a TTPO under s.256, the TTPO ceases to be in force if the child attains the age of 18 years or marries, whichever happens first.

5.23.7 Therapeutic treatment planning by DFFH

New ss.169A & 169B impose an obligation on the Secretary of DFFH – not on the Court – to ensure that a therapeutic treatment plan [‘TT plan’] is prepared in respect of a child within 6 weeks after a TTO is made. The TT plan must contain all decisions and arrangements made by the Secretary concerning the child that-

- (a) the Secretary considers to be significant; and
- (b) relate to the child’s participation in and attendance at the TTP.

New s.169C(1) of the CYFA requires a TT plan to specify a date for the review of the plan that is halfway through the period of the TTO to which the TT plan relates. Section 169C(2) imposes an obligation on the Secretary of DFFH to review a TT plan-

- (a) on or before the review date specified in the plan; and
- (b) from time to time as otherwise appears necessary.

Sections 169B & 169C impose an obligation on the Secretary to ensure that copies of a TT plan and of the review of a TT plan and any resultant amendments to the TT plan to the child, the child’s parent, the child’s carer and the provider of the TTP unless the Secretary is satisfied that to do so would be inappropriate.

5.23.8 Effect of TTO or similar voluntary program on associated criminal proceedings

Under s.251 of the CYFA any statement made by a child when participating in a therapeutic treatment program under a TTO or voluntarily in an appropriate therapeutic treatment program is not admissible in any criminal proceeding in relation to the child.

Under s.352 of the CYFA, if the Secretary reports to the Criminal Division of the Court under s.351 that a TTO has been made in respect of a child and the Court has not yet made a finding in related

criminal proceedings in which the child is an accused, the Court must adjourn the criminal proceedings for a period not less than the period of the TTO.

Under s.352A of the CYFA, if a TTO has been made in respect of a child, the Court may require the Secretary to report to the Criminal Division at the time or times specified by the Court on the child's progress and attendance at the therapeutic treatment program. The Court may make such requirement when adjourning criminal proceedings under s.352 or at any other time during the period of the TTO when the Court is exercising the jurisdiction of the Criminal Division in relation to the child. The Court may direct the Secretary to provide a copy of the report to the child and the prosecutor. This new provision, operating from 29/03/2019, appears to give the Criminal Division of the Court an implied power to conduct judicial monitoring of the progress of a child on a TTO just as s.249(2)(ba) appears to give the Family Division a similar implied power of judicial monitoring [see section 5.23.2].

Section 353 provides that if criminal proceedings are adjourned under s.352, the Secretary must report to the Criminal Division on the completion of the TTO or on the revocation of the TTO. The report must set out details of the child's participation in and attendance at the TT program under the order. The Court may direct the Secretary to provide a copy of the report to the child and the prosecutor.

Under s.354(4) of the CYFA, if the Criminal Division of the Court is satisfied that a child accused has attended and participated in a TTP under a TTO, it must discharge the child without any further hearing of the related criminal proceedings.

In *Victoria Police v HW* [2010] VChC 1 the child the subject of a TTO had earlier been charged with very serious sexual offending which occurred when he was 13 years of age. The child had been attending and participating in the TTP under a TTO. However, as the therapeutic treatment had not been completed by the end of the TTO the Department of Health & Human Services had filed an application to extend the TTO and – with the consent of the child – the TTO had been extended. Counsel for the child submitted that s.354(4) is clear and that once a child has attended and participated in the TTP under the TTO it must discharge the child even though there was an application for extension before the Family Division. The police prosecutor submitted that the Court must look at the rationale for TTO's and that given that the child is still in need of therapeutic treatment the criminal proceedings ought be adjourned until the period of the extended TTO is completed and the Court is advised of the child's compliance with the TTO. At [17]-[18] Judge Grant preferred the police submission:

“Given the purpose of a TTO, parliament would not have intended that a child be discharged on serious criminal offences in circumstances where the child was considered to require on-going treatment by way of an extension of the TTO...

The only way of interpreting s.354(4), consistent with the clear purpose of the Act, is to recognise that the words ‘attend and participate in the therapeutic treatment program’, mean attend and participate in the program until the TTP is completed. If, as in this case, the TTO has been extended for a period, the appropriate order on the associated criminal proceedings is to adjourn those proceedings for a period that is not less than the period of extension of the order.”

Subsequent to Judge Grant's decision – as and from 01/03/2016 – s.354(4A) provides that for the purposes of s.354(4), the Court must have regard to-

- (a) the child's attendance record; and
- (b) the nature and extent of the child's participation; and
- (c) whether or not the child's participation was to the satisfaction of the therapeutic treatment provider; and
- (d) the opinion of the therapeutic treatment provider as to the effectiveness of the treatment.

The legislative extension of TTOs to children aged 15-17 has the potential to lead to children accused of more serious sexual offending than has generally been experienced in relation to children aged 10-14 being candidates for TTOs – and consequent discharge if the TTO is satisfactorily completed. Hence the writer considers it likely that in some cases where the Family Division is hearing an application for a TTO it may ask the applicant Secretary the view of the prosecution and – through the prosecution – the view of the victim and/or the victim's family. Any such views would, of course, not be binding on the Court but would enable the Court to be better informed in the exercise of its discretion whether or not to grant an application for a TTO.

Section 354A gives the Criminal Division of the Court powers similar to s.354-

- (i) of adjourning criminal proceedings for an accused child-

- who is *aged 10-17 when he or she appears as an accused in a criminal proceeding* in the Court; and
 - who has exhibited sexually abusive behaviours that would justify referring the matter to the Secretary under s.349(2); and
 - where the Court has not yet made a finding in the criminal proceeding; and
 - where the Court is satisfied that the child has attended and participated, is attending and participating or will attend and participate voluntarily in an appropriate therapeutic treatment program (not pursuant to a TTO); and
- (ii) of discharging the accused after satisfactory completion of the voluntary program.

The italicized words in the first dot point of (i) are ambiguous. Do they mean aged 10-17 when he or she first appears as an accused or do they bear their literal meaning of when he or she appears at any time as an accused? A comparison with the equivalent TTO provision in s.354 would suggest the former is more likely to have been the intention of Parliament.

The significant difference between s.352 and 354A(2)(a) is that the Court **must** adjourn the criminal proceedings under s.352 where the child is on a TTO but only **may** adjourn the criminal proceedings under s.354A(2) where the therapeutic treatment program is voluntary.

Sections 354(5)/354A(5) provide that if the child is not discharged under ss.354(4)/354A(3) the Court may determine what (if any) further proceedings in the Criminal Division in respect of the child are appropriate.

5.23.9 Statistics

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

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

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

Up to and including 09/07/2008 the Therapeutic Treatment Board had processed 16 referrals and in 6 of those it had advised that an application for a TTO should not be made. Some of the TTOs which the Court has made have involved cases in which DFFH had chosen not to accept advice by the Therapeutic Treatment Board that no application should be made. The statistics below show that TTOs are relatively uncommon orders and TTPOs are very rarely made at all.

	2009 /10	2010 11	2011 /12	2012 /13	2013 /14	2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20
TTO	30	28	28	32	26	28	17	11	14	11	21
TTPO	4	2	2	2	2	0	0	0	0	0	

5.23.10 Therapeutic treatment service providers

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

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

5.24 Reports to the Court

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

The types of Family Division reports governed by Part 7.8 of the CYFA are-

- (a) protection reports;
- (b) disposition reports;
- (c) additional reports, including Children's Court Clinic reports;
- (d) therapeutic treatment application reports; and
- (e) therapeutic treatment (placement) reports.

5.24.1 Protection report

If the Family Division requires further information to enable it to determine a protection application, it may order the Secretary to submit to the Court a protection report concerning the subject child: s.553 of the CYFA. The Secretary must forward such report to the Court not less than 3 working days before the hearing: s.554. Such report must only deal with matters that are relevant to the question of whether the child is in need of protection: s.555.

5.24.2 Access to protection report

If the Court orders the Secretary to prepare a protection report, s.556(1) of the CYFA requires the Secretary – subject to the restriction provisions in s.556(2) – to cause a copy of the protection report to be given before the hearing of the proceeding to each of the following-

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

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

5.24.3 Disposition report

Subject to the minor limitations in s.557(2), s.557(1) of the CYFA requires the Secretary to prepare and submit to the Family Division a disposition report if-

- (a) the Court becomes satisfied that-
 - (i) a child is in need of protection; or
 - (ii) irreconcilable differences exist; or
 - (iii) there has been a breach of a family preservation order; or
- (ab) the Secretary applies under s.289(1A) for a care by Secretary order; or
- (ac) the Secretary applies under s.290(1A) for a long-term care order; or
- (b) the Secretary applies for a permanent care order; or
- (c) the Secretary applies, or is notified that a person has applied-
 - (i) for the variation or revocation of a family preservation order, a family reunification order or a permanent care order; or
 - (ii) for the extension of a family preservation order, a family reunification order or a care by Secretary order; or
 - (iii) for the revocation of a care by Secretary order or a long-term care order; or
- (d) the Court orders the Secretary to do so.

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

dichotomy as an analogy. Fortunately, it has become standard practice for the Department to prepare and distribute a disposition report at a pre-proof stage in every case.

Section 558 requires a disposition report to include the following:

- (a) the case plan, if any, prepared for the child; and
- (b) recommendations, where appropriate, concerning the order which the Secretary believes the Court ought to make; and
- (c) if the report recommends that the child be removed from the care of the child's parent, a statement setting out the steps taken by the Secretary to provide the services necessary to enable the child to remain in the care of the parent [see also s.276(2)(b)]; and
- (ca) the advice of the Secretary on the matters set out in s.276A, where they are applicable to the circumstances of the child; and
- (d) any other information that the Court directs or the regulations require to be included.

5.24.4 Access to disposition report

If a disposition report is required under s.557 or if the Court orders a disposition report, s.559(1) of the CYFA requires the Secretary – subject to the restriction provisions in s.559(2) – to cause a copy of the disposition report to be given before the hearing of the proceeding to each of the following-

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

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

5.24.5 Additional report – Children's Court Clinic report

If in any proceeding in which a disposition report is required under s.557(1), the Family Division is of the opinion that an additional report is necessary to enable it to determine the proceeding, s.560 empowers the Court to order the preparation and submission to the Court of an additional report by-

- (a) the Secretary; or
- (b) the Children's Court Clinic; or
- (c) another person specified by the Court.

This is the statutory provision which empowers the Court to order reports from the Clinic.

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

5.24.6 Whether Court has power to compel DFFH to provide an 'external' additional report

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

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

The provision of reports pursuant to the Children and Young Persons Act 1989 may in certain circumstances be an onerous task. That task is undoubtedly one which in the particular circumstances ought to be carried out by the Department. But where the resources of the Department are clearly not sufficient to generate from within the Department material which is sought to be included in a report prepared pursuant to Subdivision 3 of Division 8 of Part 2 of the Act, then it seems to me that the court should either make an order directly upon the appropriate person requiring that person to prepare the report or should make no order at all.

It may well be that before making an order pursuant to s.50(c) the court should receive undertakings as to the meeting of the cost of preparation of that report by, for example, one of the parties then before the court. It may be that other steps can be taken to ensure that the costs are met by the appropriate person. But in any event, given the limited nature of the jurisdiction of the Children's Court, it seems to me that a provision such as s.50 should be read so as to limit the court's jurisdiction where, without such limits, the court would be empowered to impose upon persons not directly before the court the obligation to provide and pay for reports pursuant to the Act; or, alternatively, to require a body such as the department to provide and pay for, directly or indirectly, reports which the Department cannot prepare and provide from its own resources."

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

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

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

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

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

5.24.8 Access to Children's Court Clinic report

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

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

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

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

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

5.24.9 Therapeutic treatment application & therapeutic treatment (placement) reports

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

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

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

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

Subject to the restriction provisions in ss.566(2) & 570(2) respectively, the Court must release a copy of the report to each of the following-

- (a) the subject child;
- (b) the parent(s);
- (c) the legal practitioners representing the child;
- (d) the legal practitioners representing the parent(s);
- (e) a party to the proceeding; and
- (f) any other person specified by the Court.

5.24.11 Restriction on access to reports

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

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

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

On application by-

- (a) the Secretary;
- (b) any person mentioned in s.556(1); or
- (c) with the leave of the Court, any other person-

the Court may by order restrict access by the child, parent, party or other person specified by the Court if it is satisfied that information in the report, or part thereof, may be prejudicial to the physical or mental health of the child or a parent of the child.

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

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

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

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

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

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

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

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

5.24.12 Confidentiality of contents of reports

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

The confidentiality provisions do not prevent-

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

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

5.24.13 Admissibility & relevance of prior reports

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

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

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

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

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

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

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

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

contested hearings – I have made findings of fact that certain material in the Department's reports is simply wrong. It is not uncommon for Departmental reports to be written to achieve an outcome and for material which does not support that outcome to be omitted from the reports. I could give dozens of examples of that over the past 5 years. The Department's submission, if it is adopted, would require me to accept as 'gospel truth' and as the last word everything which is contained in the 19 reports which it seeks to tender without calling the respective writers. But I don't know what factual material in those reports each of the judicial officers who made the orders has relied on - or not relied on - in making the orders. Hence the relevance to this case of the limitation put by Dixon J in *Blair v Curran*: 'The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion...Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded.'

In this case what is closed or concluded is any suggestion by any party that the findings or orders made by the Court on previous occasions were not appropriate orders and can be the subject of challenge in this hearing. I don't understand that anyone is seeking to do that anyway but taking it to its logical conclusion DOHS' submission is that everything contained in its reports must be regarded by the Court on any later occasion as being 'gospel truth'. If I was to make that finding, which in my view is not supported by the law, it would bring the mention court of this Court to its knees. There is likely to be a much smaller number of cases which would be dealt with either by consent or uncontested. However, the basis of my decision is not the damage that this issue would do to the processes of the Court. It is the fact that in my view it is not supported by law."

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

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

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

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5.25 Summary of Family Division orders

5.25.1 Blue form – Minutes of proposed Family Division orders

The following 2 page blue document is used in the Family Division to provide minutes of proposed orders under the CYFA. It contains most possible order types and for each enables input of the variables required for each prescribed form. An electronic version of this blue form can be downloaded from the CCV website.

MINUTES OF PROPOSED FAMILY DIVISION ORDERS	
CHILD(REN) _____ DATE ____/____/____	
ANNEXURE(S): <input type="checkbox"/> _____ CONDITIONS <input type="checkbox"/> ADDITIONAL ORDERS <input type="checkbox"/> ADDITIONAL NOTATIONS	
REPORT(S) ORDERED <input type="checkbox"/> CLINIC <input type="checkbox"/> DFFH <input type="checkbox"/> OTHER _____	
FINDING/OUTCOME OF APPLICATION OR BREACH NOTICE	
<input type="checkbox"/> P.A. PROVED S.162(1) <input type="checkbox"/> a <input type="checkbox"/> b <input type="checkbox"/> c <input type="checkbox"/> d <input type="checkbox"/> e <input type="checkbox"/> f <input type="checkbox"/> SUBSTANTIAL & IRRECONCILABLE DIFFERENCE	
<input type="checkbox"/> PROTECTION APPLICATION <input type="checkbox"/> DISMISSED <input type="checkbox"/> STRUCK OUT <input type="checkbox"/> NOT PROVED <input type="checkbox"/> ON GROUND(S) _____	
<input type="checkbox"/> _____ APPLICATION _____ <input type="checkbox"/> GRANTED <input type="checkbox"/> DISMISSED <input type="checkbox"/> STRUCK OUT	
<input type="checkbox"/> GRANTED IN PART AND OTHER ORDER _____ <input type="checkbox"/> MADE <input type="checkbox"/> EXTENDED	
<input type="checkbox"/> _____ APPL'N TO EXTEND _____ <input type="checkbox"/> GRANTED <input type="checkbox"/> DISMISSED <input type="checkbox"/> STRUCK OUT	
<input type="checkbox"/> _____ APPL'N TO VARY _____ <input type="checkbox"/> GRANTED <input type="checkbox"/> DISMISSED <input type="checkbox"/> STRUCK OUT	
<input type="checkbox"/> _____ APPL'N TO REVOKE _____ <input type="checkbox"/> GRANTED <input type="checkbox"/> DISMISSED <input type="checkbox"/> STRUCK OUT	
<input type="checkbox"/> BREACH OF _____ <input type="checkbox"/> PROVED <input type="checkbox"/> NOT PROVED <input type="checkbox"/> STRUCK OUT	
<input type="checkbox"/> CURRENT FAMILY REUNIFICATION ORDER IS VARIED ON AN INTERIM BASIS [S.302]	
<input type="checkbox"/> CURRENT _____ ORDER IS <input type="checkbox"/> VARIED <input type="checkbox"/> REVOKED <input type="checkbox"/> CONFIRMED	
DETAILS OF VARIATION _____	
<input type="checkbox"/> CURRENT INTERIM ACCOMMODATION IS ABRIDGED FROM ____/____/____ <input type="checkbox"/> AND IS REVOKED	
<input type="checkbox"/> ALL APPLICATIONS NOT YET FINALISED (EXCEPT PROTECTION APPLICATION(S) ARE STRUCK OUT	
ORDERS	
<input type="checkbox"/> ADJOURNED TO ____/____/____ AT ____ AM/PM AT <input type="checkbox"/> MELBOURNE <input type="checkbox"/> MOORABBIN <input type="checkbox"/> BR'MEADOWS	
<input type="checkbox"/> RESERVED SUBMISSIONS <input type="checkbox"/> PART HEARD AT <input type="checkbox"/> _____	
FOR R'OVER MENTION CC JRC 1 st DIR HRG DIR HRG CONTEST IAO CONTEST [____ DAYS <input type="checkbox"/> STANDBY]	
FURTHER LIST ____/____/____ AT ____ AM/PM AT <input type="checkbox"/> MELBOURNE <input type="checkbox"/> MOORABBIN <input type="checkbox"/> BR'MEADOWS	
<input type="checkbox"/> RESERVED SUBMISSIONS <input type="checkbox"/> PART HEARD AT <input type="checkbox"/> _____	
FOR MENTION CC JRC 1 st DIR HRG DIR HRG CONTEST IAO CONTEST [____ DAYS <input type="checkbox"/> STANDBY]	
<input type="checkbox"/> INTERIM ACCOMMODATION ORDER (must include adjournment order) GROUNDS – S.262(1) <input type="checkbox"/> c <input type="checkbox"/> f <input type="checkbox"/> _____	
<input type="checkbox"/> CHILD RELEASED UNDER S.263(1)(a) <input type="checkbox"/> UNDISCLOSED PLACEMENT	
<input type="checkbox"/> PARENT <input type="checkbox"/> SUITABLE PERSON(S) <input type="checkbox"/> OUT OF HOME CARE <input type="checkbox"/> SECURE WELFARE	
<input type="checkbox"/> DECLARED HOSPITAL <input type="checkbox"/> DISABILITY SERVICE <input type="checkbox"/> DECLARED PARENT AND BABY UNIT	
of _____	
<input type="checkbox"/> THE CURRENT INTERIM ACCOMMODATION ORDER IS EXTENDED	
<input type="checkbox"/> REGISTRAR'S LETTER(S) <input type="checkbox"/> RE ORDER IN ABSENCE <input type="checkbox"/> RE WARRANT <input type="checkbox"/> RE BOTH	
1. _____ of _____	
2. _____ of _____	
<input type="checkbox"/> DFFH MUST FILE & SERVE ANY FURTHER REPORT UPON WHICH IT PROPOSES TO RELY NO LATER THAN ____/____/____	
<input type="checkbox"/> ALL PARTIES MUST COMPLY WITH THE INFORMATION EXCHANGE REQUIREMENTS OF CC GUIDELINES	
<input type="checkbox"/> THE CHILD IS TO ATTEND COURT ON THE ADJOURNED DATE [S.216A]	

5.25.2 Mauve form – Minutes of proposed Family Division orders (supplementary)

The following 2 page mauve document is a supplementary sheet, used in the Family Division to provide minutes of less commonly made proposed orders and proposed orders for costs. It enables input of the variables required for each prescribed form for the orders referred to. An electronic version of this mauve form can be downloaded from the CCV website.

MINUTES OF PROPOSED FAMILY DIVISION ORDERS [CYFA] SUPPLEMENTARY SHEET	
CHILD(REN) _____ DATE ____/____/____	
ADJOURNMENT ORDER <input type="checkbox"/> ADJOURNED TO ____/____/____ AT ____ AM/PM AT <input type="checkbox"/> MELBOURNE <input type="checkbox"/> MOORABBIN <input type="checkbox"/> BROADMEADOWS <input type="checkbox"/> RESERVED SUBMISSIONS <input type="checkbox"/> PART-HEARD AT <input type="checkbox"/> _____ FOR MENTION CC JRC 1 st DIR HRG DIR HRG CONTEST IAO CONTEST [____ DAYS <input type="checkbox"/> STANDBY]	
COSTS ORDER <input type="checkbox"/> THE COURT ORDERS THAT _____ IS TO PAY _____ COSTS IN THE SUM OF \$ _____. A STAY OF _____ IS GRANTED.	
TEMPORARY ASSESSMENT ORDER [TAO] <input type="checkbox"/> LEAVE FOR APPLIC'N FOR TAO TO BE DEALT WITH WITHOUT NOTICE <input type="checkbox"/> GRANTED <input type="checkbox"/> REFUSED <input type="checkbox"/> APPLICATION FOR TAO <input type="checkbox"/> GRANTED <input type="checkbox"/> DISMISSED <input type="checkbox"/> STRUCK OUT <input type="checkbox"/> TEMPORARY ASSESSMENT ORDER MADE UNDER <input type="checkbox"/> S.228 [ON NOTICE] <input type="checkbox"/> S.229 [WITHOUT NOTICE] REMAINS IN FORCE FOR _____ DAYS BEGINNING ON ____/____/____ DFFH MUST PROVIDE A REPORT IN WRITING TO THE COURT BY ____/____/____ <input type="checkbox"/> THIS TAO: <input type="checkbox"/> Authorises the Secretary to enter the premises where the child is living: _____ <input type="checkbox"/> Requires _____ to permit the Secretary to enter the premises where the child is living: _____ <input type="checkbox"/> Requires _____ to permit the Secretary to interview the child and to take the child to a place to be determined by the Secretary for that interview <input type="checkbox"/> Authorises, subject to section 233, the medical examination of the child by a registered medical practitioner or a registered psychologist. <input type="checkbox"/> Directs _____ to permit the Secretary to take the child for that medical examination. <input type="checkbox"/> Authorises the results of the medical examination to be given to the Secretary. <input type="checkbox"/> Requires _____ to attend an interview with the Secretary and, subject to section 234, to answer any questions put to him/her in the interview. <input type="checkbox"/> Contains the following further direction(s)/conditions(s): _____ _____ <hr style="border-top: 1px dotted black;"/> <input type="checkbox"/> APPLICATION to VARY TAO <input type="checkbox"/> GRANTED <input type="checkbox"/> DISMISSED <input type="checkbox"/> STRUCK OUT <input type="checkbox"/> CURRENT TAO IS VARIED AS FOLLOWS: _____ <input type="checkbox"/> APPLICATION to REVOKE TAO <input type="checkbox"/> GRANTED <input type="checkbox"/> DISMISSED <input type="checkbox"/> STRUCK OUT <input type="checkbox"/> CURRENT TAO IS REVOKED	

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

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

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

DETAILS OF PROGRAM _____

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

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

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

☐ DFFH is to provide a report of the child's progress and attendance at therapeutic treatment program.

TTO review hearing ____/____/____ AT ____ AM/PM AT _____

☐ _____

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

☐ CONDITIONS: _____

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

☐ CURRENT TTO IS VARIED AS FOLLOWS: _____

☐ CURRENT TTPO IS VARIED AS FOLLOWS: _____

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

☐ CURRENT TTO IS REVOKED

☐ CURRENT TTPO IS REVOKED

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

☐ CURRENT TTO IS EXTENDED UNTIL ____/____/____ ☐ CURRENT TTPO IS EXTENDED UNTIL ____/____/____

RELEASE OF REPORTS/SUMMARIES/DOCUMENTS/NOTES

☐ _____

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

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

☐ NO COPIES TO BE MADE WITHOUT COURT ORDER ☐ NOT TO BE REMOVED FROM COURT PRECINCTS

☐ TO BE RETURNED TO _____

☐ CONDITION(S): _____

☐ SUMMARY OF CHILDREN'S COURT CLINIC REPORT IS UNCONDITIONALLY

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

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

OTHER ORDER

MAGISTRATE/JUDGE _____

5.25.3 Orange form – Proposed orders for appointment of ICL

The following one sheet orange document is a supplementary sheet, used in the Family Division to provide minutes for orders for appointment of an Independent Children's Lawyer.

MINUTES OF PROPOSED FAMILY DIVISION ORDERS [CYFA] SUPPLEMENTARY SHEET [APPOINTMENT OF ICL]	
CHILD(REN) _____ DATE ____ / ____ / ____	
APPOINTMENT OF INDEPENDENT CHILDREN'S LAWYER [ICL]	
<input type="checkbox"/> The Court having found that there are exceptional circumstances and that the child(ren)	
_____	D.O.B. ____ / ____ / ____
_____	D.O.B. ____ / ____ / ____
_____	D.O.B. ____ / ____ / ____
<input type="checkbox"/> is/are aged under 10 years	
<input type="checkbox"/> is/are aged 10 years or more and not mature enough to give instructions	
and that it is in the best interests of the child(ren) to be legally represented, the Court makes the following orders:	
1. Pursuant to s.524(4) of the <i>Children, Youth and Families Act</i> 2005, the child(ren) be legally represented by an Independent Children's Lawyer [ICL] and it is requested that Victoria Legal Aid arrange such representation.	
2. Within 2 working days of the notification to the parties of the appointment of an ICL, the parties provide the ICL with copies of all relevant documents in their possession or control which they have created or commissioned or upon which they otherwise rely.	
3. The ICL is a party to the proceeding for all purposes under the <i>Children, Youth and Families Act</i> 2005.	
<input type="checkbox"/> The Children's Court Clinic report(s) be released to the ICL on condition that no copies be made without Court order and on the following conditions:	

<input type="checkbox"/> The ICL be permitted to inspect any documents subpoenaed by any other party.	
MAGISTRATE / JUDGE _____	

On the reverse side of this sheet are spaces where names and contact details of parties and their legal representatives may be included for provision to Victoria Legal Aid together with the order for appointment of an ICL.

5.26 Family Division (Child Protection) standard conditions

While the parties have an unfettered discretion in framing appropriate conditions for protection and like orders, it is recommended that wherever possible they select from the following standard conditions, drafted by a committee of involved professionals in late 1997 and slightly amended in 2013 & 2015 and again as from March 2016. Words in italics contained within parentheses, e.g. [*directed by/agreed with*], are alternatives. An electronic version of this pink form can be downloaded from the CCV website.

1	VISITS & COOPERATION must accept visits from and cooperate with DFFH.
2	SUPPORT SERVICES must accept support services as [<i>directed by/agreed with</i>] DFFH.
3	COUNSELLING must go to counselling as [<i>directed by/agreed with</i>] DFFH and must allow reports [<i>about attendance</i>] to be given to DFFH.
4	FAMILY VIOLENCE COUNSELLING must go to family violence counselling as [<i>directed by/agreed with</i>] DFFH and must allow reports [<i>about attendance</i>] to be given to DFFH.
5	ANGER MANAGEMENT must go to a course on anger management as [<i>directed by/agreed with</i>] DFFH and must allow reports [<i>about attendance</i>] to be given to DFFH.
6	PSYCH ASSESSMENT AND/OR TREATMENT must go to a [<i>psychologist, psychiatrist, psychologist and/or psychiatrist</i>] as [<i>directed by/agreed with</i>] DFFH for [<i>assessment, treatment, assessment and treatment</i>] and must allow reports to be given to DFFH.
7	PAEDIATRIC ASSESSMENT & TREATMENT must [<i>take the child/allow the child to be taken</i>] to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to DFFH.
8	ALCOHOL / DRUG TESTING must submit to random supervised [<i>alcohol, drug, alcohol and drug</i>] testing [<i>* times per week</i>] or otherwise as directed by DFFH and must allow the results to be given to DFFH.
9	must submit to testing for [<i>alcohol, drug, alcohol and drug</i>] use as directed by DFFH and must allow the results to be given to DFFH.
11	ALCOHOL / DRUG ASSESSMENT/TREATMENT must participate in assessment and/or treatment for [<i>alcohol, drug, alcohol and drug</i>] dependence as directed by DFFH and must allow reports to be given to DFFH.
12	ABSTINENCE must not [<i>drink alcohol, drink alcohol to excess, use illegal drugs, drink alcohol or use illegal drugs, drink alcohol to excess or use illegal drugs</i>].
13	must not drink alcohol or use illegal drugs when with the child and must not be affected by alcohol or illegal drugs when with the child.
	ACCOMMODATION
14	may have respite as agreed between <input type="text"/>
15	must [<i>make best endeavour to</i>] find a suitable home.
16	must live where DFFH directs.
17	must live with <input type="text"/>
	CHANGE OF ADDRESS
18	must tell DFFH [<i>at least 24 hours before/within 24 hours of</i>] changing address.
	CURFEW
19	The child must not be away from home/placement between unless the child's parent or caregiver agrees.

20		NO COHABITATION must not live or have contact with the <i>[mother and, father and]</i> child <i>[other than during Court-ordered contact]</i> .
21		NO CONTACT must not have any contact with the child.
22		EXPOSING CHILD TO VIOLENCE must not expose the child to physical or verbal violence.
23		NO PHYSICAL DISCIPLINE must not expose the child to physical or verbal violence.
24		NO THREATS / ASSAULTS must not threaten or assault DFFH staff.
25		CHILD'S HEALTH must take the child to the Maternal and Child Health Nurse as often as the nurse recommends.
26		must take the child to the doctor for regular check-ups as required by DFFH or the doctor and must allow reports to be given to DFFH.
27		SCHOOL The child must go to school every school day unless the child is ill <i>[and a medical certificate is obtained]</i> .
28		must send the child to school every school day unless the child is ill <i>[and a medical certificate is obtained]</i> .
29		LIBERTY TO APPLY has/have the right to come to Court and ask the Court to change the order.
30		CHILDREN'S COURT CLINIC must go to the Children's Court Clinic for an assessment.
31		THE CHILD'S RIGHT TO CONTACT may have contact with the child <i>[for a minimum of]</i> at times and places as agreed between
32		may have contact with the child <i>[for a minimum of]</i> at times and places as agreed between DFFH or its nominee will supervise contact unless DFFH assesses that supervision is not necessary.
33		PRESERVATION CONDITION ON A PERMANENT CARE ORDER The permanent carer(s) must preserve the child's identity and connection to the child's culture of origin and the child's relationship with the child's birth family.
		CULTURAL PLAN FOR ABORIGINAL CHILD – PERMANENT CARE ORDER
34		must comply with the cultural plan for the child.
		OTHER

The following standard condition in relation to contact is suggested for possible use during the currency of the COVID-19 pandemic:

- “That if face to face contact is unable to proceed because-
- no suitable person is available to supervise because of the COVID-19 emergency; or
 - the child presents as unwell prior to contact (presenting with COVID-19 or like symptoms)-
- then contact will occur by virtual means until face to face contact may resume.”

5.27 Emergency care search warrants

5.27.1 Warrant types & pre-conditions for issue

Various provisions in the CYFA empower the Court or a magistrate (as the case may be), on application by a protective intervener or the Secretary, to issue a search warrant for the apprehension of a child and his or her placement in emergency care under each of the 13 statutory provisions set out in the following table:

	CYFA	ISSUED BY	PRE-CONDITIONS FOR ISSUE OF WARRANT
1	s.237(2) TEMPORARY ASSESSMENT	COURT	A necessity to enable the Secretary to exercise his or her powers under a temporary assessment order.
2	s.241(1) PROTECTION	MAGISTRATE	A child is in need of protection and it is inappropriate to proceed by notice.
3	s.243(3) PROTECTION BY NOTICE	COURT	Proceedings have been taken by notice in respect of a child said to be in need of protection, the Court has ordered that the child appear before the Court for the hearing of the application and the child does not appear.
4	s.247(1) THERAPEUTIC TREATMENT	COURT	A child in relation to whom a notice under s.246(1) has been issued does not appear before the Court for the hearing of a therapeutic treatment application.
5	s.261(1) IRD APPLIC'N	COURT	The Court has ordered that the child appear before the Court for the hearing of an IRD application and the child does not appear.
6	s.268(5)(b) VARIATION OF IAO	COURT	An application has been made by notice for the variation of an interim accommodation order and- <ul style="list-style-type: none"> • in the case of an IAO made under s.262(1)(c) on an application for a therapeutic treatment order, the child does not appear; or • in the case of an IAO made under any other limb of s.262(1) and the child has been ordered pursuant to s.216A to appear before the Court and the child does not appear.
7	s.269(3)(b) BREACH OF IAO	COURT	269(3): Breach of IAO proceedings have been initiated by notice and- <ul style="list-style-type: none"> • in the case of an IAO made under s.262(1)(c) on an application for a therapeutic treatment order, the child does not appear; or • in the case of an IAO made under any other limb of s.262(1) and the child has been ordered pursuant to s.216A to appear before the Court and the child does not appear.
8	s.269(4)(b)	MAGISTRATE	269(4): A protective intervener is satisfied there has been a breach of an IAO or a condition thereof and it is inappropriate to proceed by notice.
9	s.270(5)(b) APPLICATION FOR NEW IAO	COURT	270(5): Application has been made by notice for a new IAO and- <ul style="list-style-type: none"> • in the case of an IAO made under s.262(1)(c) on an application for a therapeutic treatment order, the child does not appear; or • in the case of an IAO made under any other limb of s.262(1) and the child has been ordered pursuant to s.216A to appear before the Court and the child does not appear.
10	s.270(6)(b)	MAGISTRATE	270(6): On an application for a new IAO, a protective intervener is satisfied it is inappropriate to proceed by notice.
11	s.313 BREACH OF FAMILY PRESERV'N ORDER	COURT	313: Proceedings have been taken by notice alleging- <ul style="list-style-type: none"> • there has been a failure to comply with any condition of a family preservation order; or • there has been a failure to comply with any direction given by the Secretary under s.282(2); or • the child is living in conditions which are unsatisfactory in terms of the safety and wellbeing of the child- and the child does not appear before the Court if ordered to do so by the Court.
12	s.314	MAGISTRATE	314: The Secretary is satisfied that there is good reason not to proceed by notice and is satisfied on reasonable grounds that any one of the three dot points listed above are made out.

	CYFA	ISSUED BY	PRE-CONDITIONS FOR ISSUE OF WARRANT
13	s.598(1) FAILURE TO COMPLY or CHILD ABSENT WITHOUT AUTHORITY	MAGISTRATE	A judicial officer is satisfied that: (a) an undertaking under s.530(2) has not been complied with; or (b) a child is absent without lawful authority or excuse from the place in which he or she was placed under an interim accommodation order or by the Secretary under s.173 or from the lawful custody of a police officer or other person; or (c) a child or parent/carer is refusing to comply with a lawful direction of the Secretary under s.173 as to the placement of the child.

By and large the provisions authorizing the Court to issue a warrant are those which involve the failure of a child to appear before a Court in answer to a notice served by the Secretary DFFH. See:

- s.243(3): Protection Application by notice
- s.247(1): Therapeutic treatment application
- s.261(1): Irreconcilable difference application
- s.268(5)(b) Variation of IAO by notice
- s.269(3)(b) Breach of IAO by notice
- s.270(5)(b) Application for a new IAO by notice
- s.313 Breach of a protection order by notice

By contrast the provisions authorizing a magistrate to issue a warrant are those which are issued out of court:

- s.241(1) Protection application by emergency care
- s.269(4)(b) Breach of IAO by emergency care
- s.270(6)(b) Application for a new IAO by emergency care
- s.314(2) Breach of a protection order by emergency care
- s.598 Failure to comply with undertaking or direction or child absent without lawful excuse

The one circumstance that falls outside the above generalization is that under s.237(2) which involves an application by the Secretary for a warrant to search for and apprehend a child to enable the Secretary to exercise his or her powers under a temporary assessment order.

The distinction is significant. The issue of a warrant by a magistrate is generally viewed as an *in personam* power rather than a power of the Court *per se*. As such the writer doubts whether rules of Court authorizing a judicial registrar to issue warrants out of court – including s.598 warrants – would be within the power conferred by s.588(1A) of the CYFA.

5.27.2 Warning: Bail justices must not issue emergency care search warrants

Under certain sections of the CYPA an "authorised bail justice" was empowered to issue a warrant. However, no bail justices had ever been authorised by the Attorney-General to issue emergency care search warrants. Under the CYFA there are no provisions empowering bail justices to issue emergency care search warrants.

5.27.3 Statistics

The number of emergency care search warrants issued state-wide has increased by 570% between 2003/04 & 2019/20, with an increase of 23% between 2017/18 & 2018/19 alone.

2003 /04	2004 /05	2005 /06	2006 /07	2007 /08	2008 /09	2009 /10	2010 /11	2011 /12	2012 /13	2013 /14
1258	1833	1847	2103	2053	2634	2784	3395	3831	4001	4069
2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20					
4961	5432	6478	6505	7983	8439					

The writer has long believed that the greatest number of these warrants are issued under s.598(1)(b) of the CYFA in circumstances where the child has absconded from the care of the Department.

The writer's belief is corroborated by recent statistics. Below is a snapshot of the emergency care search warrants issued by the on-call magistrate during the period from 10am on Saturday 07/11/2020 to 9am on Saturday 14/11/2020. The on-call magistrate takes calls during the whole period from 10am Saturday until 9am on Monday, thereafter each weekday from 5pm until 9am the following day. The numbers and breakdown of search warrants issued by the on-call magistrate in the week from 07-14/11/2020 are as follows:

CYFA Section	No. warrants issued	% CYFA warrants
s.241 [Need of protection]	7	7.7%
s.314 [Breach of protection order]	2	2.2%
s.269 [Breach of IAO]	7	7.7%
s.598(1)(b) [Missing from placement]	75	82.4%
TOTALS	91	

Of the 75 warrants issued under s.598(1)(b) during that week-

- 46 [61.3%] were for females and 29 [38.7%] were for males;
- 12 were for Aboriginal or Torres Strait Islander children: 4 of these were for males and 8 were for females with 3 warrants being issued for one of the female children during this week;
- 48 [64.9%] were issued between midnight and 6am;
- the highest percentage were issued between midnight and 3am with the peak of 24% occurring between 1am and 2am.

Between June 2020 and October 2020 an average of 100 warrants under s.598(1)(b) were issued per week with 60% being issued between 11pm and 7am on weekdays and 67% between 11pm and 7am on weekends.

PERCENTAGE OF S.598 WARRANTS AS A PROPORTION OF THE TOTAL NUMBER OF WARRANTS ISSUED				
June 2020	July 2020	August 2020	September 2020	October 2020 (to 18/10/20)
91%	92%	92%	87%	88%
n = 438/481	n = 464/503	n = 490/532	n = 351/403	n = 122/139

In terms of volume, emergency care search warrants issued under the CYFA are ranked as follows:

- (1) s.598 – child absent without lawful authority;
- (2) s.241 – child in need of protection;
- (3) s.269 – breach of interim accommodation order;
- (4) s.314 – breach of family preservation order;
- (5) s.270 – application for new interim accommodation order.

5.27.4 Form for Children's Court Search Warrant

The prescribed form for a Children's Court Search Warrant (Emergency Care) is in Form 39 of the *Children, Youth and Families (Children's Court Family Division) Rules 2017* [S.R. No.20/2017] in operation since 18/04/2017.

5.27.5 Authority & Directions

A emergency care search warrant is directed either to a named member of the police force or generally all members of the police force. It authorises the police officer(s)-

- to break, enter and search any place where the child named or described in the warrant is suspected to be; and
- to place the child in emergency care.

What happens upon the execution of the search warrant depends on the circumstances under which the warrant has been issued:

- In the case of a warrant issued under s.237: A police officer must bring the child to the Secretary to enable the Secretary to exercise his or her powers under the temporary assessment order.

- In the case of a warrant issued under ss.241, 243, 261, 291, 313 or 314 or issued under ss.268, 269 or 270 and the child is **not** the subject of an IAO made under s.262(1)(c) [i.e. **not** an IAO made on a therapeutic treatment application]:
 - ☑ The Court must hear an application for an IAO or an application under s.269(7) [as the case may be] as soon as practicable and, in any event, within one working day after the child was placed in emergency care. Unless the Court hears such application within 24 hours after the child was placed in emergency care, a bail justice must hear the application as soon as possible within that period of 24 hours; or
 - ☑ The child is to be released on an IAO of the type referred to in ss.263(1)(a) or 263(1)(b) endorsed on the warrant and the further hearing of the matter is at the Court venue on the date endorsed on the warrant.
- In the case of a warrant issued under ss.241, 243, 261, 291, 313 or 314 or issued under ss.268, 269 or 270 and the child is the subject of an IAO made under s.262(1)(c) [i.e. an IAO made on a therapeutic treatment application]:
 - ☑ A police officer must bring the child before the Court for the hearing of an application for an IAO or an application under s.269(7) [as the case may be] as soon as practicable and, in any event, within one working day after the child was placed in emergency care. Unless the Court hears such application within 24 hours after the child was placed in emergency care, he or she must be brought before a bail justice as soon as possible within that period of 24 hours for the hearing of the application; or
 - ☑ The child is to be released on an IAO of the type referred to in ss.263(1)(a) or 263(1)(b) endorsed on the warrant and the child is to appear for the further hearing of the matter at the Court venue on the date endorsed on the warrant.
- In the case of a warrant issued under s.598(1)(a): A police officer must bring the child before the Court as soon as practicable and, in any event, within one working day after the child was placed in emergency care.
- In the case of a warrant issued under ss.598(1)(b) or 598(1)(c): A police officer must take the child to the place specified in the warrant or, if no place is specified, to a place determined by the Secretary or, in the absence of a determination, to a place referred to in s.173 of the CYFA.

5.27.6 Multiple entries authorised

An emergency care search warrant remains alive until the child named in it is placed in emergency care or the warrant is returned unexecuted. It is not restricted to a single entry to one premises.

5.27.7 IAO endorsement

Any emergency care search warrant, except one issued under ss.598(1)(a), 598(1)(b) or 598(1)(c), may be endorsed by the issuing judicial officer with an endorsement that upon execution of the warrant the child is to be released on an IAO of the type referred to in s.263(1)(a) [child's undertaking] or s.263(1)(b) [IAO to parent]: see s.241(2)(b) of the CYFA. It is the writer's experience that such an endorsement is very rare.

5.27.8 Protocols

The following protocols in relation to emergency care search warrants have been established between the Court, the Department and Victoria Police:

- **Application for warrant:** Most applications are made by the applicant faxing an affidavit in support to the Court or the after hours registrar. However, occasionally the applicant will attend Court and give *viva voce* evidence in support of the application.
- **Upon issue:** If the warrant is issued, the Court faxes it to Victoria Police Central Records [CRB]. The issuing Court faxes confirmation of issue to the applicant (not after hours).
- **Before execution:** When the warrant is required to be executed, a police officer contacts CRB and arranges for the warrant to be faxed to him/her.
- **After execution:** The executing police officer endorses the warrant as executed and returns it to the issuing Court.
- **Unexecuted warrant:** If the warrant is no longer required or is unexecuted for 1 month, CRB returns the warrant to the issuing Court for cancellation.

5.28 Interstate transfer of child protection orders and proceedings

Schedule 1 of the CYFA, originally introduced into the CYPA in 2000, sets out provisions relating to the transfer of child protection orders and proceedings between Victoria and another State or a Territory of Australia or between Victoria and New Zealand or vice versa. Schedule 1 is linked to the body of the CYFA by s.338. It comprises 28 paragraphs and amounts to a code regulating such transfers. Its purpose is said in clause 1 to be two-fold:

- (a) so that children who are in need of protection may be protected despite moving from one jurisdiction to another; and
- (b) so as to facilitate the timely and expeditious determination of court proceedings relating to the protection of a child.

There are two types of transfers from Victoria which are contemplated by Schedule 1:

- an administrative transfer [Division 1] pursuant to clause 3;
- a judicial transfer [Division 2] pursuant to clause 8.

It is a condition precedent to both types of transfer that the child protection authorities in Victoria and in the other State, Territory or New Zealand each consent to the transfer: see clauses 3(1)(c) and 8(c) respectively. Clause 27 allows the Secretary to consent or refuse to consent to a proposal to transfer a child protection order to Victoria under an interstate law. It follows that a child protection order cannot be foisted on to an unwilling interstate child protection authority.

There is apparently a protocol between Victorian and other child protection authorities governing the types of orders which may be the subject of transfer but the details are unclear to the writer. During evidence in the case of *DOHS v Mr O & Ms B* [2009] VChC 2 he was initially told that “Tasmania only accepts custody to Secretary orders and above”. Subsequently he was told: “If the Court is minded to make a supervision order in contemplation of the mother and [child] returning to live in Tasmania...it may be that day to day case management can be by Tasmanian child protection authorities.”

In that case counsel for the Department raised a potential problem about the enforceability interstate of an untransferred Victorian order but also suggested a solution: “Victorian authorities wouldn’t be in a position to act on [any] breach unless the parties were in the jurisdiction. An option is to have the Tasmanian authorities issue their own protection application.” In the unusual circumstances of that case the writer considered that:

- a breach of the order in Tasmania was very unlikely; and
- it was better that the order was not formally transferred to Tasmania (assuming that it could be) notwithstanding that the mother and child were returning to live in Tasmania.

At pp.43-44 the writer said:

“There are some cases in which a Victorian child protection order involving a child living interstate could not properly be administered remotely from Victoria. This is not one of them. Given the limited protective concerns about [the mother], the only matters likely to require DOHS’ supervision or input are:

- (1) checking up from time to time on [the mother’s] and her daughter’s whereabouts;
- (2) arranging such [contact] as is possible between [the child] and [the father] and ensuring that it is supervised by the paternal grandmother or another appropriate person if she is not available; and
- (3) arranging a course in Tasmania to educate [the mother] on the risk factors associated with child sexual abuse.

None of these matters requires that the supervision order be transferred. In fact it is better that the order remains a Victorian responsibility since Victoria is where any [contact] between [the child] & [the father] will have to occur.”

Sections 334-337 of the CYFA contain a number of provisions relating to the interstate movement of children in respect of whom DFFH has responsibility for guardianship, custody or supervision:

- Section 335 empowers the Secretary, on request by or on behalf of the Minister or other person in another State or Territory exercising guardianship in that State or Territory over a child, to declare the child to be under the sole parental responsibility of the Secretary if the child has entered or is about to enter Victoria. Such declaration is deemed to be a Victorian care by Secretary order of 2 years duration.
- Section 337(1) empowers the Minister to enter into a general agreement with an interstate Minister for the transfer of children under the parental responsibility or supervision of the Secretary-
 - (a) into or out of Victoria; or
 - (b) through Victoria from one State or Territory to another.

5.29 Case planning responsibilities of the Secretary

5.29.1 Preparation of case plan

A case plan is a plan prepared by the Secretary for a child [s.166(1)]. It must contain all significant decisions made by the Secretary concerning a child that relate to the present and future care and wellbeing of the child, including the placement of, and contact to, the child [s.166(2)]. A case plan includes [s.166(3)]:

- (a) a permanency objective for the child as required by s.167; and
- (b) in the case of an Aboriginal child in out of home care under an interim accommodation order, a protection order or a therapeutic treatment (placement) order, any planning for cultural support that is required for the child under s.176.

Section 168 of the CYFA requires the Secretary to ensure that-

- (1) a case plan is prepared in respect of a child if a protective intervener is satisfied on reasonable grounds that the child is in need of protection;
- (1A) a case plan is prepared in respect of a child after the making by the Court of a therapeutic treatment (placement) order;
- (2) a copy of the case plan is given to the child and the child's parent(s)-
 - (a) within 14 days of the preparation of the case plan; and
 - (b) within 8 weeks after the making by the Court of a protection order, if the case plan is prepared after the making of the order or is amended as a consequence of the making of the order; and
 - (ba) within 8 weeks of the making by the Court of a therapeutic treatment (placement) order; and
 - (c) within 8 weeks after the extension by the Court of a protection order, if the case plan is amended as a consequence of the extension of the order; and
 - (d) within 14 days after any other amendment to the case plan.

It is clear from s.8(2) of the CYFA that the principles which the Secretary must follow in the case planning process are the best interests principles in s.10, the additional decision-making principles in s.11 and in the case of an Aboriginal child, the principles set out in ss.12-14.

5.29.2 Permanency objective of case plan

Section 167(1) of the CYFA requires a case plan to include one of the following five permanency objectives to be considered in the following order of preference as determined to be appropriate in the best interests of the child-

- (a) **family preservation** – the objective of ensuring a child who is in the care of a parent remains in the care of a parent;
- (b) **family reunification** – the objective of ensuring that a child who has been removed from the care of a parent is returned to the care of a parent;
- (c) **adoption** – the objective of placing the child for adoption under the *Adoption Act 1984* (Vic);
- (d) **permanent care** – the objective of arranging a permanent placement of the child with a permanent carer or carers;
- (e) **long-term out of home care** – the objective of placing a child in-
 - (i) a stable long-term care arrangement with a specified carer or carers; or
 - (ii) if (i) is not possible, another suitable long-term care arrangement.

Section 167(2) provides that for the purposes of ss.167(1)(c) to (e), it is to be preferred that a child is placed with a suitable family member or other person of significance to the child.

Section 167(3) provides that a permanency objective of **family reunification** would be appropriate of the child has been in out of home care – measured in accordance with s.287A – for a cumulative period of less than 12 months and the safe reunification of the child with a parent is likely to be achieved.

Section 167(4) provides that a permanency objective of adoption, permanent care or long-term out of home care would be appropriate if-

- (a) the child has been in out of home care for a cumulative period of 12 months and there is no real likelihood for the safe reunification of the child with a parent in the next 12 months; or

- (b) except in exceptional circumstances, the child has been in out of home care for a cumulative period of 24 months.

The statutory provisions relating to stability plans which applied before 01/03/2016 are repealed.

5.29.3 Review of case plan

Section 331 of the CYFA provides for internal review of decisions made by the Secretary as part of the decision-making process following the making of a protection order. Section 332 provides similarly for internal review of decisions made by an authorised officer of an Aboriginal agency in respect of an aboriginal child.

Section 333 empowers a child or parent to apply to the Victorian Civil and Administrative Tribunal [VCAT] for the review of:

- a decision contained in a case plan; or
- any other decision made by the Secretary concerning the child or any other decision made by the principal officer of an Aboriginal agency concerning an Aboriginal child.

Section 333(3) prohibits an application to VCAT unless the appellant has exhausted all available avenues for internal review under ss.331-332.

It is the writer's experience that a significant number of contested cases in the Children's Court involve an attack on the Department's case planning process as a central component. Hence, the writer considers it unfortunate that the statutory power to review child protection decisions remains vested in a separate tribunal. This is not a criticism of VCAT, simply a criticism of the splitting of the judicial process between two different judicial bodies.

In *AA v DHHS & Ors* [2020] VSC 400 the subject children, aged 5y5m & 3y6m, had been in the care of their maternal grandparents for over 2 years, initially pursuant to interim accommodation orders and family reunification orders. During a case plan meeting on 07/08/2019 the permanency objective of family reunification was changed to permanent care and was communicated to the parents and grandparents. Subsequently on 15/11/2019 the Court placed the children on care by Secretary orders [CBSOs] and they remained in the care of the grandparents. Thereafter the following things occurred, the conduct of DFFH being described by Incerti J (at [3], [238] & [250]) as "egregious":

- (1) **TRIO OF DECISIONS LEADING TO THE CHILDREN BEING PLACED WITH THE FATHER:**
On 06/01/2020, following an internal review, the Department changed the permanent care case plan to one of reunification with the father. At a case plan meeting on 17/01/2020 it formally advised the grandparents of the changed case plan for the first time, a case note dated 06/01/2020 stating: "[The Principal Practitioner] recommended the case plan meeting occur with the grandparents on the Friday and provide them the weekend to digest the news and then reunification to occur on the Monday. Do not want to provide the grandparents too much time to scare or alter reunification plans." On 20/01/2020 it placed the children in the father's care and on 21/01/2020 – contrary to what Incerti J described at [29] as the Department's "general practice...to monitor the success of the reunification and to plan for a transitional reunification rather than an immediate formal change to a family preservation order [FPO]" – it made direction notices pursuant to CYFA/s.289A directing that the father resume parental responsibility for the children.
- (2) **THE INTERNAL REVIEW:** The grandparents sought an internal review under s.331 of the CYFA. The internal review, conducted by no less than the Assistant Director of Child Protection in the Brimbank-Melton Area, was completed on 01/05/2020 and concluded that the Secretary's own delegates had not complied with the 'best interests' principles in ss.10 & 11 of the CYFA in making its decisions on 06, 20 & 21/01/2010. The author of the s.331 report purported to 'overturn' the reunification case plan and endorsed the permanent care plan for the children to be placed into the grandparents' care permanently.
- (3) **CHILDREN PLACED BACK WITH GRANDPARENTS DESPITE FPOS BEING IN EXISTENCE:**
On 06/05/2020, without prior notice to the father of the outcome of the internal review, DHHS placed the children back in the care of the grandparents notwithstanding the existence of the FPOs deemed to have come into effect on 21/01/2020 by operation of CYFA/s.289A(1)(c) and notwithstanding that "there was no evidence or suggestion by the Secretary that the children were not well cared for or were in any way at risk while in his care". At [241] Incerti J said of this: "It is astonishing that the people responsible...could proceed in the manner they did on 6 May, particularly given the strained relationships, the Children's Courts orders, and having only a few months before that removed the children from the Grandparents' care without any notice."

The judgment of *Incerti J* – holding that all of the Department's decisions were contaminated with jurisdictional error and quashing the s.289A direction notices – contained some dicta on internal review process which may be summarized as follows:

- At [97+101]: The decision to undertake an internal review, on a plain construction of the Act, is provided to the Secretary on a discretionary basis, as long as such review must implement procedures adopted by the Secretary. In this case, there was an issue as to whether the grandparents had an entitlement to an internal review and the implications of any such entitlement as to the determination of whether the grandparents were denied procedural fairness and/or whether the Secretary breached its obligations under ss.10 and 11 of the Act.
- At [122+131]: Counsel for the father was correct in highlighting that the grandparents did not have an express statutory right of an internal review pursuant to s 331. Section 331 states that it is only for the Secretary to prepare and implement procedures for the review. Section 331(2) requires the Secretary to give a copy of the procedures to the child, to the parent, but not the grandparents or anyone with whom the children happens to be placed under an order. This did not, however, preclude the grandparents from requesting an internal review. The grandparents did seek a review, consistent with the Secretary's processes as outlined in the Secretary's Policy in Respect of Reviews of Case Planning Decisions (01/03/2016 - https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/caseplanning/internal-review-decisions#h3_2). That webpage states that "internal review process is available to people directly affected by a child protection decision and who have a significant relationship to a child" and states that 'kinship carers', like the grandparents, may access the internal review process.

5.29.4 The role of the Children's Court in relation to case planning decisions

The fact that the Children's Court has no power to conduct a formal review of a case planning decision does not, however, mean that the Court has no role at all in relation to case planning decisions.

In *NM, DOHS and BS* [2004] VChC 1 at pp.15-16 Judge Coate held that the review jurisdiction created by s.122 of the CYPA, the predecessor of s.333 of the CYFA, did not in any way oust or curtail the jurisdiction of the Children's Court in the exercise of its statutory functions:

"Section 122 of the CYPA confers jurisdiction on VCAT for the review of administrative decisions of DOHS if a party chooses to use that forum for such a review. The review jurisdiction of the Tribunal is contained in s.48 of the Victorian Civil and Administrative Tribunal Act (Vic). Section 52 of that Act purports to limit the jurisdiction of the Supreme Court and Magistrates' Courts in relation to the exercise of powers under planning legislation in certain circumstances. No like provision has been made with respect to the jurisdiction of the Children's Court in its Family Division.

That VCAT has jurisdiction to review a decision of the Secretary of DOHS is no basis to assert that has any impact whatsoever on the Children Court of Victoria's power and obligations to exercise its complete statutory jurisdiction under the Children and Young Persons Act. There is no basis to assert that the capacity to review an administrative decision by the Secretary ousts the jurisdiction or curtails the jurisdiction in the Children's Court in the exercise of its statutory functions. The logical conclusion of such an assertion is that the court would be bound by every case planning decision of DOHS."

It follows from Judge Coate's judgment that the fact that the Department has endorsed a particular case plan for a child does not oust or curtail the jurisdiction of the Children's Court to make an order – within its power - which is inconsistent with that case plan. One particular example which occurs from time to time is where a parent or child lodges an application to vary a family reunification order to allow for increased contact. The fact that the Department's case plan is for permanent care does not prevent the Court from increasing contact if it considers that to be in the best interests of the child.

In the case of *DOHS v Mr & Mrs B* [2007] VChC 1 at p.40 Magistrate Power discussed the role of the Court in relation to case planning decisions:

"Though this did not happen in the present case, it is not unknown for the Department through its counsel to submit that the Children's Court has no role at all in case planning decisions: see for instance the judgment of Judge Coate in *NM, DOHS and BS* [2004] VChC 1 where this submission was raised and rejected. It is certainly true that under Part 4.3 of the CYFA the preparation and review of a case plan is the sole responsibility of the Secretary: see especially ss.166-168 of the CYFA. But in making its decisions and orders the Court has to act independently of DOHS and on the basis that the best interests of the child are paramount: see s.10 of the CYFA.

In the course of determining what is in a child's best interests, the Court usually hears evidence from a number of witnesses – many of whom are professional witnesses with expertise in disciplines relating to child development, child welfare and human behaviour – in order to determine how to weigh the 3 matters in s.10(2) of the CYFA and the 18 matters in s.10(3). For instance, to determine the appropriate orders in the present case, it is necessary for me to consider whether the Department's draft case plan for non-reunification is correct in order to decide-

- whether this plan is the best mechanism for protecting each child from harm, protecting his or her rights and promoting his or her development; and
- what weight to give to each of the potentially partly conflicting matters in paragraphs (a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (o), (p) & (q) of s.10(3).

My orders in this case would be markedly different if I considered the Department's draft case plan was not in the best interests of one or more of the children."

See also *DOHS v Ms B & Mr G* [2008] VChC 1 at pp.108-109 per Magistrate Power.

However, there remains an uneasy tension between the case planning powers of the Secretary and the obligations of the Children's Court under s.8(1) to have regard to best interests principles in making any decision or taking any action under the CYFA. The tension boiled over in the case of *DOHS v Ms O'C*. After a 6 day hearing in the Children's Court of Victoria in April 2005 in which he heard evidence from 15 witnesses, Magistrate Levine returned the oldest two of four children to their mother on supervision orders but placed the two youngest children on custody to Secretary orders. In his judgment his Honour said: "I would hope that continuing work by professionals with the mother will enable a gradual reunification of [the children] with their mother." Following that decision a case plan meeting took place on 22/06/2005. The case planner ignored the basis of Magistrate Levine's decision and determined the case plan for the two youngest children was to be permanent care. In a judgment dated 28/11/2005 on the mother's appeal against Magistrate Levine's decision, Judge Walsh upheld the decision of Magistrate Levine both in relation to the orders he made and the spirit of his judgment and disapproved the Department's case plan:

"I have noted that, after the decision of the Children's Court, the Department almost immediately went about the preparation of a case plan which involved the permanent removal of the two children from the custody of [Ms O'Connell]. This was not in accordance with either the spirit or the letter of the very comprehensive and very caring decision of the Magistrate in the Children's Court and it does not have the approval of this Court. I consider that the actions of members of the Department have done nothing to promote good relationships between [Ms O'Connell] and the Department and little to promote the interests of the children."

That too fell on deaf ears so far as the Department was concerned. In a further 10 day hearing before Magistrate Levine in December 2006 in which the Department was seeking that the two youngest children be placed on guardianship to Secretary orders, the then unit manager had the temerity to say: "If there is a large discrepancy between our view and the judge then we may not follow the court's decision." She said that she was continuing to deal with the case as a permanent care case plan. The writer finds it shocking when a government employee strikes at the constitutional bases of this State for it is nothing more or less than anarchy. Magistrate Levine was slightly more circumspect:

"It is in my view astonishing and extremely concerning that DOHS, notwithstanding any expertise that it may have in issues relating to child protection, could at the one time seek to bring applications to this court seeking adjudication of the protective issues and then when it is displeased with the decisions or recommendations of the court to then immediately invoke a case plan entirely contrary to the court's recommendation. Further, when the decision was reviewed by the County Court on appeal and that court confirmed the Children's Court decision, making critical comments about DOHS, it is most concerning that DOHS should then choose to ignore the County Court Judge's expressed views as well."

Despite his criticism of the Department, Magistrate Levine extended the custody to Secretary orders but refused to make guardianship to Secretary orders and again recommended the case plan be one of reunification. In order to attempt to achieve a beginning to a possible reunification, Magistrate Levine varied the extended custody to Secretary orders to allow for some overnight contact of the children with their mother. In a subsequent application before the writer for an additional extension of the custody to Secretary orders, the then protective worker wrongly said: "The recommendation made by the magistrate stated we needed to run a dual case plan, one of reunification and one of permanent care." His Honour had said no such thing. Ultimately on 29/02/2008 another unit manager made a further case plan decision that the children should not be reunited into the full time care of their mother. After yet another lengthy hearing in April 2008, June 2008 & September 2008 in which he

heard evidence from 13 witnesses, the writer placed the youngest child in the full time care of her mother on a supervision order but extended and varied the custody to Secretary order in relation to the second youngest child. For full details of this difficult case, see the unreported decisions of Magistrate Power in *DOHS v Ms O'C* [07/04/2008], *DOHS v Ms O'C* [16/06/2008] & *DOHS v Ms O'C* [18/09/2008].

5.30 Victorian Aboriginal Child Care Agency [VACCA]

5.30.1 'Aboriginal person' – 'Aboriginal child'

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 Island community.

There is no definition of 'Aboriginal child' in the CYFA. In the absence of such a definition it is the writer's view that an Aboriginal child is an 'Aboriginal person' who falls within the definition of 'child' in s.3(1) of the CYFA. In the case of *AW* [Melbourne Children's Court, unreported, 03/07/2017] Magistrate Levine accepted that the definition of 'Aboriginal person' in s.3(1) also encompassed an Aboriginal child, his Honour holding that it was not necessary for the Department to obtain a report recommending permanent care from an Aboriginal agency referred to in s.323(3)(a) because although the 16 year old *AW* satisfied limb (a) of the definition of 'Aboriginal person' in s.3(1) of the CYFA, she did not fall within limbs (b) or (c).

5.30.2 'Aboriginal agency'

Sections 6(1) & 6(2) of the CYFA empower the Governor-in-Council to declare an organisation to be an Aboriginal agency if it is a registered community service and the Secretary of DFFH is satisfied-

- that the organisation is managed by Aboriginal persons; and
- that its activities are carried on for the benefit of Aboriginal persons.

The Victorian Aboriginal Child Care Agency [VACCA] has been established since 1978. By an administrative oversight it was not declared to be an Aboriginal agency under the CYPA until 16/12/1997 when the relevant Order was published in the Government Gazette. It remains an Aboriginal agency under the CYFA by virtue of the transitional provisions in item 5 of Schedule 4 to the CYFA.

5.30.3 Role of VACCA

VACCA is a state-wide Aboriginal community controlled and operated service whose objectives and responsibilities include:

- the promotion of, advocating for, and achieving positive changes in the lives of Indigenous children, their families and the community; and
- the preservation, strengthening and protection of the cultural and spiritual identity of Indigenous children; and
- the provision of culturally appropriate and quality services which are responsive to the needs of the Indigenous community.

In addition VACCA has a proactive responsibility to provide quality services which, by empowering and strengthening families and communities to develop and reach their full potential, will reduce-

- the number of Aboriginal child protection notifications; and
- the number of Aboriginal children living away from their families and communities.

VACCA operates within the context that Aboriginal children are significantly over-represented in the Victorian protection and care system. For example, as at June 2009 an indigenous child in Victoria was 12 times more likely to be in out of home care than a non-indigenous child.

In *DOHS and K siblings* [2013] VChC 1 at pp.25-27, Wallington M stated:

"VACCA, an Aboriginal community controlled organisation, was established in the later 1970's to respond to the disproportionate number of Aboriginal children placed away from their families, and to provide support services to Aboriginal children and families. Lakidjeka is one of a number of programs under the VACCA umbrella and its mandate is to provide

advice to Child Protection. By law, Child Protection is required to consult with Lakidjeka on all decisions involving placement of Aboriginal children.

The VACCA file reveals numerous instances where their workers did not feel that Child Protection was listening to them...The DHS report of 17th August 2010 refers to 'updates' as the means by which adherence to the Aboriginal Child Placement Principle was implemented. When cross-examined as to what these updates entailed, the protective worker replied that they updated Lakidjeka and VACCA by email. In response to a further question as to why there were no copies of emails on the DHS file, the worker said that it was extremely hard to get hold of them so a lot of the contact 'was leaving messages'...

One of the difficulties in the consultation process is that despite the recognition in the CYFA of self-determination, the only section which gives VACCA any power to make decisions is section 323(b) which deals with Permanent Care Orders, i.e. at the end of the protective intervention process. Otherwise the Act only speaks of 'consultation' and the lip-service paid to 'consultation' seems to sometimes whittle down to 'keep in the loop – when you remember'."

5.31 Protocol between DFFH child protection service and VACCA

On 11/04/2002 a protocol was signed by Pam White, Director Community Care DOHS & Margaret Stewart, Chairperson VACCA. The protocol was established to facilitate contact between DOHS & VACCA to ensure the provision of a culturally appropriate and effective response to protecting Aboriginal children from harm. Its purpose is to establish mechanisms for ensuring the Child Protection Service ['CPS'] is fully informed of all cultural needs and issues including knowledge of extended family in reaching decisions in regard to Aboriginal children. The protocol sets out broad roles and responsibilities of DFFH and VACCA in responding to Aboriginal children notified to the CPS. It aims to enhance and foster the working relationship between VACCA & DFFH by ensuring that the CPS is better able to engage with Aboriginal children and families that come to the attention of the CPS.

In the protocol:

- 'Indigenous' has the same meaning as 'Aboriginal';
- 'Family' includes extended family; and
- 'Care arrangements' means arrangements concerning the voluntary or statutory placement of a child, including care, custody or guardianship.

The key components of the protocol are set out below.

5.31.1 Bases of the protocol

The bases of the protocol are-

- The United Nations Convention on the Rights of the Child;
- The Aboriginal Child Placement Principle prepared by the Secretariat of National Aboriginal and Islander Child Care [SNAICC], which has been endorsed by all of the states and territories of the Commonwealth and which is now the basis of ss.13-14 of the CYFA;
- The Case Planning Principles which were previously in s.119 of the CYPA and which are now set out in ss.10-14 of the CYFA.

5.31.2 Other principles underlying the protocol

- Protecting children from harm is a shared responsibility between the family, the general community, Aboriginal community, community agencies and professionals working with children, police and government. Each has a significant role to play in ensuring the safety and well-being of children and young people, and in helping prevent harm from occurring.
- DFFH and VACCA agree that every Aboriginal Child has the right to have his or her cultural needs considered and that the provision of culturally relevant services is necessary to achieve this.
- The CPS will actively consider cultural issues and extended family information in all decisions concerning Aboriginal children.

5.31.3 Roles & responsibilities of DFFH's Child Protection Service [CPS] under the protocol

The CPS works to ensure that children are protected from significant harm when their parent or caregiver is unable or unlikely to provide that protection. Services are based on the principle that, normally, the best protection for children is within the family. The CPS will, in the first instance, as required under the CYFA, take every reasonable step to enable the child or young person to remain in the care of their family by strengthening the family's capacity to protect them.

The CPS recognizes that all Aboriginal child protection cases require informed consideration of cultural and kinship arrangements. The CPS agrees to seek advice to ensure they provide a culturally relevant service to Aboriginal children and their families.

5.31.4 CPS referrals to VACCA under the protocol

The CPS will consult with VACCA on all Aboriginal notifications and investigation decisions, including notifications that do not proceed to direct investigation as follows:

1. The CPS will seek to identify the Indigenous status of all notifications. Where the child is identified as Aboriginal, the CPS will provide VACCA with identifying client information and details of the notification concerns.
2. The CPS will seek information and cultural advice in assessing if the case is to be directly investigated.
3. Where it is determined that a case is to be directly investigated, the CPS will inform and involve VACCA in the investigation and in providing an Indigenous perspective in the risk assessment and case planning.
4. The CPS and VACCA will discuss how to identify and involve relevant members of the Aboriginal community to which the child belongs in all decisions.
5. Where case planning decisions involve care arrangements of the child, the CPS will consult with VACCA. The purpose of the consultation will be to ensure that the persons involved in these care arrangements are, or at least one of them is, a member of the Aboriginal community to which the child belongs; or if this is not reasonably possible that the persons involved, or at least one of them, must be members of an Aboriginal community.
6. Where it has not been reasonably possible to make care arrangements for the child within their family, their Aboriginal community or with an Aboriginal person, the CPS will seek the assistance of VACCA in ensuring a cultural support plan is developed for these placements until such time as the child can be placed within their family or more culturally appropriate care arrangements identified.
7. When, in the course of a direct investigation or during any subsequent case planning, the CPS becomes aware that a child is Aboriginal, the CPS will follow points 3 to 6 above. In undertaking the consultation set out in this section, the CPS will at all times comply with the CYFA, for example by authorizing release of information under ss.205(2)(a) & 205(3) and by ensuring that all decision making is in accordance with ss.10-14.

5.31.5 VACCA's response under the protocol to referrals from CPS

VACCA considers the best interests of the child are of paramount importance and will work in partnership with the CPS to ensure the provision of a culturally appropriate and effective response to all Aboriginal notifications and investigations by:

1. Providing the CPS with an Indigenous perspective in the assessment of risk and case planning processes.
2. Discussing with the CPS how to identify and involve relevant members of the Aboriginal community to which the child belongs in all decision making. The involvement of such persons will always be in accordance with the best interests and welfare of the child or young person.
3. Where case planning decisions involved care arrangements of the child, providing advice and assistance to ensure that the persons involved in the care arrangements are, or at least one of them is, a member of the Aboriginal community to which the child belongs or, if this is not reasonably possible, that the persons involved, or at least one of them, must be members of an Aboriginal community.
4. Providing assistance to the CPS on cases where it has not been reasonably possible to make care arrangements for the child within their family, their Aboriginal community or with an

Aboriginal person. VACCA will provide the CPS assistance in ensuring a cultural support plan is developed for these placements until such time as the child can be placed within their family or more culturally appropriate care arrangements identified.

5. Providing advice to the CPS and liaison assistance to children and their families in accessing relevant specialist or family support services.

5.32 Additional provisions applicable to Aboriginal children

Magistrate Bowles has provided the following chart summarizing additional decision-making principles and requirements for Aboriginal children prescribed in the Children, Youth and Families Act 2005.

Principle/Requirement	CYFA
Best interests	s.10(3)(c)
Aboriginal placement principles	ss.12, 13 & 14
Aboriginal convened meetings - Aboriginal Family Led Decision Making Meetings (AFLDM)	s.12(1)(b)
Authorisation of an Aboriginal Agency to act	ss.6, 18A-D, 332
Case Plan	ss.166(3)(b), 176(1), (3), refer to ss.(4) & (5)
Cultural Plans	ss.176(2), 176(4)
Permanent care orders	s.323

5.32.1 Cultural plans for Aboriginal children

Under s.176(2) of the CYFA the Secretary must provide a cultural plan to each Aboriginal child in out of home care that is aligned with the case plan for the child. Under ss.176(1) & 176(3) such case plan must address, reflect and be consistent with the cultural support needs of the child so as to-

- (a) maintain and develop the child's Aboriginal identity; and
- (b) encourage the child's connection to the child's Aboriginal community and culture.

Section 176(4) of the CYFA provides that the child's cultural support needs may vary depending on-

- (a) the length of time that the child has spent in out of home care; and
- (b) the age of the child; and
- (c) the length of time that the child is expected to remain in out of home care; and
- (d) the extent of the child's contact with the child's Aboriginal family members; and
- (e) whether the child is placed within the child's own Aboriginal community, with another Aboriginal community or with non-Aboriginal carers. For this purpose, a child's Aboriginal community is defined in s.167(5) as-
 - (i) the Aboriginal community to which the child has a sense of belonging, if this can be ascertained by the Secretary;
 - (ii) if paragraph (i) does not apply, the Aboriginal community in which the child has primarily lived; or
 - (iii) if paragraphs (i) & (ii) do not apply, the Aboriginal community of the child's parent or grandparent.

The Court may impose a condition incorporating a cultural plan for an Aboriginal child in respect of whom the Court makes a permanent care order [s.321(f)]. Section 323(2)(b) of the CYFA prohibits the Court from making a permanent care order in respect of an Aboriginal child unless a cultural plan has been prepared for the child.

The Department advised the Court in June 2009 that by the end of August 2009 a cultural plan will have been prepared for every Aboriginal child who is the subject of a guardianship to Secretary order, a long-term guardianship to Secretary order or a custody to Secretary order.

So much for the advice. The reality was very different. In a decision handed down on 08/02/2013 – *DOHS and K siblings* [2013] VChC 1 – Wallington M stated at pp.27-28:

“The Department of Human Services has defaulted on its obligation to provide and implement a Cultural Plan for the K children for the past 2½ years since the children were placed on Guardianship to Secretary Orders on 07/09/2010.

As was the case in relation to Aboriginal Family Decision Making meetings, none of the Child Protection practitioners could explain the process for obtaining a Cultural Plan. There was confusion as to whether DHS, Ozchild or Lakidjeka was to produce the Plan, a mandatory document protecting an Aboriginal Child's cultural safety.

Mr MW explained in his evidence that it was the responsibility of none of the above. Though the legislative responsibility lies with DHS under section 176, in 2011 DHS, following an evaluation by KPMG, had provided funding for VACCA, via its Aboriginal Family Decision Making meeting convenors, to be responsible for the provision of Cultural Plans.

It makes sense that responsibility for the content of Cultural Plans had been given to a culturally appropriate organisation. It was disheartening though when Mr MW advised that not a single Cultural Plan had been produced in the Southern Region in the previous two years. This seemed to cover the period both before and after the new funding arrangement with VACCA.”

5.32.2 Other relevant provisions

The material in this section was provided by Magistrate Bowles on 02/07/2020:

- **Placement of an Aboriginal child – best interests principles:** Consideration must be given to the need to protect the child's Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community. (s.10(3)(c))
- **Aboriginal children in ‘out of home care’:** A number of the specific requirements in the CYFA apply to Aboriginal children in ‘out of home care.’ ‘Out of home care’ is defined as ‘... care of a child by a person other than a parent of the child.’ (s.3(1)) Accordingly, if a child is placed with family members, the ‘out of home’ care requirements apply.
- **Additional decision-making principles for Aboriginal children and Aboriginal child placement principles – ss.12-14:** When an Aboriginal child cannot reside with a parent, the Aboriginal Child Placement Principle provides a hierarchy and criteria for determining placement of the child. Pursuant to s.13(1) regard must be had to:
 - the advice of the relevant Aboriginal agency (eg Lakidjeka) (s.13(1)); and
 - the criteria in s.13(2); and
 - the principles in s.14.If an Aboriginal child is not placed within an Aboriginal family or community, arrangements must be made to ensure the child has continuing contact with their Aboriginal family, community and culture. (s.14(5))
- **Aboriginal self-management and self-determination including AFLDMs s.12:** DFFH is required ‘in making a decision or taking an action in relation to an Aboriginal child’ to provide an opportunity for members of the Aboriginal community to which the child belongs, to contribute their views. (s.12(1)(a)) In addition, there should be a meeting convened by an approved Aboriginal convenor and wherever possible, attended by the child, parents and members of extended family and community (AFLDM) when decisions are to be made concerning ‘placement of an Aboriginal child or other significant decision in relation to an Aboriginal child,’ (s.12(1)(b))

It is apparent that the circumstances under which an AFLDM should be conducted are very broad. Regrettably, there have been many occasions when an AFLDM has not occurred when it should have eg a change in case plan from reunification to non-reunification, final orders being made which place a child in out of home care, conciliation conferences being adjourned because an AFLDM has not been conducted and occasions when an AFLDM has been scheduled to take place after the conclusion of a contested final hearing. At all times, when an Aboriginal child is in out-of-home care and most critically when DFFH has a non-reunification case plan, it is essential for AFLDMs to be conducted in a timely manner. This is in order not only for the Court, DFFH and Aboriginal Controlled Organisations to be satisfied that there has been compliance with the

specific provisions in the CYFA relating to Aboriginal children, but also to ensure all possible enquiries have been made with family to explore whatever possibilities there may be for an Aboriginal child to live with family or for their family to have ongoing involvement in the child's life.

Magistrate Bowles has had a number of cases in which the AFLDMs were extremely successful in linking children with their extended families and connecting them to culture. During the second reading speech of the Children, Youth and Families Bill, the then Minister for Children, the Honourable Minister Garbutt stated:

"We also know that Aboriginal children and young people continue to be overrepresented in Child Protection and out-of-home care services. This is unacceptable. We want to establish a legislative framework that promotes a new approach to maintaining children's connection to their family and culture rather than breaking this connection."

A key component of the legislative framework was the introduction of the AFLDM Meetings. Minister Garbutt stated:

'The Bill promotes the use of Aboriginal family decision making, whereby an Aboriginal convenor facilitates a meeting of family members to plan how to assure children's safety and better promote their healthy development. We want to explore opportunities to use family decision-making processes as early as possible. Extended family, community members and professionals working with the family will be involved, as appropriate.'

- **Authorisation of an Aboriginal Agency to act:** An Aboriginal Agency (defined in s.6) may be authorised by the Secretary of DFFH to perform functions and powers conferred on the Secretary in relation to an Aboriginal child. (ss.18, 18A-D). As in the case of DFFH, there must be an internal review procedure of decisions made by the Aboriginal Agency. (s.332(1)).
- **Permanent care orders:** Section 323(1) provides that the Court must not make a PCO placing a child solely with non-Aboriginal person/s unless:
 - there is no suitable placement with Aboriginal person/s; and
 - there has been consultation with the child (if appropriate); and
 - the Secretary is satisfied the order will accord with the Aboriginal Child Placement Principle.

Section 323(2) provides that the Court must not make a PCO in respect of an Aboriginal child unless:

- the Court has received a report from an Aboriginal Agency which recommends the making of the Order; and
- a cultural plan has been prepared for the child.

5.33 Superior Courts' *parens patriae* jurisdiction

In *Re Beth* [2013] VSC 189; (2013) 42 VR 124 Osborn JA granted an application by the Department for an order that had the effect of Beth being placed in what fell within the terms of a "secure welfare service" under s.44 of the CYFA for a period that exceeded the maximum of 42 days permitted by s.173(2)(b) of the CYFA. His Honour held that the Court could "supplement the statutory schemes" in the CYFA and the Disability Act 2006 (Vic) and could make the orders sought under the *parens patriae* jurisdiction of the Supreme Court notwithstanding that they substantially restricted Beth's liberty since they were in her best interests and necessary for her ongoing care and protection. At [115]-[127] his Honour summarized the origins and the nature of this jurisdiction:

[115] "The *parens patriae* jurisdiction of this Court derives from the Royal prerogative. It is directed to the protection of children who are not legally competent to look after themselves. As Brennan J stated (albeit in dissent) in *Marion's case: Secretary, Department of Health and Community Services and JWB & Anor* (1992) 175 CLR 218, 279-80:

'That jurisdiction was originally vested by the royal prerogative in the English Court of Chancery and is vested in courts whose jurisdiction is defined by reference to the jurisdiction of that Court as it stood before the warrant delegating the prerogative power to the Lord Chancellor was revoked. The nature of the jurisdiction was stated by Lord Esher MR in *Reg v Gyngall*:

The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child.

The *parens patriae* jurisdiction has become essentially protective in nature and protective orders may be made either by the machinery of wardship or by ad hoc

orders which leave the guardianship and custody of the child otherwise unaffected. The court is thus vested with a jurisdiction to supervise parents and other guardians and to protect the welfare of children.

Although the jurisdiction is extremely broad, it is exercised cautiously in the manner stated by Fitzgibbon LJ in *In re O'Hara* and adopted by the House of Lords in *J v C*:

In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded.'

[116] In Victoria, the Supreme Court has such jurisdiction and such powers and authorities as it had immediately before the commencement of the Supreme Court Act 1986. Immediately before the commencement of the Supreme Court Act 1986 on 1 January 1987, s 85(2) and (3) of the Constitution Act 1975 defined the jurisdiction of the Supreme Court by equating it to the jurisdiction of the Superior Courts in England and of the Lord High Chancellor including jurisdiction in relation to probate and matrimonial causes and administration of assets at or before the commencement of Act No 502. That Act commenced on 4 January 1875.

[117] The nature of the *parens patriae* jurisdiction was further described by Mason CJ, Dawson, Toohey and Gaudron JJ in *Marion's case* (1992) 175 CLR 218, 258-9 as follows:

'As already mentioned, the welfare jurisdiction conferred upon the Family Court is similar to the *parens patriae* jurisdiction. The history of that jurisdiction was discussed at some length by La Forest J in *Re Eve*. His Lordship pointed out that '[t]he Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined.' In *Wellesley v Duke of Beaufort*, Lord Eldon LC, speaking with reference to the jurisdiction of the Court of Chancery, said:

[I]t belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.

When that case was taken on appeal to the House of Lords, Lord Redesdale noted:

Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way.

Lord Redesdale went on to say that the jurisdiction extended 'as far as is necessary for protection and education'.

To the same effect were the comments of Lord Manners who stated that '[i]t is ... impossible to say what are the limits of that jurisdiction'. The more contemporary descriptions of the *parens patriae* jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction. That is not to deny that the jurisdiction must be exercised in accordance with principle. However, as appears from the authorities discussed earlier, the jurisdiction has been exercised in modern times so as to permit medical operations on infants which result in sterilization.

No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the *parens patriae* jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind. So the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as cases in which they have the power.'

[118] At p.259 their Honours went on to describe the essential function of a court exercising jurisdiction of the kind in issue as being that of deciding whether in the circumstances of the case the order sought is in the best interests of the child.

[119] They went on to recognise that 'the best interests of the child' is imprecise but observed that it is no more so than the 'welfare of the child' and other concepts with which courts must grapple.

[120] A recent example of the exercise of the jurisdiction is the decision of White J in *Children, Youth and Women's Health Services v YJL* [2012] SASC 175, authorising the giving of a blood transfusion by a hospital to a 10 year old boy undergoing chemotherapy treatment, against the wishes of the boy and his parents who were Jehovah's Witnesses.

[121] In *Re Thomas* [2009] NSWSC 217, Brereton J contrasted that aspect of the jurisdiction which authorises a particular course of action which the parents or guardian of a child do not wish to adopt and that which authorises acts beyond the powers and rights of a guardian.

[122] The latter category is exemplified by *Marion's case* (1992) 175 CLR 218 in which the High Court held that the Court's power extended to authorising sterilisation of a child in circumstances where the parent or guardian could not consent: see pp.249-254 per Mason CJ, Dawson, Toohey & Gaudron JJ.

[123] In *Re Thomas*, the Director General of the Department of Community Services (NSW) sought orders authorising the detention of a 16 year old boy indefinitely in a secure unit and the restraint and medication of him as circumstances required. Brereton J held that the jurisdiction extended to making orders of the type sought and observed [at pp.231-234; see also *Re K* [2001] 2 All ER 719 to which his Honour referred]:

'Orders interfering with personal integrity and liberty have been made sufficiently often now that it must be accepted that the jurisdiction permits them. In *Re W* [1992] 3 WLR 758; [1992] 4 All ER 627 the Court of Appeal upheld a court order for treatment for a young person with anorexia nervosa, holding that her wishes, while relevant, were not conclusive. *Re C* [1997] 2 FLR 180 also involved a young woman with anorexia nervosa, who was ordered by the Court to remain at a clinic for treatment until discharged by her doctor or further order – and the court's order provided for the use of reasonable force, if necessary, to detain her. *Marion's Case*, as has been mentioned, resulted in the authorisation of the permanent procedure of hysterectomy, a serious invasion of personal integrity. In *DoCS v Y*, Austin J made orders to the effect that the child be returned to the Children's Hospital without her consent, to resume a course of treatment for anorexia nervosa, and authorising the hospital staff to detain her, using reasonable force if necessary. Orders substantially similar to those proposed in the present case have been made by this Court in *Re Christina* (2168/07, 5 April 2007) and *Re Nellie* (5150/08, 10 October 2008).'

[124] It is common ground between the parties that the provisions of the CYFA and the Disability Act do not exclude the *parens patriae* jurisdiction.

(1) The sole right to custody and guardianship granted to the Secretary pursuant to s.172 of the CYFA does not exclude the jurisdiction: *Johnson v Director General of Social Welfare (Victoria)* (1976) 135 CLR 92.

(2) The jurisdiction extends to making orders which a parent or guardian might not make: *Marion's case* (1992) 175 CLR 218; *Re Thomas* [2009] NSWSC 217.

(3) By its nature the jurisdiction may be invoked to supplement a statutory scheme, as Mason J explained in respect of broadly analogous legislation in *Carseldine & Anor v The Director of the Department of Children's Services* (1974) 133 CLR 345, 366:

Although the legislative scheme is far-reaching I do not think that its extensive character is a sufficient ground for concluding that the prerogative jurisdiction of the Supreme Court is entirely displaced. There may be occasions for its exercise in aid of the Director's statutory responsibilities or when it appears that the Director is not discharging his responsibilities or exercising his powers in conformity with the Act. The vesture of wide and general powers in the Director is not inconsistent with the continued existence of the Supreme Court's inherent jurisdiction, notwithstanding a reluctance, or perhaps an incapacity, on the part of the Court to exercise that jurisdiction when the Director is acting in conformity with the Act and is not invoking the assistance of the Court.'

(4) It would take the clearest language to displace the Court's jurisdiction. In *Johnson's case* Barwick CJ put the common law principle in the following terms at p.97:

This Court has been quite emphatic in expressing its view that, if the Parliament wishes to take away from the Court its power of supervising the guardians, and protecting the welfare, of children, it must do so in unambiguous language, in language which is either express or such as inescapably implies that expression of intention on the part of the Parliament: see *Minister for the Interior v. Neyens*, and *Carseldine v. Director of Children's Services*. It is, of course, to be conceded that in these more populous and complex days the courts may not be able themselves to attend to the detail involved in the protection of children and in ensuring their welfare. Consequently, it has become necessary for statutes to provide for departmental officers and staff to take care of children who are in need of care and attention. But it is to my mind supremely important that there should remain in the courts the ability in appropriate cases to supervise the actions and the performance of the duties of the public servants to whose care such children are committed. If the legislatures, in their wisdom, should decide that the court ought to be entirely excluded and the matter be left entirely to departmental officers then, of course, Parliament can say so. For my part, it will need to do so in the clearest language.

(5) This approach is now reinforced by s.85(5) of the Constitution Act 1975 (Vic) which provides: 'A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless — (a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; ...' There is no such statement bearing on the *parens patriae* jurisdiction in either the CYFA or the Disability Act.

[125] The Secretary's powers as guardian or custodian would not extend to indefinite or extended confinement of a 16 year old. Moreover, the time limitations implicit in s 173(2)(b) upon the power of the Secretary to place Beth in a SWS mean that, as in *Thomas's case*, the order sought exceeds the statutory powers of the Secretary: *Re Thomas* [2009] NSWSC 217, 229.

[126] Nevertheless the very fact that the orders sought do not fall within the legislative scheme which ordinarily governs the secure detention of children, points strongly to the need first to recognise the gravity of the deprivation of liberty which is in issue and the corresponding necessity for its full and adequate justification and secondly to exercise great caution in making the order sought: *Re Thomas* [2009] NSWSC 217, 232.

[127] In summary, I accept the submissions of the Secretary that the authorities demonstrate that the *parens patriae* jurisdiction:

- (a) is very broad;
- (b) is essentially a protective one;
- (c) is governed in its exercise by the considerations of the best interests of the child;
- (d) must be exercised with caution; and
- (e) is not excluded by the provisions of the CYFA or the Disability Act."

In *Mercy Hospitals Victoria Ltd v D1 & D2* [2018] VSC 519 Macaulay J declared that the plaintiff hospital is authorised to administer blood and/or blood products to a pregnant 17 year old woman (D1) who was a Jehovah's Witness if, in the delivery of her baby, it was considered reasonably necessary by two registered medical practitioners in order to save her life or prevent her suffering serious injury. The young woman (legally a child) and her mother had both refused on religious grounds to give consent to such treatment, although the young woman – described as "very small built" – had given consent that, if necessary, a caesarean section be performed to deliver her baby. The Court made the order upon the hospital undertaking to use all strategies *other than* the transfusion of blood or blood products which in the opinion of D1's treating medical team were reasonably available and clinically appropriate with the aim of attempting to avoid D1's death or serious injury.

At [46] Macaulay J referred with approval and adopted the *parens patriae* principles set out by Osborn JA in *Re Beth* [2013] VSC 189 at [127]. At [47]-[48] his Honour said:

[47] "In *Department of Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218 the High Court laid down the common law in Australia with respect to the legal capacity of minors to give or refuse consent to medical treatment. The court summarised and approved a principle that has come to be known as "*Gillick-*

competence”, an expression taken from the proposition endorsed by the House of Lords in *Gillick v West Norfolk AHA* [1986] AC 112. As summarised by the High Court at p.237:

‘The proposition endorsed by the majority in that case was that parental power to consent to medical treatment on behalf of a child diminishes gradually as the child’s capacity and maturity and that this rate of development depends on the individual child...A minor is, according to this principle, capable of giving informed consent when he or she “achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed”.’

[48] There have been several cases in which courts in Australia, in exercise of the *parens patriae* jurisdiction, have been asked to authorise the administration of blood or blood products to a minor who, along with his or her parent, and for reasons associated with the beliefs of Jehovah’s Witnesses, have refused to give such consent. One was a decision of Pullin J in *Minister for Health v AS* (2004) 33 Family LR 223. Another is the decision of the New South Wales Court of Appeal in *X v Sydney Children’s Hospital Network* (2013) 85 NSWLR 294 approving the decision of the judge at first instance. In each case, in broad terms, the child was being treated for aggressive lymphoma; the cancer treatment resulted in severe anaemia; without blood transfusion the anaemia would likely bring about death; but, due to an adherence to the principles of the Jehovah’s Witness faith, the child and parent refused blood transfusion.”

At [52]-[56] Macaulay J said:

[52] “In *X*, Basten JA addressed the significance and weight to be given to religious beliefs and choice at some length. Noting that religious beliefs, particularly minority religious beliefs, are not to be disregarded because they may be deemed irrational by broader community standards, his Honour observed at p.309 that religious beliefs are internationally accepted as an aspect of an individual’s fundamental autonomy which the state cannot interfere with and must not disregard. Indeed, in Victoria that notion is most closely enshrined in s.14 of the Charter of Human Rights and Responsibilities Act 2006, even though that legislation does not directly impact the Court’s exercise of its *parens patriae* jurisdiction.

[53] Basten JA went on to say, of religious beliefs motivating medical treatment choices:

‘Such a motivation is likely to be one to which the court will accord respect and weight, other things being equal. To accord a religious belief weight is not to treat it as determinative. There may be cases in which the strength with which such a belief is held, and the distress which would be caused by treatment which overrode that belief, might diminish the effectiveness of the treatment.’

[54] Earlier in his reasons, Basten JA quoted a statement made by the Ontario Court of Appeal in *Malette v Shulman* (1990) 72 OR (2d) 417. The statement was not made in the context of the exercise of a *parens patriae* jurisdiction but, to the extent that autonomy of choice is a factor to be taken into account for the ‘mature minor’, I consider it to be helpful. The court said at 429h-430b:

‘The state’s interest in preserving the life or health of a competent patient must generally give way to the patient’s stronger interest in directing the course of his own life...Recognition of the right to reject medical treatment cannot, in my opinion, be said to depreciate the interest of the state in life or in the sanctity of life. Individual free choice and self-determination are themselves fundamental constituents of life. To deny individuals freedom of choice with respect to their healthcare can only lessen, and not enhance, the value of life.’

[55] For myself, I would have thought that, consistent with principle, regard for an individual’s religious conviction might, of itself, in an appropriate circumstance, justify the conclusion that the welfare and best interests of the child are protected by allowing the child’s choice based upon religious conviction to stand, notwithstanding the threat to life or safety which that choice will or may bring. In *Children’s Youth & Women’s Health Service Inc v YJL & Ors* (2010) 107 SASR 343, 350 White J thought the court should be concerned with a child’s spiritual welfare as much as it is with the child’s physical welfare.

[56] Ultimately, however, in the exercise of the *parens patriae* jurisdiction on behalf of a child, the particular attributes of the child must remain in clear focus. Here again, with respect, at p.308 Basten JA provided helpful guidance when considering a choice made by a child, even a child thought to be *Gillick*-competent:

'The interest of the state in preserving life is at its highest with respect to children and young persons who are inherently vulnerable, in varying degrees. Physical vulnerability diminishes (usually) with age and is at its height with respect to babies. Intellectual and emotional vulnerability also diminish with age but, as the facts of this case illustrate, may be a function of experience (including, but by no means limited to education) as well as age. *Vulnerability lies at the heart of the disability identified by legal incapacity.*'

The Medical Treatment Planning and Decisions Act 2016 (Vic) came into effect on 12/03/2018. One of its main purposes is to provide for a person to execute an ACD that gives binding instructions or expressed the person's preferences and values in relation to the person's future medical treatment. Any person (including a child) may give an ACD if the person has decision-making capacity and understands the nature and effect of each statement in the directive. In this case there was no ACD in effect for D1. However at [67] Macaulay J noted:

"To the extent any question arises whether the regime provided under the MTPDA for children to make ACD's affects or limits this Court's *parens patriae* jurisdiction in relation to children, three things can be noted:

- (a) it would take the clearest language to displace the Court's jurisdiction (see *Re Beth* (2013) 42 VR 124, 150-151 per Osborn JA quoting *Johnson v Director General of Social Welfare (Victoria)* (1976) 135 CLR 92,97) and no such clear language exists;
- (b) there is no statement made under s.85(5) of the Constitution Act to repeal, alter or vary s.85(3) of the Act which confers the Court's *parens patriae* jurisdiction; and
- (c) in the Second Reading Speech introducing the Bill to Parliament {Hansard-14/09/2016 p.3498}, the Minister for Health expressly stated that the Bill would not remove the *parens patriae* jurisdiction of this Court."

At [76]-[77] his Honour concluded:

[76] "...I am not satisfied D1 does have a sufficient understanding of the consequences of her choice. I am not convinced she has based her choice on a maturely formed and entrenched religious conviction. Put another way, I am not convinced that overriding her expressed choice would so rob her of her essential self as to outweigh the loss she would suffer through losing her life or sustaining a catastrophic injury. In summary, I do not consider that allowing her, in effect, to choose to die or only survive with serious injury is in her best interests taking into account a holistic view of her welfare (physical, spiritual and otherwise).

[77] To the extent that her psychological and spiritual welfare may be addressed by her knowing that a blood transfusion was *only* administered as a last resort and upon very carefully considered medical opinion, I think it is appropriate that any declaration be made upon the undertakings that the hospital agrees to give."

In *Cardell (a pseudonym) v Secretary DHHS* [2019] VSC 781 the 2 year old child had been removed from the care of his mother – who had a history of drug and alcohol abuse – a few days after his birth. The Children's Court duly found that the child was in need of protection on the basis that he was likely to suffer emotional or psychological harm. He was placed on a family reunification order ('FRO') under which formal responsibility for his care was conferred on the Department. For 1¾ years the child was in the care of Ms C and her partner Ms K who had informed the Department that they were not in a position to care for the child permanently. Subsequently the carers separated and Ms C informed the Department that she wanted to be the child's permanent carer. The Department conducted an assessment of Ms C as a potential sole carer and determined that the proposed arrangement would not be in the child's best interests. The child was removed from Ms C's care and placed in home-based care. Two weeks later the child's mother filed an application to revoke the FRO and sought that the child be returned to Ms C's care with a proposed undertaking by the mother not to remove the child from Ms C's care. The Department filed an application for a care by Secretary order. Hubble M refused the mother's application to revoke the FRO and granted the Department's application for a care by Secretary order. For reasons set out in section 5.10.3, Maxwell P dismissed Ms C's appeal.

Shortly before the hearing of the appeal Ms C had filed a separate proceeding in the original jurisdiction of the Supreme Court, seeking to invoke the '*parens patriae*' jurisdiction. By originating motion, she sought an order that the child be made a ward of the Court. Maxwell P was very unenthusiastic about the *parens patriae* jurisdiction being used to override a decision of the Children's Court, holding at [38]-[41]:

[38] "As explained by Osborn JA in *Re Beth* (2013) 42 VR 124 at [115], the *parens patriae* jurisdiction derives from the royal prerogative. It is 'directed to the protection of children who are not legally competent to look after themselves'. As his Honour concluded at [127], the jurisdiction is broad and is 'governed in its exercise by the consideration of the best interests of the child'. It is not excluded by the provisions of the Act.

[39] Counsel for the appellant accepted that proper consideration of that application would require this Court to receive, and consider, detailed evidence about all of the circumstances bearing on an assessment of [the child's] best interests. The Secretary having had no opportunity to file affidavit material, such consideration would have to occur — if at all — at a later date.

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

[41] I remain of that view. The effect of my conclusion is that the appeal will be dismissed and the Children's Court's orders will stand. In the circumstances, **it seems inconceivable that this Court would even entertain a submission that it should somehow override the Children's Court decision and make a different decision with respect to [the child's] care.** There having been no argument on that separate application, however, I will simply adjourn the further hearing of the application to 31 January 2020. I will further order that, unless steps are taken to progress that application before that date, it will stand dismissed on that date without the need for further appearance." [emphasis added]

In *JT v Secretary to DHHS* [2019] VSC 783 JT, the mother of a nearly 7 year old child AB, brought an application in the *parens patriae* jurisdiction of the Supreme Court seeking the immediate return of her child to her care. Shortly beforehand a bail justice had made an IAO placing the child in the care of the maternal grandmother and her husband and the following day the Children's Court made a similar IAO in the absence of the mother. Ultimately Croucher J dismissed the mother's application, holding:

[57] "At least in the first instance, the Children's Court is the appropriate court to hear and determine the matters in issue, including what is in the best interests of the child AB: see s.10 of the CYFA. It is a specialist court with unique experience and expertise in dealing with matters of this type. But the Children's Court has not yet fully heard the evidence and arguments that might be presented on a contested hearing.

[58] If, after such a hearing, JT were aggrieved by the decision, then, pursuant to s.271 of the CYFA, she could appeal to this Court against the making of an IAO.

[59] In addition, pursuant to s.270, JT could return to the Children's Court and apply for a new IAO, on the basis that she was not legally represented at the hearing of the original application (as she has already sought to do) or on the basis of new facts and circumstances, such as the evidence of her father.

[60] In *Georgia and Luke (No 2)* [2008] NSWSC 1387, Palmer J, sitting in the Supreme Court of New South Wales, referred at [6] to:

a well-established line of authority in this Court, enunciated in *Re Victoria* [2002] NSWSC 647; (2002) 29 Family LR 157, that this Court will not, save in extraordinary circumstances, exercise its *parens patriae* jurisdiction in respect of the care and custody of children where there are currently proceedings relating to those children in the Children's Court, or where avenues of appeal from Children's Court proceedings are still open.

[61] There is no reason to doubt the applicability of the same principle in this State.

[62] In those circumstances, and given the evidence before me, I am not satisfied that the circumstances are relevantly exceptional or extraordinary such as to warrant the exercise of this Court's *parens patriae* jurisdiction, whether with a view possibly to ordering the return of the child to his mother or to granting any of the other forms of relief sought in the originating motion."

5.34 'Watch List' order/request to prevent child being removed from Australia

In the context of a protection application filed by the Department seeking to prevent a 13 year old girl being removed by a parent from Australia to Pakistan for the purpose of entering into an arranged marriage, the writer provided the opinion detailed in the following paragraphs 5.34.1 to 5.34.3.

5.34.1 Power of a court exercising federal jurisdiction under the Family Law Act 1975 (Cth)

In proceedings under the Family Law Act 1975 (Cth) a court exercising federal jurisdiction is empowered by s.68B to grant injunctive relief:

- (1) "The court may make such order or grant such injunction as it considers appropriate for the welfare of the child including:
 - (a) an injunction for the personal protection of a child..."
- (2) The court "may grant an injunction...in any case in which it appears to the court to be just or convenient to do so."

A 'Watch List' injunction pursuant to s.68B operates to restrain a parent or guardian from removing the child from the Commonwealth of Australia. The order also generally requests the Australian Federal Police to give effect to the injunction by placing the child's name on the 'Watch List' until further order.

However, the writer doubts that the Children's Court can be described for this purpose as "a court exercising federal jurisdiction".

5.34.2 CCV has no power under Magistrates' Court Act 1989 or Supreme Court Act 1986

Section 100(1)(b) of the Magistrates' Court Act 1989 (Vic) provides that the Magistrates' Court [MCV] has jurisdiction "to hear and determine any claim for equitable relief if the value of the relief sought is within the jurisdictional limit". Section 528(1) of the CYFA provides that the CCV "has and may exercise in relation to all matters over which it has jurisdiction all the powers and authorities that the MCV has in relation to the matters over which it has jurisdiction". However, s.100(1)(b) of the MCA is in Part 5, headed "Civil Proceedings". But s.528(2)(a) of the CYFA specifically excludes Part 5 from application in the CCV unless the contrary intention appears in the CYFA or any other Act. The writer considers it is tolerably clear that s.100(1)(b) cannot be applied in the CCV by the general power conferred by s.528(1). Moreover, in s.100(1)(b) the concluding words "*if the value of the relief sought is within the jurisdictional limit*" suggest that it has no relevance to proceedings at all in the CCV where it is impossible to place any value on the relief sought.

Section 31(a) of the Supreme Court Act 1986 (Vic) provides that "Every inferior court which has jurisdiction in equity or at law and in equity has as regards all causes of action within in its jurisdiction, power to grant in any proceedings before that court such relief, redress or remedy or combination of remedies, either absolute or conditional, as the [Supreme] Court has power to grant in the like case..." The powers of the SCV to grant equitable relief derive from s.37 of the SCA. However, the writer doubts that the CCV is a "court which has jurisdiction in equity or at law and in equity" within the meaning of s.31 of the SCA. In his opinion the CCV has no equitable jurisdiction at all. Its jurisdiction is primarily conferred by statute – and to a lesser extent by common law – but it does extend to include such powers or authorities as are necessary to give effect to orders made under its conferred jurisdiction. Moreover, some of the wording of s.37 of the SCA is not easy to reconcile with the subject matter with which the CCV deals.

Accordingly, the writer doubts that the CCV has any power derived from the Magistrates' Court Act 1989 or the Supreme Court Act 1986 to make a Watch List request to prevent a child being removed from Australia.

5.34.3 Power of CCV under the CYFA to make a Watch List order/request

Section 8(1) of the CYFA requires the CCV to have regard to 'best interests' principles in making any decision or taking any action under the CYFA. The primary such principle is in s.10. Accordingly, the writer is of the view that the CCV does have power conferred by the CYFA to make a 'Watch List' order/request if it is in the best interests of the child to do so and if:

- (i) the case is adjourned and the child is placed on an interim accommodation order ['IAO'];
- (ii) the case is adjourned without an IAO;
- (iii) the child is placed on a family preservation order ['FPO'] or a family reunification order [FRO] or a permanent care order [PCO].

Option (i): Section 263(7) of the CYFA empowers the CCV to “include any conditions that the Court or bail justice considers should be included [on an IAO] in the best interests of the child”. See e.g. *ZD v DHHS* [2017] VSC 806 where Osborn J dismissed an appeal against the decision of a magistrate of the CCV to include on IAOs a condition allowing for three children aged 5, 3 & 2 placed in foster care to be immunised against measles, such immunisation being a condition precedent to the two younger children being able to attend child care. In that case Osborn J held at [11]:

“In summary:

- (a) the plain meaning of the relevant provision is that the Court is given a wide discretion governed by the overriding principle of the best interests of the child;
- (b) that principle reflects the paramount consideration under the Act: see s.10(1);
- (c) limitations imposed by the Act upon the Secretary's administrative powers [see e.g. s.175A(2)] cannot found an implication concerning the powers of the CCV;
- (d) the interim nature of the order does not prevent the imposition of a condition of the type in issue;
- (e) such condition related directly to the circumstances of the accommodation of the children;
- (f) the condition is valid;
- (g) the action proposed pursuant to the condition is authorised in any event by other conditions of the IAO;
- (h) where the intention of the provision is clear there is no scope for the Charter of Human Rights and Responsibilities Act 2006 to affect its construction, but in any event, properly understood, the provisions of the Charter support the above conclusions.”

Option (ii): Section 530(1) of the CYFA empowers the CCV to adjourn the hearing of a proceeding “for such purposes and on such terms as to costs or otherwise as it considers necessary or just in the circumstances”. And the over-riding principle in determining what terms are necessary or just is the ‘best interests’ principle of ss.8(1) & 10.

Option (iii): Section 281(1) of the CYFA empowers the CCV to include conditions on a FPO to be observed by the child or the parent(s) provided that the pre-conditions in s.281(1A) are satisfied, namely that the CCV considers that any such condition-

- (a) is in the best interests of the child; and
- (b) is reasonably capable of being carried out by each person who will be subject to the condition; and
- (c) promote the continuing care of the child by a parent of the child.

Sections 287(1)(d) & 321(1) of the CYFA provide in broadly similar terms for the inclusion of conditions on a FRO and a PCO respectively.

It is almost axiomatic that to prohibit a 13 year old girl being removed from Australia to Pakistan for the purpose of entering into an arranged marriage would necessarily be in the best interests of the child. **To give effect to this prohibition the writer believes that whichever of options (i), (ii) or (iii) is applicable the CCV has power to impose a condition that the mother and father must not remove the child – or cause the child to be removed –from the Commonwealth of Australia.**

The writer also believes that the CCV has implied jurisdiction to make a Watch List request to the appropriate authority to place the child on the Watch List to ensure that the condition described in the above paragraph – a condition which the CCV considers necessary in the child's best interests – is complied with and hence to give effect to the said condition.

However, because the power to make such a request is essentially a subsidiary power, the writer has some doubt that the CCV has jurisdiction to make a request to the appropriate authority to place a child on a Watch List-

- for an indefinite period; or
- for a period which extends beyond that of any associated Court order; or
- in the absence of an associated Court order; or
- if the child is subject to an order on which the CCV has no power to impose conditions, namely a care by Secretary order or a long-term care order.

5.34.4 Example of a Watch List order/request

As a sitting Magistrate the writer had made a Watch List order/request in only one CCV case, that of a young child **X** who was just over 2 years old. This was after a contested case in July 2014. In September 2013 a senior protective worker had applied *ex parte* to the Federal Circuit Court of Australia for an Airport Watch List order in relation to **X**. The mother and the ICL were aware of and supported the application. Judge Connolly had granted the application and made orders including:

1. **The Respondents [father and stepmother] and their servants and agents be and are restrained from removing or attempting to remove or causing or permitting the removal of X from the Commonwealth of Australia.**
2. **X is and is hereby restrained from leaving the Commonwealth of Australia.**
3. **It is requested that the Australian Federal Police give effect to the preceding order by placing the name of the said child on the Airport Watch List in force at all points of arrival and departure in the Commonwealth of Australia and maintain the child's name on the Watch List for a period of two years.**

In July 2014 the writer placed **X** on a family reunification order which included the following conditions:

9. **X** must not be taken outside the State of Victoria without the written permission of DOHS.
10. Father must consent to the Department of Immigration and Border Protection (Cth) [DIBP] providing information to DOHS in relation to his deportation from Australia or of any other change in his status with DIBP.
11. Stepmother must inform DOHS immediately if she becomes aware that father is to be deported from Australia or of any other change in his status with DIBP.
18. Father & step-mother are each restrained from removing **X** [D.O.B. **/**/2012] from the Commonwealth of Australia.

The writer also made the following subsidiary order:

"I direct the Principal Registrar of the Children's Court of Victoria to request the Department of Immigration and Border Protection (Cth) that **X** be placed on the Airport Watch List until 28/01/2015 or until further order of this Court whichever is the earlier."

A copy of the formal written request by the Principal Registrar [identifying details deleted] is below.

To whom it may concern,

Please accept this request for the following details to be added to the Australian Federal Police Airport Watch List:

Name and date of birth of the child:

Matter number: ****/2012

1. **X** _____ DOB: **/**/2012 _____

Please find attached a copy of the court order dated **//2014. Persons named are restrained from removing the child named above from the Commonwealth of Australia.**

The Court order contains the following condition:

Father & stepmother are each restrained from removing X [D.O.B. **//2012] from the Commonwealth of Australia.**

This request is that X be placed on the Airport Watch List until 28/01/2015 or until further order of this Court whichever is the earlier.

Principal Registrar

Signature

5.35 Protocol between DFFH and Federal Circuit Court

There is sometimes an overlap between a child protection proceeding in the Children's Court of Victoria under the *Children, Youth and Families Act 2005 (Vic)* and a family law proceeding in the Federal Circuit Court under the *Family Law Act 1975 (Cth)*.

In May 2011 a protocol was entered into between the Department of Human Services Child Protection service (a predecessor of DFFH) and the Family Court of Australia and the Federal Magistrates' Court (the predecessors of the Federal Circuit Court) in order to assist cooperation, clarify procedures and improve decision making in cases that may occur in either or both the Commonwealth and State jurisdictions.

In paragraph 1.3 it is said that this "protocol articulates the statutory and non-statutory responsibilities of the Department of Human Services, the Family Court of Australia and Federal Magistrates Court to each other. While the Department of Human Services has mandatory responsibility for investigating allegations of child abuse or neglect, it requires the cooperation of the Family Court and Federal Magistrates Court in cases that also involve those courts."

The protocol contains the following 15 sections plus 6 appendices. It may be downloaded from www.cpmanual.vic.gov.au/sites/default/files/Protocol_DHS-Family_Court&Federal_magistrates_court_2011-2819.pdf

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Of particular interest is **section 11** of the protocol which, in conjunction with **Appendix 1**, details the basis on which the appropriate jurisdiction should be established where there is an overlap between State and Commonwealth jurisdictions. **Section 11** provides:

- 11.1 It is not in the interests of the child or the family that there be concurrent proceedings relating to that child in a court exercising family law jurisdiction and the Children's Court.
- 11.2 When deciding in which court the matter should most appropriately proceed, the Department of Human Services should give consideration to the following:
 - (i) Whether there is evidence to support a finding in the Children's Court that the child is in need of protection under one of the grounds in s.162(1) of the CYFA
 - (ii) Whether the protective concerns can be allieviated by a change in residence or other arrangements for the child
 - (iii) Whether there is an appropriate parent or carer prepared to lodge an application under the FLA in relation to residence or other arrangements for the child
 - (iv) Where there are family law proceedings pending, and whether the Secretary to the Department of Human Services should seek to appear as *amicus curiae* or intervene in those proceedings
 - (v) Which court is likely to provide the quickest and most effective solution to secure the welfare of the child
 - (vi) Which court has jurisdiction to make the orders that it is anticipated the parties to the proceeding will require.
- 11.3 In considering these matters, reference should be made to the memorandum of understanding signed in April 1995 by Justice Frederico of the Family Court of Australia, Nick Papas, then Chief Magistrate of the Magistrates Court and Robin Clark, then Assistant Director of Child, Adolescent and Family Welfare in the Department of Health and Community Services (now renamed Department of Human Services).

The memorandum of understanding dated April 1995 between the Family Court of Australia, the Children's Court of Victoria and the Department of Human Services which is referred to in section 11.3 of the protocol is **Appendix 1** to the protocol and provides as follows:

Background

1. A number of cases both in Victoria and interstate where families have been subjected to proceedings in the Family Court and intervention from a state welfare authority, have prompted concerns about the overlap of federal and state jurisdictions and the role of State Welfare authorities in such proceedings.
2. A recent case in which Human Services issued a Protection Application in the Children's Court following the making of an order in the Family Court highlighted the difficulties that could occur where the Department was involved in Family Court proceedings.
3. As a result on 22 November 1994 Justice Frederico convened a meeting of Senior Representatives of the Family Court of Australia, the Children's Court of Victoria and the Department of Human Services, formerly the Department of Health and Community Services (Human Services) to discuss these issues in detail and establish a Memorandum of Understanding.

Agreement

The central principles underpinning this agreement are:-

- A recognition of the specialised nature and separate jurisdictions of the Family Court and Children's Court.
- A recognition that Human Services has statutory responsibilities which may involve, or result in the involvement of, both the Family Court and the Children's Court.
- A recognition that multiple hearings, over prolonged periods of time in separate jurisdictions can be harmful to the child and should where possible be minimised.
- A recognition that parents have a right to have their disputes resolved expeditiously, efficiently and where possible within a single jurisdiction.
- A recognition that the Children's Court should not be utilised as a de facto Court of appeal from the Family Court.

It is agreed that:

1. Human Services reserves the right to choose the jurisdiction in which protective concerns in relation to children are determined, guided by the principles enunciated above.
2. If Human Services forms the view that the Family Court is the appropriate jurisdiction to decide matters of a protective nature, it may choose not to become a party but to give evidence in support of one or another party, or the child's separate representative, if appointed. This decision will be based on the level of concern, the preparedness of the other parties' legal representative to call the Department's evidence and recognition that the Department, as a witness, will be required to accept the orders of the Court without the avenue of appeal.
3. If Human Services has serious concerns and is not satisfied that its evidence will be fully presented or wishes to raise jurisdictional arguments, it may apply to be made a party to the proceedings.
4. Provided no new protective concerns emerge during the proceedings to suggest that the child is at further risk, Human Services will not apply to change the jurisdiction.
5. During the course of proceedings in the Family Court, if, as a result of new information, Human Services assessed that the child is at significant risk and that none of the parties will protect the child, proceedings will be initiated through the Children's Court.
6. Where the Department decides to initiate proceedings through the Children's Court, it will appear in person before the Family Court at the earliest opportunity to inform the Court of its intentions.
7. If, as a party to the proceedings, Human Services is dissatisfied with the outcome of the Family Court proceedings and considers the child to be at significant continuing risk, an appeal will be initiated through the Family Court.
8. Provided no new protective concerns arise following Family Court proceedings, Human Services will not commence further proceedings in the Children's Court, regardless of judgement.
9. If following the conclusion of Family Court proceedings fresh concerns are raised about the safety and/or wellbeing of a child, Human Services will determine whether the concerns are best addressed through protection application proceedings in the Children's Court or initiation of further proceedings through the Family Court. This decision will be based on the length of time since the Family Court order was made, whether or not any family members are able to adequately care for the child and the level of Departmental supervision required.
10. Where there have been previous proceedings in the Family Court or proceedings are current in the Family Court, Human Services will ensure, to the extent that it is aware, that this information is communicated clearly to the Children's Court in any report submitted to that jurisdiction by the Department.

