

# 12. CHILDREN'S COURT CLINIC

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### **12.1 Statutory basis and functions of the Clinic**

The Children's Court Clinic is an independent body within the Victorian Government Department of Justice & Regulation established by s.37(1) of the Children and Young Persons Act 1989 (Vic) [No.56/1989] ('the CYPA') and continued in operation by s.546(1) of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA').

The functions of the Clinic are defined in s.546(2) of the CYFA. Its primary function is to make clinical assessments of children and families for Children's Courts across Victoria in both child protection and criminal cases and to submit reports to the court requesting the assessments [ss.546(2)(a) & 546(2)(b)].

The Clinic is located in the Melbourne Children's Court building. Its Director is a clinical and forensic psychologist of many years' standing, Dr Patricia Brown. The Clinic has provided a unique and invaluable service to the Children's Court of Victoria for 70 years. It is a state-wide service which supplies clinical psychological and psychiatric opinions for the judicial officers of the Court.

The Clinic is independent of all of the parties in every case and hence is a bastion of independent, professional psychological/psychiatric expertise within a highly specialised court jurisdiction. Until 2001 it was the only such Clinic in Australia.

Pursuant to s.546(2)(c) of the CYFA, the Children's Court Clinic also provides clinical treatment for children and/or family members during-

- a period of deferral of sentence; or
- the period of an interim protection order; or
- an adjournment period.

The provision of treatment is usually a consequence of the Clinic having already reported to the Court that the outcome of short-term treatment could materially affect the recommendation it may make to the Court at the end of the relevant period. Examples of treatment offered by the Clinic are counselling and the provision of Drug Program services.

It is the writer's strong belief that the Clinic's work is well respected by the Courts and the legal fraternity. In 1997 the Australian Law Reform Commission recommended in its Report #84 "Seen and Heard: Priority for Children in the legal process" that the Victorian Children's Court Clinic be the prototype for other such clinics to be established for the Children's Courts in other Australian States & Territories. This ultimately led to the establishment in 2001 of the New South Wales Children's Court Clinic. In 2007 Dr Brown received the Australian Psychological Society Award for "Distinguished Contributions to Forensic Psychology". In 2009 the Children's Court Clinic received the Children's Court Award.

## **12.2 Referral to the Clinic**

Children's Court Clinic involvement with a family cannot be initiated without an order of the Court and can only occur while a case is on-going in the Court. The Clinic – assiduously and correctly – sees its role as working only for the judges and magistrates and not for any party in proceedings before the Court. Thus it accepts no separate jurisdiction to be involved with a child or family once the Court has concluded the hearing of the case.

Clinic involvement is initiated by the Court making a referral requesting the Clinic-

- in Family Division cases: to prepare an additional report pursuant to s.560(b) or another type of report pursuant to s.546(2)(b); or
- in Criminal Division cases: to prepare a pre-sentence report pursuant to ss.571 & 572(b) or another type of report pursuant to s.546(2)(b); or
- in cases in either Division: to provide clinical services to children and their families pursuant to s.546(2)(c) of the CYFA.

The Court may make a referral to the Children's Court Clinic in any appropriate case, either of its own motion or upon application by any party. The nature of the request made by the Court may be highly specific or unspecific, but in all cases the Clinic provides a comprehensive clinical picture of the child and his or her family to assist the relevant judicial officer in decision-making or provides the requested clinical services.

### **12.2.1 Referral from Family Division for a report**

The most usual type of referral from the Family Division is for an assessment of child and family functioning, often including an assessment of bonding and attachment, by way of additional report pursuant to s.560(b) of the CYFA. The Court has power to make such a referral in any proceeding in which a disposition report is required under s.557(1) if of the opinion that such a report is necessary to enable it to determine the proceeding.

A further type of Family Division report – authorized by s.73A(1) of the Family Violence Protection Act 2008 (Vic) or s.53(1) of the Personal Safety Intervention Orders Act 2010 (Vic) – is an assessment report in respect of a respondent and/or an affected person or protected person the subject of an application for an intervention order under one of other of those Acts.

An example of another type of Family Division report is for an assessment of the intellectual functioning and development of a child to enable the determination of whether the child is mature enough to give instructions to a legal representative: see e.g. s.524(2) of the CYFA.

### **12.2.2 Referral from Criminal Division for a report**

The most usual type of referral from the Criminal Division is for a pre-sentence report pursuant to ss.571 & 572(b) of the CYFA. The purpose of a pre-sentence report is to assist in the sentencing of a child who has been found guilty or has pleaded guilty to one or more offences. The only matters which can be set out in pre-sentence reports are detailed in ss.573(1), save that s.573(3) permits a recommendation as to the appropriate sentencing order.

Since 31/10/2014 the Court has power under ss.38P(c) & 38Q(1)(b) of the Crimes (Mental Impairment and Unfitness to be Tried Act) 1997 (Vic) to require a child whose fitness to be tried is in issue to undergo an examination by a registered psychologist through the auspices of the Children's Court Clinic.

An example of another not uncommon type of Criminal Division referral is for an assessment of the intellectual functioning and development of a child aged 10-13 to assist in the determination of whether or not the *doli incapax* doctrine is applicable, namely whether or not the child knew at the time of commission of the offence that what he or she was doing was not merely wrong but “gravely wrong, seriously wrong...evil or morally wrong”.

## **12.3 Operation of the Clinic**

### **12.3.1 Ethos**

The ethos of the Clinic is one of professionalism, kindness and respect for clients, and there is an appreciation of the natural wisdom inherent in the psychological defences adopted by persons from greatly disadvantaged circumstances for whom change, where indicated, needs to occur through collaboration and trusted specialist intervention. The good of the child is the central focus of assessments but the Clinic is family centred and a systems approach, as well as a developmental perspective, is taken.

### **12.3.2 Qualifications & experience of clinicians**

The Clinic currently works primarily through sessional clinicians engaged by the Director. Most clinicians are clinical and/or forensic psychologists. However psychiatrists are also engaged as required. Many teachers in the field work through the Clinic and the qualifications and experience of those employed are substantial. In addition to post-graduate training in clinical psychology at masters level, a minimum of 10 years of experience in the field has been required of sessional psychologists at the Court Clinic. However, over time the qualifications of the clinicians selected have exceeded the base level requirements set 10 years ago and the reality now is that additionally most of the psychologists either have or are completing doctorates and most have had 20 years of experience. Further, six of the clinicians are either professors or associate professors. This includes a professor and two associate professors of psychology and a professor and two associate professors of psychiatry. A number of the sessional clinicians work at child and adolescent facilities in hospital settings or at university clinics when not engaged at the Clinic. Specialists in small children, in adolescents and in adult clinical work are engaged.

### 12.3.3 Clinical assessments

Clinic assessments are completed to a stage where an appropriate recommendation can be made with some confidence to the Court. If further highly specific assessment is needed, for example, neurological assessment or assessment for learning disorders, or where treatment for a mental disorder or for therapy in general is indicated, this will be referred on post-court, such referral being negotiated by the Clinic. Also, when the Clinic undertakes assessment, the Clinician discusses the Clinic's recommendation with the legal representative for the child (and, in before-proof matters, with all counsel), and if the recommendation made is one which would involve the Department of Human Services post-court, discussion is had with the Department also, with the Clinic in both instances maintaining the right to offer opinions to the Court that differ from those of the other parties/agencies.

In cases heard at rural and regional Courts, the Court Clinic professional will travel to the country to do an assessment where there is special need for it. In the main, however, assessments are done on the Court Clinic premises in Melbourne, although young people in custody or secure welfare are seen together with their families at Remand or Secure Welfare centres. When there is special need a home visit will be made. Depending on the nature of the case, a substantial amount of time may be required in interviews and psychological tests may be administered. Interpreters are engaged whenever needed.

The clinician submitting the report is available for cross-examination at city, metropolitan or country courts when subpoenaed by a party or required to attend by notice given under s.550 of the CYFA by the child, a parent, the Secretary of the Department of Health & Human Services or the Court. Though the clinician will sometimes attend country courts in person, more often his or her evidence will be by video-conferencing link.

In 2013/2014 a notice under s.550 was given to a clinician in 122 cases and in 4 cases a sub-poena was served on a clinician. Cross-examination of the clinician eventuated in 34 of these 126 cases (27% of requests for attendance).

Subject only to the question of relevance to the specific referral received, it is a decision for the individual clinician which persons should be involved in the clinical assessment in any particular instance. The case of *NM, DOHS v BS* [Children's Court of Victoria, unreported, 21/12/2004] 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. A Children's Court Clinic report had been prepared in which the clinician had performed an assessment of the carers which was not favourable to the DOHS' case. Counsel for DOHS strenuously submitted that this report was inadmissible, the court having no jurisdiction to receive it. In ruling that the assessment of the carers performed by the Clinic was both relevant and admissible, Judge Coate held that where the court has ordered a clinic report and the child's current placement is in issue, it is the decision for the particular clinician as to whether or not those carers should form part of the clinical assessment. At p.17 Her Honour said:

"In this case, a professional assessment has been undertaken and is available to assist the court in assessing the actual and potential benefit to the child of that placement. It is crucial, particularly in circumstances where DOHS have made it clear that they do not intend to call [the carers] to give evidence, that all available evidence with respect to them be before the court in these proceedings to allow the court to fulfil its statutory function."

The numbers of referrals to the Clinic for assessments for each financial year since 1996/1997 are as follows:

YEAR	CRIMINAL DIVISION	CHILD PROTECTION	FAMILY VIOLENCE	OTHER	TOTAL
1996/1997	186 (28%)	468 (72%)			654
1997/1998	212 (26%)	531 (72%)			743
1998/1999	161 (28%)	458 (74%)			619
1999/2000	165 (26%)	459 (74%)			624
2000/2001	176 (28%)	444 (72%)			620
2001/2002	223 (34%)	427 (66%)			650
2002/2003	265 (35%)	497 (65%)			762
2003/2004	222 (25%)	666 (75%)			888
2004/2005	229 (25%)	686 (74%)	10 (1%)		925
2005/2006	224 (25%)	639 (71%)	29 (3%)	1	893
2006/2007	303 (30%)	682 (67%)	34 (3%)	3	1022
2007/2008	346 (32%)	697 (65%)	29 (3%)		1074
2008/2009	313 (29%)	712 (65%)	60 (6%)		1085
2009/2010	337 (31%)	725 (66%)	28 (3%)		1090
2010/2011	299 (31%)	613 (65%)	39 (4%)		951
2011/2012	258 (30%)	583 (67%)	31 (3%)		872
2012/2013	262 (34%)	487 (64%)	18 (2%)		767
2013/2014	232 (30%)	518 (68%)	16 (2%)		766

The 3 “other” referrals in 2006/2007 involved an assessment of the ability of a 5 year old child to give evidence in a case and 2 special referrals of youths from the Melbourne Magistrates’ Court.

Of the 262 Criminal Division referrals in 2012/2013 a total of 29 were referrals to the Children’s Court Clinic Drug Treatment Program for assessment of an accused child’s drug and alcohol problems.

On average approximately 65% to 75% of the referrals to the Clinic involve child protection cases in the Family Division of the Children’s Court. The child protection referrals predominate in the work of the Clinic, these matters usually being more complex and time consuming than the pre-sentence reports which comprise the referrals from the Criminal Division.

The breakup of metropolitan and country referrals for Clinic assessments were as follows:

YEAR	METROPOLITAN	COUNTRY	TOTAL
2006/2007	660	362	1022
2007/2008	717	357	1074
2008/2009	686	399	1085
2009/2010	683	407	1090
2010/2011	608	343	951
2011/2012	540	332	872
2012/2013	475	292	767
2013/2014	493	273	766

#### 12.3.4 Referrals for treatment

In addition to referrals for assessment, the Children’s Court Clinic has a short-term treatment function in respect of cases where treatment at the Clinic is made a condition of an interim order by a judicial officer. Before imposing such a condition, the judicial officer will generally have received advice from a clinician that this would be beneficial. An initiative to provide treatment for parents with drug problems began late in 2003/2004 with respect to protection cases and has led to a number of parents being assisted. This is in addition to the Children’s Court Clinic Drug Program for young offenders in the Criminal Division of the Court which is discussed in detail

below. For criminal and protective matters combined, 99 short-term treatment sessions, the majority of which were drug or alcohol related, were undertaken at the Clinic in 2012/2013.

### **12.3.5 Teaching function**

As well as providing a direct clinical service to the Court, the Children's Court Clinic is also a teaching facility. The Director teaches Child Forensic/Clinical Psychology at the major universities. Psychiatric registrars attend at the Clinic annually for information about the Clinic and the Court. Clinical and forensic psychology students from four Victorian universities are regularly placed at the Court Clinic, not to submit reports to the Court currently but to learn the craft for input to the Court in the future. At intervals the Clinic also arranges closed seminars for magistrates on various matters relating to child development and child welfare and supplies journal articles pertinent to the work of the Court to magistrates in Children's Courts across Victoria.

## **12.4 Children's Court Clinic Drug Program [CCCDP]**

The National Illicit Drug Strategy [NIDS] diversion initiative consists of both police and court drug diversion programs. As part of NIDS, a drug diversion program - auspiced and conducted by the Children's Court Clinic - was established in late 2001, primarily to provide clinical drug assessment and referral to drug treatment.

### **12.4.1 Aim**

The CCCDP aims to:

- divert young offenders who have a drug problem away from further involvement in the criminal justice process, through participation in drug treatment programs;
- develop a commitment to drug treatment on the part of young drug users; and
- reduce the risk of young offenders engaging in further criminal activity to support drug use.

### **12.4.2 Service**

The CCCDP provides a service for judicial officers in the Children's Court, a service which includes assessment, referral and treatment of children appearing in the Criminal Division who have a demonstrable substance misuse problem. There are currently two positions for accredited drug clinicians at the Clinic, Dr Carl Scuderi heading the program. Dr Scuderi is a registered psychologist with post-graduate training in clinical psychology and 20 years of experience working with drug addicted persons, in private practice and in the drug and alcohol sector.

### **12.4.3 Eligibility**

A child is eligible for the CCCDP if he or she:

- appears as a defendant in the Criminal Division of the Court; and
- has a demonstrable illicit drug use problem (includes cannabis); and
- is not on any other current court order with a drug treatment condition.

The program operates during an adjournment period ordered by the Court. The preferred process is for the child's charge(s) to be proved and sentence deferred pursuant to s.414 of the CYFA. In special circumstances and with the child's consent, a child may be referred to and accepted into the CCCDP prior to the charge(s) being found proved.

### **12.4.4 Referral**

Referral to the CCCDP for assessment or subsequent referral to the CCCDP for treatment is by judge or magistrate only. However, any of the parties to the case may apply to the judge or magistrate for an order that the child be accepted into the program. The referral is by way of a court order, whether as a condition of bail or a separate order, that the child attend the Children's Court Clinic for assessment/treatment under the CCCDP.

#### **12.4.5 Assessment**

During the adjournment period, the child and family will be required to attend the Clinic for a thorough clinical assessment. This will include a comprehensive drug and alcohol assessment, a broad clinical assessment of the reasons why the child is abusing substances and the development of a proposed treatment plan based on the formulation of the child's current predicaments, conflicts and resources.

The CCCDP assessment combines an individual developmental model with a systems approach in order to capture the interaction of the subject child with others in the family and the child's wider social networks. This type of assessment involves a recognition that the systems which surround the child are dynamic and concern the manner in which the child copes with deficits in his or her personal development and in the child's networks with others. This type of assessment provides an opportunity to discover more than just the nature and cause of the child's drug use. It is Dr Scuderi's experience that substance abuse problems are often the least severe of a child's multi-faceted problems and merely reflect the only solution which the child perceives to be available for his or her problems. Thus a therapeutic intervention by a health professional is often especially important for children and adolescents, not only to enable them to engage with the drug treatment sector but also to provide an opportunity to provide information to them about the consequences of their drug use, to enhance their motivation for treatment in the future, and often - most importantly - to provide an independent and non-judgmental ear in relation to their present perceived predicaments.

At the completion of the assessment the judge or magistrate will be provided with a report which will include a proposed treatment plan. If the child is assessed as being eligible to participate in drug treatment services and both the child and his or her guardians are agreeable to the recommended treatment plan, the judge or magistrate will have the option of a further adjournment to allow the child to participate in the proposed treatment while remaining under the control of the Court.

#### **12.4.6 Treatment**

The treatment provided in the CCCDP is a properly framed and supervised therapeutic intervention which treats the subject child as an individual in his or her own right and aims to unravel the complex problems behind the child's drug use.

In the CCCDP the drug treatment services are brokered by ACSO COATS or a local community drug agency, which will arrange the first appointment for the child within 2-3 days. Treatment options include:

- counselling;
- youth outreach;
- withdrawal services; and
- supported accommodation.

In some cases the child will also be required to attend the Court Clinic for regular appointments with the drug clinician. Where appropriate, families will also be invited to participate in the program. Sometimes this will involve child and/or family participating in individual or family therapy.

The drug clinician will maintain regular contact with both the child and the drug treatment service while the child is participating in the CCCDP. During the adjournment period, the drug clinician will consider variation of the treatment plan on advice from the drug treatment service.

#### **12.4.7 Final report**

The Court Clinic provides a final report to the Court at the conclusion of the treatment and the Court will almost always take the child's progress into account in any subsequent sentencing process.

#### 12.4.8 Further information

Further information about the CCCDP program can be obtained from Dr Carl Scuderi, Senior Drug Clinician at the Children's Court Clinic: ☎ 8638 3305.

### 12.5 Distribution of and access to Children's Court Clinic reports

#### 12.5.1 The competing principles

Under s.546(2)(b) of the CYFA one of the functions of the Clinic is “to submit reports to Courts and other bodies”. Whenever the Clinic provides a report to the Court two competing principles come into play. The principle of “natural justice” requires that all parties to the litigation have a right to a full and fair hearing, a right which ordinarily requires the Court to ensure that all parties are aware of – and are given a proper opportunity to respond to – all evidence to which the Court is privy. On the other hand, there is the principle of “clinician-client confidentiality”, the ethical imperative of the clinician who conducted the assessment to preserve the confidentiality of the information obtained from his or her client in the course of the professional assessment, an imperative necessarily tempered by the fact that the assessment is conducted in the knowledge that the clinician is required to prepare a report for the Court. While the Court understands that a clinician would wish to preserve as much of this confidentiality as possible, the principle of “natural justice” would rarely be satisfied if the Court kept the information in a Clinic report away from some or all of the parties.

#### 12.5.2 Distribution of and access to Family Division reports

If the Family Division of 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.

Section 562(2) permits the Clinic, if it 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, to forward a statement to that effect to the Court with the report.

Section 562(3) of the CYFA tips the balance between “natural justice” and “clinician-client confidentiality” overwhelmingly on the side of “natural justice” in requiring the Court to release a copy of the report to each of the following-

- (a) the 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 only circumstances in which the Court may refuse to make a full release to each of the above persons are set out in s.562(4). After having regard to the views of the parties and any statement from the Clinic under s.562(2), the Court may-

- (a) if satisfied that the release of the report or a particular part to the Secretary may cause significant psychological harm to the child-
  - release the report to the Secretary nonetheless;
  - refuse to release the report or part report to the Secretary; or
  - determine a later time for the release or part thereof to the Secretary;
- (b) if satisfied that the release of the report or a particular part to any other person will be prejudicial to the development or mental health of the child, the physical or mental health of the parent or the physical or mental health of that person or any other party-

- release the report to the person nonetheless;
- refuse to release the report or part report to the person; or
- determine a later time for the release or part thereof to the person.

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), read in conjunction with s.562(4).

### **12.5.3 Distribution of and access to Criminal Division reports**

If the Criminal Division of the Court orders a pre-sentence report from the Children's Court Clinic, s.574 of the CYFA requires the Clinic at least 4 working days before the return date no later than 21 days after the report was ordered to file the report with the proper venue of the Court.

Although the Court is now responsible for distributing Family Division Clinic reports, the Clinic remains primarily responsible for distributing its pre-sentence reports. Section 575(2) requires the clinician, within the period referred to in s.574, also to send a copy of a pre-sentence report to-

- (a) the child;
- (b) the legal practitioners representing the child; and
- (c) any other person whom the Court has ordered is to receive a copy.

However, it is clear from ss.575(2) & 575(3) of the CYFA that the clinician is not required to send copies of the report to (a) the child or (c) any other person whom the Court has ordered is to receive a copy if-

- the clinician is of the opinion that information contained in the report may be prejudicial to the physical or mental health of the child; or
- the child notifies the clinician that he or she objects to the forwarding of copies of the report.

If the clinician withholds the report from (a) the child or (c) other person, he or she must inform the appropriate registrar of that fact. The Court may endorse the clinician's action or may by order direct the appropriate registrar to forward a copy of the report, or a specified part thereof, as soon as possible to the person to whom access had been denied [s.575(4)].

Distribution of and access to any report ordered in the Criminal Division other than a pre-sentence report does not appear to be the subject of any legislative provisions.

### **12.5.4 Confidentiality of Children's Court Clinic 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) of the CYFA also applies to a copy of such report. Breach of this confidentiality provision is subject to a penalty of 10 penalty units [just over \$1000].

The above 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.

If because of s.575(2) part or all of a pre-sentence report was not sent to the child, s.575(5) prohibits a person who receives a copy - unless otherwise directed by the Court - from disclosing to the child any information contained in the report or part that was not sent to the child. Breach of this confidentiality provision is also subject to a penalty of 10 penalty units.

