# **1. ACTS, REGULATIONS, RULES**

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**“The rule of law is…a vital component in the proper functioning of any civilised society. Without it, civilisation cannot exist.”**

*Law Institute Victoria Ltd v Telfer* [2007] VSC 535 at [16] per Harper J.

**"Your excellency being appointed to the High and responsible position you now fill I beg most humbly as a legal colonist to draw your attention and that of your responsible Advisors (what you will surely have too much eye witness proof of) to the said condition of a very large number of houseless and homeless boys now commencing a life of nomadic and erratic wanderings without having any visible means of support, not only in and about Melbourne but in all the large towns of the colony; these boys, unless some intermediate steps be taken to stop their career and growth of idle habits will soon burst pupa shell and change into the thief, the bushranger or lawless wretch and become the worst curse of the colony and contaminars also of others than themselves and be drawn into the Vortex of Crime and Misery in Time and Forever and therefore by Your Excellencies permission I will bring before your Notice a partial Remedy which I am persuaded by God's blessing, would go far to alleviate the present sufferings of many and make them useful to their own Class and to the colony generally."**

Humble address of Thomas Bury of Melbourne to His Excellency the Governor of Victoria and His Responsible Advisors on a Reformatory for and Protection to those who have no Employment.

Melbourne, 12th October 1863.

**The Victorian Parliament duly passed the *Neglected & Criminal Children's Act 1864***

**“Laws were made to prevent the strong from always having their way.”**

Ovid.

**GENERAL NOTES ON THESE RESEARCH MATERIALS**

**ALL LEGISLATION AND SUBORDINATE LEGISLATION IN THESE RESEARCH MATERIALS IS VICTORIAN UNLESS STATED OTHERWISE**

**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”.**

**The legal basis for the change of a Department’s name was set out by the Court of Appeal in** ***RP and VS v Maryanne Foreman & Ors* [2021] VSCA 115 at [2] as follows.**

**“Section 10 of the *Public Administration Act 2004* empowers the Governor-in-Council to make orders establishing, abolishing, or changing the name of a Department.**

**Section 38AAA of the *Interpretation of Legislation Act 1984* provides that if reference is made in an Act or subordinate instrument to a particular Department and under the Public Administration Act the name of the Department is changed, ‘the reference is, from the date when the name is changed and so far as it relates to any period on or after that date, to be taken to be a reference to the Department by its new name’.**

**Section 3 of the *Administrative Arrangements Act 1983* empowers the Governor-in-Council to make orders containing provisions requiring a reference in any Act to a Department to be construed as a reference to a Department described in the order.**

**Relevantly, the Governor-in-Council has made a number of orders, the result of which is that when the current proceedings were in the Children’s Court and the Trial Division, the correct name of the Department was the Department of Health and Human Services. After orders were made in the Trial Division, however, the Department’s name changed to the Department of Families, Fairness and Housing. Nothing turns on these changes so far as this appeal is concerned, and no party sought leave to amend the name of the third respondent (the Department of Health and Human Services).”**

**In recent years the Department of Justice has also changed its name to the Department of Justice and Regulation and is now called the Department of Justice and Community Safety.**

**Nothing turns on any of these changes so far as the processes of the Children’s Court are concerned.**

**IN THESE RESEARCH MATERIALS A REFERENCE TO “THE SECRETARY” OR “THE SECRETARY DFFH” IS A REFERENCE TO THE HEAD OF THE DEPARTMENT OF FAMILIES, FAIRNESS AND HOUSING, THE CURRENT NAME OF THE CHILD PROTECTION AUTHORITY.**

**WHERE APPROPRIATE IN THESE RESEARCH MATERIALS, A REFERENCE TO “THE SECRETARY” INCLUDES A REFERENCE TO THE PRINCIPAL OFFICER OF AN ABORIGINAL AGENCY WHICH HAS BEEN AUTHORISED UNDER S.18 CYFA TO PERFORM SPECIFIC FUNCTIONS AND EXERCISE SPECIFIC POWERS DETAILED IN S.18(2) IN RESPECT OF A CHILD OR A CLASS OF CHLDREN.**

**IN THESE RESEARCH MATERIALS A REFERENCE TO THE “FAMILY COURT” OR THE “FAMILY COURT OF AUSTRALIA” IS A REFERENCE TO WHAT IS NOW KNOWN AS THE “FEDERAL CIRCUIT COURT AND FAMILY COURT OF AUSTRALIA”.**

**CROSS-REFERENCES TO SPECIFIC CHAPTERS, PARTS, SECTIONS AND SUBSECTIONS IN THESE RESEARCH MATERIALS ARE HIGHLIGHTED IN GREEN.**

## **1.1 Acts**

The legislation underpinning the Children's Court of Victoria, as it operates today, is the product of 150 years of social, philosophical, political and legislative debate, research and development and in particular of a number of years of research and debate in the 1980s and in the 2000s.

The *Neglected & Criminal Children’s Act 1864* [Act 27 Vict. No.216] was in operation from 1865 to 1888. It was replaced by the *Neglected Children’s Act 1887* and the *Juvenile Offenders’ Act 1887* and ultimately by the *Neglected Children’s Act 1890* [Act 54 Vict. No.1121].

However, it was not until 1906 that a special Children’s Court was established in Victoria. Before that Victorian children were dealt with in the same courts and with the same procedures as adults. Under the *Children’s Court Act 1906* [No.2058] – in operation from 1906 to 1915 – the Children’s Court was established as a closed court at every place where a Court of Petty Sessions – now known as the Magistrates’ Court – was held. The rationale for the creation of the 1906 Act was described in the Introduction to “A Short Manual for the Guidance of Children’s Court Magistrates and Probation Officers” as follows:

“The repression of crime and the extinction of the criminal is one of the problems that is, with constantly increasing persistence, confronting modern civilization.

The old idea that the criminal was to be treated as one of the necessary elements of society, and that it was the duty of society merely to defend itself against him, has been gradually dissipated, and it is now generally recognised that crime is largely due to the existing conditions of society, and is, to a great extent at any rate, bred and fostered by those conditions.

For some time past most civilized communities, actuated by this latter view, have adopted measures to ameliorate these conditions. It has been realized that what is sometimes called the ‘criminal instinct’ is not so much an instinct as a habit, that such a habit is merely the result of early associations, and that this unhappy problem will probably be solved by society exercising the keenest vigilance over the education and training of the young.

Society has begun to realize that it is its duty to regard every child born into it as being under its corporate care, that as far as possible it should watch its growth, surround it with associations and tendencies that will make for its welfare, correct it mildly, yet firmly, when it shows a disposition to wander, and when it errs treat it as a sentient being to be moulded and developed, and not merely as a beast to be punished and degraded. This change of sentiment has been world-wide in its operation, and it is difficult to find any community which has not given concrete shape to it by the establishment of institutions and methods for the treatment and training of erring or unfortunate children.

Victoria has begun to follow the example set by other countries in this direction. It has started, by the establishment of Children’s Courts and the system of probation in the year 1906, what promises to be a complete recognition of what may be called the new method of facing the criminal problem.

Prior to the establishment of Children’s Courts, children coming within the pale of the law were dealt with before the same tribunals and under the same procedure as adults. This meant that they were exposed to associations which were likely to have a mischievous effect on natures which are in a plastic state, and largely affected by the activity of the imitative process.

To throw children into the company of adult perverts, whether during the period of detention before trial or during the hearing of cases before the ordinary tribunals, was likely to prove a grievous injury to their susceptibilities. Further, judicial officers dealing with children in the ordinary tribunals are likely to lose sight of the fact that the treatment of youthful offenders requires special study and consideration, that what is fitting treatment for an adult is by no means always fitting treatment for a child, and that very often what merits the severest censure in the case of an adult is deserving only of sympathy and pity in the case of a child.

It is the result of considerations of this character that has led to the establishment in almost all countries of special tribunals to deal with children and persons of immature judgment.”

The jurisdiction of this new Children’s Court was an exclusive one, confined to children under the age of 17 years with responsibility conferred by ss.12(1) & 12(2) for-

* hearing and inquiring into all charges and informations against children for felony and misdemeanour, with power to discharge or commit for trial;
* hearing and determination of all informations for offences punishable on summary conviction; and
* hearing and determination of all charges and applications in relation to the committal of children authorised by the *Neglected Children’s Act 1890* or Part II, Division 2 of the *Crimes Act 1890*.

The ‘criminalisation’ of Victorian children who were merely in need of protection – as instanced in the language of the 3rd dot point above and throughout most of the 20th century Victorian Children’s Court Acts – continued through replacement Acts until 1992, surviving the following five changes of legislation:

* *Children’s Court Act 1915* [consolidating Act No.2627], in operation 1915-1929;
* *Children’s Court Act 1928* [No.3653], in operation 1929-1957;
* *Children’s Court Act 1956* [Act No.6053], in operation 1957-1959;
* *Children’s Court Act 1958* [consolidating Act No.6218], in operation 1959-1974;
* *Children’s Court Act 1973* [Act No.8477], in operation 1974-1992.

The Children’s Court also continued largely unaltered through these legislative changes with Courts of Petty Sessions throughout the metropolitan and country areas continuing to hear and determine children’s cases. However, the location of a separate Melbourne Children’s Court was changed several times as follows:

* From 1908-1941 it sat at the Gordon Institute in Bowen Street, Melbourne.
* From 1941-1960 it sat at Carlow House in Flinders Lane, Melbourne.
* From 1960-1990 it sat in a new building in Batman Avenue, Melbourne.
* From 1990-2000 it sat in a converted factory in Queensbridge Street, Southbank.
* Thereafter it has sat in a purpose-built Children’s Court at 477 Little Lonsdale Street, Melbourne.

In 1982 the Victorian government set up the Child Welfare Practice and Legislation Review, chaired by Dr Terry Carney of Monash University. In 1984 the Committee handed down its final report, entitled “Equity and Social Justice for Children, Families and Communities”, to which was annexed a draft Bill. The Carney report recommended a number of changes to the structure and jurisdiction of the Children's Court and significantly enhancing its powers.

One of the most significant issues addressed in the Carney Report was the failure of the previous system to distinguish between children in need of protection and young people who were offending against the criminal law. Not only did the Court buildings and the Court processes and outcomes not make any clear distinction between these two classes of children, the institutions in which they were placed were often the same. Babies, children and young persons before the Court were **charged** with being in need of protection and if this charge was found proved it would appear on a police criminal history sheet. This has subsequently been recognised as a legislative evil and has been made the subject of a statement of recognition and various remedies in Chapter 7A of the *Children, Youth and Families Act 2005* [inserted by Act No.42/2018].

### **1.1.1 *Children and Young Persons Act 1989* [Act No.56/1989]**

In 1989 the Victorian legislature passed the *Children and Young Persons Act 1989* [No.56/1989] [‘CYPA’]. The CYPA adopted many of the recommendations of the Carney Review. It brought together in the one piece of legislation all the legislative provisions governing children and young persons who are in need of protection or who have committed offences while at the same time drawing a sharp distinction between the two. In effect it consolidated and replaced the *Children's Court Act 1973*, the *Children's Court (Amendment) Act 1986*, the *Community Services Bill 1986* and most provisions of the *Community Services Act 1970*.

The objectives of the CYPA were described in the Second Reading Speech [08/12/1988, p.1150] as follows:

* to provide a comprehensive and high-quality child protection service which strengthens the capacity of the community to protect children and young people who have been maltreated or who are at risk of harm and which responds appropriately to the needs of the children and families with which the service is involved;
* to strengthen the role of the Children's Court of Victoria as a specialist court responsible for dealing with matters affecting children and young people;
* to maintain and strengthen the distinction between the Family Division and the Criminal Division of the Children's Court, so as to ensure that their procedures, standards of proof and dispositions reflect the fundamental difference in the nature of child protection and juvenile justice proceedings;
* to provide an adequate and constructive response to children and young people who have been charged with and found guilty of committing offences;
* to enhance the rights of children, young people and their families in their relationships with the court system, the child protection authority and other service providers, in accordance with justice principles; and
* to provide for an extended and more flexible range of dispositions in each of the divisions of the Court, which seek to enable children to remain at home wherever practicable and appropriate.

These objectives were consistent with the recommendations of the Child Welfare Practice and Legislation Review.

Most of the CYPA came into operation in 1991. It established a Family Division of the Children's Court, distinct and separate from the Criminal Division, with special procedures available for the hearing of protection cases. This recognised the force of the Carney Review's view: "Adjudication in offender matters is based on a philosophy focussing on the individual responsibility of the young offender whereas in protection matters responsibility for the acts or omissions by adults should not be attributed to the child." [See p.238 of the Carney report].

The CYPA also provided this new Family Division with a broader range of protection orders for children found to be in need of protection. The new hierarchy of orders was said in the Second Reading Speech (at p.1153) to be designed to ensure:

* that the dispositional powers of the Family Division range from minimum to maximum intervention in the life of the child, with principles to assist the court in choosing the least interventionist order appropriate; and
* flexibility in the range of orders available to the Family Division, including the capacity to add conditions to these orders so that the court can tailor the order to the needs of the particular child and family.

In 2004 the Victorian legislature passed the *Children and Young Persons (Koori Court) Act 2004* [No.89/2004]. This created a third Division of the Children’s Court, in effect a sub-division of the Criminal Division: see s.3(6) of the CYPA. The purposes of the 2004 Act are-

1. to establish a Koori Court (Criminal Division) of the Children’s Court; and
2. to provide for the jurisdiction and procedure of that Division-

with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Children’s Court through the role to be played in that process by the Aboriginal elder or respected person and others so as to assist in achieving more culturally appropriate sentences for young Aboriginal persons.

In order to fulfil the objective of maintaining and strengthening the distinction between the Family Division and the Criminal Division of the Children's Court, those two Divisions share no common orders and the procedures in the two Divisions are quite different. In contrast with the legislation in operation prior to 1991, the 'guardianship to Secretary order', formerly known as wardship, is no longer available as a sentencing option in the Criminal Division. Sections 8(3)-8(5) of the CYPA enshrine the philosophy:

"(3) The Court has the following Divisions-

(a) the Family Division;

(b) the Criminal Division;

(c) the Koori Court (Criminal Division).

(4) Every proceeding in the Court must be commenced, heard and determined in one of those Divisions.

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

See now ss.504(3), 504(4) & 504(5) of the CYFA.

The Second Reading Speech highlighted [08/12/1988, p.1150] the philosophy of ensuring "that protective issues are dealt with in the Family Division and do not obscure issues of criminal responsibility, which are the proper concern of the Criminal Division". This philosophy is given effect by s.18(2) of the CYPA which provides: "If at any time there are proceedings in both Divisions of the Court relating to the same child, the Court must, unless it otherwise orders, hear and determine the proceedings in the Family Division first." However, it must be said that the Court frequently has no option other than "otherwise to order", especially where there is an issue in the criminal case as to whether the child should be detained in custody. So, for example, the question of a child's placement under a Family Division order is of its nature subservient to the question of whether or not the child is to be granted bail or remanded in custody. It must also be said - and to say this is not to criticise any agency but merely to reflect reality, to reflect what is a central cause of child offending - that a disproportionate proportion of young offenders are or have been found to be in need of protection.

Thus, by and large the Family & Criminal Divisions are water-tight. The only area of overlap was to be found in the “referral” provisions of ss.132-133 of the CYPA, enabling the Court to refer a defendant in the Criminal Division to the Secretary to investigate whether grounds exist for the making of a protection application in respect of the child [see now ss.349-351 of the CYFA].

In line with the recommendations of the Carney Review, the CYPA increased the minimum age of criminal responsibility from 8 to 10 years. It also expanded the non-custodial sentencing options available to the Court to strengthen the rehabilitative focus in sentencing young offenders.

The CYPA enshrined principles of natural justice by requiring that a child or young person found guilty of an offence be treated strictly in accordance with those principles. How it achieves this was summarised in the Second Reading Speech (at p.1154) as follows:

* revising the procedures and criteria for bail to ensure that young people are not denied bail on the grounds of lack of accommodation;
* stipulating requirements relating to the content of pre-sentence reports, the right of access to such reports by young people and their legal representatives and a right to challenge information in such reports;
* setting out the matters to be taken into account by the court when it decides which sentencing order to impose; and
* setting out clearly the procedures and penalties for breaches of sentencing orders.

The CYPA also sought to ensure that the procedures operating in the Children's Court are consistent with those in the Magistrates' Court wherever practicable and unless specific provisions to the contrary are contained in the CYPA. (see p.1151).

The CYPA was replaced by the *Children, Youth and Families Act 2005* in April & October 2007.

### **1.1.2 *Children, Youth and Families Act 2005* [Act No.96/2005]**

The *Children, Youth and Families Act 2005* [‘CYFA’] received the Royal Assent on 07/12/2005. The CYFA updates and combines the CYPA and part of the *Community Services Act 1970* [‘CSA’] to create an integrated child protection and child and family support system. Much – but not all – of the contents of the CYFA had been foreshadowed in an Exposure Draft released by the Victorian Minister for Children on 03/08/2005 under the title *The Children Bill*. Amendments to the original CYFA were made by the *Children, Youth and Families (Consequential and Other Amendments) Act 2006* [assented 15/08/2006] and the *Terrorism (Community Protection) (Amendment) Act 2006* [assented 07/03/2006].

The CYFA exists, in conjunction with the *Children’s Services Act 1996* and the *Adoption Act 1984*, within the over-arching framework provided by the *Child Wellbeing and Safety Act 2005*, which sets objects and principles relevant to the broad range of services delivered to children; young people and families in Victoria and which guides the operations of the Child Safety Commissioner, the Children’s Services Coordination Board and the Victorian Children’s Council.

The CYFA replaced most of the CYPA on 23/04/2007. A few sections [involving Dispute Resolution Conferences (now called Conciliation Conferences), Therapeutic Treatment & Therapeutic Treatment (Placement) Orders and s.18] did not come into operation until 01/10/2007.

In *AA v DHHS & Ors* [2020] VSC 400 at [68]-[69], Incerti J said of the CYFA:

“The Act is the bedrock legislation regulating the law in relation to children, youth and families in this State. It is one of the most important pieces of legislation in this State. At the heart of the legislation are a set of values propounded by Bell J in *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221, 227 at [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 and 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.’

The importance of the Act and how it relates to the daily lives of children and families across the State cannot be underestimated. The Secretary wields significant power and holds tremendous responsibility in relation to these children and families.”

The purposes of the CYFA are set out in s.1 and are-

(a) to provide for community services to support children and families; and

(b) to provide for the protection of children; and

(c) to make provision in relation to children who have been charged with, or who have been found guilty of, offences; and

(d) to continue the Children’s Court of Victoria as a specialist court dealing with matters relating to children.

Purpose (a) involves the incorporation into the CYFA of some of the CSA in a somewhat varied form.

The CYFA retains the largely water-tight compartmentation of the Family & Criminal Divisions established by the CYPA. The only areas of overlap are to be found in the “referral” provisions of ss.349-351 of the CYFA. Section 349(1) provides that if-

(a) a child appears as a defendant 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 a protection application in respect of the child-

the Court may refer the protective matter to the Department of Families, Fairness and Housing for investigation.

Section 349(2) provides that if-

(a) a child appears as a defendant 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 therapeutic treatment order in respect of the child-

the Court may refer the matter to the Department of Families, Fairness and Housing for investigation.

The powers and functions of the Koori Court (Criminal Division) of the Children’s Court in ss.517-520 of the CYFA are unchanged from those in ss.16A, 16B, 16C & 16D of the CYPA.

The CYFA made no substantial alteration to the operation of the Criminal Division of the Children’s Court other than the important addition of a power to order a Group Conference as an adjunct to the sentencing powers of the Court and a power to breach sentencing orders and to enforce fines imposed by the Children’s Court against a person who is no longer a child.

Nor did the CYFA substantially alter the existing powers of the Family Division of the Court. However, it does invest a number of new powers in the Family Division, including powers to hear and determine applications for the following new orders together with associated applications-

* temporary assessment order [ss.228-239];
* therapeutic treatment order [ss.244-251 & 255-258];
* therapeutic treatment (placement) order [ss.252-258];
* extension of supervision order (now called family preservation order) [ss.293-298];
* long-term guardianship to Secretary order (now called long-term care order) [s.290].

The CYFA assembles in ss.8-14 a number of principles to which decision makers must have regard in making any decision or taking any action under the CYFA. In particular, all judicial and administrative decisions and actions under the CYFA – other than those in relation to Chapter 5 [Children and the Criminal Law] – must be consistent with the “best interests principles”:

1. “the best interests of the child must always be paramount”; and
2. when determining whether a decision or action is in the best interests of a child, “the need to protect the child from harm, to protect his or her rights and to promote his or her development [cf. ‘welfare’ in s.87(1)(aa) and ss.119(1)(b) & 119(1)(c) of the CYPA] (taking into account his or her age and stage of development) must always be considered”; and
3. consideration must also be given, where they are relevant to the decision or action, to each of the 18 other matters listed in s.10(3), many of which are in identical or similar terms to those in s.87(1) of the CYPA.

In addition, principles which must be complied with when dealing with Aboriginal children include, in ss.13-14, the nationally agreed Aboriginal Child Placement Principle.

In an information sheet about *The Children Bill* which had been posted on the DHS website [www.dhs.vic.gov.au/protectingchildren](http://www.dhs.vic.gov.au/protectingchildren) it was said:

“Wherever possible, cases will be managed in the community, rather than through protection applications and court orders. This will require the development of collaborative case planning, case management, and consultation capacities.

Child Protection will continue to have responsibility for the investigation of notifications, for making applications to the Children’s Court, and for planning for the safety and well-being of children and young people subject to Children’s Court orders.

The voluntary placement provisions in the Act will continue.”

In her Second Reading Speech the Minister, noting that “the protection of children cannot be separated from policies and programs to improve children’s lives as a whole”, reiterated that “the Children’s Court will remain central to the statutory system of child protection”. The Minister went on to explain the intended operation of the dual gateway provisions of the new legislation and to clarify the relationship between community-based intake, assessment and referral services and child protection intake services:

“Rather than over-relying on child protection to provide a gateway into services for children and their families…[p]rofessionals and any member of the public will be able to go to [community-based intake, assessment and referral services] for help if they have concerns that a family is under stress and would benefit from support. This is before problems escalate to the point that the children are placed at risk of significant harm...Child protection will continue to be targeted at children and young people who are in need of protection, based on concerns they may be at risk of significant harm.”

The writer believes that one of the greatest impacts on the Court of the new legislation is philosophical, flowing from the changed permanent care pre-condition in s.319 of the CYFA: “Child’s parent has not had care of the child for a period of at least 6 months or for periods that total at least 6 months of the last 12 months” (not counting periods on voluntary child care agreements). This is a significant reduction on the pre-condition formerly in s.112 of the CYPA which requires out of home care for at least 2 years or periods that total at least 2 of the last 3 years.

It is clear from the Second Reading Speech that the Minister saw stability for children and associated time frames as the central legislative changes:

“An absolutely critical theme of the Act is to improve vulnerable children and young people’s stability of care. 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. They will provide children and young people with the stable relationships that they need to grow up healthier, happier and better able to fulfil their potential.”

This factor was ultimately the catalyst for further amendments to the CYFA as from March 2016 which are discussed below.

### **1.1.3 Amendments to *Children, Youth and Families Act 2005* from March 2016**

On 09/09/2014 the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* [No.61 of 2014] received the Royal Assent. This Act came into operation on 01/03/2016 and made very substantial amendments to the CYFA. The main purposes of the amending Act were said to be-

1. to make further provision for the protection and permanent care of children; and
2. to abolish the Youth Residential Board and transfer its functions to the Youth Parole Board; and
3. to provide for group conferences where the Children’s Court is considering making certain youth justice orders; and
4. to further improve the operation of the CYFA.

On 15/03/2016 the *Children Legislation Amendment Act 2016* [No.8 of 2016] received the Royal Assent. It came into operation on the following day. It was designed to correct errors and fill gaps in the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*.

In addition to transitional provisions, the amendments to the CYFA caused by these two Acts included-

**FAMILY DIVISION**

* replacing the concepts of “custody” and “guardianship” with the concept of “parental responsibility” defined as “all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children”; however, the CYFA does retain the concept of “major long-term issues” for a child [guardianship by another name] which include issues about the child’s education, religious and cultural upbringing, health and name;
* changing the definition of parent to include “any person who has parental responsibility for the child, other than the Secretary”;
* adding two circumstances in which the Court must not make an interim accommodation order;
* adding placement with a disability service provider as a placement option for an IAO;
* amending the restrictions on making a protection order;
* requiring the Court to have regard to [but not necessarily to accept] advice from the Secretary about certain matters in determining whether to make a protection order;
* renaming certain protection orders: supervision order -> “family preservation order”, custody to Secretary order -> “family reunification order”, guardianship to Secretary order -> “care by Secretary order” and long-term guardianship to Secretary order -> “long-term care order”;
* abolishing interim protection orders, custody to third party orders and supervised custody orders;
* changing the pre-requisites for conditions on family preservation and family reunification orders;
* imposing significant restrictions on both the length of a family reunification order and the extension of such order;
* changing the length of a care by Secretary order from a maximum of 2 years to a non-variable 2 years (unless child turns 18 in meantime) but providing a changed review procedure after 12m;
* allowing a family reunification order or a care by Secretary order to be converted into a family preservation order by administrative direction [in the same way as a supervised custody order can currently be converted into a supervision order];
* allowing the Secretary to apply *ex parte* for a variation of the conditions of a family reunification order in certain circumstances;
* making provision for applications for care by Secretary orders and long-term care orders;
* making substantial amendments to the provisions governing permanent care orders, in particular placing significant limits on conditions involving contact between the child and the child’s parent;
* requiring leave of the Court as a pre-requisite to a parent applying to vary or revoke a PCO;
* repealing provisions involving a “stability plan” and including a requirement of one of five types of “permanency objectives” in a case plan;

**CRIMINAL DIVISION**

* expanding the power of the Court to order a group conference [previously restricted to cases where the Court was considering imposing probation or a YSO] and allowing the Court to make a YAO or YRC or YJC order notwithstanding that the child has participated in a group conference;
* restricting deferral of sentence to 2 months maximum if the child has been remanded in custody;
* abolishing the Youth Residential Board and transferring its functions to the Youth Parole Board;
* empowering the Court to discharge a child who has voluntarily participated in a therapeutic treatment program but is not subject to a therapeutic treatment order;
* requiring the Court to have regard to 4 specific matters in deciding whether to discharge a child who has participated – voluntarily or pursuant to a TTO – in a therapeutic treatment program.

A more detailed version of the above is contained in **Chapter 5** of these Research Materials.

Part 11 of the 2014 amending Act inserted new ss.175A & 175B. Section 175A allows the Secretary to specify certain issues relating to a child in out of home care about which a person who has care of the child may be authorized to make decisions. The specification may relate either to a particular child, a child subject to a particular type of order or a person who provides a certain category of care. If the child is subject to an interim accommodation order, a family reunification order or a therapeutic treatment (placement) order, the specification must not relate to “a major long-term issue”. Examples given of issues to which s.175A(1) applies (presumably these are regarded as minor long-term issues or short-term issues) are the signing of school consent forms, obtaining routine medical care for a child or the day to day treatment of a child who suffers from a chronic or serious health condition. Section 175B empowers the carer of a child placed in out of home care under an IAO or a protection order that confers parental responsibility for the child on the Secretary to make a decision in relation to the child on an issue specified under s.175A without consulting the Secretary, if authorized by the Secretary or the person in charge of an out of home care service to make decisions on the issue. Part 11 came into operation on 10/09/2014.

## **1.1.4 COVID-19 amendments to relevant legislation [2020/21] and their aftermath**

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. As a consequence of this pandemic the Victorian Parliament enacted the *COVID-19 Omnibus (Emergency Measures) Act 2020* which came into operation on 25/04/2020. This Act temporarily amended certain Acts, and temporarily empowered the making of regulations, to modify certain aspects of the law of Victoria to respond to the COVID-19 pandemic. The amendments which were relevant to the Children’s Court were originally to be repealed on 24/10/2020.

The *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* came into operation on 21/10/2020. This Act extended the repeal date of the original COVID-19 Act until 26/04/2021. It also introduced some relevant new amendments including s.600OA CYFA which adds up to 6 months to the period of a family reunification order [‘FRO’] or extension in some circumstances.

Experience gained in court operations and community public health during the COVID-19 pandemic led the Department of Justice & Community Safety, in consultation with all of the courts and tribunals, to seek to extend temporarily or make permanent – either in an unchanged or amended form – some of the temporary amendments which had been effected by the temporary COVID-19 legislation. This has been achieved by enactment of the huge 168-page *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (No.11/2021) [‘JLASA’] which was assented to on 23 March 2021 and largely commenced operation on 26/04/2021. It makes amendments to 27 Acts and further consequential amendments to 6 Acts. So far as the Children’s Court [‘ChCV’] is concerned, JLASA’s main purposes are:

1. to extend until 26/04/2022 four sets of temporary provisions introduced into the CYFA by the COVID‑19 legislation;
2. to extend until 26/04/2023 the temporary modifications in the CYFA to the period of a FRO;
3. to make permanent – mostly in an amended form – a large number of temporary COVID-19 provisions in the CYFA and other Acts and Regulations.

Any provisions of the COVID-19 legislation which were not expressly extended or made permanent by the JLASA ceased to be in operation (apart from some minor transitional exceptions) on 26/04/2021.

For the ChCV the most significant of the JLASA provisions are as follows:

* Conciliation conferences in ChCV Family Division may be conducted in person or by audio visual link AVL or audio link AL.
* Bail justice IAO hearings remained suspended until 26/04/2022.
* Extended duration provisions for making/extending a FRO remain applicable until 26/04/2023.
* The ChCV may sit at any time and place. The ChCV may order that a hearing be held at an appropriate place that is not the ‘proper venue’ if it is appropriate and in the interests of justice.
* Powers of registrars in the ChCV and the Magistrates’ Court [MCV] are expanded.
* Five additional methods of service of documents are included in the CYFA:
* on the person by (d) confirmed electronic service; or
* on the person’s legal representative by (e) registered post, (f) leaving at business premises, (g) personal service or (h) confirmed electronic service.
* A witness is not required to attend court on the date and time specified in a witness summons if a criminal proceeding is adjourned prior to the date and time specified in the summons.
* A number of provisions of the *Evidence (Miscellaneous Provisions) Act 1958* are amended to allow the use of AVL and several are amended in relation to the use of AL. These include:
* **A child who is not an accused** may not be directed to appear, give evidence or make a submission by AL unless exceptional circumstances exist [s.42F(7)].
* **A child accused** must appear physically unless the ChCV directs appearance by AVL which it may do if exceptional circumstances exist or an appearance by AVL is necessary for ChCV’s case management, is consistent with the interests of justice and is reasonably practicable [ss.42O, 42P].
* A hearing by audio visual link or audio link is not invalid merely because of a failure to comply with the complex technical requirements included in the EMPA [s.42Y].
* The *Bail Act 1977* is amended to allow certain documents to be signed electronically.
* The *Criminal Procedure Act 2009* is amended to allow a court to determine any issue (other than whether an accused is guilty or not guilty) in any criminal proceeding without an oral hearing and entirely by written submissions and without the appearance of parties if in the interests of justice.
* The *Magistrates’ Court Act 1989* is amended to allow the MCV [and ChCV by operation of s.528 CYFA] to determine any issue in any non-criminal proceeding without an oral hearing and entirely by written submissions and without the appearance of parties if it is in the interests of justice.
* Amendments are made to the *Electronic Transactions (Victoria) Act 2000* primarily in relation to witnessing by AVL and the use of electronic signatures.
* Amendments are made to the *Oaths and Affirmations Act 2018* primarily to allow affidavits and statutory declarations to be validly made by AVL subject to various provisos.
* The *Open Courts Act 2010* is amended to provide-
* permanently that handing down and delivering judgments by electronic communication; and
* temporarily until 26/10/2022 that a failure to hold a hearing in a court room open to the public-

do not contravene rules of law relating to open justice provided that certain stipulations are met.

A detailed summary of those provisions of the JLASA which have some relevance to the ChCV as well as several of its provisions which have relevance to other courts can be downloaded from this website.

## **1.1.5 CYFA amendments in the Aboriginal Self-determination etc Act 2023**

Assented to on 27/06/2023, the *Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-determination and Other Matters) Act 2023* makes amendments to multiple Acts. Commencement dates for various sections of this Act are set out in s.2. Insofar as it amends the *Children, Youth and Families Act 2005* [CYFA], its provisions whose headings are shaded **green** came into operation on 28/06/2023. Those shaded **yellow** are to come into operation on 01/07/2024.

Insofar as it amends the CYFA, s.1(a) of the amending Act notes that its main purpose is–

1. to include an Aboriginal Statement of Recognition and recognition principles relating to child protection decision-making for Aboriginal children;
2. to incorporate further Aboriginal child placement principles;
3. to make amendments relating to authorisation of principal officers of an Aboriginal agency [to perform specified functions and exercise specified powers in respect of an Aboriginal child and any non-Aboriginal sibling];
4. to provide for use and disclosure of information to and by principal officers authorised under ss.18 or 19 of the CYFA; and
5. to enable judicial registrars to exercise powers of magistrates to issue warrants for the purposes of having a child placed in emergency care and to enable judicial registrars to exercise powers of registrars.

In the Second Reading Speech on 22/02/2023 Minister Spence said:

“One of the main purposes of the [Act] is to advance the self-determination of Aboriginal people in relation to the protection of children, the provision of community services and in the health system.”

The amendments which are directly or indirectly relevant to the Children’s Court are summarised below.

|  |  |  |  |
| --- | --- | --- | --- |
| **CYFA** | | **AMENDMENT** | |
| **Part 1.1A** | **s.7AA** | | **Statement of acknowledgement** |
| **New s.7AA** provides:  s.7AA(1) The Parliament acknowledges that removing an Aboriginal child from the care of a parent may–   1. disrupt the child’s connection to their culture; and 2. cause harm to the child, including serious harm.   s.7AA(2) The Parliament does not intend by this section to affect in any way the interpretation of this Act or of any other laws in force in Victoria. | | | |
| **Part 1.1A** | **s.7A** | | **Statement of Recognition** |
| **New s.7A** details the Statement of Recognition which includes:  s.7A(6) The Parliament supports rights and initiatives that–   1. address the factors that drive the over-representation of Aboriginal children in the child protection system; and 2. will require Aboriginal children, families and communities to be treated fairly and equally.   s.7A(7) It is the intention of Parliament that the child protection system must recognise, respect and support the distinct cultural rights of Aboriginal people and their right to self-determination. | | | |
| **Part 1.1A** | **s.7B** | | **Acknowledgement of Victoria’s Treaty process** |
| **New s.7B(1)** provides that the Parliament acknowledges Victoria’s Treaty process and the aspiration of Aboriginal people to achieve increased autonomy, Aboriginal decision-making and control of planning, funding and administration of services for Aboriginal children and their families, including through self-determined Aboriginal representative bodies established through Treaty. | | | |
| **Part 1.1A** | **ss.7C, 7D** | | **Effect of Part 1.1A** |
| **New ss.7C & 7D** provide that Part 1.1A is not intended to create in any person any legal right or give rise to any civil cause of action or to alter or affect an existing entitlement to compensation or create an entitlement to compensation arising from any matter referred to in s.7A. | | | |
| **Part 1.1B** | **ss.7E, 7F, 7G, 7H** | | **Recognition principles, their role and their application by the Children’s Court** |
| **New s.7E** details ten recognition principles which include:   1. The right of Aboriginal children, families and communities in Victoria to self-determination must be recognised, respected and supported. 2. When considering the views of Aboriginal children, decision-makers must uphold their cultural rights and sustain their connections to family, community, culture and Country. 3. Understanding of, and respect and support for, Aboriginal culture, cultural diversity, customary lore, knowledge, perspectives and expertise is to be demonstrated in decision-making. 4. Strong connections with culture, family, Elders, communities and Country are to be recognised as the foundations needed for Aboriginal children to develop and thrive and to be protected from harm. 5. Historic and ongoing biases and structural and everyday racisms create barriers to the best interests of the Aboriginal child and are to be recognised and overcome. | | | |
| **New s.7F** requires the Children’s Court to have regard to and apply the above principles set out in ss.7E(1) to (5) (where relevant) in making any decision or taking any action in relation to an Aboriginal child. **New s.7G** imposes similar obligations on the Secretary DFFH and on a community service in relation to all 10 principles in s.7E. | | | |
| **New s.7H(1)** provides that the recognition principles are intended–   1. to give guidance in the administration of the CYFA; and 2. to ensure that the distinct cultural rights of Aboriginal children and Aboriginal families and the right of Aboriginal people to self-determination are recognised, respected and supported.   **New ss 7H(2)-(3)** provide that the recognition principles apply subject to the best interests provisions in s.10 CYFA and in addition to – and without limiting – the principles in ss.11-14 CYFA.  **New s.7H(4)** provides that nothing in Part 1.1B applies in relation to any decision or action under Chapter 5 (Children and the criminal law) or under Chapter 7 (The Children’s Court of Victoria) in relation to any matter under Chapter 5. | | | |
| **Part 1.2** | **s.13(4)** | | **Aboriginal Child Placement Principle** |
| **New s.13(4)** provides that for the avoidance of doubt, the Court or a bail justice (as the case may be) must have regard to the Aboriginal Child Placement Principle in making any decision or taking any action in respect of a child in need of protection under Chapter 4. | | | |
| **Part 1.2** | **s.14** | | **Further principles for placement of Aboriginal child** |
| **Amended s.14** contains 4 new principles, additional to the 4 principles already enacted in s.14, for the placement of an Aboriginal child:  *Prevention principle*  (1A) An Aboriginal child has a right to be brought up within the child’s family and community.  *Partnership principle*  (1B) The Aboriginal community to which the child belongs and other respected Aboriginal persons have a right to participate in the making of a significant decision in relation to an Aboriginal child under the CYFA.  (1C) Representatives of the Aboriginal community have a right to participate in the design and implementation of child protection and community services relating to Aboriginal children and their families under the CYFA.  *Participation principle*  (1D) The parents and members of the extended family of an Aboriginal child have a right to participate, and to be enabled to participate in an administrative or judicial decision-making process under the CYFA that relates to that child.  *Connection principle*  (1E) An Aboriginal child has a right to develop and maintain a connection with the child’s family, community, culture, Country and language.  In relation to ss.14(1B) & 14(1D) the Explanatory Memorandum states at page 9: “[N]ew section 14(1B) and (1D) is intended to support and guide decision making.” This was reinforced by Minister Spence in the Second Reading Speech in the Legislative Assembly on 22/02/2023 [see Hansard at page 482] [emphasis added]:  *“Embedding all five elements of the Aboriginal Child Placement Principle*  Currently, s.13 of the CYFA describes matters to be considered when placing an Aboriginal child in care. This has the effect of placement being incorrectly considered as the sole, or most important, principle.  This Bill amends the Act to expressly include all five elements underpinning the intent of the Aboriginal Child Placement Principle, namely: prevention; participation; partnership; placement; and connection. This addition gives prominence to the Principle and clarifies that it is to be applied to all decision-making regarding Aboriginal children, not just in relation to a placement decision.  **The five elements of these non-binding principles are intended to support decision makers to adopt an Aboriginal lens regarding the placement of an Aboriginal child in care. In this way, the principles are guiding in nature and do not purport to interfere with existing decision-making powers.**  **Importantly, the best interests of the child remain paramount as set out in the CYFA. The Aboriginal Child Placement Principle is therefore expressed to be subject to section 10 of the CYFA*.****”*  See also Minister Blandthorn’s Second Reading Speech in the Legislative Council on 09/03/2023 [Hansard at page 798]. | | | |
| **Chapter 2** | **s.17(3), 18** | | **Secretary may authorise principal officer of Aboriginal agency to act** |
| **New s.17(3)** expands the power of the Secretary DFFH to delegate the power to make an authorisation under s.18 by providing: “The Secretary may, by instrument, delegate to an executive within the meaning of the *Public Administration Act 2004* the power to make an authorisation under s.18.” | | | |
| **Previous s.18 is substituted by a new s.18** which reflects the self-determination provision of the Treaty process in new s.7B(1). The purpose of new **s.18** is described in the Explanatory Memorandum at p.9 as follows:  “New s.18 provides for seamless authorisation of the functions and powers of the Secretary from protective intervention through to protection orders and other relevant orders to provide for consistency of culturally appropriate service delivery to Aboriginal children and their families. This will also be an expansion of the Secretary's existing authorisation power as it enables an Aboriginal agency to be authorised to manage a child who is subject to relevant orders, in addition to protection orders. Further it enables an authorisation to be made with respect to classes of Aboriginal children and their siblings, in addition to a specific Aboriginal child and their sibling.” | | | |
| **New s.18(1)** empowers the Secretary DFFH to authorise the principal officer of an Aboriginal agency – who must be an Aboriginal person [see **s.18(5)**] – to perform specified functions and exercise specified powers referred to in **s.18(2)** in respect of any of the following–   1. an Aboriginal child; 2. any non-Aboriginal sibling of an Aboriginal child for whom an authorisation has been made; 3. a child or class of children whom the Secretary believes to be Aboriginal; 4. any non-Aboriginal sibling of an Aboriginal child or class of children for whom an authorisation has been made. | | | |
| **New s.18(2)** provides that the functions and powers that may be specified in an authorisation are those conferred by or under the CYFA on the Secretary DFFH–   1. as a protective intervener; and 2. to receive reports under s.185 and to investigate those reports; and 3. in relation to a protection order or a “relevant order”, the latter defined in what ultimately became new **s.18(8)** as a temporary assessment order, an interim accommodation order, a therapeutic treatment order, a therapeutic treatment (placement) order and a permanent care order. | | | |
| **New s.18(3)** provides that such authorisation may only be made with the agreement of the Aboriginal agency and the principal officer. **New s.18(4)** requires the Secretary DFFH, before giving an authorisation, to provide the Aboriginal agency and the principal officer with all the information that is known to the Secretary and that is reasonably necessary to assist the agency and the principal officer to make an informed decision as to whether or not to agree to the authorisation. | | | |
| **New s.18(6)** provides that before giving an authorisation under ss.18(1)(a) or 18(1)(c), the Secretary DFFH must have regard to any view expressed by the child and the parent of the child if those views can be reasonably obtained. | | | |
| **New s.18(7)** provides that on an authorisation being given, the CYFA applies in relation to the performance of the specified functions or the exercise of the specified powers referred to in the authorisation for the specified child(ren) as if the authorised principal officer were the Secretary. | | | |
| **Part 4.4** | **s.181(c)** | | **Who is a protective intervener?** |
| **Existing ss.181(a) & (b)** provide that for the purposes of the CYFA the following persons are protective interveners:   1. the Secretary DFFH; and 2. all police officers.   **New s.181(c)** complements new s.18 by adding to s.181:   1. the principal officer of an Aboriginal agency authorised under s.18 to perform functions and exercise powers of a protective intervener, to the extent that the principal officer performs those functions and exercises those powers in relation to a child who is the subject of the authorisation. | | | |
| **Chapter 2** | **s.18AAA** | | **Revocation of authorisation under s.18(1)** |
| **New s.18AAA** empowers the Secretary DFFH to revoke an authorisation under s.18(1) in writing at any time and requires the principal officer upon such revocation to provide the Secretary DFFH with all records created by or on behalf of or provided to the Aboriginal agency in respect of the child or children as a result of the authorisation. New **s.18AAA(4)** provides that despite the revocation of an authorisation in respect of an Aboriginal child or a child or class of children who the Secretary believes to be Aboriginal, an authorisation under ss.18(1)(c) or 18(1)(d) of a non-Aboriginal sibling of the Aboriginal child(ren) continues to have effect until revoked. | | | |
| **Chapter 2** | **s.18AAB** | | **If agency considers authorisation is no longer in best interests** |
| **New s.18AAB** requires the principal officer of an Aboriginal agency to notify the Secretary DFFH in writing as soon as practicable if he or she considers that an authorisation under s.18 is no longer in the best interests of a particular child or children who are the subject of the authorisation. On receiving a notification, the Secretary DFFH may revoke the authorisation in accordance with s.18AAA. However, nothing in this section affects the Secretary’s power under s.18AAA to otherwise revoke an authorisation. | | | |
| **Chapter 2**  **Part 4.5** | **ss.19A**  **192(4)** | | **Information use and disclosure for the purposes of authorised functions and powers** |
| **New ss.19A(1) & (2)** provide for information disclosure by the Secretary DFFH to the principal officer of an Aboriginal agency and vice versa.  **New s.19A(3)** empowers the principal officer to disclose any information obtained by the principal officer in the course of performing functions or exercising powers under the authorisation, if the principal officer reasonably believes that the information is necessary for performance of those functions or exercise of those powers.  **New s.19A(4)** empowers the Secretary DFFH to require the principal officer to give information to the Secretary if it is necessary to update records held by the Secretary.  **Existing s.192** specifies the circumstances when the Secretary DFFH or a protective intervener may request and disclose information. **New s.192(4)** provides that-   * a reference to the Secretary includes a reference to a principal officer performing functions or exercising powers of the Secretary under a section 18 or 19 authorisation; and * a reference to a protective intervener includes a reference to a principal officer performing functions or exercising powers of a protective intervener under an authorisation made under section 18. | | | |
| **Part 4.7** | **s.215B(1)** | | **Management of child protection proceedings** |
| **Section 215B(1)** deals with the powers of the Court to manage Family Division proceedings. It expressly provided that it does not limit the best interests and other decision-making principles in Part 1.2 of the CYFA and is now amended to add that it also does not limit the recognition principles in new Part 1.1B [ss.7E to 7H]. | | | |
| **Part 7.4** | **s.529(1)** | | **Recall and cancellation of warrants by judicial registrars** |
| **Amended s.529(1)(a) and new s.529(1)(ab)** give a judicial registrar power to recall and cancel warrants issued by judicial registrars. | | | |
| **Part 7.6A** | **s.542J(4)** | | **Performance of duties by judicial registrar** |
| **New s.542J(4)** provides: “A judicial registrar has any of the powers, duties and functions of a registrar under this Act and any other Act or the rules of Court.” | | | |
| **Part 7.11** | **s.588**  **(1AB)(ba)** | | **Power to make rules of court to enable judicial registrars to issue emergency care search warrants** |
| **New s.588(1AB)(ba)** empowers the President together with 2 or more magistrates to jointly make rules of court providing for a judicial registrar to exercise any power of a magistrate under the CYFA with respect to the issue of a search warrant for the purpose of having a child placed in emergency care.  There are 13 types of emergency care warrants referred to in the CYFA. Eight of these [under ss.237(2), 243(3), 247(1), 261(1), 268(5)(b), 269(3)(b), 270(5)(b) & 313(b)] can be issued by “the Court”, defined in s.504(2) as including the judicial registrars. Applications for the remaining five [under ss.241(1), 269(4)(b), 270(6)(b), 314(2) & 598(1)] are expressed as being made to a magistrate.  New s.588(1AB)(ba) enables the making of rules of court to empower judicial registrars to issue all types of emergency care search warrants. Pursuant to this section, the *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* [S.R. No.22/2021] were amended as and from 10/07/2023 by S.R. No.70/2023 to enable Children’s Court judicial registrars to issue all 13 types of emergency care warrants. For further details see sections 1.3 & 5.27. | | | |
| **Part 8.6** | **ss.633-4** | | **Transitional provisions & transitional regulation-making powers** |
| **New s.633** applies the new s.18 to previous s.18 authorisations of principal officers of Aboriginal agencies and continues the authorisation until–   * it is revoked by the Secretary under s.18AAA; or * the protection order in respect of the child to whom the authorisation relates ceases to be in force–   whichever is the earlier.  **New s.634** empowers the making of transitional regulations arising as a result of this amending Act. | | | |

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## **1.1.6 Relevant amendments made by the Justice Legislation Amendment Act 2023**

Assented to on 10/10/2023, the *Justice Legislation Amendment Act 2023* [JLA] makes amendments to multiple Justice portfolio Acts. The substantive amendments which are relevant to the Children’s Court – as described in s.1 JLA – are summarised in the following table. In the last column the relevant sections of the Research Materials are referenced.

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| --- | --- | --- |
| **JLA**  **2023** | **SUMMARY OF AMENDMENT** | **RESEARCH MATERIALS** |
| **s.1(a)(i)**  **Part 2** | To amend **s.8B *Open Courts Act 2013*** to make permanent certain temporary measures by clarifying that rules of law relating to open justice are not contravened if, in the interests of justice, public access to a proceeding is provided in specified ways other than a physically open court or tribunal. | **2.7.1** |
| Amended **s.8B OCA** provides in part:  A court or tribunal does not contravene any rule of law relating to open justice if, instead of holding a proceeding or hearing in a court room or hearing room that is physically open to the public, the court or tribunal does whichever of the following things the court or tribunal is satisfied it is in the interests of justice to do—   * arranging or providing a contemporaneous audio or audio visual broadcast of the proceeding or hearing; or * arranging or providing an audio or audio visual recording of the proceeding within a reasonable time after the conclusion of the proceeding or hearing—   to the public generally or to a member of the public on request.  A court or tribunal may determine what means of access or combination of means of access under subsection (1) is or are more appropriate in all the circumstances.  No fee is payable by a person to whom a broadcast or recording is provided. | | |
| **s.1(a)(ii)**  **Part 2** | To amend the ***Court Security Act 1980*** to ensure that courts and tribunals can permanently manage public health risks on court premises in relation to public health events and pandemics and to make other minor amendments. | **2.5.4** |
| The meaning of “the security, good order or management of the court premises” in **s.2(2) CSA** is expanded to include:  (d) in relation to a pandemic declaration, the health of all persons or any class of person who work at, attend or are in custody at the court premises;  (e) the following of any relevant pandemic order at the court premises;  (f) the following of any relevant directions made by an authorised officer under Part 8A or 10 of the *Public Health and Wellbeing Act 2008* at the court premises. | | |
| **Sections 3(4) & 3(6) CSA** are modified to permit an authorized officer to seize and retain any item the officer **believes on reasonable grounds** is a prohibited item. | | |
| **Section 4B(2A) CSA** is added: “A person may publish a record of a proceeding if the person does so on behalf of a court or tribunal for a purpose set out in s.8B OCA.” | | |
| **Section 7A CSA** which provided some other temporary measures in response to the COVID-19 pandemic is repealed. | | |
| **s.1(c)**  **Part 4** | * To amend **ss.3, 21, 22** (including **Table 1**), **23 & 24 *Spent Convictions Act 2021*** and to add **ss.22A-22E** to facilitate information sharing. * To amend **ss.3, 9(1) & 11(1) SCA** and to add **ss.5A & 5B** to clarify other aspects of the operation of the SCA. | **11.13.2** |
| **s.1(f)**  **Part 7** | To amend the ***Children, Youth and Families Act 2005*** [CYFA] to support the introduction of the electronic case management system [CMS] in the Family Division of the Children’s Court. | **1.6.3**  **3.7.2**  **Chapter 5** |
| To enable electronic filing of documents via CMS, the words “by the appropriate registrar” or similar words in **ss.214, 228, 243, 246, 253, 258, 259, 260, 262, 266, 320, 326, 409L, 409W, 527, 532, 550, 574, 579 & 588 CYFA** are either omitted or replaced by “in the Court” or similar words. For the same purpose a minor amendment is made to **s.587 CYFA**. | | |
| **Section 533A(2) CYFA** is added: “Without limiting subsections (1) and (2), the issuing or transmission of any order, process or document by electronic communication may include the use of an information system.” In **s.3(1) CYFA** “information system” is newly defined as having “the same meaning as in the *Electronic Transactions (Victoria) Act 2000*.” | | |
| **Section 533B CYFA** is added: “Any document to be filed in the Court may be filed by electronic communication, including by using an information system.” | | |
| **Section 538(3) CYFA** is replaced by:  “(3) Process issued by a registrar may be recalled and cancelled by— (a) the principal registrar; or (b) a judicial registrar; or (c) any other registrar; or (d) a magistrate.” | | |
| **s.1(g)**  **Part 8** | To amend **ss.47A & 54H(5)** ***Jury Directions Act 2015*** in relation to sexual offence cases. | **10.3.3.5C** |
| **s.1(j)**  **Part 11** | To amend **ss.464AAB & 464FA *Crimes Act 1958*** in relation to notification of the Victorian Aboriginal Legal Service. | **8.2.2** |
| **Sections 464AAB & 464FA CA** are amended to apply to Torres Strait Islanders as well as to Aboriginal persons. | | |
| **Section 464FA CA** is amended to require an investigating official to notify the Victorian Aboriginal Legal Service within one hour of a person being taken into custody or as soon as practicable thereafter if the person states that they are an Aboriginal person or a TSI or the official knows or is of the opinion that the person is an Aboriginal person or a TSI. | | |

The amendments detailed in s.1(j) JLA commenced operation on 01/01/2024. All of the other amendments detailed above commenced operation on 11/10/2023.

## **1.2 Regulations**

This Part contains a summary of various sets of Regulations that have some relevance to the operation of the Children’s Court.

### **1.2.1 Children, Youth and Families Regulations 2017**

Section 600 of the CYFA empowers the Governor in Council to make regulations for or with respect to 30 listed matters relating to various aspects of the Act.

The Regulations originally made under the CYFA were the *Children, Youth and Families Regulations 2007* [S.R. No.21/2007]. They were made on 17/04/2007 and came into operation on 23/04/2007. They were amended as from 01/01/2010 by S.R. No.159/2009. The major effect of this amendment was to revoke the forms used for or with respect to proceedings in the Criminal Division of the Court, these being placed initially in the *Children’s Court Criminal Procedure Rules 2009* [S.R. No.189/2009] and now in S.R. No.161/2019.

The 2007 Regulations were revoked and replaced by the *Children, Youth and Families Regulations 2017* [S.R. No.19/2017]. They were made on 17/04/2017 and came into operation on the same day. Minor amendments have since been made in 2018 [S.R. No.5/2018, 8/2018, 53/2018 & 147/2018] & 2019 [S.R. No.75/2019].

The 2017 Regulations also revoke and replace the *Children, Youth and Families (Bail) Regulations 2016* [S.R. No.27/2016].

The 2017 Regulations prescribe various matters required to be prescribed or permitted under the CYFA. The majority of the regulations have no relevance to the operation of the Children’s Court. Those which have at least some relevance are detailed below.

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| **REG.** | **SUBJECT MATTER** |
| 15 | Information required under ss.242(1) & 247A(1) of the CYFA to be given by a protective intervener to parent(s) and child of or above the age of 12 years when a child is placed in emergency care. |
| 16 | Criteria to which the Secretary must have regard in preparing a report pursuant to s.263(6) of the CYFA on the suitability of a person for the purpose of placing a child with that person on an interim accommodation order. |
| 17+Sch.2 [Form 6] | Prescribed form of notice of direction by the Secretary under s.282(2) of the CYFA in relation to compliance with a family preservation order. |
| 18 | Matters to be considered by a Court for the purposes of s.319(1)(c)(i) of the CYFA in determining whether to make a permanent care order in respect of a child. |
| 23 + Sch.3 | Prescribed regions for the placement in a police gaol of a child remanded in custody pursuant to ss.346(3)(b), 347(1) & 347(1A) of the CYFA. |
| 24 | The whole of the State is a prescribed region pursuant to s.387(2)(a) of the CYFA for the making of youth supervision orders. |
| 25+Sch.4  [Form 1] | Prescribed form for notice of suspension of youth supervision order pursuant to s.390(1) of the CYFA. |
| 26+Sch.4  [Form 2] | Prescribed form for notice of required attendance at a youth justice unit pursuant to s.402(2) of the CYFA. |
| 27+Sch.4  [Form 3] | Prescribed form for notice of suspension of youth attendance order pursuant to s.403(1) of the CYFA. |
| 30 | Terms and conditions of a youth parole order for the purposes of s.458(4) of CYFA. |
| 37 | Remission of sentences of detention in youth residential centre or youth justice centre where a detainee is not eligible for parole |
| 38 | Prescribed particulars for the issue of warrants in electronic form pursuant to s.528B of the CYFA. |
| 43 | Infringement notice |
| 44 | Minimum registrable amount |
| 45+Sch.6 | CAYPINS forms |

### **1.2.2 Intervention Orders Regulations**

The following Regulations are ancillary to the legislation in respect of intervention orders and hence have some relevance to the Children’s Court:

* *Personal Safety Intervention Orders Regulations 2011* [S.R. No.89 of 2011] which sunset on 30/08/2021;
* *Family Violence Protection Regulations 2018* [S.R. No.161 of 2018].

These Regulations came into operation on 05/09/2011 and 01/12/2018 respectively and prescribe various matters required or necessary to be proclaimed under the respective Acts.

### **1.2.3 COVID-19 temporary Regulations**

Four sets of regulations were made in 2020 to modify temporarily certain aspects of the law of Victoria to respond to the COVID-19 pandemic. Those relevant to the Children’s Court were S.R. No.34, 38, 45 & 120/2020. All of these regulations expired on 26/04/2021. As and from that date many of their contents have been enacted permanently – mostly in an amended form – by related provisions in the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021*. For details see **section 1.1.4** above.

### **1.2.4 Criminal Procedure Regulations 2020**

The Regulations originally made under the *Criminal Procedure Act 2009* [‘the CPA’] were the *Criminal Procedure Regulations 2009* [S.R. No.169/2009] which were amended by S.R. No.1/2011 and S.R. No.46/2018. They were revoked and replaced by the *Criminal Procedure Regulations 2020* [S.R. No.134/2020] which were made on 08/12/2020 and came into operation on 13/12/2020.

The objectives of the 2020 Regulations are-

1. to provide for the making, use, possession, copying, storage, access to and destruction of audio and audiovisual recordings referred to in Division 5 and Division 6 of Part 8.2 of the CPA; and
2. to specify the allowances and expenses that are to be paid to prosecution witnesses; and
3. to provide for the use of various audio or audiovisual recordings made in certain proceedings for the purpose of assisting intermediaries or the training or evaluation of intermediaries; and
4. other matters required or necessary to be prescribed by the CPA.

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| **REG.** | **SUBJECT MATTER** |
| **Part 2**  **Regs.6-13** | **Division 5 recordings** |
| Division 5 (ss.366-368A) of the CPA deals with the use of recorded evidence-in-chief of children and cognitively impaired witnesses in a sexual offence, assault or family violence criminal proceeding (other than a committal). A Division 5 recording is an audio or audiovisual recording of a kind referred to in ss.367-368A of the CPA. |
| **Reg. 6: For the purposes of s.367 of the CPA who may ask questions**  **Reg. 7: Information to be included in a Division 5 recording**  **Regs. 8-9: Copies and transcript of a Division 5 recording**  **Reg.10: Right of accused to listen to or view Division 5 recording**  **Reg.11: Record of persons listening to or viewing Division 5 recordings**  **Reg.12: Use of Division 5 recordings, copies or transcripts**  **Reg.13: Retention and destruction of recordings and copies** |
| **Part 3**  **Regs.14-17** | **Division 6 recordings** |
| Division 6 (ss.369-376) of the CPA deals with procedure and rules for children and cognitively impaired complainants in trials that relate (wholly or partly) to a charge for a sexual offence. A Division 6 recording is an audio or audiovisual recording of a kind referred to in ss.370-376 of the CPA. |
| **Reg.14: Right of accused to listen to or view Division 6 recording**  **Reg.15: Record of persons listening to or viewing Division 6 recordings**  **Reg.16: Use of Division 6 recordings, copies or transcripts**  **Reg.17: Retention and destruction of recordings and copies** |
| **Part 4**  **Regs.18-24** | **Prosecution witnesses allowances and expenses**  **Reg.18: Attendance allowance for expert witness**  **Reg.19: Allowances and expenses of other witnesses**  **Regs.20-22: Meal, accommodation and travelling allowances for witnesses**  **Reg.23: No payment to prisoners**  **Reg.24: Evidence of expenses etc. to be produced** |
| **Part 5**  **Regs.25-26**  **Sch.1** | **Intermediaries** |
| The function and use of intermediaries are governed by Division 2 of Part 8.2A of the CPA. Their function – set out in s.389I – is to communicate or explain:   1. to a witness for whom an intermediary is appointed, questions put to the witness to the extent necessary to enable them to be understood by the witness; and 2. to a person asking questions of a witness for whom an intermediary is appointed, the answers given by the witness in reply to the extent necessary to enable them to be understood by the person. |
| **Reg.25+Schedule 1: Intermediaries’ oath or affirmation**  **Reg.26: Use of recordings and transcripts** |

### **1.2.5 Bail Regulations 2022**

The *Bail Regulations 2022* [S.R. No.116/2022] were made under s.33 of the *Bail Act 1977* on 18/10/2022 and come into operation on 10/12/2022. They revoke and replace the *Bail Regulations 2012* and subsequent amendments in 2013, 2016, 2017 & 2018. They were amended as and from 25/03/2024 by the *Bail Amendment Regulations 2024* [S.R. No.8/2024].

The objective of the current Regulations (as amended) is to prescribe forms to be used for the purposes of the *Bail Act 1977*. There are 21 prescribed forms in total. These are listed and described in detail in **section 9.2.9** **in Chapter 9** of these Research Materials. In relation to prescribed forms it is noted that s.53 of the *Interpretation of Legislation Act 1984* – under the heading “**Strict compliance with prescribed forms not necessary**” – provides as follows:

“Where a form is prescribed by an Act or subordinate instrument for any purpose, any form in or to the like effect of the prescribed form shall, unless the contrary intention appears, be sufficient in law.”

## **1.3 Rules**

Sections 588(1), 588(1A), 588(1AC) & 588(1B) of the CYFA empower the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to–

* the prescription of forms for the purposes of the Family Division of the Court;
* judicial resolution conferences, including but not limited to the practice and procedure of the Court in relation to judicial resolution conferences;
* any matter relating to the jurisdiction of the Family Division of the Court given by s.515(4);
* generally any matter relating to the practice and procedure of the Family Division of the Court;
* prescribing forms for the purposes of the Criminal Division of the Court.
* generally any matter relating to the practice and procedure of the Criminal Division of the Court;
* any matter or thing required or permitted by or under the *Vexatious Proceedings Act 2014* to be dealt with by rules of court or otherwise necessary or required for the purposes of that Act;
* prescribing forms for the purposes of the CAYPINS procedure or generally any matter relating to the CAYPINS procedure.

Section 588(1AAB) of the CYFA empowers the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to–

* the form in which process may be issued out of the Court and the manner in which it may be authenticated, stored, transmitted or otherwise dealt with;
* the manner in which orders may be authenticated;
* electronic communication and electronic processes, including, but not limited to–
* applications by electronic means, electronic filing and electronic service of documents in any proceeding; and
* the transmission and issuing of orders, processes and other documents by electronic communication; and
* use of electronic signatures and seals;
* the storage, disposal or destruction of documents–
* filed or lodged in proceedings in the Court; or
* issued out of the Court in proceedings in the Court and kept by the principal registrar.

Section 588(1AB) of the CYFA empowers the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to–

* the prescription of the proceedings or class of proceedings which may be dealt with by the Court constituted by a judicial registrar;
* delegating to the judicial registrars all or any of the powers of the Court specified by the rules of court in relation to proceedings so prescribed, including, but not limited to, the exercise by judicial registrars of the jurisdiction of the Court other than the power—
* to impose a sentence of detention in a youth justice centre or youth residential centre; or
* to make a youth attendance order;
* providing for a judicial registrar to exercise any power of a magistrate under this Act with respect to the issue of a search warrant for the purpose of having a child placed in emergency care;
* the transfer or referral of proceedings between the Court constituted by a judicial registrar and the Court constituted by a magistrate of the Court;
* reviews of, and appeals from, the Court constituted by a judicial registrar;

As part of the COVID-19 pandemic recovery process, the CCV was granted funds to establish judicial registrar positions in its jurisdiction. The *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* [S.R.No.22/2021] came into operation on 25/03/2021, were amended by S.R.No.90/2021 from 23/07/2021 and were further amended by S.R.No.70/2021 from 10/07/2023.

Section 588(2) provides that a rule made under s.588 must not be inconsistent with a provision made by or under this or any other Act, whether the provision was made before or after the making of the rule.

In addition ss.589-590 & 590A of the CYFA empower the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to–

* requirements for the purposes of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958* for or with respect to 6 specific matters relating to audio visual or audio links;
* applications to the Court under Division 2 or 3 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958*;
* any matter relating to the practice and procedure of the Court under Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958*;
* the return to the Court of warrants issued under this Act or issued by the Court under s.57 of the *Magistrates’ Court Act 1989* as applied by this Act;
* any other matter or thing required or permitted by or under Part 4A of the *Sex Offenders Registration Act 2004*to be dealt with by rules of court or otherwise necessary or required for the purposes of Part 4A of that Act;
* any matter relating to the practice and procedure of the Koori Court (Criminal Division) and the Neighbourhood Justice Division of the Court and to the transfer of proceedings to and from those courts.

Section 591 of the CYFA provides that the power of the President together with 2 or more magistrates for the Court jointly to make rules of court is subject to the rules being disallowed by a House of Parliament in accordance with s.23 of the *Subordinate Legislation Act 1994*.

Section 210(1) of the *Family Violence Protection Act 2008* (‘the FVPA’) empowers the President of the Children’s Court, together with 2 or more magistrates of the court, jointly to make rules for and with respect to proceedings in the court in relation to applications and orders made under the FVPA, including the non-exhaustive list of matters set out in s.210(2).

Section 184(1) of the *Personal Safety Intervention Orders Act 2010* (‘the PSIA’) empowers the President of the Children’s Court, together with 2 or more magistrates of the court, jointly to make rules for and with respect to proceedings in the court in relation to applications and orders made under the PSIA, including the non-exhaustive list of matters set out in s.184(2).

In *Victorian Legal Services Board v Kuksal (Costs and Amendment Application)* [2024] VSC 48 Gorton J – in rejecting the defendants’ submission that rule 4.05(b) does not authorise the commencement of the proceeding by way of originating motion – said at [19]: “More fundamentally, **the Rules are the servants, not the masters, of judicial process**. The defendants did not identify any prejudice that they have or will suffer by reason of their facing a proceeding commenced by originating motion rather than by writ.” [emphasis added]

The following 8 sets of rules – listed in the “Acts and Regulations” section under the tab “Legal Professionals” on the Children’s Court website [www.childrenscourt.vic.gov.au](http://www.childrenscourt.vic.gov.au) – are current.

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| **RULES** | | | **OBJECT OF RULES** |
| S.R.No.20/2017 | *Children, Youth and Families (Children’s Court Family Division) Rules 2017* [as amended by S.R.No.185/2018, 3/2019 & 100/2022] | * To prescribe certain matters and 42 forms for the purposes of the ChCV Family Division. * The amendments on 01/02/2019 include addition of rules 9, 9AA & 9A-9H (Witness summons) and rule 10 (Application to the Court – publication of proceedings). * The amendments on 01/10/2022 update the forms of an affidavit/declaration of service in the Family Division and the Criminal Division and include other minor and consequential changes. | |
| IN OPERATION 18/04/2017 |
| **AMENDED 01/02/2019**  **& 01/10/2022** |
| S.R.No.169/2018 | *Children's Court (Family Violence Protection) Rules 2018* [as amended by S.R.No.10/2020] | To make rules of procedure for proceedings in the Children’s Court of Victoria under the FVPA. To revoke Children’s Court (Family Violence Protection) Rules 2008 & Children’s Court (Family Violence Protection) (Amendment No.1) Rules 2011. | |
| IN OPERATION 03/12/2018 |
| **AMENDED 01/03/2020** |
| S.R. No.15/2018 | *Children's Court (Evidence – Audio Visual and Audio Linking) Rules 2018* | To facilitate applications to the Court under Part IIA of the Evidence (Miscellaneous Provisions) Act 1958, namely applications under ss.42E, 42L, 42M, 42N & 42P relating to the giving of evidence and/or the appearance of a person at court by means of an audio visual link or audio link. | |
| IN OPERATION 26/02/2018 |
| **REVOKES S.R. No.11/2008** |
| S.R.No.161/2019 | *Children's Court Criminal Procedure Rules 2019* | To provide for the practice and procedure of the Criminal Division of the Children’s Court, including various forms prescribed for the purposes of the Criminal Division. | |
| IN OPERATION 22/12/2019 |
| **REPLACES S.R. No.189/2009** |
| S.R.No.126/2020 | *Children's Court Authentication and Electronic Transmission Rules 2020* [as amended by S.R.No.104/2023] | To provide for the following in the Children’s Court:   1. the authentication of orders; 2. the issue and authentication of process; 3. the authentication of warrants; 4. the filing of documents by electronic communication or by CMS. | |
| IN OPERATION 17/11/2020 |
| **AMENDED**  **09/10/2023** |
| S.R.No.127/2020 | *Children's Court Criminal Procedure, (Family Violence Protection) and (Personal Safety Intervention Orders) Amendment Rules 2020* | To amend S.R.No.161/2019, 169/2018 and 94/2011 to enable filing of documents in accordance with Order 3 of S.R. No. 126/2020. | |
| IN OPERATION 17/11/2020 |
|  |
| S.R.No.22/2021 | *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* | 1. To prescribe proceedings that may be dealt with by the ChCV constituted by a judicial registrar. 2. To delegate to judicial registrars some of the powers of the ChCV. 3. To establish a procedure for the review by the ChCV of a determination of the Court constituted by a judicial registrar. | |
| IN OPERATION 25/03/2021 |
| **AMENDED BY S.R.No.90/2021 AS AND FROM 23/07/2021. FURTHER AMENDED BY S.R.No.70/2023 AS AND FROM 10/07/2023.** | |
| S.R.No.113/2021 | *Children's Court (Personal Safety Intervention Orders) Rules 2021* | To make rules of procedure for proceedings in the Children’s Court of Victoria under the PSIA. | |
| IN OPERATION 01/09/2021 |
| **REPLACES S.R. No.94/2011** |

Several of the sets of rules detailed above contain prescribed forms for various purposes. In this connection it is noted that s.53 of the *Interpretation of Legislation Act 1984* – under the heading “**Strict compliance with prescribed forms not necessary**” – provides as follows:

“Where a form is prescribed by an Act or subordinate instrument for any purpose, any form in or to the like effect of the prescribed form shall, unless the contrary intention appears, be sufficient in law.”

## **1.4 Practice Directions/Notes, Court Guidelines & Court Information Guides**

### **1.4.1 Practice Directions & Practice Notes**

Section 592 of the CYFA empowers the President (or pursuant to s.509(4) the Acting President) to issue practice directions, statements or notes – which must not be inconsistent with any provision in any legislation – for the Court–

* in relation to proceedings or any class of proceedings in either the Family Division or the Criminal Division of the Court; or
* in relation to the exercise by a registrar of any jurisdiction, power or authority vested in the registrar as registrar under Schedule 3 of the CYFA.

Practice Directions have been issued by the President since 2006. The current Practice Directions are summarised as follows.

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| [**No.3 of 2016**](https://www.childrenscourt.vic.gov.au/sites/default/files/2020-02/Practice%20Direction%203%20of%202016.pdf)  08/06/2016 | **LISTING OF MATTERS IN THE CHILDREN’S KOORI COURT (CRIMINAL DIVISION) AT MELBOURNE**  This PD aims to ensure that matters adjourned to the Children’s Koori Court at Melbourne are in a position to proceed as either a plea of guilty or, where appropriate, for diversion to be considered pursuant to s.59 of the *Criminal Procedure Act 2009* and s.528 of the CYFA. |
| [**No.2 of 2018**](https://www.childrenscourt.vic.gov.au/sites/default/files/2020-02/Practice%20Direction%202%20of%202018.pdf)  05/04/2018 | **PROCEDURE FOR INDICTABLE OFFENCES THAT MAY BE HEARD AND DETERMINED SUMMARILY**  This PD sets out directions in relation to the listing, procedure and venue for charges falling within s.356(6) [Category A serious youth offence committed by child aged 16+] and s.356(8) [Category B serious youth offence committed by child aged 16+]. |
| [**No.3 of 2022**](https://www.childrenscourt.vic.gov.au/sites/default/files/2022-03/Practice%20Direction%20No.3%20of%202022_0.pdf)  01/03/2022 | **LISTING & HEARING ARRANGEMENTS FOR ALL INTERVENTION ORDER MATTERS HEARD BY THE CHILDREN’S COURT**  This PD (which revokes PD No.3 of 2021 & Nr.15 of 2021) is effective from 07/06/2021. It outlines protocols for the listing and hearing of all intervention order proceedings (under the *Family Violence Protection Act 2008* or the *Personal Safety Intervention Orders Act 2010*) heard by the Children’s Court of Victoria at all Court venues. |
| [**No.2 of 2023**](https://www.childrenscourt.vic.gov.au/sites/default/files/2023-07/Practice%20Direction%20No.%202%20of%202023.pdf)  31/07/2023 | **CRIMINAL DIVISION**  This P.D. (which revokes Practice Directions No.1 of 2022; Nos.4‑6 of 2018; No.1 of 2009 & Nos.1-2 of 2007) is effective from 31/07/2023. It contains directions under the following headings:  **ALL CHILDREN’S COURTS – STATEWIDE**   * **3: FILING** * **4-6: ONLINE HEARINGS** * **7-9: FIRST REMAND HEARINGS** * **10-12: SECOND AND SUBSEQUENT REMAND HEARINGS** * **13-14: BAIL APPLICATIONS** * **15-25: BAIL VARIATION(S)** * **26: SUMMARY CASE CONFERENCING** * **27-38: DIVERSION HEARING(S)** * **39-40: SEXUAL OFFENCE(S)** * **41-42: INTERMEDIARIES** * **43-47: GROUND RULES HEARINGS** * **48-50: CONFIDENTIAL COMMUNICATIONS AND PROTECTED HEALTH INFORMATION**   **CHILDREN’S COURT OF VICTORIA SITTING AT MELBOURNE**   * **51-55: REMAND COURT** * **56-59: MOORABBIN AND SUNSHINE CUSTODY LISTINGS** |
| [**No.1 of 2024**](https://www.childrenscourt.vic.gov.au/sites/default/files/2023-03/Practice%20Direction%20No%201%20of%202023%20%281%29.pdf)  18/04/2024 | **FAMILY DIVISION**  This P.D. (which revokes and replaces P.D. No.3 of 2023 dated 20/10/2023) is effective from 18/04/2023. It contains directions for the listing and hearing of all child protection proceedings (under the *Children, Youth and Families Act 2005*) heard by the Children’s Court of Victoria at all venues of the Court. It also contains directions for the listing and hearing of Family Division matters pursuant to the *Terrorism (Community Protection) Act 2003*. The directions are set out under the following headings:   * **1-9: MANAGEMENT OF CHILD PROTECTION PROCEEDINGS** * **10: CHILD PROTECTION PRACTITIONERS** * **11-15: LEGAL PRACTITIONERS** * **16-17: ADULT PARTY TO CHILD PROTECTION APPLIC’N IN CUSTODY** * **18-19: DIGITAL RECORDINGS** * **20: INTERSTATE CHILD PROTECTION ORDERS** * **21: CHILDREN’S COURT CLINIC** * **22-29: LISTING AND HEARING OF CHILD PROTECTION CASES** * **30-35: CONCILIATION CONFERENCES** * **36-43: READINESS HEARINGS** * **44-51: WITNESS SUMMONS TO PRODUCE** * **52-58: MARRAM-NGALA GANBU (KOORI FAMILY HEARING DAY)** * **59-65: SUPPORT AND ENGAGEMENT ORDERS (TERRORISM ACT)** |

All Practice Directions listed in this section can be downloaded from the Children’s Court of Victoria website [www.childrenscourt.vic.gov.au](http://www.childrenscourt.vic.gov.au).by clicking on the relevant P.D. Number above.

### **1.4.2 Court Guidelines**

The Court has also issued the following Guidelines – currently in operation – which are summarised below. They can be read and downloaded from the linked websites by clicking on the relevant heading.

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| **01/03/2016** | [**GUIDELINES FOR CONCILIATION CONFERENCES**](https://www.childrenscourt.vic.gov.au/sites/default/files/2020-07/Guidelines%20for%20Conciliation%20Conferences%20-%201%20March%202016_0.pdf)  A conciliation conference is intended to facilitate the early resolution of applications in the Family Division of the Court through a non-adversarial mediation process. The Guidelines are structured under the following headings:   1. **INTRODUCTION AND PURPOSE** 2. **PROCEDURAL MATTERS** 3. **ROLE OF CONVENOR** 4. **RESPONSIBILITIES OF ALL PARTICIPANTS** 5. **ROLE OF LAWYERS** 6. **ROLE OF CHILD PROTECTION PRACTITIONERS** 7. **ROLE OF FAMILY AND COMMUNITY MEMBERS** 8. **CONCILIATION CONFERENCE REPORT** |

The **Intermediary Program** summarised below commenced as a Pilot Program on 01/07/2018 but is now an ongoing program, future funding having been confirmed. The original Guidelines dated 28/06/2018 were updated on 28/07/2023 to reflect an amendment made to the *Criminal Procedure Act 2009* [‘CPA’] which provides that from 30/07/2023 a ground rules hearing must be held for all complainants in relation to a charge for a sexual offence. The Children’s Court uses the “Multi‑jurisdictional Court Guide for Ground Rules and the Intermediary Program” which can be downloaded from the County Court website by clicking on the link below.

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| **28/06/2018 UPDATED ON 28/07/2023** | [**MULTI-JURISDICTIONAL COURT GUIDELINES FOR GROUND RULES AND THE INTERMEDIARY PROGRAM**](https://www.countycourt.vic.gov.au/practice-notes?filter%5bdivision%5d%5b0%5d=13&filter%5bkeyword%5d=multi-jurisdictional)   1. These Guidelines relate to the use of intermediaries and the conduct of ground rules hearings in the **Intermediary Program** [IP] which has operated since 01/07/2018. The scheme relating to intermediaries and ground rules hearings is set out in Part 8.2A of the CPA which commenced on 28/02/2018 and was expanded from 30/07/2023. 2. The introduction of an intermediary scheme, based on the English model, was recommended in the 2016 VLRC report “The Role of Victims of Crime in the Criminal trial Process”. An intermediary scheme and the use of ground rules hearings in Victoria was endorsed in *R v Ward (a pseudonym)* [2017] VSCA 37 on the subject of questioning of children and obligations of counsel and judicial officers. The principles also apply equally to other vulnerable witnesses. 3. The IP came into effect from 01/07/2018 after the participating venues of the Court were gazetted pursuant to s.389F(1)(b) of the CPA and a panel of intermediaries was established pursuant to s.389H. 4. The IP operates more narrowly than the scheme set out in the CPA and is not currently available for all witnesses who would otherwise be eligible. It applies to witnesses who are under the age of 18 years or have a cognitive impairment (‘vulnerable witnesses’) in the following circumstances: 5. complainants in sexual offence matters who are vulnerable witnesses; 6. vulnerable witnesses, apart from the accused, in homicide matters; 7. where (a) or (b) applies, in Melbourne Children’s Court, Melbourne Magistrates’ Court, the Melbourne venues of the County Court & Supreme Court and in Bendigo, Geelong and Warrnambool and other participating venues as gazetted from time to time; and 8. police SOCIT sites in Bendigo, Box Hill, Fawkner, Frankston, Geelong, Knox, Melbourne & Warrnambool and other locations as nominated by the IP from time to time. 9. Intermediaries are trained professionals with specialist skills in communication. They are not expert witnesses called by a party. They are officers of the Court [see s.389I(2) CPA] who, under the IP, assist the vulnerable witness and the Court so that the witness can give their best evidence during the conduct of any VARE and in their evidence in Court. 10. A ground rules hearing is a hearing at which the Court considers the communication, support and other needs of witnesses and decides how the proceeding is to be conducted to fairly and effectively meet those needs. The Court sets ground rules – which take the form of Court directions – for the questioning of the witness. 11. In the past the conduct of ground rules hearings was limited to cases in which an intermediary had been appointed. However, the CPA was expanded on 28/07/2023 to require a ground rules hearing to be held for ALL complainants in relation to a charge for a sexual offence whether or not an intermediary is appointed: see new s.389B(3) CPA. 12. The rest of the Guidelines contain information about:  * Ground rules hearings – an introduction [section 4] * Ground rules hearings – the process [section 5] * Intermediaries – an introduction [section 6] * Intermediaries – the process [section 7]. |

### **1.4.3 Court Information Guides**

In addition to the above Practice Directions & Court Guidelines the Court has provided a number of Information Guides on its website. Under the “**Going to Court**” tab information is available on the following matters:

* under the heading “**Court Divisions and Programs**” information is provided on:

[**Criminal Division**](https://www.childrenscourt.vic.gov.au/criminal-division)

[**Family Division (Child Protection)**](https://www.childrenscourt.vic.gov.au/family-division)

[**Intervention Orders**](https://www.childrenscourt.vic.gov.au/family-division/intervention-orders)

[**Conciliation Conferences**](https://www.childrenscourt.vic.gov.au/family-division/child-protection/conciliation-conferences)

[**Children’s Court Clinic**](https://www.childrenscourt.vic.gov.au/childrens-court-clinic)

* under the heading “**Attending Court**” information is provided on:

[**Court Locations**](https://www.childrenscourt.vic.gov.au/court-locations)

[**Court Documents and Recordings**](https://www.childrenscourt.vic.gov.au/court-documents-and-recordings)**.**

## **1.5 *Charter of Human Rights and Responsibilities Act 2006* [Act No.43/2006]**

The *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’) was assented to on 25/07/2006. Under s.1(2), the main purpose of the Charter is to protect and promote human rights by-

1. setting out the human rights that Parliament specifically seeks to protect and promote; and
2. ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
3. imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
4. requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and
5. conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

Section 4 of the Charter lists organizations which are public authorities for the purposes of the Charter. In s.4(1)(j) the list specifically excludes “a court or tribunal except when it is acting in an administrative capacity”. A note to s.4(1)(j) states: “Committal proceedings and the issuing of warrants by a court of tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.”

In *LG v Melbourne Health* [2019] VSC 183 at [73]-[82] Richards J – applying *PJB v Melbourne Health (Patrick’s Case)* (2011) 39 VR 373 at [123]-[129] – held that-

* VCAT was acting in an administrative capacity and the exception in s.4(1)(j) does not apply; and
* VCAT had not given proper consideration to the relevant human rights of the applicants in making guardianship and administration orders in relation to LG.

### **1.5.1 Human Rights**

Part 2 of the Charter sets out the human rights that Parliament specifically seeks to protect and promote:

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| **SECTION** | **HUMAN RIGHT** |
| 8 | Recognition and equality before the law |
| 9 | Right to life |
| 10 | Protection from torture and cruel, inhuman or degrading treatment |
| 11 | Freedom from forced work |
| 12 | Freedom of movement |
| 13 | Privacy and reputation |
| 14 | Freedom of thought, conscience, religion and belief |
| 15 | Freedom of expression |
| 16 | Peaceful assembly and freedom of association |
| 17 | Protection of families and children |
| 18 | Taking part in public life |
| 19 | Cultural rights |
| 20 | Property rights |
| 21 | Right to liberty and security of person |
| 22 | Humane treatment when deprived of liberty |
| 23 | Children in the criminal process |
| 24 | Fair hearing |
| 25 | Rights in criminal proceedings |
| 26 | Right not to be tried or punished more than once |
| 27 | Retrospective criminal laws |

Section 7(2) of the Charter – headed “**Human rights—what they are and when they may be limited**” – provides: “A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including-

1. the nature of the right; and
2. the importance of the purpose of the limitation; and
3. the nature and extent of the limitation; and
4. the relationship between the limitation and its purpose; and
5. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”

Section 8 of the Charter – headed “**Recognition and equality before the law**” – provides:

“(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Section 12 of the Charter – headed “**Freedom of movement**” – provides: “Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.”

Section 13 of the Charter – headed “**Privacy and Reputation**” provides:

“A person has the right-

1. not to have his or her privacy, family, home or correspondence unlawfully ot arbitrarily interfered with; and
2. not to have his or her reputation unlawfully attacked.

Section 17 of the Charter – headed “**Protection of families and children**” – provides:

“(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.”

Section 19 of the Charter – headed “**Cultural rights**” – provides:

“(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community-

1. to enjoy their identity and culture; and
2. to maintain and use their language; and
3. to maintain their kinship ties; and
4. to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.”

Section 21 of the Charter – headed “**Right to liberty and security of person**” – provides:

“(1) Every person has the right to liberty and security.

(2) A person must not be subjected to arbitrary arrest or detention.

(3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

(4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.

(5) A person who is arrested or detained on a criminal charge-

1. must be promptly brought before a court; and
2. has the right to be brought to trial without unreasonable delay; and
3. must be released if paragraph (a) or (b) is not complied with.

(6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear-

1. for trial; and
2. at any other stage of the judicial proceeding; and
3. if appropriate, for execution of judgment.

(7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must-

1. make a decision without delay; and
2. order the release of the person if it finds that the detention is unlawful.

(8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.”

Section 22 of the Charter – headed “**Humane treatment when deprived of liberty**” provides:

“(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.

(3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

Section 23 of the Charter – headed “**Children in the criminal process**” – provides:

“(1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.

1. An accused child must be brought to trial as quickly as possible.
2. A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.”

Section 24 of the Charter – headed “**Fair hearing**” – provides:

“(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.”

Section 25 of the Charter – headed “**Rights in criminal proceedings**” – provides:

“(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees-

1. to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
2. to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
3. to be tried without unreasonable delay; and
4. to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and
5. to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and
6. to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*; and
7. to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
8. to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
9. to have the free assistance of an interpreter if he or she cannot speak or understand English; and
10. to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
11. not to be compelled to testify against himself or herself or to confess guilt.

(3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child’s rehabilitation.”

In *DPP v SL* [2016] VSC 714; 263 A Crim R 193, in the course of giving directions as to the conduct of proceedings in the Supreme Court in which the 15 year old accused was pleading guilty to charges including attempted murder and burglary, Bell J said at [13] that the procedures in s.522(1) of the CYFA regarding the conduct of proceedings in the Children’s Court are clearly intended to give effect to the human rights principles in ss.8(3), 17(2), 23(1),(2) & (3) and 25(3) of the *Charter of Human Rights and Responsibilities Act 2006*.

In *Thompson v Minogue* [2021] VSCA 358 the Court of Appeal (Kyrou, McLeish & Niall JJA) the respondent Dr Minogue, a prisoner at Barwon Prison, had been ordered on 04/09/2019 to undergo a random drug test by providing a urine sample after being strip-searched. On 01/02/2020 he was directed to undergo a random drug test again. On 18/02/2020 he was directed to undergo a strip search before and after a contact visit from his lawyer. At first instance Richards J had held that the directions on 04/09/2019 & 01/02/2020 were incompatible with Dr Minogue’s right to privacy in s.13(a), his right to be treated humanely and with respect for the inherent dignity of the person in s.22(1) and in breach of s.38(1) of the Charter. The search on 18/02/2020 was compatible with Dr Minogue’s human rights. In a lengthy judgment in which it discussed the scope of and the onus of proof for the justification requirement in s.7(2) of the Charter and applied *HJ v Independent Broad-based Anti-corruption Commission* [2021] VSCA 200, the Court of Appeal allowed the appeal.

See also *JL v Mental Health Tribunal* [2021] VSC 868 at [81]-[108].

### **1.5.2 Interpretation of Laws**

Perhaps the main impact of the Charter on the operation of the Children’s Court of Victoria is to be found in s.32 which came into operation on 01/01/2008. That section provides-

“(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of-

(a) an Act or provision of an Act that is incompatible with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.”

Section 33 empowers a court or tribunal, on application of a party or on its own motion, to refer to the Supreme Court a question of law which arises that relates to the application of the Charter or a question which respect to the interpretation of a statutory provision in accordance with the Charter. If such question has been referred, the referring court or tribunal must not-

1. make a determination to which the question is relevant while the referral is pending; or
2. proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.

Section 36(2) of the Charter provides that subject to any relevant override declaration (by Parliament under s.31), if the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, it may make a declaration of inconsistent interpretation. Section 36(5) provides that such a declaration does not-

1. affect in any way the validity, operation or enforcement of the statutory provision; or
2. create in any person any legal right or give rise to any civil cause of action.

Section 38(1) of the Charter provides that subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

Section 39(1) of the Charter provides that if, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter. Section 39(3) provides that a person is not entitled to be awarded any damages because of a breach of this Charter.

In *Gebrehiwot v State of Victoria* [2020] VSCA 315 the applicant had brought proceedings in tort against the State of Victoria claiming damages for battery and false imprisonment following an incident with officers of Victoria Police in which he was injured. The State admitted that force was used but relied on the defence that the police officers acted with lawful justification in accordance with s 462A of the *Crimes Act 1958*. The Court of Appeal (Tate, Kaye & Emerton JJA) allowed an appeal against a decision of a jury which accepted the defence. In the course of its reasons the Court of Appeal addressed several issues in relation to the Charter:

* At [132]: The judge was correct to conclude that a breach of s.38 could not found a claim for damages. Unlike human rights instruments in other jurisdictions, which confer an entitlement to plenary forms of relief for breach [see, eg, *Human Rights Act 1998* (UK) s.8(1)] or expressly acknowledge that damages may be awarded [HRA, s.8(2)] the prohibition on damages in the *Charter* is unequivocal.
* At [134]: However, Gebrehiwot also advanced an alternative submission relying on the *Charter*, namely, that any direction the judge gave to the jury about the meaning and application of s.462A in the circumstances had to be informed by an interpretation that was compatible with the human rights that were engaged. The judge’s failure to give a direction on s.462A also meant that she did not consider and apply the interpretive obligation under the *Charter* in construing s.462A.
* At [142]: We consider that the judge was incorrect to hold that s.32 of the *Charter* was irrelevant to the jury’s deliberations. In our view, s.32 was relevant to the jury’s deliberations on liability because it may have affected its consideration of whether s.462A applied in the circumstances. However, there is no ground of appeal that identifies an error by the judge in the application of s.32 of the *Charte*r and the determination of an interpretation of s.462A that is human rights-compatible must wait for another day.

The Court of Appeal also referred to the following cases in its discussion of the Charter: *R v DA* [2016] VSCA 325 at [44] per Ashley, Redlich and McLeish JJA; *Nguyen v DPP* (2019) 59 VR 27; [2019] VSCA 20; *Momcilovic* (2011) 245 CLR 1; [2011] HCA 34; *Slaveski v Smith* (2012) 34 VR 206; [2012] VSCA 25; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4; *Castles v Secretary, Department of Justice* (2010) 28 VR 141; [2010] VSC 310 (Emerton J).

### **1.5.3 The Charter applies to protection proceedings in the Children’s Court**

In *DOHS v Sanding* [2011] VSC 42 four Aboriginal children aged 9, 7, 4 & 2 had been residing in the care of their maternal grandmother under custody to Secretary orders. At [279] Bell J described “the real risk to the wellbeing of the children” as “the drug-taking activity of their mother and her disturbance of the home of the grandmother in which the family was living”. Nine weeks after the custody to Secretary orders were made, the Department removed the children from the care of their grandmother and placed them separately in out of home care with non-Aboriginal families. No family was available to take the four children together and no Aboriginal family was available to take any of them. Within a week of their separation, the behaviour of the two oldest children substantially regressed. The mother made applications to revoke each of the custody to Secretary orders on the basis that the children would live with her mother and that she would not live in the home. A Children’s Court magistrate conducted a submissions contest, revoked the custody to Secretary orders and placed the children on interim accommodation orders in the grandmother’s care. An appeal by DOHS was dismissed.

At [155]-[207] Bell J discussed the application of the Charter to the conduct of protection proceedings and the making of protection orders by the Children’s Court. In the course of this, his Honour considered numerous provisions of the CYFA and referred with approval to dicta in *Kracke v Mental Health Review Board* [2009] VCAT 646; *Sabet v Medical Practitioners Board* (2008) 20 VR 414; *R v Williams* (2007) 16 VR 168, 177; *In Re K (infants)* [1963] 1 Ch 381; *Humberside County Court v R* [1977] 1 WLR 1251; *J v Lieschke* (1987) 162 CLR 447, 451; *Reynolds v Reynolds* (1973) 47 ALJR 499, 501-2; *M v M* (1988) 166 CLR 69, 76; *Neale v Colquhoun* [1944] SASR 199; *W Children* [2010] UKSC 12 and a different *M v M* [1993] 1 VR 391, 393. At [204] his Honour said:

“In protection proceedings, a number of important civil rights and obligations are at stake. These include whether the child will be taken away from their parents, whether the child will be protected from physical and emotional harm and how, where and with whom the child will live, whether the child will live with their siblings, who will have custody of the child, who will grow the child up, where the child will go to school, whether and what kind of cultural contact the child will have with their community, including the Aboriginal community (where applicable), whether and what religious instruction the child will have, what conditions will be imposed on those caring for the child and whether the child and their parents will have access to each other. The court can make interim and final orders with respect to those and other matters. Any such orders will be determinative, legally enforceable and impact heavily on the lives of the people concerned. The orders will be determinative not just of the rights and obligations of the child and their parents under the Act, but also of their fundamental rights and freedoms as children and parents under the common law and under human rights specified in the Charter, especially the right to family and to protection as a child in s.17(1) and (2). Therefore protection proceedings under Chapter 4 of the *Children, Youth and Families Act* come within the scope of the human right to a fair hearing in s.24(1) of the Charter.”

At [206]-[207] his Honour concluded:

“[A] protection proceeding (including a revocation proceeding) in the court under Chapter 4 of the *Children, Youth and Families Act* is a ‘civil proceeding’ under s.24(1) of the Charter; the child and their parents are parties to the proceeding, as may be other persons, depending on the nature of the application and the actual circumstances.

In the present case, the represented parties to the mother’s application to revoke the custody to secretary orders were the secretary, the mother and the grandmother. The father of three of the children appeared personally and was also joined as a party. All these persons were, in my view, parties to the protection proceeding for the purpose of s.24(1) of the Charter, except the secretary. The secretary was not covered by that right as she appeared in the performance of a statutory function and not in an individual capacity.”

For reasons discussed in detail in **sections 5.11.7 & 5.11.16** of these Research Materials, in *ZD v DHHS* [2017] VSC 806 Osborn J dismissed the mother’s appeal against a 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. During the hearing of the appeal the parties sought to rely on the Charter – in particular ss.17(1) & 17(2) – in support of their respective proposed interpretations of s.263(7) of the CYFA. At [106] & [109] Osborn J said:

[106] “…I have determined that s.263(7) of the CYFA is not capable of more than one interpretation. It follows that s.32(1) of the Charter, and that the Charter rights identified as potentially relevant, do not assist in the construction to s.263(7) of the CYFA and cannot be used as a basis for preferring some alternative construction than that already identified.”

[109] “…It cannot be said that a construction of s.263(7) of the CYFA that has properly taken the factors in s.10 into account is inconsistent with the rights in s.17 of the Charter.”

In *Secretary to the Department of Families, Fairness and Housing v AM (a pseudonym)* [2023] VSC 291 Ginnane J rejected the father’s submission that an IAO condition under s.267(3) of the CYFA releasing the children into the care of the mother on condition that they reside at an address not known to the father was inconsistent with ss.12, 13(a), 17(2) & 19(1) of the Charter. His Honour applied the approach of Osborn JA in *ZD v DHHS* [2017] VSC 806 – quoting in particular paragraphs [103]-[111] & [116] – and concluded at [72]-[73]:

[72] “The reasoning in *ZD* is directly applicable in this case to the rights contained in s 17(2) and s 13 of the Charter. In addition to that reasoning, I add that a condition properly imposed under s 263(7) releasing the children into the care of the mother on condition that they reside at an address not know to the father, would not unlawfully restrict their rights of freedom of movement.

[73] I consider that the Court’s power to make an IAO with the Secretary’s condition does not infringe any applicable Charter rights because it involves an exercise of discretion as to what is required in the best interests of the children. The discretion is given under a statute which carefully balances the applicable human rights by reference to the best interests of the children.”

## **1.6 Towards an electronic Court [eCourt]**

### **1.6.1 Remote hearings using Webex**

In Victoria a State of Emergency was declared on 16/03/2020 because of the health risks associated with the COVID-19 pandemic. As a consequence, most hearings in both divisions of the Children’s Court of Victoria were generally conducted remotely from late March 2020 to early 2022 by means of an off-the-shelf computer application known as **Webex**.

### **1.6.2 Courtlink & Bridge**

In the mid-1980s a DOS-based computerized listing and order processing system known as **Courtlink** was developed for criminal proceedings in the Magistrates’ Court. In about 1991 the **Courtlink** system was extended to include listing and order processing for intervention orders (IVOs) in the Magistrates’ Court. In about 2001 the **Courtlink** intervention order system and a modified version of the **Courtlink** criminal system were introduced in the Children’s Court throughout the State.

In the mid-1990s a simple order processing system for child protection cases was built by the author based on Word5 templates. This system – known as **Kidlink** – was only available at Melbourne Children’s Court.

In about 2001 a web-based computer system known as **Lex** was developed as a replacement for Kidlink and was introduced for listing and order processing of child protection cases in the Children’s Court state-wide. On 12/11/2018 an upgraded version of Lex – named **Bridge** – replaced Lex state-wide. On 23/10/2023 **Bridge** was replaced by **CMS** and all its data was migrated to **CMS**.

### **1.6.3** **Case Management System (CMS), including eDocs**

The 2017/18 Victorian State Budget provided $89.2 million to Court Services Victoria for a modern computerized case management system for the Magistrates’ Court and the Children’s Court as part of a whole of government response to the Royal Commission into Family Violence. This new electronic **Case Management System (CMS)** is intended to replace Courtlink and Bridge.

The CMS Project aims to provide-

* processes and systems that support minimal reliance on paper within the courts and when dealing with external parties;
* an electronic case record which acts as a single source of truth;
* automation of a number of manual processes to enable staff to focus on higher-value tasks;
* electronically signed documents and orders that will be treated as the official court record;
* functionality that allows authorised third parties, where appropriate, to initiate cases (e.g. system identified agents and lawyers), submit documents and track cases through interfaced systems or online portals.

The CMS Project includes an application called **eDocs**, an online filing portal to enable the electronic transmission of documents to the Court which is intended to replace manual and paper-based processes. Release of the first phase of eDocs was fast-tracked because of the COVID-19 pandemic and the associated need to minimise face-to-face human contact. The completed eDocs operates as an electronic filing and document exchange portal between the Court and authorised agencies and other court users.

Access to the eDocs portal was introduced in the Children’s Court for all Criminal Division proceedings and also for IVO applications by Victoria Police, Victoria Legal Aid and authorised legal practitioners on a staggered basis between 17/11/2020 & 08/12/2020.

A fully developed **CMS** for child protection matters was implemented in the Children’s Court of Victoria as and from 23/10/2023. The whole CMS Project is scheduled for completion later.

To support the introduction of the electronic case management system [CMS] in the Family Division of the Children’s Court, the following amendments were made to the CYFA to operate as and from 11/10/2023:

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| To enable electronic filing of documents via CMS, the words “by the appropriate registrar” or similar words in **ss.214, 228, 243, 246, 253, 258, 259, 260, 262, 266, 320, 326, 409L, 409W, 527, 532, 550, 574, 579 & 588 CYFA** are either omitted or replaced by “in the Court” or similar words. For the same purpose a minor amendment is made to **s.587 CYFA**. |
| **Section 533A(2A) CYFA** is added: “Without limiting subsections (1) and (2), the issuing or transmission of any order, process or document by electronic communication may include the use of an information system.” In **s.3(1) CYFA** “information system” is newly defined as having “the same meaning as in the *Electronic Transactions (Victoria) Act 2000*.” |
| **Section 533B CYFA** is added: “Any document to be filed in the Court may be filed by electronic communication, including by using an information system.” |
| **Section 538(3) CYFA** is replaced by:  “(3) Process issued by a registrar may be recalled and cancelled by— (a) the principal registrar; or (b) a judicial registrar; or (c) any other registrar; or (d) a magistrate.” |

To further support the introduction of the electronic case management system [CMS] in the Family Division of the Children’s Court, the *Children's Court Authentication and Electronic Transmission Rules 2020* [S.R.No.126/2020] were amended by S.R.No.104/2023 as and from 09/10/2023 as follows:

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| The following definition of **CMS** is inserted into **Rule 1.04**: “**CMS** means the computer system in operation in the Court from time to time which, among other things–   1. deals with process; and 2. issues documents; and 3. stores and retrieves documents and information;   **Example**  Process and court orders.” |
| **Rule 2.02** is substituted by:  “Process may be issued by–   1. a person– 2. signing the process; or 3. signing the process with an electronic signature; or 4. sealing the process with an electronic seal; or 5. CMS with an electronic signature or seal.” |
| **Rule 3.01(1)** is substituted by–  “(1) Subject to subrule (2) and Rule 3.03, a document may be submitted for filing in the Court by–   1. lodging that document into CMS in accordance with the requirements of CMS; or 2. other electronic communication in accordance with any practice direction, statement or note issued by the President under section 592 of the Act.” |
| **Rules 3.01(3**) and (4) are substituted by–  “(3) Subject to Rule 3.02(3), a document that is accepted for filing in the Court is taken to be filed in the Court at the time and on the date that the document was first submitted in accordance with subrule (1).” |
| **Rule 3.02(1)** is substituted by–  “(1) A registrar may refuse to accept a document submitted for filing under Rule 3.01 until satisfied that the document complies with–   1. these Rules; or 2. any other Act or Rule; or 3. any practice direction, statement or note issued by the President under section 592 of the Act." |

## **1.7** **Yoorrook Justice Commission’s Second Interim Report & Govt response**

The Yoorrook Justice Commission [‘Yoorrook’] possesses the full powers of a royal commission. Yoorrook’s second interim report – [Report into Victoria’s Child Protection and Criminal Justice Systems](https://yoorrookforjustice.org.au/wp-content/uploads/2023/08/Yoorrook-for-justice-report.pdf) – was tabled on 04/09/2023. After receiving over 100 submissions, hearing from 84 witnesses over 27 hearing days, undertaking 12 roundtable discussions across Victoria, making 5 adult and youth prison visits and reviewing more than 4,000 government documents, Yoorrook in its 445-page second report–

* details extensive systemic injustice, racism, discriminatory laws and policy failures that have caused, and continue to cause, harm to First Peoples; and
* makes 46 recommendations for legislative and system reform.

In its response dated April 2024 the Victorian Government noted at p.5 that–

“The 445-page Report emphasises that present injustice has deep roots in the colonial foundations of the State and makes 46 recommendations for change. In considering the Report’s recommendations, the Victorian Government:

* **supports [in full]** 4 recommendations and **supports in principle** 24 recommendations to reform the child protection and criminal justice systems
* will further consider 15 recommendations (categorised as **under consideration**)
* **does not support** 3 recommendations.”

The Yoorook recommendations for reform include giving full effect to self-determination by transferring to First Peoples decision-making power, authority, control and resources in the child protection and criminal justice systems as these relate to them and requiring the Victorian Government to uphold its commitment to self-determination through negotiations under the Treaty process [recommendations **1 & 2** **under consideration**]. This includes in recommendations **1b & 1c** negotiation through the Treaty process of new, dedicated legislation – developed by First Peoples, for the safety, wellbeing and protection of First Peoples children and young people – which goes beyond the transfer of existing powers and functions under s.18 CYFA.

Other Yoorrook recommendations require the Victorian Government–

**6**. to clarify and strengthen the *Charter of Human Rights and Responsibilities Act* [**not supported**];

1. to create a new independent police oversight authority to end the practice of police investigating police complaints [**under consideration**];
2. to make changes to bail laws to stop people being unnecessarily imprisoned that go beyond the amendments introduced to Parliament in the *Bail Amendment Bill 2023* [**not supported**];
3. to raise the minimum age of criminal responsibility to 14 years without exceptions and to prohibit the detention of children under 16 years [**not supported**];
4. to prohibit routine strip searching in all Victorian adult and youth prisons [**support in principle**].

Additional Yoorrook recommendations which may have some relevance – direct or indirect – to the Children’s Court include the following–

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| **NUMBER** | **RECOMMENDATION** |
| **5** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must as soon as possible significantly upscale the capability, competence and support in relation to human rights, including Aboriginal cultural rights, of all persons appointed to work or working in:   1. the child protection system; 2. the corrections system, including prisons; 3. the youth justice system, including youth detention and like facilities and the bail system; 4. the adult justice system including the bail system; 5. Victoria Police; and 6. the forensic mental health system,   to ensure that they have that capability, competence and support necessary for them to carry out their obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and other human and cultural rights laws, and in particular for this purpose the government must:   1. review and revise all relevant policies, procedures, protocols, administrative directions, guidelines and like documents 2. review all relevant training courses and programs, and 3. ensure that Victorian First Peoples businesses or consultants participate on a paid basis in the review and revision of training courses and programs, and the delivery of these, wherever possible. |
| **8b** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must enshrine prevention and early help/intervention as a guiding principle in the CYFA and take all necessary steps to implement this principle in the administration of the CYFA. |
| **9** | **GOVERNMENT SUPPORTS IN FULL**  The Victorian Government must publicly report annually on the amount and proportion:   1. of total child protection and family services funding allocated to early intervention (family and parenting services) compared to secondary and tertiary services (community delivered child protection services, care services, transition from care services and other activities), and 2. of funding allocated to Aboriginal Community Controlled Organisations compared to mainstream services for early intervention (family and parenting services), secondary and tertiary services. |
| **12** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  When DFFH receives a pre-birth report regarding a pregnant Aboriginal woman or a child protection report is substantiated regarding an Aboriginal child, then subject to the consent of the person to whom the report relates, DFFH must automatically notify a Victorian Aboriginal legal service provider to be funded by the Victorian Government so that the child’s parents and/or primary care giver are offered legal help and, where appropriate, non-legal advocacy. |
| **14** | **GOVERNMENT SUPPORTS IN FULL**  The Department of Families, Fairness and Housing must ensure that:   1. all incoming child protection staff, as part of their pre-service education, complete cultural awareness and human and cultural rights training covering issues including: 2. the history of colonisation and in particular the impact of ‘protection’ and assimilation policies; 3. the continuing systemic racism and paternalism inherent in child protection work today that must be identified, acknowledged and resisted; 4. the value of First Peoples family and child-rearing practice; 5. upholding human rights including Aboriginal cultural rights; and 6. the strength of First Peoples families and culture and culturally appropriate practices; 7. all child protection staff and Department executives undertake regular, mandatory cultural safety training, to be designed and delivered by a Victorian First Peoples business or consultants on a paid basis; and 8. completion rate for training are published by the Department annually. |
| **15a** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  DFFH, in consultation with the Commissioner for Aboriginal children and Young People and relevant Aboriginal Community Controlled Organisations must improve how they identify and deindentify First Peoples children in the Victorian child protection system. |
| **17** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must amend the CYFA to:   1. specify that priority be given to keeping siblings together in placement decisions (both in out of home care and permanent placements); 2. include in the decision-making principles a presumption that removal of a First Peoples child from their family or community causes harm; 3. provide that a child protection practitioner must record how they have considered the presumption of harm caused by removal in their decision to remove a First Peoples child; and 4. provide that the Children’s Court is required to include in its reasons for a removal decision how the presumption of harm caused by removal has been considered. |
| **18** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must:   1. ensure Children’s Court of Victoria judicial officers determine child protection matters state-wide; and 2. abolish the current practice of having non-specialist magistrates determining child protection matters in some rural and regional court locations. |
| **19** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must as soon as possible expand and sufficiently resource the Marram-Ngala Ganbu (Koori Family Hearing Day) state-wide [see **section 4.9.8** for details of Marram-Ngala Ganbu]. |
| **20** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must address barriers to First Peoples becoming carers for First Peoples children in the child protection system by making 3 specified changes. |
| **21** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must amend the CYFA to require DFFH to ensure that all children who are placed in out of home care receive a developmental disability assessment and health assessment consistent with the National Out of Home Care Standards and in a timely way. |
| **22** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must amend the CYFA to provide the Children’s Court with greater powers to ensure that cultural plans are developed, implemented and monitored, particularly when out of home care orders are being extended and children’s separation from their families is prolonged. |
| **25** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must amend the CYFA to allow the Children’s Court of Victoria to extend the timeframe of a Family Reunification Order [as to which see **section 5.17.4** for relevant details] where it is in the child’s best interest to do so. |
| **30** | **GOVERNMENT SUPPORTS IN FULL**  In relation to the decriminalisation of public intoxication:   1. the Chief Commissioner of Police must ensure that Victoria Police conduct is closely monitored to ensure police members do not use existing powers to unnecessarily take intoxicated people into custody, for example by ‘upcharging’; and 2. the Victorian Government’s planned independent evaluation of the monitoring of police conduct must: 3. be First Peoples led, with appropriate governance by them; 4. cover at least the first 12 months and then 3 years of implementation; and 5. have results that are made public. |
| **33** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must:   1. develop, deliver and publicly report on a cultural change action plan to ensure all bail decision-makers exercise their powers and functions on the basis that imprisonment on remand (including that of First Peoples) is used only as a last resort, and 2. ensure that the development and ongoing monitoring of performance of the action plan is First Peoples led. |
| **34** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must ensure access to culturally safe and appropriate ball hearings for Aboriginal people, and culturally safe support for First Peoples on bail. |
| **36** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government’s planned new *Youth Justice Act* must:   1. explicitly recognise the paramountcy of human rights, including the distinct cultural rights of First Peoples, in all aspects of the youth justice system; 2. embed those rights in the machinery of the Act; and 3. require all those involved in the administration of the Act to ensure those rights. |
| **38** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must amend the *Criminal Procedure Act 2009* and the CYFA to remove the requirement that the prosecution (including police) consent to diversion and replace it with a requirement that the prosecution be consulted. |
| **45** | **GOVERNMENT SUPPORTS IN FULL**  By 29 February 2024 the Victorian Government must legislate to create a new statutory protection for public records that ensure that information shared on a confidential basis with Yoorook will be kept confidential for a minimum of 99 years once Yoorook finishes its work and its records are transferred to the Victorian Government. |
| **46** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must:   1. review s.534 CYFA to identify a workable model that: 2. places clear time limits on the operation of s.534 so that where the only individuals identified in a publication are adults who have provided their consent, and the Children’s Court matter is historical in nature, then the prohibition does not apply; and 3. enables a Royal Commission or similar inquiry to publish information about a child who is subject to protection proceedings or a protection order, where the child provides that information, is capable of understanding the consequences of losing anonymity and provides their consent; and 4. ensure that any review of s.534 CYFA is First Peoples led insofar as the proposed reforms affect First Peoples. |

