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**UNLESS INDICATED OTHERWISE, ALL LEGISLATION REFERRED TO IS VICTORIAN.**

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## **3.1 Roles of judicial officers**

**"I've been a judge for 21 years. The voices have kept at me and at me. Mellifluous, strident, sad, cool, persuasive, angry – voices demanding justice ‑ voices insisting upon the law – some voices wanting both."**

Robert Shenton French (Former Chief Justice of the High Court of Australia)

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

Socrates

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

In addition since May 2021 judicial registrars have been appointed who preside over some hearings in both Divisions of the CCV. The jurisdiction which may be exercised by judicial registrars is detailed in the *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* and encompasses:

* the proceedings and matters listed in rule 2.03 whether or not contested;
* the proceedings and matters in the Criminal Division listed in rule 2.04 whether or not contested;
* the proceedings and matters in the Criminal Division listed in rule 2.05 if uncontested;
* the proceedings and matters in the Family Division listed in rule 2.06 whether or not contested;
* any other applications in proceedings in the Family Division if uncontested [rule 2.07].

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

The role of the judicial officer is to determine the dispute between the parties by applying the relevant law to particular fact situations. In *Noone*, *Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors (No 2)* [2011] VSC 153 at [12] Pagone J said of this: “The overriding duty for the Court must be to achieve justice between the parties and to ensure that it is satisfied that the burden which a party bears is adequately and reliably discharged.”

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

In *Onyeka Evans Nwagbo v The Queen* [2021] VSCA 93 the Court of Appeal (Priest, Niall & T Forrest JJA) allowed an appeal and granted a new trial on a charge of attempting to possess a commercial quantity of unlawfully imported border controlled substance on the basis that there had been a substantial miscarriage of justice occasioned by the trial judge–

* crossing the boundary between the roles of judge and advocate;
* frequently intervening in witness examination;
* eliciting evidence from witnesses; and
* being very critical of counsel for the accused in the presence of the jury.

At [22]-[38] the Court of Appeal discussed the legal principles underpinning the role of a judge, noting at [22] that this role “is circumscribed by what the dynamics of an adversarial system require, as opposed to what would be required of a judge in an inquisitorial system”. In this connection it is important to note that the Criminal Division of the Children’s Court operates under the adversarial system but child protection proceedings in the Family Division are at least partly inquisitorial as evidenced by–

* the obligation of the presiding judicial officer – independently of the parties – to have regard to relevant ‘best interests’ principles in making any decision or taking any action in child protection proceedings; and
* the provisions of ss.215 & 215B of the *Children, Youth and Families Act 2005* [CYFA] in relation to the conduct and management of child protection proceedings in the Children’s Court.

In the course of its judgment in *Nwagbo’s Case* the Court of Appeal referred with approval to dicta from a large number of cases, saying–

* “The judge’s [role] is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points made by the advocates and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.” {*Jones v National Coal Board* [1957] 2 QB 55 at 64 per Denning LJ.}
* “Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence. It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked … The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law.” {*Ratten v The Queen* (1974) 131 CLR 510, 517 per Barwick CJ.}
* “The degree to which judicial interventions are permissible will vary from civil to criminal jurisdiction and from case to case. **Where a judge is the ultimate fact-finder, a more liberal approach to judicial intervention may be justified: *Galea v Galea* (1990) 19 NSWLR 263, 281 (Kirby ACJ), citing *R v Matthews* (1983) 78 Cr App R 23, *EH Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146. After all, there can be no complaint about the trier of fact properly informing himself or herself of those facts and the opinions that surround them.** Where, however, a jury is tasked with determining the outcome, a judge will normally need to be more circumspect and leave counsel and the jury to perform their respective tasks.” [Emphasis added]
* “A judge goes beyond the scope of permissible judicial intervention in questioning witnesses if he or she appears to adopt the role of a party in the proceeding. Leaving evidentiary and procedural rulings to one side, a judge cannot shape the content of the trial or convey to the jury the impression that he or she has taken a side in the dispute. As Hansen JA said in *Buchwald v The Queen* (2011) 38 VR 199, 229: ‘The question is ultimately whether, having regard to all the circumstances of the trial, including the length, terms and nature of the judge’s questioning, the judge’s intervention crossed the boundary between impartial judge and partial advocate.’”
* “It is not part of the functions of a trial judge [in a jury trial] to endeavour to fill gaps in a Crown case; nor to ask questions of an accused or any other witness in order to raise an issue which the Crown and the accused have left alone; nor to ask leading questions of an accused or any other witness in an endeavour to throw doubts upon the witness’s credit, particularly if the witness is the accused… It is permissible for a judge to intervene, even, if necessary, repeatedly, during evidence-in-chief and cross-examination of an expert witness in a judge-alone trial where the intervention occurs to ‘enable [the judge] to understand the technical points of the case’: *Jones* [1957] 2 QB 55, 62 (Denning LJ). Indeed, a judge is ‘bound to intervene’ in these circumstances.” {*R v Brdarovski* (2006) 136 A Crim R 336 per Nettle JA at [25].}
* “It is permissible for a judge to intervene, even, if necessary, repeatedly, during evidence-in-chief and cross-examination of an expert witness in a judge-alone trial where the intervention occurs to ‘enable [the judge] to understand the technical points of the case’…Indeed, a judge is ‘bound to intervene’ in these circumstances.” {J*ones v National Coal Board* [1957] 2 QB 55 at 62 & 65.}
* “A judge may intervene, frequently if necessary, in order to maintain proper control over the proceedings and to ensure that witness examination remains fair and relevant.” {See *Anderson v National Australia Bank* [2007] VSCA 172 at [83].}
* “It is impermissible for a judge’s interventions to have the effect of undermining counsel’s forensic plan or strategy. Intervening, particularly in a criminal trial by jury, creates an especial risk of producing an unfair trial.”
* “A judge should not, during the course of questioning [in a criminal trial], raise a point which neither party had raised or sought to raise. In *Brdarovski*, the trial judge intervened during cross-examination of the accused to question him on DNA, directed towards an issue the prosecutor had elected to leave alone: ‘It was not for the judge to create an issue where none existed.’”
* “Judges should avoid denigrating counsel, particularly before a jury *Galea* (1990) 19 NSWLR 263, 282 (Kirby ACJ) (and, ideally, in its absence: *Piccolotto v The Queen* [2015] VSCA 143, [31]–[35] (Redlich, Santamaria and Beach JJA); *Pyliotis v The Queen* [2020] VSCA 134, [60] (Priest, Niall and T Forrest JJA).”
* “A judge should not, through questioning, convey scepticism about a witness’ evidence or his or her credibility.”
* “Judges possess the full range of human strengths and weaknesses. In an adversarial system, it may be expected that judges of different temperaments may respond very differently to identical circumstances and it is unrealistic to expect unfailing wisdom seasoned with serene composure. Judges may sometimes be belligerent and rude. They can on occasions be confrontational and impatient. They may be sarcastic and disdainful. Whether the cumulative effect of such conduct will constitute a substantial miscarriage of justice will always be a question of fact and degree. In *Budd v Kambah Tea Tree Plantations Pty Ltd* [2001] NSWCA 180 at [103] Heydon JA, in the setting of civil litigation, sanctioned the robust approach to the conduct of a trial adopted by the judge at first instance as a ‘modern technique, and a not unacceptable one, particularly in a busy trial court under pressure from crowded lists’. Nettle JA, citing this observation in *Anderson* [2007] VSCA 172, remarked at [95] that trial litigation often called for ‘plain speaking, directness and sometimes asperity’. In the scheme of things, a trial judge should endeavour to avoid ‘truculence and discourtesy’, although ‘in any hard fought case’ it may well arise. The fact that it does is not necessarily determinative of the question whether there has been a substantial miscarriage of justice. It is always necessary to ask whether the trial has been so compromised by the judge’s conduct as to no longer justify the characterisation of a ‘fair trial’.”

In the context of adversarial proceedings, the Court of Appeal concluded in *Nwagbo’s Case* at [38] that:

“In summary, the following propositions can be distilled from the authorities:

* 1. Whether judicial intervention will constitute a substantial miscarriage of justice will always be a question of fact and degree.
  2. An adversarial system prescribes distinct roles to counsel and the judge, and the role of the judge is circumscribed by the dynamics of the adversarial system.
  3. In jury trials, judges should be especially careful to avoid unnecessary intervention in the presence of the jury.
  4. Judicial intervention in the presence of the jury ought not descend to denigration of counsel or counsel’s case.
  5. A judge must not give the appearance of adopting the role of a party to the proceeding, nor appear as if that party’s partial advocate.
  6. A judge must not shape the content of a trial, save for procedural or evidentiary rulings. Hence, a judge must not endeavour to fill gaps in a party’s case, examine areas that the parties have left alone, nor endeavour to impact upon a witness’s credit.
  7. A judge may intervene in order to understand technical issues in a case, or to endeavour to clarify those issues for the jury.
  8. A judge may intervene to maintain proper control over proceedings.”

In *Becker v The King* [2023] VSCA 332 Emerton P, Priest JA & Kidd AJA held at [283] that the trial judge – by making extensive comments during the prosecution opening and witness examination and when charging the jury in a complex and document-heavy alleged mortgage fraud trial – had “crossed the line…between what may be acceptable intervention and comment by a trial judge to ensure a jury understands the issues in a case”. Noting at [108] that “in an adversarial context…it is the parties who are the protagonists and hence who dictate the forensic landscape against which the facts fall to be determined” {per Doyle JA in *Roberts v The Queen* (2022) 141 SASR 73 at [63]}, the Court held at [6] that “the trial proceeded in a way that was inimical to the principles of adversarial justice…The result was that the applicant did not receive a fair trial according to law.” A retrial was ordered.

By contrast, in *Constantinou v The King* [2024] VSCA 79 Macaulay, Kaye & T Forrest JJA held at [104]:

“…we are conscious that, particularly in a criminal trial, it is most important that the judge exercise restraint in intervening in the questioning process, particularly when it involves an accused person or a witness whose evidence might be of particular consequence to the outcome of the trial. Nevertheless, for the reasons we have outlined, we are not persuaded that the judge’s interventions in this case were such as, in some way, to convey to the jury his Honour’s view that the witness, Ms Waenga, ought not to be believed. Rather, each of the interventions constituted a constructive set of questions asked by the judge that was designed to clarify and elucidate important matters which the jury was required to consider in determining the verdict in the case.”

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### **3.1.1 Procedural fairness (natural justice) generally**

In the process of determining the dispute between the parties, the judicial officer is required by law to accord **procedural fairness** – sometimes described as “**natural justice**” – to all parties. In *Roberts v Harkness* [2018] VSCA 215 the Court of Appeal (Maxwell P, Beach & Niall JJA) stated:

[46] “[It] is the fundamental obligation of every court to ensure a fair hearing for the parties before it. The High Court recently affirmed, in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99 [156], that procedural fairness is ‘an essential attribute of a court’s procedure’ The correlative right of each party to a fair hearing is firmly established at common law and — since 2006 — has been enshrined in s 24(1) of the Charter, which relevantly provides as follows:

‘A person charged with a criminal offence … has the right to have the charge … decided by a competent, independent and impartial court or tribunal after a fair and public hearing.’

[47] The existence of the fair hearing right being uncontroversial, the critical question is: ‘What does the duty to act fairly require in the circumstances of the particular case?’ See *Kioa v West* (1985) 159 CLR 550, 585. Natural justice is ‘fair play in action’: *Salemi v Minister for Immigration & Ethnic Affairs (Cth) [No 2]* (1977) 137 CLRT 396, 445. As Gleeson CJ said in Lam (2003) 214 CLR 1, 14 [38]:

‘Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.’

[48] It is an essential requirement of a fair hearing that each party be given a ‘reasonable opportunity’ of presenting its case, whether in writing, or orally, or both: *Russell v Duke of Norfolk* (1949) 1 All ER 109, 118; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 341 [55]; *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301, 308-9 [38]–[41]. This will ordinarily include being informed of the case to be advanced by the opposing party and having an opportunity to respond: *Condon v Pompano Pty Ltd* at [157].

[49] Axiomatically, what is ‘reasonable’ for this purpose will depend on the circumstances of the case: *Russell* (1949) 1 All ER 109, 118; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 311-2, 319-20; *Condon v Pompano Pty Ltd* at [156]. Matters to be taken into account in determining the practical content of fairness in the particular case will include:

• the nature of the decision to be made;

* the nature and complexity of the issues in dispute;
* the nature and complexity of the submissions which the party wishes to advance;
* the significance to that party of an adverse decision (‘what is at stake’: *Shrestha* at [49] & [54]); and
* the competing demands on the time and resources of the court or tribunal: *AMF 15 v Minister for Immigration and Border Protection* (2015) 241 FCR 30, 48 [44](e); *Shrestha* at [53]-[54]; *Barratt v Howard* (2000) 96 FCR 428, 444-5 [50]-[54]; *Chen v Minister for Immigration and Ethnic Affairs* (1984) 48 FCR 591, 600-602.”.

In *SZBEL v Minister for Immigration and Multicultural Affairs* [2006] HCA 63 the High Court of Australia held that the Tribunal which had refused to grant the Iranian appellant a protection visa had not accorded the appellant procedural fairness in that it had not given him a sufficient opportunity to give evidence, or make submissions, about what turned out to be two of three determinative issues arising in relation to the decision under review. In its joint judgment at [32] the High Court referred with approval to the following dicta of Northrop, Miles & French JJ in the Federal Court of Australia in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592:

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

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

“The rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."

In *Chief Commissioner of Police v IHF & Police Registration and Services Board* [2021] VSCA 147 the Court of Appeal (Kyrou, Emerton & Kennedy JJA) said at [113]-[115]:

[113] “Ordinarily, procedural fairness does not require a decision-maker to disclose their provisional views or proposed conclusions: see, eg, *Ansett Transport Industries Ltd v Minister for Aviation* (1987) 72 ALR 469, 499 (Lockhart J). Nor is there a general obligation for a decision-maker to disclose their mental process, in the sense of providing a ‘running commentary’ that gives the applicant ‘forewarning of all possible reasons for failure’: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 69 [31]; [2001] HCA 22 (Gleeson CJ and Hayne J); see also *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369. To the contrary, adopting such a course ‘would be likely to run a serious risk of conveying an impression of prejudgment’: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 166 [48]; [2006] HCA 63 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). However, in some cases procedural fairness may require that a decision-maker disclose, for instance, a particular path of reasoning that the parties could not reasonably have anticipated or forewarn of a proposed conclusion that is likely to take the parties by surprise: *Habib v Director-General of Security* (2009) 175 FCR 411; [2009] FCAFC 48. Similarly, procedural fairness may require disclosure that a decision-maker proposes to reject an issue that the parties had agreed on (*Stead v State Government Insurance Commission* (1986) 161 CLR 141; [1986] HCA 54) or if the decision-maker changes their view on an argument that they had earlier indicated would be accepted or rejected (see eg, *Pantorno v The Queen* (1989) 166 CLR 466; [1989] HCA 18). Ultimately, the question is whether procedural fairness — assessed by reference to the particular statutory scheme (*SZBEL* (2006) 228 CLR 152, 162; [2006] HCA 63) — requires disclosure in order for the person affected by a decision to have the opportunity to be heard (see, eg, *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, and in particular at 100–4 (Keely J)).

[114] The principles were set out by the Full Federal Court (Northrop, Miles & French JJ) in *Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; [1994] FCA 1074 at 591-2:

‘Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision maker. It also extends to require the decision maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.’

[115] As this passage suggests, the opportunity to be heard would ordinarily require a party affected by a decision to have the opportunity to ascertain and address the issues relevant for determination (that is, issues that are ‘in the ring’: *Victims Compensation Fund Corporation v Nguyen* (2001) 52 NSWLR 213, 220–1 [44]; [2001] NSWCA 264 (Mason P, Handley and Powell JJA).”

In *Moran v The King* [2024] VSCA 13 the Court of Appeal held that the trial judge – sentencing the applicant on charges including reckless conduct endangering persons – had been in breach of procedural fairness by obtaining and relying on the sentencing reasons of another judge in relation to one of the applicant’s prior criminal matters without giving the applicant an opportunity to be heard in relation to those reasons. See esp. at [48]-[51] where Walker & Boyce JJA said:

[48] “The applicant submitted that the sentencing judge denied him procedural fairness by obtaining the Judge Gwynn reasons and relying on them in order to take an adverse view of the applicant’s prospects of rehabilitation without first having notified the applicant’s legal representatives of his Honour’s intention to do so.

[49] In support of this submission the applicant cited *Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1994) 119 ALR 206, 210 where Mason CJ, Brennan, Deane, Dawson and Gaudron JJ observed that a judge’s decision must be made on the basis of the evidence and arguments in the case and not ‘on the basis of information which is independently acquired’. The applicant also relied on this Court’s statement of principle in *SD v The Queen*, namely, that a court ‘is not entitled to take into account factual material not in evidence without notice to the parties’: (2013) 39 VR 487, 496 [37].

[50] As noted above, the respondent conceded that there had been a breach of procedural fairness caused by the sentencing judge’s use of the Judge Gwynn reasons.

[51] We accept the applicant’s contention of error and the respondent’s concession in this regard concerning Ground 1(a) and (b). The concession is consistent with the decisions of this Court in *R v Ulla* [2004] VSCA 130 and *R v Wise* (2000) 2 VR 287; [2000] VSCA 169. Each was a case where procedural fairness was denied when a sentencing judge sentenced a person by reference to earlier sentencing reasons concerning that person, in circumstances where those reasons had not been brought to the attention of the sentenced person’s legal representatives.”

The sentencing discretion being reopened, the Court of Appeal imposed a TES IMP 27m/18m in lieu of a TES IMP 31m/20m.

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

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

See also *Stevens v DP World Melbourne Ltd* [2022] VSCA 285 at [22] & [63]-ground (8).

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

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

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

In *DPP v Fogarty* [2021] VSC 392 a magistrate had sought extrinsic information – without recourse to the parties – in order to make an assessment as to whether the particular charges before him were in proper form. After discussion of [*Gilfillan v County Court of Victoria*](https://jade.io/citation/3082428) (2001) 123 A Crim R 433 (Nathan J) and [*Griekspoor v Scott*](https://jade.io/article/141882) (2000) 23 WAR 530 (Roberts-Smith J), Priest JA held that the magistrate had failed to accord procedural fairness, relying at [48] on the following dicta in [*SD v The Queen*](https://jade.io/article/296260) (2013) 39 VR 487 (Ashley, Redlich and Priest JJA) at [36]-[39]:

“It is axiomatic that a judge may not search for, or take account of, information that is not in evidence, save where a fact is of such notoriety that a judge may take judicial notice of it.  Mason CJ and Brennan, Deane, Dawson and Gaudron JJ in [*Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd*](https://jade.io/article/188371) (1994) 119 ALR 206 at [210](https://jade.io/article/188371/section/140579); [68 ALJR 179](https://jade.io/article/188371) at [182](https://jade.io/article/188371/section/140331) referred to the undoubted principle that a judge’s decision must be made on the basis of the evidence and arguments in the case and not ‘on the basis of information or knowledge which is independently acquired’. A court is not entitled to take into account factual material not in evidence without notice to the parties: [*International Finance Trust Co Ltd v New South Wales Crime Commission*](https://jade.io/article/119721)(2009) 240 CLR 319 at [381–3](https://jade.io/article/119721/section/896), [[146]](https://jade.io/article/119721/section/896) per Heydon J.

The rationale for the prohibition is to be found within the fundamental rule of natural justice that a party is entitled to know the case sought to be made against it and be given an opportunity of replying to that case.  The entitlement of a litigant is to a fair opportunity to correct or contradict any relevant material which is prejudicial:[*Kioa v West*](https://jade.io/article/67250)(1985) 159 CLR 550 at [569](https://jade.io/article/67250/section/140363) per Gibbs CJ, [582](https://jade.io/article/67250/section/140269) per Mason J. As Brennan J stated in [*Kioa v West*](https://jade.io/article/67250) at 628:

‘A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters to his interests which the repository of the power proposes to take into account in deciding upon its exercise.’

The fundamental requirement of procedural fairness is that a party who is subject to the possibility of an adverse determination on the basis of any information, whatever its source, must be made aware of the case to be raised against the party, and be afforded an opportunity to respond. The judicial obligation to afford a party reasonable opportunity to present or meet a case {[*Minister for Immigration and Multicultural Affairs v Bhardwaj*](https://jade.io/article/68319)(2002) 209 CLR 597 at [611](https://jade.io/article/68319/section/140890), [[40]](https://jade.io/article/68319/section/140890)} is vital both to the reality and the appearance of justice.”

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

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

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

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

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

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

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

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

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

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

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

In *Kelly v The Queen* [2021] VSCA 216 events occurring after the plea hearing had been adjourned had been taken into account by the sentencing judge against the appellant but he had not been given the opportunity – despite requesting to do so – to make submissions about those events. At [37] the Court of Appeal (Priest & Beach JJA) concluded that “in making the findings the judge made, on the issues of acceptance of responsibility, insight and rehabilitation, without seeking further submissions from the appellant, involved a denial of procedural fairness.” However, despite that finding, the Court of Appeal dismissed the appeal on the basis that assuming in the appellant’s favour that he appropriately accepted responsibility, possessed insight and had good prospects of success, the Court was not satisfied that any different sentence should be imposed.

In *Konidaris v The Queen* [2021] VSCA 309 the Court of Appeal held that the sentencing judge had failed to afford procedural fairness to the appellant by accessing and relying on a medical report not formally tendered or relied on in the plea and by using the report to make findings contrary to the expert evidence before the Court. At [89] Emerton & Osborn JJA said:

“We consider that in obtaining and using the Sevar report to counter the evidence given by Dr Owens, the sentencing judge acted not as an adjudicator, but as an investigator and, in so doing, stepped outside the judicial role. It is not within the limits of the judicial function for a judge to attempt to fill a gap in the evidence on a matter of controversy, as this involves ‘trespassing into prohibited territory’: *SD* (2013) 39 VR 487, 498 [43]; [2013] VSCA 133 (Ashley, Redlich and Priest JJA), referring to *R v H* [2005] NSWCCA 282, [67]–[69] (Studdert, Bell and Latham JJ); *Perrin The Queen* [2006] NSWCCA 64 (McClellan CJ at CL, Rothman J, Smart AJ).”

In *Nathanson v Minister for Home Affairs* [2022] HCA 26 the appellant N, a citizen of New Zealand born in Zimbabwe, arrived in Australia in 2010 when he was 26 years old. In 2013 N was granted a Class TY Subclass 444 Special Category visa. In 2018, a delegate of the respondent Minister cancelled that visa pursuant to s 501(3A) of the *Migration Act 1958 (Cth)*. Section 501(3A) required the Minister to cancel the visa because the Minister was satisfied that N did not pass the “character test" in s 501(6) of the Act and because he was then serving a sentence of imprisonment on a full-time basis in a custodial institution for offences against laws of the Northern Territory. The particular offences that led to cancellation of N's visa were depriving a person of personal liberty, aggravated assault, stealing and driving a vehicle in a dangerous manner. The objective circumstances of the offences were serious, including in that: the victim was a 70 year old man; the attack was unprovoked and the victim was deprived of his liberty for almost 12 hours during which the appellant threatened the victim's life; and the offending involved the victim in a high speed car pursuit with police. For the offences, N had been sentenced to a total effective period of imprisonment of two years and six months. A delegate of the Minister decided not to revoke the mandatory cancellation of N’s visa pursuant to s 501CA(4) of the Act. The AAT refused N’s application for review of the Minister’s decision. A majority of the Full Court of the Federal Court of Australia dismissed N’s appeal. The High Court allowed his appeal, set aside the orders of the Federal Court, allowed his application for review, set aside the decision of the AAT and remitted the matter to the AAT to be heard and determined according to law. The basis of the decision was that the AAT had denied N procedural fairness by not giving him an opportunity to address the relevance of incidents of domestic violence to the primary consideration prescribed by direction made under s 499 of the *Migration Act*. At [1]-[2] Kiefel CJ, Keane & Gleeson JJ said [emphasis added]:

"The issue in this appeal is whether procedural unfairness by the AAT in the course of hearing the appellant's application for review of a decision to refuse to revoke the mandatory cancellation of his visa involved jurisdictional error. Following a hearing conducted by the Tribunal, the Tribunal affirmed the decision to refuse to revoke the visa cancellation. As the Courts below recognised, **the Tribunal's error in failing to afford the appellant procedural fairness will have involved jurisdictional error only if that failure was material to the Tribunal's decision. Materiality is established if the error deprived the appellant of a realistic possibility of a different outcome**: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [45]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 449 [2], 462 [85]; 390 ALR 590 at 592, 610; see also *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134-135 [30]-[31]. The appellant bore the onus of demonstrating that the denial of procedural fairness was material in this sense*: SZMTA* (2019) 264 CLR 421 at 433 [4]; *MZAPC* (2021) 95 ALJR 441 at 449 [2]; 390 ALR 590 at 592.

Applying these principles, the appellant discharged his onus of demonstrating that the Tribunal's denial of procedural fairness deprived him of a realistic possibility of a different outcome. That realistic possibility was demonstrable from the record of the Tribunal's decision. Contrary to the conclusion of the majority of the Full Court of the Federal Court of Australia (2020) 281 FCR 23 at 53 [127], **the appellant was not required to articulate a specific course of action which could realistically have changed the result**.”

In *MNX (a pseudonym) v TNV (a pseudonym)* [2022] VSC 592 the plaintiff MNX sought judicial review of a decision of the Magistrates’ Court of Victoria – made in a mention hearing – refusing to grant TNV, the police applicant, leave to withdraw an application for a family violence intervention order against MNX and at the same time granting MNX leave to apply for revocation or variation of an existing interim family violence intervention order made on the application of TNV. The affected family members and protected persons were MNX’s former wife, SDW, and their infant son. Garde J held:

* at [76]-[84] that the magistrate’s refusal to give the police applicant leave to withdraw the intervention proceeding was not legally unreasonable; and
* at [88]-[102] that once her Honour had heard from each of the parties to the extent that she had available court time, procedural fairness was invoked, it was not open to disregard the requirements of procedural fairness in dealing with the applications before the Court; however
* at [110] that the breach in refusing, rather that adjourning TNV’s application for leave to withdraw, did not result in any practical injustice because MNX was just as well placed after the refusal to apply for revocation or variation of the interim order: “One door was closed, but another was opened.”

In *Kyriazis v Victoria Police* [2022] VSC 596 after exchanges between the plaintiff and the magistrate involving how the proceeding was to be conducted, the plaintiff voluntarily left the courtroom and the summary charge of failing to provide a sample of an oral fluid for testing was heard and determined in his absence. The exchanges were triggered by the plaintiff wishing to raise as a preliminary issue that he had a right to trial by judge and jury. Ginnane J held that there had been no denial of procedural fairness. At [32]-[33] & [37]-[39] his Honour said:

[32] “Mr Kyriazis was entitled to be provided procedural fairness in the hearing before the Magistrate, as the ‘right to procedural fairness – to a fair trial – is a fundamental right of each accused’: *HM v R* (2012) 44 VR 717, 726 [29]-[30] (Redlich JA and Kaye AJA). Section 25 of the Charter also gave him that right.

[33] The content of procedural fairness in a case like this is influenced by the ‘particular capabilities and attitudes of the self-represented litigant’: [*Doughty-Cowell v Kyriazis*](https://jade.io/article/602136) [2018] VSCA 216, [[1]–[2]](https://jade.io/article/602136/section/10667); s.[24](https://jade.io/article/281699/section/192) of the [*Charter of Human Rights and Responsibilities Act 2006*](https://jade.io/article/281699)*.* The Court must ensure that a self-represented litigant has a reasonable opportunity to present their case and, if necessary, be informed of what issues need to be addressed. But a self-represented litigant is not given free rein as to how they conduct themselves in a hearing. As the Western Australian Court of Appeal stated in [*O’Connell v The State of Western Australia*](https://jade.io/article/264351)[*O’Connell v The State of Western Australia*](https://jade.io/article/264351) [2012] WASCA 96 [[109]](https://jade.io/article/264351/section/2178), a case on which the first defendant relied:

‘An unrepresented accused cannot deliberately take advantage of this position to conduct him or herself in a way that would not be acceptable from defence counsel. Being unrepresented is not a free pass to misbehave, flout the legal or procedural rules, ignore the law of evidence or to treat the trial judge and witnesses with disrespect or contempt. Where an unrepresented accused acts or attempts to act in any of these ways, a trial judge must fairly and, if necessary, firmly deal with such behaviour. The extent to which a trial is regarded as fair will be examined in the light of the accused's own conduct.’”

[37] “In my opinion, the conduct of the Magistrate as transcribed, and heard via the audio-recording, did not deny Mr Kyriazis procedural fairness. It was appropriate for the Magistrate to tell him that if he left the courtroom he was doing so of his own accord, and that she intended to hear and determine the charge. The Magistrate took reasonable steps to ensure the hearing would proceed with Mr Kyriazis present, and it was his choice to leave the courtroom. When a litigant leaves the court room before the completion of the hearing, there is no denial of procedural fairness in the court proceeding with the hearing: [*Andelman v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs*](https://jade.io/article/214796)[2011] FCA 299 [[38]–[40]](https://jade.io/article/214796/section/6610) (Jagot J); [*Charara v Commissioner of Taxation*](https://jade.io/article/463199) [2016] FCA 451 [[81]](https://jade.io/article/463199/section/936) (Wigney J).

[38] Mr Kyriazis sought to raise his ‘preliminary issue’, the constitutional issue, at the commencement of the hearing, but the Magistrate did not immediately allow him to address it. Nor was she obliged to. As a judicial officer her role was to control the conduct of the hearing and the manner and order in which issues were to be determined. The judicial officer conducts the hearing, not the parties. The parties, whether represented or not, must accept, and give reasonable respect to, the judicial officer’s role and authority. There is no indication in the transcript or recording that the Magistrate would not have allowed Mr Kyriazis to present his constitutional argument if he had remained in the courtroom. They only indicate that, as the presiding judicial officer, she proposed to decide the order in which issues were to be argued. The Magistrate in fact stated that ‘[h]is behaviour in the Court meant that I was unable and not prepared to hear his preliminary points until he put those points in a respectful and calm way. At no point, did that happen’. It is important for the administration of justice, and in the interests of all whose work requires them to be present in courtrooms, that all persons who are parties to criminal or civil proceedings, whether represented or not, show reasonable respect for the judicial officer. It is not for litigants to constantly interrupt the presiding judicial officer, but to listen and respond to the questions put to them and make their submissions when it is their turn. Mr Kyriazis is an experienced litigant: [*Doughty-Cowell v Kyriazis*](https://jade.io/article/602136)[2018] VSCA 216, [[75]](https://jade.io/article/602136/section/140831) (Maxwell P, Beach and Niall JJA).

[39] Mr Kyriazis was not denied procedural fairness and once he walked out waived any further entitlement to a hearing. The Magistrate had power to proceed with the hearing and determination of the charge even though Mr Kyriazis had left the hearing: [*Onus v Sealey*](https://jade.io/article/75762) (2004) 149 A Crim R 259; [2004] VSC 396, [[25]](https://jade.io/article/75762/section/140706).”

In *AML (a pseudonym) v Longden Super Custodian Pty Ltd* [2023] VSCA 170 the Court of Appeal refused the applicant leave to appeal a decision of McDonald J summarily dismissing his appeal from a VCAT decision. At [1]-[2] & [47]-[49] Macaulay JA & J Forrest AJA said [emphasis added]:

[1] “This is the fifth occasion on which the applicant has challenged, in a division of the Supreme Court, the correctness of a decision by the Victorian Civil and Administrative Tribunal (‘VCAT’) to refuse or not consider his application to adjourn a hearing of his landlord’s claim for possession of his rental premises.

[2] On each occasion a judge (or judges) determined that the applicant had not made out a prima facie case that he had been denied procedural fairness by not adjourning the hearing.”

…

[47] “In summary, as at 1 September 2022, at the latest, AML knew: the hearing listed for 1 September 2022 was proceeding; his first request for an adjournment had been refused; his second request for an adjournment had not been granted but may be considered at the hearing at 11:30 am on 2 September 2022; and he either could participate in the VCAT telephone hearing himself or appoint a representative to participate on his behalf. He did neither of those things. No person appeared before the VCAT to advance his request for an adjournment before the Member hearing Longden’s application for possession. It was not that he could not appear; rather, he would not appear. McDonald J was correct to find that AML chose not to appear.

[48] Irving AsJ’s observation (on the summary dismissal application) is directly to the point:

‘A further problem arises if AML’s line of argument were to be accepted. That is, it would leave the process before VCAT to his convenience. Such a position is beyond what the duty to provide procedural fairness requires and is contrary to modern case management principles and the need for finality in litigation. It also does not strike the appropriate balance between the interests of both parties to the litigation.’

[49] **We would go further. It is not for the parties to litigation in this day and age, and with the pressures on courts to deal with cases efficiently and speedily, to dictate whether a case will or will not proceed on a particular day or time. That is the Court’s decision.**”

In *Mia Harris (a pseudonym) and Adam Jackson (a pseudonym) v Secretary to the Department of Families Fairness and Housing* [2023] VSC 228 a Children’s Court magistrate had found – after a 4 day contested hearing – that a 14 month old child Isaac (a pseudonym) – who was removed from parental care at birth – was in need of protection on the likelihood limbs of ss.162(1)(d) & 162(1)(e) CYFA and placed him on a care by Secretary order. The mother had been legally represented but the father – who was then in custody serving an 8 month sentence and a 3 year CCO for various offences, including several relating to an incident where he stabbed the mother’s ex-partner – was unrepresented. Both the mother and the father – who had sought a family reunification order in respect of Isaac – appealed on a number of grounds. The mother’s appeal was dismissed. The father’s appeal was allowed on a single ground, namely that he had been denied procedural fairness. At [305]-[311] O’Meara J said:

[305] “In my view…her Honour correctly identified, more than once, that Mr Jackson had been ‘entitled’ to cross-examine the authors of the relevant reports. In particular –

(a) to that point, the pattern of the hearing had been exactly that – witnesses proffering evidence against the appellants were called and, where appropriate, cross-examined;

(b) the reports of Dr W and Ms C, in particular, had been introduced late, were relevant to and confirmed as relied upon in the Secretary’s case and were adverse to the interests of Mr Jackson;

(c) Mr Jackson had relevant and cogent questions for the authors; and

(d) it was quite realistic to consider that such a process could be to his benefit.

[306] Initially–

(a) so much seems to have been acknowledged by all counsel; and

(b) counsel for the Secretary confirmed that enquiries were being made of the witnesses.

[307] I should add that it was not then suggested by anyone that the fact that Mr Jackson was not proposing to call his own expert neuropsychologist or forensic psychologist should be thought to in some way displace or affect his entitlement to cross-examine the witnesses called in the case against him.

[308] The complexion of the position changed significantly two hearing days later when the case for the Secretary was sought to be closed without the missing witnesses being called. That development placed both her Honour and Mr Jackson in an acutely difficult position.

[309] It was also in that context that several of the points now sought to be advanced by the Secretary emerged and rather ‘swirled around’ in the hearing with the effect that, in the end, Mr Jackson was dissuaded from pressing to cross-examine Dr W and Ms C.

[310] In particular–

(a) counsel for the Secretary raised the spectre of an adjournment – which, as I have earlier noted, counsel for Ms Harris initially opposed;

(b) counsel for the Secretary sought broadly to ‘anticipate’ the points that Mr Jackson would ‘like to raise’ and deal with that by accepting that they would ‘no doubt be accepted’;

(c) thus, her Honour was edged in the direction of the proposal ultimately made to Mr Jackson, namely that ‘you can just as well make those points to me as you can probably make them to the witnesses’;

(d) in that context, her Honour observed that Mr Jackson was not calling another expert;

(e) counsel for Ms Harris raised the ‘risk’ that if the witnesses were called they might say that they need to undertake another assessment; and

(f) her Honour then settled upon Mr Jackson telling her ‘how you think you have improved’.

[311] In my view, while that course of events may be understood as having been produced by difficult circumstances, it plainly had the effect of denying procedural fairness to Mr Jackson. In particular, Mr Jackson was persuaded to accept an alternative to cross-examining the witnesses that, in the circumstances, was no true alternative at all.”

O’Meara J concluded at [345]:

“I am inclined to order that the proceeding be remitted to the Children’s Court to be re-determined, but not to specify that the Court hearing the proceeding should differently be constituted. It seems to me that the more important considerations are time and efficiency and so I would not outright exclude the possibility that it could be convenient for the further hearing of the remitted matter to proceed to conclusion before the same Magistrate.”

The case ultimately settled in the Children’s Court “on the doorstep of the court”.

In *Casperz v Garry & Warren Smith Pty Ltd & Ors (No 2)* [2024] VSC 8 O’Meara J said at [23] & [95]‑[96]:

[23] “I have read the 91 page transcript of [the VCAT] hearing, and also listened to the audio recording. The tone and content of various statements made by the applicant during the course of that hearing are, on no view, appropriate.

…

[95] “More generally, to state the obvious, when a litigant behaves in a sustained, offensive, unco-operative and quite unacceptable way, as the applicant did on the present occasion, the ultimate decision of the Tribunal to bring the proceeding to an end [by adjourning it for a further directions hearing] when it was plain enough that no such assistance would be given, should not be thought to amount to a denial of procedural fairness or natural justice.

[96] In the circumstances, there is no substance in the applicant’s overarching complaints of ‘prejudice’, ‘bias’, denial of procedural fairness and breach of natural justice and it follows that the complaints central to the applicant’s purported questions of law or grounds 1, 2 and 3 must be rejected.”

In relation to **procedural fairness** see also **subsection 3.5.6.4** below and see generally *J v Lieschke* (1987) 162 CLR 447 at 457 per Brennan J (Mason, Wilson, Deane & Dawson JJ agreeing); *R v Fisher* [2009] VSCA 100 at [65]; *Pantorno v The Queen* (1989) 166 CLR 466 at 473 per Mason CJ & Brennan J; *Friend v Brooker* [2009] HCA 21 at [115] per Heydon J; *MH6 v mental Health Review Board and another* [2009] VSCA 184 at [20]-[36]; *[CL] v [RP] (Ruling)* [2011] VSCA 297*; DPP v Sanding* [2011] VSC 42 at [135]-[147] per Bell J*; AB v Magistrates’ Court at Heidelberg* [2011] VSC 61 at [93] per Mukhtar AsJ; *Zigouris v Sunshine Magistrates’ Court* [2012] VSC 183 at [24]-[27] per Zammit AsJ; *DOHS v Children’s Court of Victoria & Ors* [2012] VSC 422 at [12]-[21], [29] & [32] per Dixon J; *Danne v Coroner* [2012] VSC 454 at [20]-[26] per Kyrou J; *Eaton v Dental Board of Australia* [2012] VSC 510 at [25]-[32] per Kyrou J; *Williams v Hand* [2014] VSC 527 at [97]-[105].*Trkulja v Markovic* [2015] VSCA 298 at [37]-[39] per Kyrou & Kaye JJA and Ginnane AJA; *David Hingst v Construction Engineering (Aust) Pty Ltd* [2019] VSCA 67 at [67]-[76] per Priest AP & Beach JA; *Shadi Farah v The Queen* [2019] VSCA 300 at [72]-[80]; *Celsius Fire Services Pty Ltd v Magistrates’ Court of Victoria & anor* [2019] VSC 835 at [36]-[44]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* [2021] HCA 6 at [22]-[44]; *Cathcart v Wang* [2021] VSC 685; *The Crown in Right of the State of Victoria (Department of Health) v Magistrates’ Court of Victoria* [2022] VSC 630 at [12]-[14]: *Viva Energy Australia Pty Ltd v Glen Eira City Council* [2022] VSC 726 at [83]-[95]; *Hycenko v Badge & Ors* [2023] VSC 19 at [24]-[41]; *TL v The King* (2022) 96 ALJR 1072 at [33]; *DPP v Sharman (a pseudonym)* [2023] VSCA 56 at [32]-[54]; *AML (a pseudonym) v Longden Super Custodian Pty Ltd* [2023] VSCA 118; *Woodman v State of Victoria & Independent Broad-based Anti-corruption Commission* [2023] VSCA 169 at [29]-[37]; *Marks v Thompson* [2023] VSC 716 at [48]-[56] applying *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FLR 356; *HH v WW* [2023] VSC 459 at [9]; *AGN (a pseudonym) v Secretary to the Department of Families, Fairness and Housing (Redacted)* [2024] VSC 176 at [58]-[79]; *Shearer v Chief Commissioner of Police (Victoria)* [2024] VSC 181 at [49]-[74]; *Brissenden v Victorian Institute of Teaching* [2024] VSC 580 at [59]-[231]; *Shininggarden Pty Ltd v Omega Building Group Pty Ltd* [2024] VSC 583 at [30]-[42]; *Kostiuk v KH (a pseudonym)* [2024] VSC 586 at [18]-[40].

### **3.1.2 Actual or apprehended judicial bias**

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

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

In *Davies v The Queen* [2019] VSCA 66 – cited with approval in *Ross v Commonwealth of Australia* [2022] VSC 457 at [6] – the Court of Appeal (Kaye, McLeish & T Forrest JJA) said at [523]:

“The principles concerning bias applications are well established and have received recent consideration by this Court, other intermediate appellate courts and the High Court. It is sufficient to set these principles out in summary form:

* A judge must not sit on a case where he or she is biased (actual bias) or might reasonably be perceived to be biased (apprehended bias): *Livesey v NSW Bar Association* (1983) 131 CLR 288; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (‘*Ebner*’); *Johnson v Johnson* (2000) 201 CLR 488.
* The test for apprehended bias is whether a hypothetical fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide: *Ebner* (2000) 205 CLR 337.
* A judge will only be disqualified for actual bias if a party establishes that a judge is so committed to an outcome that he or she will not alter that outcome, regardless of the evidence and/or arguments presented: *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 (‘*Legeng*’).
* The principles for actual and apprehended bias still apply to a judge in a criminal jury trial. Even though a judge in a criminal jury trial is not responsible for determining questions of fact, he or she is still required to make evidentiary decisions, may subtly influence the jury and must determine sentence in the event of a guilty verdict or verdicts: *Rozenes v Kelly* [1996] 1 VR 320; *R v Branko Balic* *(No 2)* (1994) 75 A Crim R 52; *R v Goussis* [2007] VSC 171.
* A party making a recusal application must identify the cause of an appearance of bias and demonstrate the logical connection between the cause and the appearance of partiality. A bare assertion that a judge has an interest in the outcome of a case is not sufficient: *Ebner* (2000) 205 CLR 337.
* The apprehension of bias must be reasonable and not fanciful or unreasonable: *Guscor v Ellicott* [1997] 1 VR 332.
* While a hypothetical lay observer does not have a detailed understanding of the law, he or she has basic knowledge of the judicial process and the issues to be determined: *Roner v ANZ Banking Group* (2000) 2 VR 531.
* The hypothetical lay observer does not know the personality of the judge, but knows that the person is a judge who has been trained to discount irrelevant, prejudicial or immaterial matters: *Honda Australia Motorcycle v Johnstone* (2005) VSC 387.
* The hypothetical lay observer has a broad knowledge of the material facts of the case and the circumstances that led to the trial. The lay observer also knows that the judge does not rely on inaccurate or incomplete information, or rely solely on the facts known to one of the parties: *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 (‘*Laws*’); *Victoria v Psaila* [1999] VSCA 193 (‘*Psaila*’).
* A judge’s bad temper or mere lack of niceties is not sufficient to establish apprehended bias: *Galea v Galea* (1990) 19 NSWLR 263; *Psaila* [1999] VSCA 193.
* A short and emotional exchange will not necessarily demonstrate that a judge is incapable of behaving impartially. However, prolonged or intense animosity towards a party, even if the animosity is not always apparent, may amount to actual or apprehended bias: *Ibid.*
* A judge may express a tentative view about an issue without creating an apprehension of bias: *Laws* (1990) 170 CLR 70; *Legeng* (2001) 205 CLR 507; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546.”

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

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

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

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

At [180] Callinan J said:

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

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

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

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

“The mere fact that a judge is related to a victim of crime is not sufficient to disqualify the judge from presiding at a trial of a person accused of a like crime: cf. *R v Goodall* (2007) 15 VR 673. In the present case, however, the relationship of the judge to the victim of the first crime, the similar age and circumstances of the victims and the emotional involvement of the judge might have led a fair minded observer to think the similarity in the crimes and victims might have induced in her Honour a sympathy for the alleged victim of the offences with which the applicant was charged which prevented her from bringing an impartial mind to the conduct of the trial. In this respect I think it is significant that the judge underwent the harrowing experiences of searching for her child overnight and then dealing as best she could with her daughter’s distress.”

In *Charisteas v Charisteas* [2021] HCA 29 the wife's barrister had engaged in private communication with trial judge, including while case was underway and while judgment was reserved, without previous knowledge and consent of other parties. The wife's barrister said that the communications did not concern the substance of the case. By majority (Strickland and Ryan JJ, Alstergren CJ dissenting), the Full Court of the Family Court of Australia dismissed the appeal. Strickland and Ryan JJ rejected the allegations of apprehended bias and dismissed the appeal against the 2018 Property Orders. Alstergren CJ would have allowed the appeal on the ground of apprehended bias and remitted the matter for rehearing. In allowing the husband’s appeal, the High Court (Kiefel CJ, Gageler, Keane, Gordon & Gleeson JJ) said at [11]-[22]:

[11] “Where, as here, a question arises as to the independence or impartiality of a judge, the applicable principles are well established {*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345 [6]-[8]; *Concrete* *Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 581-582 [3], 609 [110]; *Smits v Roach* (2006) 227 CLR 423 at 443-444 [53]; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 437 [31]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [21]; *CNY17* *v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 88 [21], 98-99 [57]} and they were not in dispute. The apprehension of bias principle is that ‘a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’ {*Ebner* (2000) 205 CLR 337 at 344 [6]; *Concrete* (2006) 229 CLR 577 at 609 [110]}. The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal {*Ebner* (2000) 205 CLR 337 at 343 [3], 344-345 [6]-[7], 348 [22]-[23], 362 [79]; *Concrete* (2006) 229 CLR 577 at 609-610 [110]-[111]}. Its application requires two steps: first, ‘it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits"; and, second, there must be articulated a ‘logical connection’ between that matter and the feared departure from the judge deciding the case on its merits {Ebner (2000) 205 CLR 337 at 345 [8]; see also 350 [30]}. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed {*Ebner* (2000) 205 CLR 337 at 345 [8], 350 [30]; *Concrete* (2006) 229 CLR 577 at 609-610 [110]-[111]; *CNY17* (2019) 268 CLR 76 at 88 [21], 98-99 [57]}.

[12] As five judges of this Court said in *Johnson v Johnson* {(2000) 201 CLR 488 at 493 [13] (footnote omitted), quoted in Concrete (2006) 229 CLR 577 at 609-610 [111]. See also *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 378-381}, while the fair-minded lay observer ‘is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice’.

[13] Ordinary judicial practice, or what might be described in this context as the most basic of judicial practice, was relevantly and clearly stated by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* {(1986) 161 CLR 342 at 346, 350-351} in 1986 by adopting what was said by McInerney J in 1972 in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* {[1973] VR 122 at 127. Now reflected in Australasian Institute of Judicial Administration Inc, Guide to Judicial Conduct, 3rd ed (2017) at 19-20 [4.3]}:

‘The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.’

[14] In this matter, what is said might have led the trial judge to decide the case other than on its legal and factual merits was identified. It comprised the various communications between the trial judge and the wife's barrister ‘otherwise than in the presence of or with the previous knowledge and consent of’ {cf *Magistrates' Court at Lilydale* [1973] VR 122 at 127} the other parties to the litigation. Indeed, given the timing and frequency of the communications between the trial judge and the wife's barrister, it cannot be imagined that the other parties to the litigation would have given informed consent to the communications even if consent had been sought, and it was not. The communications should not have taken place. There were no exceptional circumstances.

[15] A fair-minded lay observer, understanding that ordinary and most basic of judicial practice, would reasonably apprehend that the trial judge might not bring an impartial mind to the resolution of the questions his Honour was required to decide. The trial judge's impartiality might have been compromised by something said in the course of the communications with the wife's barrister, or by some aspect of the personal relationship exemplified by the communications. Accordingly, there is a logical and direct connection between the communications and the feared departure from the trial judge deciding the case on its merits.

[16] In their reasons the majority in the Full Court recognised the principle of judicial practice. Their Honours accepted that once a trial has commenced, private communication between a judge and counsel for one of the parties, without the knowledge and consent of the other parties, is so obvious a departure from the norms of judicial and professional conduct that it will usually be sufficient to establish the first limb in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. Nothing that was said in the passage in *Magistrates' Court at Lilydale* [1973] VR 122 at 127 extracted above, in guidelines {Australasian Institute of Judicial Administration Inc, Guide to Judicial Conduct, 3rd ed (2017) at 34 [6.11.1]} or in a leading text on judicial ethics {Thomas, Judicial Ethics in Australia, 3rd ed (2009) at 65 [4.65]} limits the period necessary to avoid communication to after the commencement of the trial. In any event, whilst communication here was halted while evidence was taken, it was resumed before final submissions and continued over the lengthy period of 17 months when the written reasons for the judgment on the question of recusal and the judgment on the settlement of property were reserved.

[17] Focusing on this latter period, the majority in the Full Court reasoned that the trial judge and the wife's barrister were aware of some of their obligations, by not communicating during the course of the trial, and the trial judge may be taken to have failed to appreciate that the same strictness applied at other times. According to the majority, the hypothetical observer would understand that the trial judge mistakenly held such a view but would not consider his lack of disclosure to be sinister.

[18] This reasoning is erroneous. The apprehension of bias principle is so important to perceptions of independence and impartiality ‘that even the *appearance* of departure from it is prohibited lest the integrity of the judicial system be undermined’ (emphasis added) {*Ebner* (2000) 205 CLR 337 at 345 [7]}. No prediction by the court is involved in deciding whether a judge might not bring an impartial mind to bear {*Ebner* (2000) 205 CLR 337 at 345 [7]-[8]}. No question as to the understanding or motivation of the particular judge arises.

[19] The lack of disclosure in this case is particularly troubling. It is difficult to comprehend how the trial judge could have failed to appreciate the need to disclose the communications, particularly when he was dealing with the application to recuse himself on other grounds. It may give the hypothetical observer reason to doubt the correctness of the claim by the wife's barrister that their communications did not concern ‘the substance’ of the case, if the ambiguity inherent in that statement is not itself of sufficient concern.

[20] The majority also reasoned that the second limb in *Ebner* was not made out by reference to what the fair-minded lay observer, properly informed as to the judiciary and the Bar, would think. The information included that barristers are professional members of an independent Bar who do not identify with the client; that judges are usually appointed from the senior ranks of the Bar; and that it may be expected they will have personal or professional associations with many counsel appearing before them {citing *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215 at 230. See also *Taylor v Lawrence* [2003] QB 528 at 554-555 [73]}. Informed by such matters, the majority reasoned, the hypothetical observer would be ‘able to tolerate’ some degree of private communication between a judge and the legal representative of only one party, even if undisclosed. The majority considered that the hypothetical observer would accept in this case that the judge and the wife's barrister would adhere to professional restraint in what was discussed and would accept that a professional judge who has taken an oath of office would not discuss the case at hand.

[21] Once again, this reasoning is erroneous. The alignment of the fair-minded lay observer with the judiciary and the legal profession is inconsistent with the apprehension of bias principle and its operation and purpose. The hypothetical observer is a standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system {*Johnson* (2000) 201 CLR 488 at 492-493 [12]; *Ebner* (2000) 205 CLR 337 at 359 [65], 363 [81], 364 [84], 375 [123]}. The hypothetical observer is not conceived of as a lawyer but a member of the public served by the courts. It would defy logic and render nugatory the principle to imbue the hypothetical observer with professional self-appreciation of this kind.

[22] It may be accepted that many judges and lawyers, barristers in particular, may have continuing professional and personal connections. The means by which their contact may be resumed is by a judge making orders and publishing reasons, thereby bringing the litigation to an end. It is obviously in everyone's interests, the litigants in particular, that this is done in a timely way.”

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

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

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

Other cases in which principles relating to judicial bias have been discussed include *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Clenae v ANZ Banking Group Ltd* [2000] HCA 63; *Anne Wintle v Stevedoring Industry Finance Committee & Others* [2002] VSC 39; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Re JRL: Ex parte CJL* (1986) 161 CLR 34; *Vakauta v Kelly* (1989) 167 CLR 342; *Webb v R* (1994) 181 CLR 44; *Johnson v Johnson* (2000) 201 CLR 488 at 506; *Mond & Mond v Dyan Rabbi Isaac Dov Berger* [2004] VSC 45; *Gascor v Ellicott* [1997] 1 VR 332; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Webb v The Queen* (1993) 181 CLR 41; *Re Keeley: Ex parte Ansett Transport Industries (Operations) Pty Ltd* (1990) 94 ALR 1; *Antoun v The Queen* (2006) 80 ALJR 497 at [22], [27]-[30], [56]-[57] & [81]; *Smits v Roach* [2006] HCA 63; *Commonwealth Bank of Australia v Taylor* [2008] VSC 3; *Anderson v National Australia Bank* [2007] VSCA 172; *R v Rich (Ruling No.21)* [2009] VSC 32; *Slaveski v Victoria* [2010] VSC 97; *R v Sonnet* [2010] VSCA 315 at [15]-[27]; *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; *Velissaris v Bruno Distributors Pty Ltd* [2011] VSC 395; *Moorfields Community & Ors v Stanislawa Bahonko* [2011] VSCA 295; *Bahonko v Moorfields Community* [2012] VSCA 89; *R v Vasiliou* [2012] VSC 216 at [9]-[11]; *Flavel v Morsby* [2012] VSC 433; *Waddington v Magistrates’ Court of Victoria & Kha (No. 2)* [2013] VSC 340 at [51]-[61]; *Wain & Ors v Drapac & Ors (No 3)* [2014] VSC 23; *Katherine Jackson v The Queen* [2019] VSCA 65; *AB v XYZ Pty Ltd* [2019] VSC 788 at [38]-[58]; *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; *In the Matter of Kornucopia Pty Ltd (No 2)* [2019] VSC 802; *Gild v The Queen* [2017] VSCA 367; *Bayley North (a pseudonym) v DPP (Cth)* [2020] VSCA 1 at [39]-[49]; *Elliott v Lindholm* [2020] VSC 567; [2020] VSCA 260; *Oakey Coal Action Alliance Inc v New Acland Coal P/L* [2021] HCA 2; *Steven Dural (a pseudonym) v The Queen* [2021] VSCA 82; *Grahame v Bendigo and Adelaide Bank Ltd* [2021] VSCA 222 at [47]-[58]; *Minister for Home Affairs v Benbrika (No.2)* [2021] VSC 684 at [40]-[44]; *Tessa v DPP (Cth)* [2022] VSCA 61 esp. at [21]-[29]; *Minogue v Falkingham* [2022] VSC 111 at [42]-[65]; *Hill v Cronin (No 2)* [2022] VSC 328; *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2022] VSC 600; *VLSB v Kuksal & Ors (Recusal Applications)* [2022] VSC 648; *Bolitho & Anor v Banksia Securities Limited & Ors (No 19)* [2022] VSC 761; *Xerri v The King* [2023] VSCA 15 at [108]-[125]; *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15, esp. at [36]-[58], [67]-[85], [153]-[175],[189] & [273]‑[302]; *Keene v The King* [2023] VSCA 142 at [21]-[40]; *Ramsay Alec (a pseudonym) v The King* [2023] VSCA 208, esp. at [28]-[35] {see summary in **Part 2.7**}; *DPP v Smith* [2023] VSCA 293, esp. at [4]-[7], [10], [32]-[34] & [56] {also summarised in **Part 2.7**}; *Kuksal v Victorian Legal Services Board (Recusal Application)* [2023] VSC 722 and the earlier *Kuksal* cases cited therein; *Santos (a pseudonym) v The King* [2023] VSCA 320; *Gibson (a pseudonym) v The King* [2024] VSCA 33 at [53]‑[55] {re “entering the fray”}; *Andre McKechnie v Detective Peter Evans (Recusal Application)* [2024] VSC 192; *McKechnie v State of Victoria* [2024] VSCA 171 at [34]-[43]; *Kuksal v* *Victorian Legal Services Board (Further Recusal)* [2024] VSC 508; *Kostiuk v KH (a pseudonym)* [2024] VSC 586 at [43]-[53]; *Fuller v Fletcher Building Limited* [2024] VSC 712.

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## **3.2 Judicial Independence**

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

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

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

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

## **3.3 Children’s Court Judicial Powers**

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

### **3.3.1 Contempt powers conferred by the *Magistrates’ Court Act 1989***

Section 528(1) of the *Children, Youth and Families Act 2005* [‘CYFA’] provides that the Children’s Court has and may exercise in relation to all matters over which it has jurisdiction all the powers and authorities that the Magistrates’ Court has in relation to matters over which it has jurisdiction. Note also that under s.528(2) of the CYFA, the *Magistrates' Court Act 1989* (except s.58 & Part 5 – Civil proceedings) and the regulations made under that Act apply with any necessary modifications, unless the contrary intention appears, to the Children's Court and proceedings of any Division of the Court.

Included in these powers are powers to deal with contempt in face of the Court [s.133] and contempt of Court [s.134]. For some examples of the latter see *R v Nationwide News Pty Ltd* [2018] VSC 572 and the annexure thereto.

For further discussion of contempt powers generally, see *Moira Shire Council v Sidebottom Group Pty Ltd (No.3)* [2018] VSC 556; *Re Albert (a barrister) and McLean (a solicitor)* [2021] VSC 297; *R v The Herald & Weekly Times Pty Ltd* [2021] VSC 253; *Khoury v Kirwan (No 4)* [2021] VSC 333; *Victorian Legal Services Board v Thexton (penalty)* [2021] VSC 391; *Re Ramsay Health Care Australia Pty Ltd* [2022] VSC 226; *Zhang v Shi (No 6)* [2022] VSC 271; *Victorian Legal Services Board v Jensen* [2022] VSC 603; *Victorian Legal Services Board v Bowers-Taylor* [2023] VSC 519; *Fahey v Bird (No 2)* [2023] VSC 540.

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

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

1. the Supreme Court;
2. the County Court;
3. the Magistrates’ Court;
4. in relation to an order under this Act that relates to intervention order legislation, the Children’s Court.

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

1. the *Crimes (Family Violence) Act 1987* as in force immediately before its repeal;
2. the *Family Violence Protection Act 2008*;
3. the *Personal Safety Intervention Orders Act 2010*; and
4. the *Stalking Intervention Orders Act 2008* as in force immediately before its repeal.

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

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

For details of these four types of orders, see **Part 6.15** of these Research Materials.

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

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

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

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

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

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

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

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

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

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

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

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

[17] At p.249 Meagher JA said:

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

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

A broadly similar circumstance – although a vastly different fact situation – arose in *5 Boroughs NY Pty Ltd v State of Victoria (No 3)* [2023] VSC 22. This was an application by the defendant State of Victoria to stay a group proceeding brought against the State and four senior government officials claiming economic loss consequent on the allegedly negligent exercise of emergency powers under s.200 of the *Public Health and Wellbeing Act 2008 (Vic)* in implementing a hotel quarantine program during the COVID-19 pandemic. Criminal proceedings had been laid for breach of the *Occupational Health and Safety Act 2004 (Vic)* against the relevant State Department of Health [DHHS] based in part on the same conduct. There was a substantial overlap in issues between the civil and criminal proceedings. The plaintiff accepted that, as things presently stood, the prosecution of DHHS must precede the trial of the civil action but opposed the granting of a stay of the group proceeding. In refusing the defendant’s application for a stay, John Dixon J said at [3], [18]-[22], [41]-[43] & [78]:

[3] “I am not satisfied that it is in the interests of justice to grant the State’s application to stay the group proceeding. Interlocutory steps may progress the group proceeding without prejudice to the State’s right not to assist the prosecution in proof of its case, to the extent such a right exists. The proceeding is subject to close case management and appropriate directions can be given or protective orders made as found necessary to balance the competing concerns in respect of each proposed step in the group proceeding.”

…

[18] There is no automatic right to the stay of the civil action when a related criminal case is on foot. The applicant must show a real risk of prejudice in the conduct of its defence in the criminal trial: *Commissioner of the Australia Federal Police v Zhao* (2015) 255 CLR 46.

[19] The High Court has emphasised two central characteristics of the criminal process:

(a) The accusatory principle: the prosecution bears the burden of proving its case beyond reasonable doubt;

(b) The companion principle: Absent a clear statutory power to the contrary, a person charged with a crime cannot be compelled to assist in the discharge of the prosecution’s onus of proof.

See *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission* (2013) 251 CLR 196; *Lee v The Queen* (2014) 253 CLR 455.

[20] While there is no privilege against self-incrimination for bodies corporate [*Evidence Act 2008 (Vic)* s 187], the State contended that the companion principle extends beyond the privilege and has been held to apply to corporations: *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456, 490 [155], referring to *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

[21] The companion principle extends to practical, not just legal, compulsion: *Zhao*. One of its fundamental aspects is the protection of forensic choices available to the defence: ‘The asking of questions and compelling of answers inevitably interfere with the conduct of an accusatorial trial and embarrass the defence of the accused.’ [*Lee v NSW Crime Commission* at [79]-[80]. It is well-recognised that civil proceedings may prejudice a criminal trial, requiring a stay of the civil proceedings: *Zhao* at [47]; *Lucciano v The Queen* (2021) 287 A Crim R 529 at [24]; *McLachlan v Browne (No 9)* [2019] NSWSC 10 at [38]. Indeed, it is not even necessary for the applicant to give specific evidence of the likely prejudice: *Zhao* at [42]-[43].

[22] That said, the extent to which a proceeding need be stayed to protect the fair trial of an accused, depends on the facts. In some cases, the facts may allow certain steps to be taken before granting a stay. For example, as in this case, a strike out application may not affect a pending criminal prosecution: *Impiombato v BHP Group Limited* (2020) 143 ACSR 301 at [144]. However, other interlocutory steps may cause prejudice: *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* (2019) 138 ASCR 42 at [99].

…

[41] In balancing any prejudice the State may face by participating in this group proceeding against the prejudice to the plaintiff of a stay, in order to assess where the interests of justice lie, it is important to consider that the State does not face the same peril of conviction as a non-government entity would. The DHHS, if found guilty and ordered to pay a fine, would simply be paying money from one State bank account into another. This is not a case where an accused individual is facing twenty years in prison.

[42] Conversely, the prejudice to group members from a stay would be considerable. The group members are some tens of thousands of businesses in Victoria. The plaintiff maintained that these persons experience ongoing financial hardship as a result of the second-wave lockdown and a delay in compensation is prejudicing their financial viability…Therefore, while any delay in relief is an injustice, the harm is particularly acute in this case.

[43] The ongoing delay may also lead to the deterioration in the quality of available witness evidence and other recognised non-financial prejudice: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 213-4 [99]-[101].

…

[78] For these reasons, I consider the present application to be an exceptional case where the specific matters of prejudice must be articulated, particularly because it appears to be open to the court to manage the preparation of the group proceeding for trial in a manner that would ameliorate any genuine prejudice to the State in the criminal proceeding.”

Holding that there was no error in his Honour’s orders, the Court of Appeal (Beach, T Forrest & Hargrave JJA) refused leave to appeal: *State of Victoria v 5 Boroughs NY Pty Ltd* [2023] VSCA 101.

In *Figurehead Construction Pty Ltd v Machado* [2023] VSC 448 Matthews J – citing the principles enunciated by John Dixon J in *5 Boroughs NY Pty Ltd v State of Victoria (No 3)* [2023] VSC 22 – found there was a real risk of prejudice and granted a temporary stay of civil proceedings pending determination of criminal proceedings related to the same subject matter. At [35]-[36] her Honour said:

“It is clear from the summary of principles in *5 Boroughs* and from all of the authorities canvassed that there is no automatic right to a stay of a civil proceeding due to the existence of a criminal proceeding. It is also clear that what is required is a balancing of the competing prejudices: the prejudice to the defendant in the Criminal Proceeding arising from his participation in this proceeding compared with the prejudice to the plaintiff in staying this proceeding.

It is also clear that there must be a real risk of prejudice to the defendant and that the defendant bears the onus of establishing this.”

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

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

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

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

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

See also *Ah Fook v Transport Accident Commission* [2022] VSCA 199 at [52]-[63]; *Soo v Yang & Vale Pty Ltd* [2022] VSCA 227; *Taylor v Merlino* [2022] VSCA 37; *Holden v Kukuy; Re Jay Invest Property Pty Ltd (in liq)* [2022] VSC 796 at [23]-[24]; *YZ v Beit Habonim Pty Ltd & Weiden* [2023] VSC 222.

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

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

### **[3.3.4.1 Power to prevent an abuse of the Court’s own judicial process](#_3.3.4.1_Power_to)**

The Court also has power to prevent an abuse of its own judicial process, for a discussion of which see the judgments of the High Court in *Victoria International Container Terminal Limited v Lunt* [2021] HCA 11 at [18]-[24] & [36]-[45] and the cases cited therein. At [21]-[22] Kiefel CJ, Gageler, Keane & Gordon JJ said:

[21] “In *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325, Kiefel CJ, Bell and Nettle JJ held at 360 [85] that a stay of proceedings was warranted in the circumstances of that case because the abuse of process on the part of the prosecution so affected the prospects of a fair hearing that ‘the prejudice to a fair trial is at least to a significant extent incurable’. Edelman J, who concurred with the plurality, explained at 409 [248] that an order for a permanent stay is ‘a measure of last resort’ which will be ordered ‘where there is no other way to protect the integrity of the system of justice administered by the court’. His Honour went on to say at 415 [264]:

‘Before a permanent stay can be ordered, it is necessary to consider whether there are any other curial measures that could be taken to address any systemic incoherence that would be caused by a trial of the accused. This must be considered because the court's ability to protect its integrity is not confined to orders that grant a permanent stay of proceedings.’

[22] Gageler J, who dissented as to the result of the case, was also of the opinion at 373 [115] that a permanent stay of proceedings cannot properly be ordered where the substantial unfairness in the conduct of proceedings is capable ‘of being averted through the adoption ... of measures less drastic than ordering a permanent stay’. And Gordon J, who also dissented as to the result of the case, agreed that there is no occasion to order a permanent stay of proceedings where the prejudice resulting from an abuse of process is curable by less drastic means. Her Honour said at 408 [244]:

‘[I]f a fair trial can be had, or if it is not possible to say now that a fair trial cannot be had, why would the administration of justice be brought into disrepute if the prosecutions were permitted to proceed?’"

In *Buchanan (a pseudonym) v The King* [2024] VSCA 50 Emerton P, Whelan JA & Elliott AJA said at [31]-[32]:

[31] “The principles governing an application for a permanent stay are well settled, and were not in dispute. A court should only stay an indictment (or any part of it) if satisfied that, in all the circumstances, its continuation would involve unacceptable injustice and unfairness or would be so unfairly and unjustifiably oppressive as to constitute an abuse of process: *Walton v Gardiner* (1993) 177 CLR 378, 392; [1993] HCA 77. As for the meaning of abuse of process in the context of a criminal proceeding, see *Tuteru* (2023) 105 MVR 125, 147–8 [66]–[67], 157 [127]; [2023] VSCA 188, citing *Strickland (a pseudonym) v DPP (Cth)* (2018) 266 CLR 325, 409 [249]; [2018] HCA 53; *Haris (a pseudonym) v The King* [2023] VSCA 205, [49], citing *R v Edwards* (2009) 83 ALJR 717, 723 [33]; [2009] HCA 20. The party seeking the stay bears a heavy onus, with consideration of whether it has been discharged to be assessed on the balance of probabilities: *GLJ* (2023) 97 ALJR 857, 867 [21]; [2023] HCA 32.

[32] A fulsome elaboration of the considerations which underpin a decision to permanently stay proceedings was provided by this court in *R v FJL* (2014) 41 VR 572 at [17]–[26], [90] & [92]; [2014] VSCA 57.These principles were later extracted and restated in *Hermanus (a pseudonym) v The Queen* (2015) 44 VR 335 at [40]; [2015] VSCA 2 (citations omitted), as follows:

• First, the exercise of the power to stay must be exceptional since it results in effect in a refusal to exercise jurisdiction. The primary responsibility for deciding whether criminal proceedings should be maintained lies with the Executive and not with the court.

• Secondly, in cases involving delay, to justify a permanent stay of criminal proceedings there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences. The accused must demonstrate that the delay is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute.

• Thirdly, circumstances that the court should consider in determining an application for a stay include: the length of the delay; reasons given by the prosecution to explain or justify the delay; the accused’s responsibility for and past attitude to the delay; proven or likely prejudice to the accused; and the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime. The critical factors are on the one hand the proven or likely prejudice to the accused, and on the other, the public interest in the prosecution and conviction of the guilty.

• Fourthly, in order to justify a stay, it is the probability of unacceptable unfairness — rather than the possibility — that is critical.

• Fifthly, a trial will not necessarily be unacceptably unfair even where relevant documents, recordings or other kinds of evidence have been lost or destroyed, or witnesses have died, so that the jury will be called upon to determine issues of fact on less than all of the relevant material which might bear upon the issues thrown up for determination.

• Sixthly, the trial judge may avoid obstacles to a fair trial by evidentiary rulings — including by the exclusion of evidence which is technically admissible, but which might operate unfairly against the accused — and by directions to the jury designed to counteract any prejudice that the accused might otherwise suffer.

See also *Mokbel v DPP (Vic) & Ors* [2008] VSC 433 per Kaye J at [24]-[39]; *Neville Donohue v The Queen (No.3)* [2020] VSCA 302; *Karam v The King* [2023] VSCA 318 at [187]-[355]; *Kuksal v Victorian Legal Services Board* [2024] VSC 732 at [61]-[73].

In *Willmot v Queensland* [2024] HCA 42 the appellant, an indigenous woman, brought proceedings against the State of Queensland seeking damages for sexual abuse and serious physical abuse she alleged she had suffered more than 50 years before when she was a “State Child”. The primary judge had granted a permanent stay of the proceedings. The Queensland Court of Appeal dismissed the appellant’s appeal against the stay. The High Court allowed the appeal in part, holding that the State’s application for a permanent stay should be dismissed except in relation to one particular allegation of digital penetration and certain allegations of physical abuse which were part of a different allegation. At [15]‑[18] the plurality (Gageler CJ, Gordon, Jagot & Beech-Jones JJ) said:

[15] “The principles relating to a permanent stay of proceedings were conveniently summarised by Bell P in *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 233234 [71] (references omitted) as follows:

(1) the onus of proving that a permanent stay of proceedings should be granted lies squarely on a defendant ...

(2) a permanent stay should only be ordered in exceptional circumstances ...

(3) a permanent stay should be granted when the interests of the administration of justice so demand ...

(4) the categories of cases in which a permanent stay may be ordered are not closed...

(5) one category of case where a permanent stay may be ordered is where the proceedings or their continuance would be vexatious or oppressive ...

(6) the continuation of proceedings may be oppressive if that is their objective effect ...

(7) proceedings may be oppressive where their effect is 'seriously and unfairly burdensome, prejudicial or damaging' ...

(8) proceedings may be stayed on a permanent basis where their continuation would be manifestly unfair to a party ..., and

(9) proceedings may be stayed on a permanent basis where their continuation would bring the administration of justice into disrepute amongst right-thinking people ...

[16] The relevant inquiry is whether any prospective trial will be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process: *GLJ* (2023) 97 ALJR 857 at 868 [23]; 414 ALR 635 at 645. See also *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [24]-[25]; *Rozenblit v Vainer* (2018) 262 CLR 478 at 498 [66]; *UBS AG v Tyne* (2018) 265 CLR 77 at 127 [136]. If a fair trial can be held and will not be so unfairly and unjustifiably oppressive as to constitute an abuse of process, a court ordinarily has a duty to hear and decide the case. If the trial will be necessarily unfair, a stay must be ordered: *GLJ* (2023) 97 ALJR 857 at 868 [23]; 414 ALR 635 at 645.

[17] The extreme step of granting a permanent stay demands recognition that the question of whether a trial will necessarily be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process admits of only one correct answer: *GLJ* (2023) 97 ALJR 857 at 866 [17], 868 [23]; 414 ALR 635 at 642-643, 645. The evaluative inquiry in each case is unique and highly fact-sensitive: *GLJ* (2023) 97 ALJR 857 at 876 [64]; 414 ALR 635 at 656; cf *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264 [7]. The correct answer in each case turns on its own facts and requires separate consideration of each claim – its nature, content, and the available evidence: *GLJ* (2023) 97 ALJR 857 at 869 [27], 887 [130], 893 [167]; 414 ALR 635 at 646, 671, 680; *Moubarak* (2019) 100 NSWLR 218 at 235 [77].

[18] This Court in *GLJ* addressed for the first time the application of the stay principles in the context of the recent enactment of s 6A of the Limitation Act 1969 (NSW) [which] was inserted into the Limitation Act by the Limitation Amendment (Child Abuse) Act 2016 (NSW) in response to recommendations of the Royal Commission. The unique evaluative exercise in that appeal was the application of the stay principles, in the context of that provision, to the facts of *GLJ* (2023) 97 ALJR 857 at 886 [123], cf 888 [137]; 414 ALR 635 at 669, cf 673. During this appeal, and during the related matter of *RC v The Salvation Army (Western Australia) Property Trust* [2024] HCA 43, it was apparent that different views had been taken of what was required by the application of the approach of the majority of this Court in *GLJ* for the operation of the stay principles in the context of s 6A. Indeed, during argument in both matters, it became evident that the meaning and effect of some of the language of the reasons of the majority in *GLJ* has been understood in different ways. It is unsurprising then that the facts, matters and issues in this appeal, and in the related matter of *RC*, require this Court to consider further aspects of the intersection between the stay principles and s 6A of the Limitation Act and equivalent provisions.”

In *RC v The Salvation Army (Western Australia) Property Trust* [2024] HCA 43 the applicant commenced an action against the respondent (‘the Salvation Army’) in the District Court of Western Australia claiming damages for sexual abuse allegedly suffered between August 1959 and April 1960 when he was 12 and 13 years old and in the care of the Nedlands Boys’ Home.. The primary judge had granted a permanent stay of the proceedings. The Western Australian Court of Appeal dismissed the appellant’s appeal against the stay. The High Court allowed the appeal and dismissed the Salvation Army’s application that the plaintiff’s action be permanently stayed. At [3]-[5] & [40] the plurality (Gageler CJ, Gordon, Jagot & Beech-Jones JJ) said:

[3] “RC's application for special leave to appeal to this Court was heard immediately following the appeal in *Willmot v Queensland* [2024] HCA 42.In this matter, and in *Willmot*, the Court was required to consider the intersection between the principles relating to a permanent stay and a provision that lifted the time-bar on commencing proceedings for a claim for child sexual abuse.

[4] In this case, s 6A(2) of the *Limitation Act 2005* (WA), which is in substantially similar terms to equivalent provisions in other States and Territories,provided that "[d]espite anything in this or any other Act, no limitation period applies in respect of a child sexual abuse action"...

[5] The principles are addressed in *Willmot* at [15]-[32]. Applying those principles to the unique facts of RC's claim, the Court of Appeal was wrong to conclude that there could be no fair trial of these proceedings. The Salvation Army's application for a permanent stay of the proceedings should have been dismissed and the proceedings should proceed to trial.

...

[40] The Salvation Army contends that in the end a trial will be a contest where RC makes allegations that the Salvation Army says it can do no more than deny. That contention is an incomplete description of the Salvation Army's position as it has sufficient information to make a meaningful response to RC's allegations. In any event, as explained in *Willmot* at [29], cases where a party can do no more than deny the main allegation are tried in the criminal courts every day. In such cases, a trial judge ordinarily exercises care before accepting uncorroborated evidence of this kind, and the required *level* of impairment is that the trial would be unfair, even if the trial judge heeds the *Longman* warnings: see *Longman v The Queen* (1989) 168 CLR 79 at 91, citing *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31‑32, 42-44, 56-57, 71-72. In all the circumstances, the Salvation Army has not discharged its heavy onus to obtain a stay because it has not identified that the trial of the joined issues would be unfair.”

The power to prevent an abuse of the Court’s own judicial process also includes in a “rare and exceptional” or an “extreme” case power to grant a permanent stay: see *Hadju v Breguet* [2008] VSC 185 at [15]-[18]; *Champion v Richardson* [2003] VSC 482 at [38]; *Jago v District Court of NSW* (1989) 168 CLR 23 at76; *Connellan v Murphy* [2017] VSCA 116; *Pound v The Queen* [2019] VSCA 279 at [114]-[115]; *Harper (a pseudonym) v DPP (Cth)* [2021] VSCA 173; *Grant v Bird* [2021] VSC 380 at [34]‑[60]; *Phillips & Anor v Stanzer* [2022] VSC 355 at [35]-[56]; *YZ v Beit Habonim Pty Ltd (ACN 051 827 984) ATF Association of Parents & Friends of Zionist Youth & Weiden* [2022] VSC 402 & [2023] VSCA 294; *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; *Haris (a pseudonym) v The King* [2023] VSCA 205; *Haris (a pseudonym) v The King 128* [2024] VSCA 9; *Porter (a pseudonym) v The King* [2024] VSCA 127 at [45]-[53] & [72]-[76]. See also the cases discussed in **section 10.3.10**.

Further, see “[Abuse of Judicial Process in Criminal Proceedings](https://criminalcpd.net.au/wp-content/uploads/2017/01/abuse-of-judicial-process-criminal-cle-0117.pdf)”, a paper by a Sydney barrister Stephen Lawrence, given at a Law Society of Fiji Conference at Suva in September 2015, which contains a very detailed analysis of the case law to that time.

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

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

A striking example of a permanent stay granted in the Criminal Division of the Children’s Court is the case of *CDPP v Carrick (a pseudonym)* [2023] VChC 2. The accused TC was a socially isolated 13-14 year-old autistic child with a fixation on ISIS and an IQ of 71. TC’s behaviour was of such concern that his parents sought assistance from Victoria Police. The Security Investigation Unit of Victoria Police referred the family to the Countering Violent Extremism Unit (CVE) on 21 April 2021 and Ms CM, a case manager at CVE, became engaged to provide services to rehabilitate and reintegrate TC and to provide services to mitigate risk. TC’s parents consented to the engagement of their son in the CVE’s comprehensive rehabilitation program. However, as part of a Joint Counter Terrorism Team (JCTT) investigation into the child, an online covert operative (OCO) was also appointed and engaged with the child secretly online. TC’s parents and TC’s psychologist were unaware of the existence of the OCO. In the course of a large number of ‘grooming’ conversations with the OCO, TC’s online behaviour escalated and a knife with ISIS written on it was found in his bedroom. Shortly after his 14th birthday TC was charged with two offences:

(1) membership of a terrorist organisation contrary to s 102.3 of the *Criminal Code Act 1995 (Cth)*; and (2) advocating terrorism contrary to s 80.2C of *the Code*.

The charges were based on a number of utterances by TC about terrorism and his expressed intention to engage in terrorist behaviour. He also expressed his affection for and allegiance to terrorist organisations. Much of this arose over a 71-day period between 29 July and 6 October 2021 during which the OCO engaged with TC on 55 days. The engagement occurred regularly and frequently and often more than once in a day. The evidence in the contested hearing before Magistrate Fleming was that TC had limited capability to enact any of the behaviour discussed in the online chats with the OCO.

In ordering that the criminal proceedings against TC be permanently stayed, Magistrate Fleming said at [72]‑[84]:

[72] “There is no doubt that terrorist activities are an abomination that strike fear into every citizen. It is right that the Prosecution describes the case before the Court as one of national security. The community is right to expect police entities to do all that they can to identify, investigate and prosecute offenders. The community also has a right to expect police entities to engage in conduct that is beyond reproach.

[73] The diversionary program engaged in was tailor-made for TC. The evidence is that rehabilitation does not progress in a straight line, particularly when children are involved and especially when there are complex mental health factors in play. There will be lapses in a participant’s progress. This is to be expected. The AFP and Victoria Police are experienced in assessing risk and managing risk. Significantly, the first stage of police involvement with TC was to set up [the CVE] rehabilitation program. It was the intention of [the case manager] Ms CM to support TC and his family. I have no doubt that Ms CM’s priority was rehabilitation. [But] the JCTT never intended to prioritise the rehabilitation program and TC’s reintegration into a pro-social way of living. The intention of the police entities became evident when the OCO was appointed.

[74] The potential risk in relation to terrorism offences is of the highest order because the outcomes can be of the highest harm. The JCTT relied on the diversionary program undertaken by Victoria Police to assist it in the criminal investigation and in the gathering of evidence against TC.

[75] Once the OCO commenced TC’s rehabilitation was thwarted. The evidence is that TC’s risk of committing an act of terrorism escalated. The rehabilitation program was undermined by the contamination of the OCO. Competing forces were at play which pulled TC in opposite directions. The JCTT approached this case as though the threshold test was that no risk is acceptable when dealing with the grave threat of terrorism. It is through this lens that the JCTT engaged in the conduct it has engaged in to detect the risk, assess it and act to ensure the protection of the community. The means however do not justify the end: *Strickland (a pseudonym) v CDPP* [2018] HCA 53 at [106]. The conduct of the JCTT must be moderated by the circumstances of each case. The evidence obtained in the way it has been obtained has not ‘worked itself pure’ [to use] an expression borrowed from *Omychund v Barker* (1744) 1 Atk 21 at 33 [26 ER 15 at 23].

[76] In *Clark v The Queen* [2016] VSCA 96, Weinberg, Ashley and Coghlan JJA, describing the principles underpinning the granting of a permanent stay in criminal proceedings, said at [13]-[19]:

[13] ‘These principles are well settled. The power to order a permanent stay derives from the inherent (or, in some cases, implied) power of a court, including the County Court, to protect the integrity of its processes where the administration of justice so requires. It is a remedy that is invoked in order to prevent an abuse of process.

[14] The concept of abuse of process extends to the use of the court’s processes in a way that is inconsistent with two fundamental requirements arising in criminal proceedings. These are, first, that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court’s processes will be seen as lending themselves to oppression and injustice.

[15] The continuation of proceedings that are unjustifiably and unfairly oppressive will, of itself, amount to an abuse of process. Moreover, as is well understood, a prosecution can be stayed if it has been instituted and maintained for an improper purpose.

[16] In a criminal context, the term “abuse of process” encompasses not only circumstances within the narrowest conception of that term (such as bringing a prosecution for an improper purpose or maintaining one that is clearly foredoomed to fail), but also pursuing a criminal proceeding in a manner that is unfair and gives rise to oppression.

[17] It is only in an extreme case that a permanent stay of proceedings will be ordered. Necessarily, such cases will be rare. It follows that an applicant for a permanent stay must discharge a heavy onus if a court is to be persuaded to grant that remedy.

[18] In determining whether a permanent stay should be granted, a court must have regard to the substantial public interest in having those charged with serious criminal offences brought to trial. A stay of that kind is tantamount to an immunity from prosecution and is not therefore lightly to be granted.

[19] There is more to a court’s decision as to whether a trial should proceed than fairness to the accused. An applicant for a stay must establish that the continuation of the proceedings would, not merely could, involve unacceptable injustice or unfairness. It must be shown that the continuation of the proceedings would be so unfairly and unjustifiably oppressive as to itself constitute an abuse of process.’

See also *DPP v Tuteru* [2023] VSCA 188 at [63]-[69].

[77] A permanent stay may be ordered where there are no other means to protect the integrity of the court’s processes. Edelman J stated in *Strickland v CDPP* at [249]:

‘”Abuse of process” may not be the best language to describe the category where the focus is upon the integrity of the court generally rather than its particular processes. The rationale for this category has been described in various ways. The rationale has been described as being “a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law”. It has been described as avoiding “an erosion of public confidence”. It has also been described as arising where a trial would bring the administration of justice into disrepute. Each of these verbal formulations attempts to capture a concern for the systemic protection of the integrity of the court within an integrated system of justice. The possibility of an unfair trial, or a degree of unfairness in a trial, may be a factor contributing to that concern. But an unfair trial is not a prerequisite for a permanent stay in this category.’ (citations omitted)

[78] The chats between the OCO and TC were obtained in circumstances that do not meet the minimum standard that society expects of law enforcement officers.

[79] The community would not expect law enforcement officers to encourage a 13-14 year old child towards racial hatred, distrust of police and violent extremism, encouraging the child’s fixation on ISIS.

[80] The community would not expect law enforcement to use the guise of a rehabilitation service to entice the parents of a troubled child to engage in a process that results in potential harm to the child.

[81] By its conduct in attempting to radicalise TC for the purposes of gaining evidence to prosecute TC for the offences with which he has been charged, the AFP has completely and inevitably undermined the therapeutic process initiated by TC’s parents and the CVE to seek help to engage TC in the therapeutic and rehabilitative process.

[82] The conduct engaged in by the JCTT and the AFP falls so profoundly short of the minimum standards expected of law enforcement offices that to refuse this application would be to condone and encourage further instances of such conduct.

[83] I am satisfied that to allow this proceeding to continue would not only be unjustifiably and unfairly oppressive to TC but would also lead to an erosion in public confidence in the Court’s processes. The re-radicalisation of TC which was created by JCTT in the guise of OCO’s chats with TC were obtained in circumstances that fall far short of the minimum standard that society expects of law enforcement officers.

[84] There is no other way to protect the integrity of the system of justice administered by the Court except to grant the application and order that the proceedings be permanently stayed.”

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

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

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

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

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

See also *Ballard (a pseudonym) v The King* [2024] VSCA 26 where the Court of Appeal held that a trial judge had not erred in refusing to order a permanent stay of a proposed retrial on charges of rape and reckless endangerment after a jury was discharged without verdict at an earlier trial.

The issue of abuse of process includes but is inherently broader than the estoppel issues discussed in the next subsection: see the judgment of Judge Cosgrave in *Yu v Lu & Ors* [2021] VCC 923 in which at [23] his Honour cited the joint judgment of French CJ, Bell, Gageler and Keane JJ in *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [25]-[26]:

“Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories {*Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 262 [1], 265 [9]}, abuse of process is capable of application in any circumstances in which the use of a court’s procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute {*PNJ v The Queen* (2009) 83 ALJR 384 at 385-386 [3]}. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.

Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel {*Walton v Gardiner* (1993) 177 CLR 378 at 393}. Similarly, it has been recognised that making such a claim or raising such an issue can constitute an abuse of process where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel {*O’Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at 722-724 and the cases there cited}.”

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

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

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

The purpose of all of these doctrines is to ensure the finality of judicial decisions. If any judicial tribunal in the exercise of its jurisdiction delivers a judgment which is in its nature final and conclusive, the judgment is said to be ***res judicata***. If in any subsequent proceedings – unless they be of an appellate nature – in the same or in any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case. These doctrines and their inter-relationship were discussed by Riordan J in *Gemcan Constructions Pty Ltd v Westbourne Grammar School* [2022] VSC 6 at [45]-[58] and by John Dixon J in *Zaric & Ors v City of Greater Dandenong* [2022] VSC 680 at [46]-[50].

In *Yu v Lu & Ors* [2021] VCC 923 at [17] Judge Cosgrave said of **issue estoppel** that it

“operates to prevent a party raising in a subsequent proceeding an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in an earlier judgment. It is important that the issue estoppel can arise only in respect of a matter which was an essential step in the reasoning of the earlier court. Where a court makes findings of fact or law which are of a subsidiary or collateral nature, they do not give rise to an estoppel. As Dixon J explained in *Blair v Curran* (1939) 62 CLR 464, 531-2:

A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared…

Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.…

In the phraseology of Lord Shaw, ‘a fact fundamental to the decision arrived at’ in the former proceedings and the ‘legal quality of the fact’ must be taken as finally and conclusively established (*Hoystead v Commissioner of Taxation* (1926) AC 155). But matters of fact or law which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to the rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.”

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

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

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

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

[28] Two forms of estoppel are potentially applicable. One is that sometimes referred to as ‘cause of action’ estoppel: *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517 [22]. The terminology has been recognised as problematic given the range of senses in which the expression ‘cause of action’ tends to be used: see *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 610-612; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508. The relevant sense is that of title to the legal right established or claimed: *Blair v Curran* (1939) 62 CLR 464 at 532; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 611. See also *Baltimore Steamship Co v Phillips* (1927) 274 US 316 at 321, quoted in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 514. Especially in a statutory context such as the present, the form of estoppel would be better referred to by the more generic description of ‘claim’ estoppel: cf Casad and Clermont, *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (2001) at 9-10. The other form of estoppel is most commonly referred to in Australia as ‘*Anshun* estoppel’, after *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, although the Full Court chose to refer to it as the ‘*Henderson* extension’.”

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

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

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

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

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

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

‘A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. **The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion…Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded**. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.’

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

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

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

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

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

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

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

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

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

The case of *SL v DFFH* [2021] VSC 523 involved two siblings, A (born 11/08/2020) and J (born 12/06/2017). On 01/08/2018 the Children’s Court [CCV] had found a protection application for J proved on the actual harm limb of s.162(1)(c) CYFA and the likelihood of harm limbs of ss.162(1)(e) & 162(1)(f) and placed J on a care by Secretary order [CBSO]. The findings and order were uncontested by the mother. The applications currently before the CCV are a protection application by emergency care for A and an application for a long-term care order for J. The issue before the CCV which grounded the Order 56 applications to the Supreme Court was whether – and if so to what extent – the mother was estopped in a contest involving the 2020 applications from challenging the findings and orders made by the CCV in relation to J in 2018. Overruling the magistrate’s determination, O’Meara J made the following findings at [150]:

(a) no estoppel arises in the 2020 application concerning child A;

(b) an estoppel arises in the 2020 application concerning child J but that does not extend beyond the finding that J had suffered ‘actual harm’;

(c) that estoppel does not prevent the mother from adducing evidence or calling witnesses in order to contest any proposition that particular injuries were suffered by child J or in respect of what might broadly be called the issue of ‘responsibility’ for harm of that type;

(d) the mother SL may not contend that the 2018 CBSO was wrongly made.

His Honour’s reasons for making these formal findings included the following [emphasis added]:

* At [107]: “**I cannot accept that the presence of s 10(1)** (or any other provisions of the Act referred to in the [mother’s] ground 1) sought to be interpreted via *Schorel* [1990] Fam CA 58 and *CDJ v VAJ* (1998) 187 CLR 172 **is such as to displace the operation of the doctrines of *res judicata* and issue estoppel within the scheme of the Act** that I have described. In my view, it is much more likely that such doctrines are implicit within the operation of that scheme.”
* At [113]: In the context of the elements and principles relating to the doctrine of issue estoppel, “**it may be accepted that the earlier determination of the Children’s Court was final in the necessary sense**, and neither party contended to the contrary.”
* At [120]: “…[it] must therefore be accepted that the Children’s Court did accept that child J had suffered ‘actual harm’, and the [mother’s] submission that no specific finding was made must be rejected. However, the [DFFH] submission to the effect that the Children’s Court must be taken to have accepted some particular view of the underlying evidence in the Court book must also be rejected.”
* At [141]: “**I cannot accept that it is open to the [mother] to conduct the present application relating to child J on the basis that the earlier order was wrongly made.** Such an endeavour seems to me to be inconsistent with the proper administration of justice: *Walton v Gardiner* (1993) 177 CLR 378, 392-393. In any event, for reasons that should be apparent, it is simply unnecessary for the [mother] to defend the present application concerning child J on that basis (or, for that matter, the application concerning child A). There can be dispute as to whether child J suffered certain injuries and, indeed, whether either or both parents ought to be considered to bear responsibility for such injuries, without any need specifically to contend that the earlier order was ‘wrongly made’.”
* At [143]-[149]: **“[O]n the face of s.162(1)(c), there is no identity of issues between the determination of the Court concerning child J in 2018 and the issues now arising in the applications relating to child A**…The manner in which the [DFFH] sought to sidestep the present difficulty was to submit that child A is a ‘privy’ of child J…That submission was sought to be supported by reference to a sequence of authorities. However, so far as I can tell, none of those authorities concerns circumstances akin to the present. Moreover, the authorities refer to privity of blood, title and interest. The relevant submissions of the [DFFH] ranged between emphasising matters of blood and interest, each in a general sense, but without distinguishing between those notions with any particular specificity. Estoppel is a matter personal between parties. In each case, privies of blood, title or interest are made subject to the benefit or burden of an estoppel because they are representatives of the party originally so bound. In that sense, it may be understood why it is a person succeeding to the rights and liabilities of another via death, insolvency, assignment or statute could be a privy: that person has a legal or beneficial interest in the previous litigation or its subject matter. The privy comes to that interest under, through or on behalf of the party bound. **However, no relation of such a kind exists between child J and child A or, for that matter, between either of the parents and child A. In the present applications concerning him, child A is a party in his own right, as are each of his parents. Similarly, child J is a party in his own right in the application concerning him. The submission that child A is a privy of child J, or, for that matter, his parents, in any of the senses discussed in the authorities, must be rejected.**”
* At [151]: “Whether or not the parents are strictly bound by an estoppel arising from any aspect of the making of the care by Secretary order in 2018 is one thing, but whatever that position might be it does not mean that the fact that such an order was earlier made unopposed does not have at least evidentiary significance in the present applications concerning child J and child A. In that regard, it is to some extent evident that the earlier order was made in circumstances where there was already some measure of underlying dispute concerning the injuries and any explanation for them, yet the order was made unopposed anyway. Ultimately, however, whether there is any significance in those matters or not must be a matter for the Children’s Court.”

In the writer’s opinion this case highlights a particular problem faced by jurisdictions like the Family Division’s Child Protection jurisdiction or the Family Court where a case is not necessarily ever over until the subject child turns 18 and where new siblings tend to appear on the scene from time to time. The doctrines of *res judicata* and issue estoppel, on the other hand, are founded on jurisdictions where a case is over [subject to appeals, variations, breaches and the like] once the court has made a decision. So, the traditional legal analyses do not fit all that well with the CCV’s Family Division. On the other hand, there has to be some limit to litigation on particular issues, else – as his Honour has noted at [141] with reference to the dicta of the High Court in *Walton v Gardiner* (1993) 177 CLR 378, 392-393 – the proper administration of justice will be impaired and the CCV’s Family Division will be at risk of being flooded. It is a very difficult balance.

See also *Miller v Martin & Ors* [2021] VSCA 108 at [74]-[80]; *Hicks v Slater and Gordon Ltd* [2024] VSCA 298 at [57]-[62].

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

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

The protection application in *Y’s Case* was issued under the provisions of the *Children and Young Persons Act 1989*. The relevant provisions of that Act were replaced by the CYFA on 23/04/2007 and in the process the ‘best interests’ provisions of this child protection legislation were significantly strengthened. In Part 1.2 – Principles – s.8(1) CYFA provides: “The Court must have regard to the principles set out in this Part (where relevant) in making any decision or taking any action under this Act.” In the writer’s view s.8(1) imposes an independent obligation on the Court to ensure that the withdrawal of a protection application is in the ‘best interests’ of the subject child when measured according to the principles in ss.10 & 13-14. Accordingly, the reasoning of Nathan J that leave of the Court is required to withdraw or discontinue a protection application once it has been filed and served is even stronger now in cases under the CYFA than it was at the time the case was decided.

In *DE (a pseudonym) v DFFH* [2021] VSC 691 DFFH had filed a protection application in relation to a child on the basis that she was in need of protection under s.162(1) CYFA. The protective concerns were centred on an alleged risk of abuse by the stepfather DE and an associated risk that the mother [M] would fail to protect the child from such abuse. Subsequently DFFH filed minutes of proposed orders consented to by the parties that the protection application be struck out with no order for costs. However, a magistrate decided not to strike out the proceeding at that time and instead made an order for the filing of a Children’s Court Clinic report [CCCR] seeking assessments in relation to risk factors involving DE & M. Although the magistrate’s order for a CCCR was set aside on appeal, Ginnane J said at [29]: “I should first state that the CCV was not obliged to make the orders sought by consent. However, if it did not, or it was not ready to decide whether to make the orders, the order that it did make for the provision of an addition report had to be authorised by the Act.” His Honour’s dicta is thus consistent with the dicta of Nathan J in *Secretary of the Department of Human Services v Y*.

### **3.3.4.4 Implied power to reinstate a proceeding which was struck out**

It seems clear enough that the Children’s Court in both the Family Division and the Criminal Division has implied power to reinstate a proceeding (whether comprising an application or a charge) which has been struck out. In *The Herald and Weekly Times Pty Ltd & Anor v State of Victoria & Ors* [2006] VSCA 146 the Court of Appeal (Chernov, Nettle & Ashley JJA) held at [19] that the Victorian Civil and Administrative Tribunal had such an implied power in appropriate circumstances:

“In our view, the Tribunal does have the implied power, in appropriate circumstances, to reinstate a proceeding that it has struck out. Generally, as was pointed out by Kaye J in *R v. McGowan; Ex parte Macko & Sanderson* [1984] VR 1000 at 1002, an order striking out an action does not terminate it. The latter occurs where judgment is entered in the proceeding or where it is discontinued. An order striking out an action, said his Honour, only has the effect of removing it from the list. It is plain enough, we think, that it would be a serious impediment to the Tribunal’s administration of the Act if it could not reinstate a proceeding that was struck out in order to make an otherwise appropriate order in relation to it. See also *Aiken v. Aiken* [1941] VLR 124 and *Roberts v. Gippsland Agricultural and Earth Moving Contracting Co. Pty Ltd* [1956] VLR 555 at 565 per Smith J.”

See also *Thurin v Krongold Constructions Aust P/L* [2022] VSCA 226 at [150]; *Zhang v Bajada* [2024] VSC 15 at [65]. See also the criminal cases referred to in **section 11.1.10**.

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## **3.4 Procedural guidelines**

### **3.4.1 Comprehensibility etc.**

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

(a) to take steps to ensure that the proceeding is comprehensible to-

* the child;
* the parents; and
* all other parties who have a direct interest in the proceeding;

(b) to seek to satisfy itself that the child understands the nature and implications of the proceeding and of any order made in the proceeding;

(c) to allow the child and in the case of a proceeding in the Family Division, the parents and all other parties who have a direct interest in the proceeding to participate fully in the proceeding;

(d) to consider any wishes expressed by the child;

(e) to respect the cultural identity and needs of-

* the child; and
* the parents and other members of the child's family; and

(f) to minimise the stigma to the child and his or her family.

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

### **3.4.2 Program for Intermediaries and Ground Rules Hearings**

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

The introduction of an intermediary scheme, based on the English model, was recommendation 30 in the 2016 VLRC Report “The Role of Victims of Crime in the Criminal Trial Process”. An intermediary scheme and the use of ground rules hearings in Victoria was endorsed in *R v Ward (a pseudonym)* [2017] VSCA 37, a decision relating to the questioning of children and obligations of counsel and judicial officers. The statutory authority for the use of intermediaries and ground rules hearings is in Part 8.2A of the *Criminal Procedure Act 2009* [‘CPA’] which commenced on 28/02/2018. See also regs.25-26 & Schedule 1 of the *Criminal Procedure Regulations 2020*.

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

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

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

Section 389K(4) of the CPA provides that a person must not act as an intermediary in a particular proceeding unless the person has taken an oath or made an affirmation in the prescribed form. In *Peter James (a pseudonym) v The King* [2023] VSCA 34 the intermediary was not sworn as required by 389K(4) of the CPA and reg 21 and sch 1 of the *Criminal Procedure Regulations 2020*. In rejecting the applicant’s submission that the failure to swear the intermediary had resulted in a substantial miscarriage of justice, the Court of Appeal (Emerton P, Kyrou and Kaye JJA) said at [62]:

“In our opinion, compliance with the requirement in s 389K(4) of the CPA that an intermediary must not act in that role in a proceeding unless he or she is sworn is not a fundamental requirement of a properly constituted criminal trial such that any breach will automatically result in a substantial miscarriage of justice. The same conclusion applies to the requirement in s 22(1) of the Evidence Act (insofar as it is taken to apply to intermediaries), that a person must either take an oath or make an affirmation before acting in that role in a proceeding. Whether a breach of these statutory provisions results in a substantial miscarriage of justice will depend on the circumstances of each case including, in particular, the role performed by the intermediary in each case.”

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

A program for Intermediaries and Ground Rules Hearings commenced operation as a Pilot at Melbourne Children’s Court on 02/07/2018 and applies to criminal proceedings which commenced on or after 28/02/2018 that relate to a sexual offence (as defined in s.4(1) of the *Criminal Procedure Act 2009*) or a homicide offence. See Practice Direction No 6 of 2018 plus a Multi-Jurisdictional Guide which can be downloaded from <https://www.childrenscourt.vic.gov.au/legal/guidelines-intermediary-pilot-program>. The Intermediary Program is now an ongoing program, future funding having been confirmed. However, the original Guidelines dated 28/06/2018 have not yet been formally amended and – at least as yet – the operational limits of the IP, set out in paragraph 4 of the Guidelines, have not been altered.

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

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

It is expected that-

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

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

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

### **3.4.3 Standing to participate as a party**

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

“As far as **practicable** the Court must in any proceeding allow–

1. the child; and
2. in the case of a proceeding in the Family Division, the child’s parents and all other parties who have a **direct interest** in the proceeding–

to participate fully in the proceeding.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In determining whether it is “**practicable**” to allow a person who has a “**direct interest**” to be joined as a party, some assistance may be gained from the decision of the High Court in *J v Lieschke* (1987) 162 CLR 447. In that case the appellant J was the mother of five children whom the first respondent Mr Lieschke had apprehended and brought before a NSW Children’s Court, alleging that each was a “neglected child” as defined in s.72 of the *Child Welfare Act 1939 (NSW)*. In ensuing proceedings before a magistrate, J applied as of right to appear as a party. The magistrate, in respect of one child concerning whom serious allegations were to be made against J, agreed “to permit the parents to appear by leave at the commencement of the proceedings” but refused the parents leave to appear in relation to the other children, saying that they would be allowed to give evidence if he found a *prima facie* case. The High Court allowed the appeal, holding unanimously that the parents of the children had a right to be heard, and also broadened this application of the principle of natural justice to include guardians. In the leading judgment Brennan J said at pp.456 & 458 [emphasis added]:

“The general principle which governs this case is clearly established. It is stated by Barwick CJ in *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at pp.109-110 in these terms:

‘The common law rule that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power is both fundamental and universal…But the legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded the affected person to oppose its exercise. However, if that is the legislative intention it must be made unambiguously clear.’

…It would offend the deepest human sentiments as well as a basic legal principle to permit a court to take a child from its parents without hearing the parents when they can be heard and when they wish to be heard in opposition to the making of an order. **A guardian who has been appointed in loco parentis is no less entitled to be heard.** Only by ensuring, where practicable, that the parents or guardians have an opportunity to be heard can the Court be confident that it has protected whatever interests the child may have in its parents’ or guardians’ discharge of their duty to the child.”

However, one should also note his Honour’s qualification at p.457:

“In some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy to the welfare of the child; e.g., it may be necessary to keep a welfare report confidential, as in *In re K. (Infants)* [1965] AC 201…But a desire to promote the welfare of the child does not exclude application of the principles of natural justice except so far as is necessary to avoid frustration of the purpose for which the jurisdiction is conferred: see *Re JRL; Ex parte CJL* (1986) 161 CLR 342*.*”

Further, in determining whether it is “**practicable**” to allow a person to be joined as a party, the matters relating to management of child protection proceedings set out in s.215B of the CYFA appear to the writer to be relevant considerations. See **subsection 3.5.6.3** below for a discussion of s.215B.

Finally, although it is not directly applicable to proceedings in the Children’s Court, rule 9.06 of the *Supreme Court (General Civil Procedure) Rules 2015* – providing for the ‘Addition, removal, substitution of a party’ – may provide some useful guidance in relation to whether it is “**practicable**” to allow a person to be joined as a party in ChCV Family Division cases. In particular rule 9.06(b) provides:

“At any stage of a proceeding the Court may order that any of the following persons be added as a party–

1. a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon; or
2. a person between whom and any party to the proceeding there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding.”

See also *Bass Strait Freight Pty Ltd v Colac Otway Shire Council* [2024] VSC 590 at [11]-[34]; *Vernon v Sixty Third Octex Pty Ltd* [2024] VSC 599; *Garlick v Kerbaj (No 5)* [2024] VSC 614.

### **3.4.4 Interpreter**

Section 526 of the CYFA prohibits the Court from hearing and determining a proceeding without an interpreter if the Court is satisfied that a child, a parent or any other party to the proceeding has a difficulty in communicating in the English language that is sufficient to prevent him or her from understanding or participating in the proceeding.

Speaking in the context of an appeal, Maxwell P, with whom Redlich JA & Habersberger AJA agreed, said in *R v Yasso* [2007] VSCA 306 at [5]:

“It is, of course, an elementary requirement of natural justice that a defendant in criminal proceedings be able to participate fully, to present argument and answer questions, and to understand everything that is said by the bench and by opposing counsel. For a non-English speaking defendant, accurate interpreting is vitally important. See, for example, *R v Lee Kun* [1916] 1 KB 337 (right of accused to an interpreter at trial); *Kunnath v The State* [[1993] 4 All ER 30](https://www.lexisnexis.com:443/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T2657946393&A=0.42250531858259566&linkInfo=AU%23All+ER%23year%251993%25page%2530%25vol%254%25sel2%254%25sel1%251993%25&bct=A) (incomplete interpretation at criminal trial); *Dietrich v R* (1992) 177 CLR 292 (right of accused to fair trial according to law); *R v Johnson* (1986) 25 A Crim R 433 (whether a witness should have an interpreter); *R v Saraya* (1993) 70 A Crim R 515 (deficient interpretation at criminal trial) cf *Fernando de la Espriella-Velasco v R* [2006] WASCA 31 (requisite standard of interpretation at criminal trial). See also *Charter of Human Rights & Responsibilities Act 2006* s 25(2)(i).”

See also *Re East; ex parte Nguyen* (1998) 196 CLR 354; [1998] HCA 73; *Howard Nichols (a pseudonym) v The Queen* [2021] VSCA 273 at [47]-[60].

The role of a court interpreter and the effect of an alleged mistranslation were explained by the High Court in *DVO16 v Minister for Immigration and Border Protection; BNB17 v Minister for Immigration and Border Protection* [2021] HCA 12 at [4]‑[8] as follows (some citations omitted):

[4] “The function of translation in a curial or administrative setting is interpretation of communications as accurately and completely as possible. The process of interpretation involves comprehension of words spoken or written in a source language, conversion to a target language, and delivery in a manner faithful both to the content of the words and to the register and style of the speaker or writer. That, at least, is the ideal.

[5] Long past is the time when an interpreter might have been thought to be appropriately described as a ‘translating machine’ or ‘bilingual transmitter’ performing a function ‘not different in principle from that which in another case an electrical instrument might fulfil in overcoming the barrier of distance’: *Gaio v The Queen* (1960) 104 CLR 419 at 430-431. See also at 429, 432-433. More accurate is to conceive of an interpreter as a ‘bilingual mediating agent between monolingual communication participants in two different language communities’ and to recognise that ‘total equivalence’ between words spoken or written in a source language and words translated into a target language is a ‘chimera’. Translation is not a ‘simple word-matching exercise’ but ‘a difficult and sophisticated art’ which, ‘[t]o be done well’, ‘requires not only linguistic sophistication and sensitivity to 'minor' linguistic details (which may be correlated with vast differences in conceptualization), but also an intimate knowledge of the cultures associated with the language in question, of the social and political organization of the relevant countries, and of the world-views and life styles reflected in the linguistic structure’.

[6] Professor Wigmore noted the ‘peculiarity’ of language that ‘the most perfect system of signs, the most richly developed language, leads only to a partial comprehension ... whose degree of completeness depends upon the nature of the subject treated, and the acquaintance of the hearer with the mental and moral character of the speaker’. Imperfections in communication arising out of mistranslation of words spoken or written in one language into another language are inherent in the human condition, as are imperfections in communication arising out of misuse or misunderstanding of words spoken or written in a common language. ‘Perfect interpretations’ simply ‘do not exist’: see *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at 18 [26].

[7] Unsurprisingly therefore, questions not infrequently arise as to the effect of mistranslation on curial or administrative outcomes. Those questions cannot be answered through the application of a simple or uniform mode of analysis.

[8] Whether and if so in what circumstances mistranslation might result in invalidity of an administrative decision turns necessarily on whether and if so in what circumstances mistranslation might result in non-compliance with a condition expressed in or implied into the statute which authorises the decision-making process and sets the limits of decision-making authority: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 132 [23], 145 [66]; *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at 59 [15]; 385 ALR 212 at 217. In a decision-making process conditioned by a requirement to afford procedural fairness the content of which is implied by the common law, the effect of mistranslation on the resultant decision will turn on whether the mistranslation has resulted in ‘unfairness’ in the decision-making process (*SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at 215-216 [9]-[10], 219 [24], 224-225 [46]-[48], 229-230 [65]-[75]) amounting to ‘practical injustice’: *Re Minister for Immigration and Multicultural and Indigenous Affairs;* *Ex parte Lam* (2003) 214 CLR 1 at 14 [37]. In a decision-making process in which procedural fairness is excluded or is sufficiently provided if specific statutory requirements are met, the effect of a mistranslation on the resultant decision will turn on the ‘blunter question’ (*SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at 230 [74], citing *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6; see also *Singh v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 1 at 6 [26]-[28]) of whether the mistranslation has resulted in one or more specific statutory requirements not being met.”

### **3.4.5 Representation of adults in the Family Division**

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

(a) personally; or

(b) by an Australian legal practitioner within the meaning of the *Legal Profession Act 2004*; or

(c) by an employee of the public service (whether or not admitted as a barrister and solicitor of the Supreme Court) who is authorized by the Secretary to appear in proceedings before the Family Division.

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

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

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

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

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

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

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

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

In *Weldemichael v Duy Tri Ha* [2022] VSC 817 one of the plaintiff’s objections was that the respondent had received assistance from his son during a VCAT hearing. The son had addressed the Tribunal on occasions and had made submissions on his behalf although it appeared that an interpreter was present and that Mr Ha had some command of English. In rejecting this objection Ginnane J said at [20]:

“VCAT had power to allow Mr Ha’s son to assist him in the way that he did. This is consistent with the Court of Appeal’s decision in *Hua Li v John Hong Ping So* [2021] VSCA 32, [20] which discussed the discretion to permit a non-legally trained person to represent a litigant as a *McKenzie* friend in special circumstances. That power is appropriately used to assist a person present their case when they may otherwise be unable to do so. The assistance may extend to making oral submissions on a person’s behalf.”

Other cases involving a McKenzie friend assisting a party include *Vella v Wybecca Pty Ltd* [2014] VSC 443 and *210 Hawthorn Road Pty Ltd v Ellinson & Ors* [2024] VSC 61.

In *Myers v VCAT & Ors* [2024] VSCA 206 Walker JA held that the trial judge had not erred in refusing the applicant’s application for a McKenzie friend to make oral submissions at trial or in finding that special circumstances were not made out or in finding the proposed McKenzie friend not suitable. Walker JA also held that the trial judge had not denied the applicant procedural fairness and had not breached the *Charter of Human Rights and Responsibilities Act 2006* or the *Equal Opportunity Act 2010*.

In *Victorian Legal Services Board v Nida* [2023] VSC 25 the respondent, a former barrister whose practising certificate the Victorian Bar Association had refused to renew, had engaged in legal practice by appearing on behalf of her two sons aged 26 & 29. At [4] Gorton J said:

“[I]n Victoria, lawyers with practising certificates have the right to appear in court for those who retain them but other people, including lawyers without practising certificates, can only appear in court for others with the leave of the court. Sections 10 and 11 of Schedule 1 of the Uniform Law prohibits anyone other than a ‘qualified entity’ from engaging in legal practice. The definition of ‘qualified entity’ includes an Australian legal practitioner, but that term is defined to mean an Australian lawyer who holds a current Australian practising certificate. Appearing for a party in court as a lawyer is ‘engaging in legal practice’. The true position is that mothers do not have an automatic right to represent their children in court and need the leave of the court to do so. The court retains a discretion to grant leave to a non-lawyer to appear as an advocate for someone else in an appropriate case – see *Hubbard Association of Scientologists International v Anderson* [1972] VR 340, 342 (Smith, Little and Gowans JJ); *Worldwide Enterprises Pty Ltd v Silberman* (2010) 26 VR 595, 601 [32] (Weinberg JA).”

### **3.4.6 Duty of judicial officer to assist a self-represented litigant in the Family Division**

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

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

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

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

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

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

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

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

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

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

See also *Daher v Bell* [2020] VSC 346 at [8]-[9] per Derham AsJ; *Re Rococo Group Pty Ltd (in liq)* [2022] VSC 167 at [7] per Hetyey AsJ.

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

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

## **3.5 What happens in court**

All Court proceedings in the Children’s Court are digitally recorded in accordance with s.19A *Magistrates’ Court Act 1989* read in conjunction with s.528(2)(a) CYFA. See also **section 2.7.6**.

### **3.5.1 Preparation**

Before a case goes before a judicial officer, it is prepared by the legal practitioners representing the various parties. The parties may negotiate a settlement at any time before or during a hearing before an order is made and entered by the Court into the records of the Court. However, while the Court usually accepts a settlement and makes consent orders, it is not bound to do so. This is especially true of child protection proceedings in the Family Division of the Children’s Court where the Court has an independent underlying duty to ensure that orders made by it are in the best interests of the subject child: see ss.8(1) & 10 of the CYFA.

### **3.5.2 Mention**

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

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

### **3.5.3 Evidence**

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

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

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

(a) relate to bail; or

(b) are interlocutory proceedings or proceedings of a similar kind; or

(c) are heard in chambers; or

(d) subject to subsection (2) relate to sentencing.

(2) If such a proceeding relates to sentencing-

(a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and

(b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters – the direction has effect accordingly.”

### **3.5.3.1 Admissibility of evidence generally**

In *DPP v Roberts (Ruling No 15)* [2022] VSC 345 in a murder retrial Kaye JA admitted – against an objection by the prosecution – evidence that the accused had advised police 15 years later of the location of weapons and other items involved in the murders. At [7] & [10] his Honour said:

[7] “Section 55(1) of the *Evidence Act 2008* provides that evidence is relevant in a proceeding if it could rationally affect (‘directly or indirectly’) the assessment of the probability of the existence of a fact that is in issue in the proceeding. Section 102 provides that ‘credibility evidence’ about a witness is not admissible. Section 101A defines credibility evidence as evidence that is relevant only because it affects the assessment of the credibility of a witness or a person…

[10] … I consider that the potential relevance for the evidence is marginal, but the evidence is capable of having some probative value. That is, the evidence is capable of going beyond affecting the mere credibility of both [the co-accused] Debs and the accused as witnesses in the trial, as it could indirectly affect the jury’s assessment of the probability of one or more facts in issue in the trial.”

Section 135 of the *Evidence Act 2008* provides **a general discretion to exclude evidence**:

“The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time; or

(d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence.

**Note**

This section does not limit evidence of family violence that may be adduced under Part IC of the **Crimes Act 1958**.”

Section 136 of the *Evidence Act 2008* provides **a general discretion to limit the use of evidence**:

“The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing.”

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

“(1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding-

1. a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
2. any other question arising under this Act-

have been proved if it is satisfied that they have been proved on the balance of probabilities.

1. In determining whether it is so satisfied, the matters that the court must take into account include-
2. the importance of the evidence in the proceeding; and
3. the gravity of the matters alleged in relation to the question.”

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

Section 137 of the Evidence Act 2008 relates to the **exclusion of prejudicial evidence in criminal proceedings**:

“In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.”

In *DPP v Roberts (Ruling No 4)* [2021] VSC 778 the accused was charged with two murder charges. He applied for exclusion of audio recordings of listening devices and telephone intercepts on the basis that the recordings of those conversations are so inaudible or unintelligible that it would not be open to the jury to find that the words or sounds, contained in the recordings, are those claimed by the prosecution. Accordingly, it was submitted that the evidence is irrelevant. Alternatively, it was submitted that the evidence should be excluded under s 137 of the *Evidence Act* on the basis that its probative value was outweighed by the danger of unfair prejudice to the accused. Kaye JA held that some of the impugned passages were admissible and some were inadmissible. At [5]-[10] his Honour said:

[5] “The principles that apply to the present application are well settled. In summary, they are as follows:

(1) Where an out of court conversation has been recorded by mechanical means, the recording is the best evidence of the contents of the conversation. If the recording is available, there is no reason to admit evidence of an out of court listener of the recording, or a transcript made by that listener, as evidence of the content of the conversation: *Butera v DPP* (1987) 164 CLR 180, 186 (Mason CJ, Brennan and Deane JJ).

(2) Where there are aspects of such a recording which are indistinct so as not to yield the full content of the conversation, so that it may need to be played over repeatedly before the conversation can be accurately understood, the court may receive a transcript of the conversation, not as evidence of the conversation, but rather as a means of assisting in the understanding of it: *Butera* at 187.

(3) In such a case, the jury must be directed that the purpose of the transcript is not to provide independent evidence of the conversation, but rather to assist the jury to follow and understand it: *Butera* at 188.

(4) If the quality of the recording is so poor that the jury could not make a fair and reliable assessment of the conversation, or if there is a real risk that the jury might misconstrue the words contained in the recording in a manner that would be unfairly prejudicial to the accused, the recording should not be admitted in evidence: *R v Robson* [1972] 1 WLR 651, 656 (Shaw J); *Smith, Ashford & Schevella v The Queen* (1990) 50 A Crim R 434, 450–1 (Young CJ, Crockett and Southwell JJ); *DPP v Debs and Roberts (Ruling No. 5)* [2002] VSC 386, [15]–[19] (Cummins J); *Christos v The Queen* [2013] VSCA 202, [10] (Nettle AJA).

(5) In such a case, it may be necessary to exclude the recording of a conversation where the inaudible parts of it might unfairly affect the meaning attributed to the parts of the recording that are audible: *DPP v Debs and Roberts (Ruling No. 5)* [2002] VSC 386, [19] (Cummins J).

[6] The leading authority on the admissibility of such evidence is the decision of the High Court in *Butera*. That case was primarily concerned with the admissibility of transcripts of recorded conversations which were in a foreign language. The transcripts were produced by interpreters who had translated the foreign language into English. The High Court held that the transcripts had been properly admitted in evidence.

[7] In reaching that conclusion, the court considered the question of the admissibility and use of transcripts of recorded conversations.

[8] In their joint judgment, Mason CJ, Brennan and Deane JJ commenced by stating the first proposition outlined above, namely, that the recording of a conversation is the best evidence of such a conversation, so that, where the recording is available, there is no reason to admit the evidence of an out of court listener to the conversation, or a transcript made by the listener: *Butera* at 186. Nevertheless, their Honours recognised the practical assistance that might be provided to the court by the provision to it of a transcript of the conversation as an aid to assist it listen to and understand the recording. In that respect, they stated at 187:

Although evidence derived from a tape recording is not subject to some of the frailties of human testimony, it may exhibit deficiencies from which human testimony is usually free. A tape recording which is indistinct may not yield its full content to the listener on its first playing over. It may need to be played over repeatedly before the listener’s ear becomes attuned to the words or other sounds recorded. This situation has led courts to receive transcripts not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence tendered by the playing over of the tape. In *Williams v The Queen*, Neasey J. cited with approval a Canadian case *Reg. v MacLean and MacLean [No. 1]* in which the trial judge held:

that he would not permit the transcripts to be used as evidence of the contents of the recording, but did admit them for the use of ‘the trier of the facts, after being properly instructed in that regard, for the sale purpose of following the playing of the tape in court and to assist the trier of the facts in determining what is in fact recorded thereon’.

Where the quality of the recording is such that the provision of a transcript for the use of the jury would permit them clearly to follow an indistinct recording, a transcript may be seen as an aid to listening though it is not independent evidence of the recorded conversation.

[9] In reaching that conclusion, the Court emphasised at 188 that the jury should be given instruction that the purpose of admitting the transcript is not to provide independent evidence of the conversation, but in order to aid the jury to understand the conversation that was recorded on the tape, and the jury should be instructed that it could not use the transcript as a substitute for the tape is the jury is not satisfied that the transcript correctly sets out what the jury heard on the tape.

[10] The fourth principle, which I have outlined above, was discussed by the Court of Criminal Appeal in *Smith, Ashford & Schevella*. In that case, the Court expressed its acceptance of the test of admissibility applied by Shaw J in *Robson* at 656, namely, whether the quality of the recording was adequate in its ‘continuity, clarity and coherence’ to ‘enable the jury to form a fair and reliable assessment of the conversations’.”

In *Colin Stevenson (a pseudonym) v The Queen* [2020] VSCA 27 the applicant, aged 24, had been in a sexual relationship with a complainant, aged 14 to 15. He had been charged with 9 counts of sexual penetration of a child under 16 and one of an indecent act with a child under 16. He was acquitted of 8 charges but found guilty of the last two in the series. The issue on appeal was whether the trial judge had erred in admitting evidence of Facebook posts capable of showing that the applicant became aware of the assertion that the complainant was aged 15 just prior to the last two instances of sexual penetration. Finding no error in admitting evidence as to the purported date of the applicant’s comment on the Facebook posts, the Court of Appeal held:

* **Section 146**: The impugned evidence was admissible pursuant to s.146 relating to “**Evidence produced by processes, machines and other devices**”: see [63] & [71]-[73].
* **Section 161**: The impugned evidence was also admissible pursuant to s.161 relating to “**Electronic communications**”: see [64] & [75]-[77].
* **Section 137**: The probative value of the evidence of the Facebook posts was not outweighed by the danger of unfair prejudice to the applicant: see [82]-[86].

In *Moreno (a pseudonym) v The King* [2023] VSCA 98 the applicant was charged with murder and aggravated burglary arising from a single incident. On the same indictment, the applicant was also charged with an earlier attempted armed robbery. A witness had identified the applicant after a conversation with another person and having been shown a Facebook photograph of the applicant. The trial judge had allowed the admission of the impugned identification evidence. In its analysis at [95]-[107] the Court of Appeal allowed the appeal, applying s.137 of the Evidence Act 2008 and holding that the probative value of the impugned evidence was low but the prejudice to the applicant was substantial and was not capable of being adequately ameliorated by judicial direction.

See also *R v Dickman* (2017) 261 CLR 601; *DPP v Roberts (Ruling No 3)* [2021] VSC 658; *Tate (a pseudonym) v The King* [2023] VSCA 249.

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

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

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

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

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

On its face s.142 of the *Evidence Act 2008* also applies to evidence led in proceedings in the Family Division. However, s.8 of that Act provides- “This Act does not affect the operation of the provisions of any other Act.” Note 4 to s.4 states: “Provisions in other Victorian Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by s.8 of this Act. These include s.215 of the **Children, Youth and Families Act 2005**.” It follows that s.142 of the *Evidence Act 2008* does not alter the power of the Family Division of the Children’s Court to “inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary”.

The proper operation of a provision akin to s.215(1)(d) CYFA was explained by Higgins J in the Supreme Court of the A.C.T. in *A & B v Director of Family Services* (1996) 20 I LR 549 at 553-4-

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

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

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

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

Higgins J went on to discuss in detail the dangers inherent in the reception of hearsay evidence, citing dicta of the High Court in *Bannon v R* (1995) 132 ALR 87; 70 ALJR 25 and *Straker v R* (1977) 15 ALR 103; 51 ALJR 690. The writer saw a striking example of such a danger in a contested Family Division case in 2018 in which one of the Department’s reports had said that “a secondary report was received that [the father] had been seen with [M, one of his children] in [X] shopping center [*sic*]”. However, the case note in which this comment was made – a case note on which reporter privilege was unsuccessfully claimed – included information that the reporter “didn’t personally see [the father and M] together but that it was an unrelated third person “who had told him she believed she saw [the father and M] together at [X] shopping centre on the Saturday”.

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

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

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

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

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

* s.60: evidence relevant for a non-hearsay purpose;
* ss.63-64: first-hand hearsay in civil proceedings;
* ss.65-66: first-hand hearsay in criminal proceedings;
* s.66A: contemporaneous statements about a person’s health etc;
* s.69: business records: cf. *Hayward v A & T Goldman Pty Ltd (Ruling)* [2023] VSC 719; *Kane (a pseudonym) v The King; Moon (a pseudonym) v The King* [2023] VSCA 305 at [65]-[66].
* s.70: tags and labels;
* s.71: electronic communications;
* s.72: Aboriginal and Torres Strait Islander traditional laws and customs;
* s.73: marriage, family history or family relationships;
* s.74: public or general rights;
* s.75: use of evidence in interlocutory proceedings;
* s.81: admissions;
* s.87(2): representations about employment or authority;
* s.92: exceptions to the rule in s.91 excluding evidence of judgments and convictions;
* ss.110-111: character of and expert opinion about accused persons.

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

(a) was made under a duty to make that representation or to make representations of that kind; or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

(c) was made in circumstances that make it highly probable that the representation is reliable; or

(d) was against the interests of the person who made it at the time it was made and was made in circumstances that make it likely that the representation is reliable.

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

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

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

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

For judicial discussion of s.65 see *DPP v BB & QN* [2011] VSCA 211 per Bongiorno JA (with whom Harper & Hansen JJA agreed); *Sajanesh Easwaralingham v DPP* [2010] VSCA 353at [32]-[44] per Tate JA (with whom Buchanan JA agreed) dismissing on this issue an appeal from Pagone J [2010] VSC 437 at [13]-[19]; *R v Rossi (Ruling No.1)* [2010] VSC 459 per Lasry J; *Snyder (a pseudonym) v The Queen* [2021] VSCA 96; *Steven Moore (a pseudonym) v The King* [2024] HCA 30; Ruling 5 in *DPP v Alhassan (Rulings 1 to 5)* [2024] VSC 573 at [120]-[130].

Section 66 provides an exception to the hearsay rule in a criminal proceeding in a case where a person who made a previous representation is available to give evidence about an asserted fact. Section 66(2) provides that the hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made if-

(a) the person who made the representation has been or is to be called to give evidence; and

(b) either-

(i) when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; or

(ii) the person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years at the time the representation was made.

See s.66(2A) for matters which may be taken into account in determining whether the occurrence of the asserted fact was “fresh in the memory of the person who made the representation”. See also *DPP v Roberts (Ruling No 14)* [2022] VSC 344 where hearsay evidence was allowed of representation made 15 years after the occurrence of the asserted fact.

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

For an extensive judicial discussion of ss.91 & 92 see *Osborne v Butler (a pseudonym)* [2024] VSCA 6 at [19]-[37] & [61]-[62]; see also *Commissioner of the Australian Federal Police v Kannan (Evidence Ruling)* [2024] VSC 35 at [45]-[54].

### **3.5.3.5 Expert evidence**

From early times courts have been accustomed to act on the opinions of experts. The topic is dealt with in great detail in "Expert Evidence", a 5 volume loose-leaf service by Ian Freckleton & Hugh Selby. The relevant principles are discussed and applied in the judgments of the High Court in *Lang v The Queen* [2023] HCA 29 and *HG v R* (1999) 197 CLR 414 at [39] & [44] per Gleeson CJ. See also *Makita Australia Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] per Heydon JA; *Ocean Marine Mutual v Jetopay* (2000) 120 FCR 146 at [21]-[23] per Black CJ, Cooper & Emmett JJ; *Ronchi v Alcoa* [2008] VSCA 83 at [54] per Eames JA; *Mackie & Staff Pty Ltd v Glengollan Village for Aged People* [2007] VSC 201 at [11]-[14] & [30] per Habersberger J; *R v Dong Song Choi & Ors* [aka *In the Matter of the Pong Su (Ruling No. 19)*] [2005] VSC 66 at [29]-[30] per Kellam J; *R v Cox (Ruling No.1)* [2005] VSC 157 at [11] & *(Ruling No.2)* [2005] VSC 224 per Kaye J; *R v Rich (Ruling No.10)* [2009] VSC 10 at [26]-[34] per Lasry J; *MA v The Queen* [2013] VSCA 20 at [57]-[77] per Osborn JA & [89]-[100] per Redlich & Whelan JJA; *Godwin (a pseudonym) v The King* [2024] VSCA 225 at [46]-[54] & [94]-[100] per Priest, Taylor & Orr JJA.

Part 3.3 of the *Evidence Act 2008* (Vic) contains a number of stipulations about the admissibility of opinion evidence.

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| **SECTION** | **PART 3.3—OPINION** |
| 76 | The opinion rule  Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. |
| 77 | **Exception—evidence relevant otherwise than as opinion evidence**  The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed. |
| 78 | **Exception—lay opinions**  The opinion rule does not apply to evidence of an opinion expressed by a person if—   1. the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and 2. evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event. |
| 78A | **Exception—Aboriginal and Torres Strait Islander traditional laws and customs**  The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group. |
| 79 | **Exception—opinions based on specialised knowledge**   1. If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge. 2. To avoid doubt, and without limiting subsection (1)— 3. a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and 4. a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following— 5. the development and behaviour of children generally; 6. the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences. |
| 80 | **Ultimate issue and common knowledge rules abolished**  Evidence of an opinion is not inadmissible only because it is about—   1. a fact in issue or an ultimate issue; or 2. a matter of common knowledge. |

Section 102 of the *Evidence Act 2008* (Vic) contains the credibility rule: Credibility evidence about a witness is not admissible. However, s.108C provides an exception to the credibility rule – in terms which are similar to those in s.79 – providing that the credibility rule does not apply to evidence of persons with specialised knowledge.

See the judgment of the High Court in *BQ v The King* [2024] HCA 29 for a discussion of ss.79 & 108C.

The judgments in *Lang v The Queen* [2023] HCA 29 contain a very detailed analysis of expert evidence, its admissibility generally and its admissibility in the circumstances of this quite unusual case. The appellant is a former medical practitioner. The victim was his 68 year old girl‑friend. The cause of the victim’s death in her bed in her apartment in the early hours of the morning was blood loss from a stab wound to her abdomen from a knife. The appellant and the victim were the only two people who were in the victim’s apartment at the time of her death. The appellant accepted at trial and before the High Court that there were only two possibilities: either the victim committed suicide or she was murdered by the appellant. The appellant had been convicted in a first trial before a judge and jury in which prejudicial evidence was admitted concerning the suicide rates of Australian women. The erroneous admission of that evidence led to that conviction being quashed on appeal.

The appellant was then retried before a judge and jury. He was convicted again and sentenced to life imprisonment. He appealed against that conviction on two grounds:

(1) that the verdict was unreasonable; and

(2) that an important aspect of the expert evidence given by Dr Ong, a forensic pathologist, expressing his opinion that the victim’s knife injury was more likely to have been inflicted by another person than to have been self-inflicted was inadmissible.

The Court of Appeal of the Supreme Court of Queensland dismissed the appeal. The appellant, by special leave, appealed to the High Court on the same two grounds. By a majority of 3:2 the High Court dismissed the appeal. The primary majority judgment was that of Jagot J. The secondary majority judgment was that of Kiefel CJ & Gageler J. The dissenting judgment was that of Gordon & Edelman JJ.

In relation to ground (2), Jagot J noted at [422]-[423]:

[422] “…the appellant accepted that the question whether wounds are self-inflicted or not is capable of being the subject of expert evidence, if the evidence is based on the witness's training, study, or experience: *Velevski v The Queen* (2002) 76 ALJR 402 at 427 [156]; 187 ALR 233 at 268. There was no question that Dr Ong was an expert in a recognised field of expertise, forensic pathology, by reason of which he could provide the jury with an expert opinion (if based on that expertise), which the jury could not itself reach unassisted, about the more likely cause of the deceased's fatal stabbing wounds being infliction by another person rather than by the deceased herself: *Clark v Ryan* (1960) 103 CLR 486 at 491; *R v Bonython* (1984) 38 SASR 45 at 46-47. The appellant submitted, however, that the evidence exposed that the impugned evidence of Dr Ong was inadmissible under the applicable common law principles, as he was giving his opinion as to the likelihood of the deceased acting in a particular way, which was not an opinion based on his expertise as a forensic pathologist.”

[423] As a result of the pre-trial hearing, the trial judge held that ‘Dr Ong has laid a sufficient foundation for the evidence he has given based on his training, study and experience’, with the consequence that the application to exclude his evidence, that the deceased's wounds were more likely inflicted by another person than self-inflicted by the deceased, was refused. Accordingly, Dr Ong was able to, and did, give this evidence during the trial. The Court of Appeal dismissed the appeal on the ground of inadmissibility of this part of Dr Ong's evidence on the basis that it was ‘not a fair reading of Dr Ong's evidence at trial to submit that the impugned answer was the expression of a personal opinion not based on his medical expertise in respect of stab wounds’.

Speaking about the admissibility of opinion evidence, Kiefel CJ & Gageler J said at [4]-[19] & [26] [emphasis added]:

[4] “We write to elaborate on the common law principles which bore on the admissibility of Dr Ong's opinion.

[5] Expert evidence need not be opinion evidence. Evidence given by an expert sometimes involves nothing more than imparting expert knowledge and sometimes involves nothing more than giving a technical description of events and processes in which the expert was involved. Much of Dr Ong's evidence at the trial was evidence of the latter kind. It was evidence of what he did and saw in his capacity as a forensic pathologist when first he attended the scene of Mrs Boyce's death and when later he conducted her autopsy

[6] Subject to limited exceptions, however, opinion evidence can only be expert evidence. The reason lies in the nature of an opinion and in the nature of the curial process. An opinion is an inference drawn from observed and communicable data: *Honeysett v The Queen* (2014) 253 CLR 122 at 130-131 [21]. Within the curial process, data that has been observed is communicated to a court through the adducing of evidence. Drawing inferences from that evidence to make findings of fact is the function of the tribunal of fact. The tribunal of fact, whether a judge or a jury, can be expected to perform that fact‑finding function forming their own opinion as to the inferences to be drawn from the evidence based on their own common knowledge and experience. Another person cannot usurp the factfinding function of the tribunal of fact, and an opinion of another person based on nothing more than the common knowledge and experience of that person cannot assist the tribunal of fact in performing that function: *Smith v The Queen* (2001) 206 CLR 650 at 655 [11]. The tribunal of fact might at most be assisted in the performance of the function by being apprised of the opinion of another person – an expert – based on that person's specialised knowledge or experience. The probative value of evidence of an opinion that is based on specialised knowledge or experience then lies in the extent, if any, to which the opinion has the potential to assist the tribunal of fact in the process of drawing the requisite inferences for itself.

[7] That common law conception of the opinion of an expert having probative value only if and to the extent that the opinion can assist the tribunal of fact in forming its own opinion as to inferences to be drawn from evidence was the starting point and the dominant theme of the influential analysis in *Makita (Australia) Pty Ltd v Sprowles*: (2001) 52 NSWLR 705 at 729-745 [59]-[86]. The role of expert witnesses was explained at the commencement of that analysis in the following terms [citing] *Davie v Magistrates of Edinburgh* 1953 SC 34 at 40; Cross on Evidence, 13th Aust ed (2021) at 1143-1144 [29075] and the cases there noted:

‘Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury.’

[8] The traditional approach of the common law to the admissibility of evidence of the opinion of an expert has been consistent with that conception of the probative value of evidence of the opinion of an expert lying in the extent, if at all, to which the opinion might assist the tribunal of fact to draw inferences from other evidence that has been adduced. The approach has been simultaneously to accept that ‘the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance’ and to deny that ‘the opinions of witnesses can be received when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it’: Smith's Leading Cases, 7th ed (1876), vol 1 at 577, quoted and applied in *Clark v Ryan* (1960) 103 CLR 486 at 491 and *Burger King Corporation v Registrar of Trade Marks* (1973) 128 CLR 417 at 421.

[9] The traditional approach has come under strain as developments in specialised knowledge, especially in fields of behavioural science {eg *Murphy v The Queen* (1989) 167 CLR 94 at 111, 122, 130-131; *Farrell v The Queen* (1998) 194 CLR 286 at 292-293 [10]-[13], 299-301 [27]-[31], 320-322 [91]- [93]} and forensic science {eg *Velevski v The Queen* (2002) 76 ALJR 402 at 427 [156]; 187 ALR 233 at 268}, have narrowed the subject-matters in respect of which it might continue to be asserted categorically and with confidence that common knowledge and experience provide so firm a foundation upon which to engage in fact-finding that the opinion of an expert could be of no assistance. This Court has emphasised that ‘it does not follow that, because a lay witness can describe events and behaviour, expert evidence is unavailable to explain those events and that behaviour’: *Murphy v The Queen* (1989) 167 CLR 94 at 112. Nor does it follow that evidence of the opinion of an expert is unavailable to assist the tribunal of fact merely because the tribunal of fact, whether a judge or a jury, could be expected in the absence of that expert evidence to work out their own explanation for events and behaviour making use of nothing more than the common knowledge and experience that can be attributed to them.

**[10] Nonetheless, it remains a condition of the admissibility of evidence of the opinion of an expert at common law that the opinion be demonstrated to be based on specialised knowledge or experience of the expert that is beyond the common knowledge and experience attributable to the tribunal of fact. Only if that condition is satisfied can the opinion of the expert assist the tribunal of fact to form the requisite opinion of its own as to the inferences to be drawn from the evidence to make findings about disputed facts should the tribunal of fact be persuaded to accept and act upon the opinion: *Velevski v The Queen* (2002) 76 ALJR 402 at 432-433 [177]-[182]; 187 ALR 233 at 274-275.**

**[11] The parties were therefore correct in choosing to present their arguments on the appeal on the common understanding that the principles stated in *Makita* (2001) 52 NSWLR 705 at 743-744 [85], and acknowledged and applied in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 604 [37] in the context of considering the admissibility of the opinion of an expert under the uniform evidence legislation, apply equally to the determination of the admissibility of an expert opinion at common law. Those principles require that, in order to satisfy the condition of admissibility that the opinion of an expert be demonstrated to be based on specialised knowledge or experience, the inference drawn by the expert which constitutes the opinion be supported by reasoning on the part of the expert sufficient to demonstrate that the opinion is the product of the application of the specialised knowledge of the expert to facts which the expert has observed or assumed.**

[12] The requirement for the opinion to be demonstrated to be the product of the application of the specialised knowledge of the expert is not absolute. In the terminology of the uniform evidence legislation, it is enough that the opinion be demonstrated to be based substantially on that specialised knowledge. Expression of the requirement in terms of substantiality recognises that specialised knowledge cannot be wholly divorced from common or ordinary knowledge and that it is ‘the added ingredient of specialised knowledge to the expert's body of general knowledge that equips the expert to give his or her opinion’: *Velevski v The Queen* (2002) 76 ALJR 402 at 427 [158]; 187 ALR 233 at 268. The requirement will not be contravened by a process of reasoning on the part of an expert which involves using only those parts of the common or ordinary knowledge of the expert that are necessary for the expert to use in forming his or her opinion through the application of specialised knowledge: *Velevski v The Queen* (2002) 76 ALJR 402 at 429 [164]; 187 ALR 233 at 270.

[13] Reasoning sufficient to demonstrate that the opinion formed by an expert is the product of the application of his or her specialised knowledge need not be limited to formal induction or deduction. Speculation, however, is not reasoning: *HG v The Queen* (1999) 197 CLR 414 at 428 [41]. Nor is intuition. Writing extra-curially 90 years ago, in a passage adopted judicially in *Makita* (2001) 52 NSWLR 705 at 730 [60] and many times elsewhere {eg *R v Jenkins; Ex parte Morrison* [1949] VLR 277 at 303, approved in *Morrison v Jenkins* (1949) 80 CLR 626 at 637, 641; *R v Juric* (2002) 4 VR 411 at 426 [19]; *Samuels v Flavel* [1970] SASR 256 at 260; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 623 [92]}, Sir Owen Dixon observed that ‘courts cannot be expected to act upon opinions the basis of which is unexplained’: Dixon, "Science and Judicial Proceedings", in Crennan and Gummow (eds), Jesting Pilate, 3rd ed (2019) 124 at 130. He continued: ‘[h]owever valuable intuitive judgment founded upon experience may be in diagnosis and treatment, it requires the justification of reasoned explanation when its conclusions are controverted’: see also *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 623 [92].

[14] That is not to say that the permissible reasoning of an expert must be confined to matching an observed or assumed pattern of fact to patterns of fact encountered by the expert in the past. To adapt a comment made by the Supreme Court of the United States in *General Electric Co v Joiner* (1997) 522 US 136 at 146 in relation to Federal rule 702 of evidence which there permits expert testimony to be given in the form of an opinion if ‘scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue’:

‘Trained experts commonly extrapolate from existing data. But nothing ... requires a ... court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.’

[15] Here, it is important to highlight a distinction touched on but not elaborated upon in *Makita* at [85]-[86]. The distinction is between the present question as to whether a process of reasoning engaged in by an expert is sufficient to demonstrate that his or her opinion is the product of the application of specialised knowledge and the question of the extent to which a process of reasoning engaged in by an expert through the application of specialised knowledge is clear and convincing. Both questions can be described as going to the utility or value of the opinion: *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 732 [66], 733 [68]- [69], 735 [72].

[16] However, it is the present question alone that goes inexorably to the ‘admissibility’ of the opinion as distinct from its ‘weight’: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 605 [42]. In addressing the present question of whether the opinion satisfies the condition of admissibility that the opinion be demonstrated to be based on specialised knowledge or experience of the expert, lack of cogency in so much of the reasoning as is found to involve application of specialised knowledge is not to the point: ‘the giving of correct expert evidence cannot be treated as a qualification necessary for giving expert evidence’: *Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292 at 303; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 623 [91].

[17] The latter question – as to the cogency of reasoning involving the application of specialised knowledge – can also go to the admissibility of a resultant opinion. But that is only in so far as the degree of cogency of the reasoning bears on the extent to which the resultant opinion has the potential to assist the tribunal of fact in drawing requisite inferences from the evidence and so bears on the calculus to be undertaken by a court if and when the court is asked or required to consider whether the opinion should be excluded on the distinct ground {see *Stephens v The Queen* (1985) 156 CLR 664 at 669; *Festa v The Queen* (2001) 208 CLR 593 at 609-610 [51]; see also ss 135 and 137 of the *Evidence Act 1995 (NSW)* considered in *Aytugrul v The Queen* (2012) 247 CLR 170 at 186 [32]} that the probative value of the opinion is outweighed by its prejudicial effect. Undertaking that calculus by assessing the probative value of the opinion having regard to the cogency of the reasoning proffered in evidence in support of it involves no departure from the now settled principle that the assessment of the probative value of evidence requires that evidence to be ‘taken at its highest’: taking evidence at its highest involves making no assumption that the evidence in question is convincing: see *IMM v The Queen* (2016) 257 CLR 300 at 314-315 [50]. The prejudicial effect which might in an appropriate case be required to be weighed against the probative value of an expert opinion has properly been recognised to be capable of including a risk that a jury might give the opinion more weight than it deserves by reason of a perception of the status of the expert – the so-called "white coat effect" – or by reason of difficulty in assessing information of a technical nature: see *R v Sica* [2013] QCA 247 at [130].

[18] The latter question does not arise for consideration in the present appeal. The question is not within the scope of the second ground of appeal. The trial judge was not asked to exclude the opinion of Dr Ong on the ground that its probative value was outweighed by its prejudicial effect. No argument was put to the Court of Appeal or to this Court that failure to exclude the opinion on that ground constituted a miscarriage of justice.

[19] The question for determination on the second ground of appeal therefore reduces to whether the process of reasoning disclosed by Dr Ong's testimony was sufficient to demonstrate that his opinion that Mrs Boyce's wound was more likely to have been inflicted by another person than to have been self-inflicted was the product of his application of the specialised knowledge of the interpretation of incised injuries which he undoubtedly had to the facts which he recounted as having observed when he attended the scene of Mrs Boyce's death and when later he conducted her autopsy.”

…

[26] “…we cannot conclude that, in engaging in the process of reasoning which led to the formation of the opinion, Dr Ong did other than draw substantially on his specialised knowledge. Accordingly, the appeal should be dismissed.”

See also the dicta of Jagot J at [428]-[470] and the dicta of Gordon & Edelman JJ at [221]-[229] on admissibility of expert evidence generally and at [230]-[242] on the admissibility of Dr Ong’s evidence.

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

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

2. whether the witness has sufficient expertise in such field as would enable him or her to assist the court (*Grace v Southern* [1978] VR 75).

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

(a) a party wishing to call an expert witness must clearly identify the field of specialized knowledge in respect of which it is said the witness can proffer an opinion;

(b) a party must then identify the expertise of the witness in that field; it must be demonstrates that by reason of specialized training, study or experience the witness is truly an expert in that area;

(c) the opinion expressed by the witness must be either wholly or substantially based on that specialist knowledge and not on the everyday knowledge of the common person;

(d) the opinion must be based on clearly identified facts; and

(e) the onus rests on the party calling the witness to satisfied the above criteria.

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

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

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

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

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

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

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

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

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

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

In *DOHS v Ms B & Mr G* [2008] VChC 1 Power M referred with approval to the above dicta from *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 in a section discussing the limitations of the expert evidence adduced in that case. Several clinical psychologists and an infant psychiatrist had been called to give expert evidence, part of which related to the ultimate issue, namely the frequency, duration and nature of contact between the family members. His Honour considered that “a major limitation of their evidence is that each of their observations involved only part of the overall factual matrix”. Each of the experts had met and assessed a sub-set of the family members. None had met and assessed the entire family. At pp.120-121 His Honour also commented on the weight to be given in any particular case to relevant general research and literature:

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

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

The case of *DFFH v ZX* [2023] VChC 3 involved a protection application taken out in relation to a 9 year old boy ZX. One of the protective concerns was family violence allegedly perpetrated by the father towards the mother. In ultimately finding that family violence perpetrated by the father towards the mother was not a current protective concern, Hamilton M discussed the evidence given by a child protection practitioner – witness 3 – and drew a distinction between evidence of an expert witness called to provide evidence “about the dynamics and characterisation of family violence” as expressly provided for under s.73 of the *Family Violence Protection Act 2008* and that not falling within s.73. At [24] & [31]‑[43] her Honour said:

[24] “The DFFH’s evidence, both within the tendered reports and in the oral evidence provided by the child protection practitioners was that the risk of exposing ZX to family violence between his parents was a current, ongoing and unaddressed protective concern.

…

[31] Witness 3 explained in her oral evidence that ‘ongoing’ meant ‘it had not been addressed by the father’ and that ‘not addressed’ meant ‘the father has not done a Mens Behaviour Change Program despite being asked to complete one by the DFFH.’ [It was not a court ordered condition and the father’s evidence was that he had competed an online anger management course although no evidence of this was produced in this hearing.]

[32] The most recent L17 dated 22/3/2023 was followed by reports of a verbal argument between the parents while ZX was present during Easter 2023.

[33] In her evidence about the Department’s concerns about the family violence, witness 3 gave evidence that she saw family violence through a feminist lens: ‘Mr X has a position of power over the mother and therefore the mother’s response can be thought of as family violence because of the coercive control over her’ and further ‘I consider the mother to be in a vulnerable position due to her stroke and the father used that vulnerability to exert control and coercion over her.’ There were no specific examples given of incidents which demonstrate control and coercion other than witness 3 positioning the mother inviting the father to her home as her doing so as a result of the father’s coercive control rather than a decision made of the mother’s own free will. This is a position disputed by the mother.

[34] I find witness 3’s view of family violence through a feminist lens – in the absence of direct application to ascertainable incidents observed by witness 3 and/ or corroborated by credible, independent observation – to be an opinion as to the likely occurrence of family violence if certain criteria or circumstances are present.

[35] In other words, it is the type of evidence the court would expect of an expert witness called to provide evidence ‘about the dynamics and characterisation of family violence’, as is expressly provided for under the *Family Violence Protection Act 2008* in relation to proceedings under that Act.

[36] Section 73 of the FVP Act provides that ‘an expert witness may include evidence of “the general nature and dynamics of relationships affected by family violence…social , cultural or economic factors that impact on persons who are or have been in a relationship affected by family violence…” and importantly “expert witness means a witness with relevant qualification, training or expertise in family violence.’

[37] Counsel for the DFFH did not present witness 3’s evidence in this context nor did counsel make reference to or attempt to satisfy the recognised foundation enabling a Court to consider expert evidence. In this regard, I refer to *Baulch v Lyndoch Warrnambool & Anor (Ruling No. 3)* [2008] VSC 420 at [10]-[14] where Forrest J summarized the relevant principles as follows, in part referring to and relying upon *Makita Australia Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] per Heydon JA:

(a) a party wishing to call an expert witness must clearly identify the field of specialized knowledge in respect of which it is said the witness can proffer an opinion;

(b) a party must then identify the expertise of the witness in that field; it must be demonstrates that by reason of specialized training, study or experience the witness is truly an expert in that area;

(c) the opinion expressed by the witness must be either wholly or substantially based on that specialist knowledge and not on the everyday knowledge of the common person;

(d) the opinion must be based on clearly identified facts; and

(e) the onus rests on the party calling the witness to satisfy the above criteria.

[38] Of course, in the Family Division the Court ‘may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary’: s.215(1)(d) of the CYFA . However, in *A & B v Director of Family Services* (1996) 20 Fam LR 549 at 553-4 Higgins J in the Supreme Court of the A.C.T. explained the proper operation of such a provision as follows:

‘[I]t should be recognised that such provisions do not render the rules of evidence irrelevant…

The proper approach to the application of the rules of evidence in the face of such a provision was considered by Lockhart J in *Pearce v Button* (1985) 65 ALR 83 at 97; 8 FCR 408 at 422. “…a judge should be slow to invoke it [a power to dispense with compliance with rules of evidence] where there is a real dispute about matters which go to the heart of the case.”’

[39] This approach was confirmed by Bell J in *DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 where His Honour said at [64]: ‘Certainly the rules of evidence may be valuable and should not be lightly discarded, particularly where there is a serious dispute over a matter which may be of importance to the outcome of the proceeding.’

[40] The DFFH position on the father’s family violence towards the mother in the presence of the child is one of the two central protective issues which are in dispute and which, on the DFFH case, has prevented and should continue to prevent the father spending time with the mother and child as a family, even to the extent that he ought not be permitted to facilitate contact between the child and the mother by providing transport, let alone providing co-parenting support in the mother’s home while ZX is in her care.

[41] I find it is a real dispute which goes to the heart of the case and is of importance to the outcome of the proceedings and accordingly, I disregard witness 3’s evidence where it diverges into what I consider to be opinion evidence excluded by s.76 of the *Evidence Act 2008*:

‘The opinion rule- Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.’

[42] The mother has suffered a series of strokes and the medical evidence, and I might say common sense, indicates she has had periods of being slower to complete tasks, reduced physical prowess and it really goes without saying that she needs and, I am sure, appreciates the support the father provides around the home and his apparent availability and willingness to provide same.

[43] On the basis of the evidence, provided largely by the DFFH, I find the father has spent time with the mother on multiple occasions, including spending extended periods of time with the mother in her home and I presume he is providing her with any required supports and would continue to do so if ZX were placed into her care. In the absence of any further reported incidents of family violence since April 2023 and in the context of the father spending significant amounts of time with the mother, I do not find family violence perpetrated by the father towards the mother to be a current protective concern and I find the risk of future family violence perpetrated by the father is mitigated by an order mandating him to complete a Mens Behaviour Change Program and to provide a certification of completion over the course of the order I have made.”

*R v Duong* [2022] VSC 816 involved a judge-along trial in which Jane Dixon J dismissed a charge of dangerous driving causing death pursuant to s.319(1) *Crimes Act 1958*. In dicta which is equally relevant to proceedings in the Family Division of the Children’s Court her Honour described the basis on which she was required to assess the evidence of the various expert witnesses who gave evidence at the trial. At [28]-[30] her Honour said:

[28] “Regarding unchallenged expert evidence, as the trier of the facts I am not required to accept an expert’s opinion, even where it was not challenged by the opposing party. Although the experts called are experts in their stated fields, like any other evidence their opinions are pieces of evidence which I am entitled to accept or reject.

[29] When assessing each expert’s opinion, I am obliged to consider factors such as how well-qualified the expert is; whether the expert strayed outside their area of expertise, or just gave evidence of their understanding of certain factual matters (rather than applying expert knowledge to the subject at hand). I must also consider the overall objectivity of any expert witness called by either party.

[30] Subject to these kinds of considerations, however, I am required to have good reason for not accepting unchallenged expert evidence. Where there is unanimous agreement amongst expert witnesses, I may only reject their evidence for the following reasons: if the facts underlying the opinion are not present; if the process of reasoning that led to the opinion is unsound; or if there is some other factor casting doubt on the validity of the opinion: *Taylor v The Queen* (1978) 45 FLR 343; *R v Kotzmann* [1999] 2 VR 123; *R v Hilder* (1997) 97 A Crim R 70; *R v Klamo* (2008) 18 VR 644; *R v Matheson* [1958] 1 WLR 474. Where the evidence of competing expert opinions is in conflict, I am entitled to prefer the evidence of one expert over another, based on my assessment of the expert opinion I consider most persuasive: *Velevski v R* (2002) 76 ALJR 402.”

### **3.5.3.6 Illegally or improperly obtained evidence**

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

“(1) Evidence that was obtained-

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law-

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning-

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account-

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

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

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

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

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

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

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

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

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

“The admissibility of the search warrant evidence arises in criminal proceedings in which the desirability of admitting the evidence reflects the public interest in the conviction of wrongdoers. The undesirability of admitting evidence obtained in consequence of the deliberate unlawful conduct of a private ‘activist’ entity is the effect of curial approval, or even encouragement, of vigilantism. The RSPCA had no advance knowledge of Animals Australia’s plan to illegally record activities at the Londonderry property. There is nothing to suggest a pattern of conduct by which Animals Australia or other activist groups illegally collect material upon which the RSPCA takes action. The desirability of admitting evidence that is important to the prosecution of these serious offences outweighs the undesirability of not admitting evidence obtained in the way the search warrant evidence was obtained.”

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

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

In *Peter Johnston (a pseudonym) v The King* [2023] VSCA 49 on Christmas Day 2020 – pursuant to a warrant believed to have been issued by the Children’s Court under s.598(1) CYFA to search for a 17 year old female CM in the care of the State of Victoria – six police members (including 2 sergeants) had entered and searched CM’s father’s house where it was suspected that CM may be located. For some time after it became clear that CM was not at the house, the officers continued to conduct an intensive search of the house. In the course of their search, several items – in particular a video depicting a male engaged in sexual intercourse with an unconscious female and iPhone text messages evidencing drug trafficking – were identified by police officers. This in turn led to a s.465 warrant to search for property being executed on 21 April 2021.

Both the trial judge and the Court of Appeal held that the Christmas Day search was in part unlawful, although they differed substantially as to the extent. The trial judge had held in [2022] VCC 1083 at [44]-[45]:

[44] “The purpose for which a safe custody warrant is issued is to locate and return a child (believed or found to be in need of protection) into emergency care or a place nominated by the Secretary. Given its purpose, the authority conferred on police to enter and search premises under such a warrant should not be construed narrowly. For instance, the authority given to police may well extend to searches of electronic devices found at the premises, where there are reasonable grounds for suspecting that such a search may elicit information regarding the child’s whereabouts.

[45] Here however, the search conducted by F/C [M] continued for approximately 30 minutes after police became aware that [CM] was ‘long gone’ and on a train. From that point in time, I find that F/C [M] continued his search of the property for the purpose of investigating whether a crime had been committed, albeit with respect to [CM]. He did so without authority. The safe custody warrant did not authorise a search for this purpose. F/C [M’s] search of the property, without a s 465 warrant having been sought and obtained, was in contravention of Australian law, in that it exceeded the authority of the safe custody warrant, and was improper.”

By contrast the Court of Appeal held at [5] that the search was unlawful “once it was clear that CM was not on the premises”. They elaborated on this at [122]-[123] & [201] as follows:

[122] “There is nothing in the terms of a warrant that would permit a search for information as to the whereabouts of CM. The warrant solely covers the recovery of CM and not an unlimited search of premises whatever the purpose. Because of the invasive nature of a warrant — permitting what would otherwise be unlawful in terms of entry onto any premises where the police suspect a child to be present — it should be given no greater scope than that which its express terms permit. There is no basis for the implication of wider powers of search of a property. An interpretation which conforms with the terms of the safe custody warrant is necessary given that the warrant can be executed anywhere and at any time in the search for a missing child based on the suspicion of the relevant police officer.

[123] In summary, there was no power (either express or implied) to permit a search of the house (or of the electronic devices within it) to elicit information regarding CM’s whereabouts — if indeed that was ever the purpose of the search, which we doubt.”

[201] “No part of the search after five minutes was directed to ascertain the whereabouts of CM, but rather it appears to have been a forensic exercise directed to eliciting evidence of general criminality without any proper basis for the police officers being on the premises. The house search video is compelling in relation to the invasiveness and duration of the search.”

The trial judge and the Court of Appeal also differed on the outcome of the balancing exercise under s.138 of the *Evidence Act 2008*. The trial judge – conceding that there is “a difficult tension in the competing public interest considerations in this case” – had held the evidence admissible for the reasons she set out at [77]-[86] including:

* the video evidence is distinctly probative and of significant weight in relation to the prosecution case that the complainant was raped whilst unconscious and if it was ruled inadmissible, the rape charges could not proceed;
* the evidence of the text messages which found the drug trafficking charge are of similar centrality to the prosecution case;
* there is a high public interest in the apprehension, prosecution and conviction of those allegedly engaged in such extremely serious criminal conduct.

In allowing the appeal and holding that all items seized pursuant to the execution of the April 2021 warrant were not to be admitted into evidence in the applicant’s trial, the Court of Appeal said at [198]‑[204]:

[198] “Returning to the synthesis, the prosecution has not discharged the burden imposed by s 138. Specifically, the prosecution has not demonstrated that the desirability of admitting this unlawfully obtained evidence outweighs the undesirability of admitting it into evidence.

[199] We accept that in many cases the importance of the evidence and the seriousness of the charges will mean that it is more desirable to admit the evidence despite an impropriety or unlawfulness, as the judge held in this case.

[200] However, this is not such a case. Whilst the iMac video and the iPhone text messages are critical to the prosecution of very serious charges, the impropriety and contravention of the law by two senior police officers and their junior officer is stark and deliberate…

[202] The applicant’s right to privacy was seriously violated over a lengthy period of time and with no apparent consideration given to the illegality of the search and the breach of that right.

[203] It is of real significance that no disciplinary action has been taken against any of the officers and that the prosecution now endeavours to persuade the Court to give its imprimatur to this significant impropriety. Whilst it is not determinative to the outcome of this application, we decline to give judicial imprimatur to a search carried out by sworn officers with such astonishing disregard for both the law and the rights of the applicant.

[204] In our view, and notwithstanding the public interest in pursuing these serious charges, we are not satisfied that that public interest prevails when balanced against the public interest in deterring police illegality, protecting individual rights and maintaining juridical legitimacy.”

See also *Jackson Elliot (a pseudonym) v The King* [2023] VSCA 48 at [30]-[32]; *Duran (a pseudonym) v The King* [2023] VSCA 314 at [27]-[35]; *CDPP v Carrick (a pseudonym)* [2023] VChC 2 at [85]-[89]; *R v Lynn (Rulings 1-4)* [2024] VSC 373 and footnotes 2-4 in *R v Lynn* [2024] VSC 635.

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

### **3.5.3.7 Admissibility of tendency evidence and coincidence evidence**

Section 97 of the *Evidence Act 2008* – under the heading “**The tendency rule**” provides:

“(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless—

1. the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
2. the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1)(a) does not apply if—

1. the evidence is adduced in accordance with any directions made by the court under section 100; or
2. the evidence is adduced to explain or contradict tendency evidence adduced by another party.

**Note**

The tendency rule is subject to specific exceptions concerning character of and expert opinion about an accused (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

Section 98 of the *Evidence Act 2008* – under the heading “**The coincidence rule**” provides:

“(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless—

1. the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
2. the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

**Note**

One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceedings.

(2) Subsection (1)(a) does not apply if—

1. the evidence is adduced in accordance with any directions made by the court under section 100; or
2. the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

**Note**

Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

In the interlocutory appeal of *Matthews (a pseudonym) v The King* [2023] VSCA 229 the applicant is currently facing trial charged with the sexual assault of 3 women and rape of one of the women. The prosecution gave notice under s.97(1)(a) of the *Evidence Act 2008* that it intended to use the evidence of each of the women to prove the tendency of the applicant to have both a particular state of mind (namely a sexual interest in his female clients) and to sexually assault females who were attending him in his capacity as a masseur. For the 7 reasons set out at [5] in the judgment the trial judge held that the evidence as set out in the notice could be led. The Court of Appeal was satisfied that it was in the interests of justice to grant leave to appeal the interlocutory decision but affirmed the trial judge’s reasoning and decision with which they expressly agreed: see [9].

At [33]-[36] the Court of Appeal (Kennedy & Macaulay JJA, J Forrest AJA) discussed ss.97 & 101 in the context of the recent case law relating to admissibility of tendency evidence:

[33] “In a criminal proceeding, it is not sufficient that the tendency evidence is of significant probative value. Pursuant to s 101 of the Act, the probative value of the evidence must also substantially outweigh any prejudicial effect that it may have on the accused:

**101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution**

1. This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
2. Tendency evidence about an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

[34] In *Hughes v The Queen* (2017) 263 CLR 338, 356-7 [41]; [2017] HCA 20 – cited in *Klein (a pseudonym) v The King* [2022] VSCA 249, [85] – Kiefel CJ, Bell, Keane and Edelman JJ enunciated the two-step test applied by the judge in determining whether evidence is of ‘significant probative value’:

The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence … In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

See also See also *McPhillamy v The Queen* (2018) 361 ALR 13, 19 [26], 20–1 [33]; [2018] HCA 52; *TL v The King* (2022) 405 ALR 578, 585–6 [28]–[29]; [2022] HCA 35.

[35] Recently, in *Townsend (a pseudonym) v The King* [2022] VSCA 201 at [21], this Court (Kyrou, Kennedy and Kaye JJA) said of the admissibility of tendency evidence:

In order to determine whether the evidence, on each of the charges in this case, is admissible as tendency evidence in respect of the other charges, it is necessary to address four fundamental questions, namely:

1. Whether the evidence, in respect of a particular charge, supports the particular tendency that is sought to be relied on;
2. Whether that tendency has a probative value in respect of the offence that is the subject of one of the other charges; that is, whether the proposed tendency evidence is capable of rationally affecting the assessment, by the jury, of the probability of a particular fact in issue on one or more of the other charges;
3. Whether, as such, the tendency evidence sought to be relied on has significant probative value in respect of that fact in issue;
4. Whether the probative value of that tendency evidence would substantially outweigh any prejudicial effect it may have on the accused person.

[36] We should also refer to another recent decision of this Court in *Gustav (a pseudonym) v The King* [2023] VSCA 141 in which Priest, Niall and Taylor JJA set out at [23]-[24] the critical parts and effect of the decisions of *Hughes* and *Bauer*:

The High Court has held that, in a case for sexual offences involving a single complainant, proof of the accused’s commission of a sexual offence against the complainant on one occasion makes it more likely that the accused may have committed another, generally similar sexual offence against the complainant on another occasion, so long as they are not too far separated in time. Hence, in *R v Bauer* (2018) 266 CLR 56, 83 [50] the High Court said:

Since proof of an accused’s commission of a sexual offence against a complainant on one occasion makes it more likely that the accused may have committed another, generally similar sexual offence against the complainant on another occasion, at least where the two are not too far separated in point of time, where an accused is charged with a number of counts of generally similar sexual offences against a single complainant the several counts may ordinarily be joined in a single indictment and so tried together: see *Criminal Procedure Act 2009* s 194. In such cases, evidence of each charged act is admissible as circumstantial evidence in proof of each other charged act and, for the same reason, evidence of each uncharged act is admissible in proof of each charged act: HML v The Queen (2008) 235 CLR 334, 397-8 [168], 401-2 [181].

In *Bauer* at [58]-[60] the Court also made it clear that, in cases involving multiple complainants, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another, the logic of probability reasoning dictates there must be some feature of or about the offending which links the two together:

In a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together. More specifically, absent such a feature of or about the offending, evidence that an accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant. And the mere fact that an accused has committed an offence against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant: see *HML* (2008) 235 CLR 334, 354 [11]-[12], 382-3 [105], 370 [59]; *GBF v The Queen* [2010] VSCA 135 [26]; *BBH v The Queen* (2012) 245 CLR 499, 525 [70]-[71]. If, however, there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true.

*Hughes* illustrates the point. The case involved multiple complainants each alleging that the accused had committed one or more sexual offences against her, where the offences that were alleged to have been committed against some groups of complainants were in significant respects different in kind and circumstance from the sexual offences alleged to have been committed against each other group of complainants: see [44]-[54]. It was not disputed that evidence of each sexual offence alleged to have been committed against a complainant was admissible as tendency evidence in proof of other sexual offences alleged to have been committed against that complainant, even though, in some cases, the nature of the offending differed significantly from one charge to another. The issue was how much if any of each complainant’s evidence of the sexual offences and uncharged acts alleged to have been committed against her was admissible as tendency evidence in proof of the sexual offences alleged to have been committed against the other complainants. And the case was ultimately decided by majority on the basis that, taken as a whole, the evidence of each alleged sexual offence and uncharged act demonstrated a common feature that a man of mature years had a sexual interest in female children under 16 years of age and a tendency to act upon it by committing sexual offences against them opportunistically in circumstances which entailed a high risk of detection. In the view of the majority, such was the significance of that common feature that evidence of each alleged sexual offence and uncharged act had significant probative value in proof of each other charged offence. By contrast, in a single complainant sexual offences case, where a question arises as to whether evidence that the accused has committed one sexual offence against the complainant is significantly probative of the accused having committed another sexual offence against that complainant, there is ordinarily no need of a particular feature of the offending to render evidence of one offence significantly probative of the other.

In rejecting the applicant’s submission that the ruling is inconsistent with the decision of the High Court in *Phillips v The Queen* (2006) 225 CLR 303; [2006] HCA 4 on the issue of consent, the Court of Appeal said at [50]-[52] & [56]:

[50] “In *Phillips*, a joint trial of the accused had been conducted with multiple complainants, each of whom gave evidence that the accused pursued sexual activity with them in circumstances where they did not consent. The High Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), in holding that the evidence of each complainant was not cross-admissible in proof of offending against each other complainant, said this at [46]:

Normally similar fact evidence is used to assist on issues relating only to the conduct and mental state of an accused. Did the accused do a particular thing? Or did the accused do it with a particular mental state? But where a particular count supported by one complainant’s evidence raises the issue of whether she consented to certain conduct by an accused, the issue relates much more to her mental state than his. The trial judge kept referring to ‘the improbability of similar lies’ on that issue. That is an expression used by Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen*; however, as counsel for the appellant pointed out, they used it not on the question of whether the complainants in that case consented, but on whether the accused behaved towards them as he said he did. To tell the jury that the evidence went to the improbability of each complainant lying or being unreliable about consent was to say that a lack of consent by five complainants tended to establish lack of consent by the sixth.

[51] The tendency evidence in this case is not sought to be adduced to prove a lack of consent. The relevant evidence here, as in *Hoch v The Queen* (1988) 165 CLR 292, is to be adduced not on the question of whether the complainants consented but on whether the applicant behaved towards them as they said he did (and he said he did not) while performing a massage.

[52] If there is any risk of the jury considering that this body of evidence goes to the question of consent in each of the individual cases, then that, undoubtedly, will be dealt with by a direction by the trial judge.

…

[56] In our view, the judge was correct to admit the tendency evidence. Here, there is a remarkable congruity between each episode as the judge noted. The features of each of the alleged offences were strikingly similar. Each occurred at the applicant’s house with only himself and a vulnerable adult female present in the room, partially clothed, whilst undergoing a massage. Each allegedly involved or commenced with the applicant’s hands on the breast; and concerned him moving his hands beneath a towel; and the three alleged incidents were all reasonably proximate in time. The occurrence of one alleged sexual assault, in that specific way, makes more likely the occurrence of another when it is alleged to have occurred in the same or very similar fashion. The judge was correct to identify these similarities as providing a solid foundation for admitting the evidence of the three complainants under s 97 of the Act.”

In rejecting the applicant’s submission pursuant to s.101(2) of the Act that the probative value of the evidence does not substantially outweigh its prejudicial effect, the Court of Appeal said at [67]:

[67] “We agree with the judge’s characterisation of the probative value of the evidence. It is clear that this body of evidence is significant in proving each of the charges. The similarities in the conduct of the applicant, as we have already noted, are striking. The prejudice occasioned by admitting the evidence (which we accept will occur) can be ameliorated by an appropriate judicial direction…”

In *DPP v Roder (a pseudonym)* the tendency evidence relied on by the prosecution consisted of both charged and uncharged acts. In [2023] VSCA 262 the Court of Appeal (Priest, Niall & Taylor JJA) had said at [29] & [33]-[34]:

[29] “In our opinion, the circumstances of the present case are indistinguishable in any relevant sense from those of *Dempsey (a pseudonym) v The Queen* [2019] VSCA 224. If the judge were to direct the jury that they need not be satisfied beyond reasonable doubt of the existence of any charged act in order to use it for tendency purposes, whilst concomitantly directing that they could not find the respondent guilty of any particular charge unless satisfied that the elements of that charge (including the particular charged act) had been proven beyond reasonable doubt, the criminal standard of proof would doubtlessly be confused, and unacceptably undermined.

…

[33] In our view, *Dempsey* should be followed. Section 61 of the JDA differs from the provision considered in *Rassi v R* [2023] NSWCCA 119 at [9] and the cases that preceded it. By its clear terms, s 61 requires a trial judge to direct the jury that ‘the elements of the offence charged’ must be proved beyond reasonable doubt. In the present case, every sexual act alleged in every charge on the indictment is an element of that charge. A direction that any such element must be proved beyond reasonable doubt — no matter the use sought to be made of the evidence — would not offend s 61 of the *Jury Directions Act 2015*. Indeed, such a direction would plainly be in conformity with the section.

[34] For these reasons, we consider that the judge was correct to hold that the jury should be directed that every charged act relied upon by the prosecution as tendency evidence must be proved beyond reasonable doubt before it can be so used. To direct differently would be to risk confusing, and unacceptably undermining, the criminal standard of proof. Indeed, we consider that to direct differently would be an invitation to the jury to indulge in an impermissible circular reasoning process, and to apply a less rigorous standard of proof to the charges on the indictment. We would add that the judge will not need to direct the jury ‘sequentially’, so long as it is made clear that none of the charged conduct may be used by the jury for the purposes of tendency reasoning unless the particular conduct has been proved to the jury’s satisfaction beyond reasonable doubt.”

In (2024) 98 ALJR 644, 649 [19]; [2024] HCA 15 [2024] HCA 15 the High Court allowed the Director’s appeal, set aside the orders of the Court of Appeal and the ruling of the trial judge and remitted the matter to the trial judge to consider what ruling, if any, should be made in relation to the respondent’s application. At [1]-[2] & [37] Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ said:

[1] “In *R v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 at [86], this Court observed that trial judges in New South Wales should not ordinarily direct a jury that, before they may act on evidence of uncharged acts adduced to support an alleged tendency on the part of an accused, they must be satisfied of proof of the uncharged acts beyond reasonable doubt. The Court noted at [86] that one circumstance in which such a direction should be given is where there is a ‘significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt’, citing, amongst other cases, *Shepherd v The Queen* (1990) 170 CLR 573 at 584-585.

[2] In *Bauer* at [86], this Court also observed that the giving of a direction to the effect that such uncharged acts should be proved beyond reasonable doubt is precluded in Victoria by ss.61 and 62 of the *Jury Directions Act 2015* (Vic). The principal question raised by this application is whether the same position applies in Victoria in relation to evidence of *charged* acts relied on to support an alleged tendency on the part of the accused. For the reasons that follow, the answer is ‘yes’. As the Victorian Court of Appeal was wrong to conclude otherwise {[2023] VSCA 262 at [33]}, special leave to appeal should be granted, the appeal should be allowed and the trial judge's ruling to the contrary should be set aside.

…

[37] As this case concerns Victoria, the primary point of reference for determining the content of the appropriate directions in relation to tendency evidence is the *Jury Directions Act*, Pt 4 Div 2. That said, it follows from the nature of tendency evidence that, in a case where the prosecution relies on both uncharged and charged acts to establish an alleged tendency of the kind under consideration here, a single separate tendency direction should ordinarily be given. Such a direction should not direct or invite the jury to make findings in respect of charged conduct, but instead should indicate the evidence relied on to support the alleged tendency {*JS* [2022] NSWCCA 145 at [43]; see also *Jury Directions Act*, s.27(3)(a)}, direct the jury to consider whether they are satisfied of the alleged tendency and then advise the jury that, if they are so satisfied, they can use that tendency in considering whether it is more likely that the accused committed the specific offences with which he or she is charged. Careful directions should be given to the jury as to the requisite onus and standard of proof {*Jury Directions Act*, ss.61-64} as well as to the contents of the elements of the offence and the need for separate consideration of each charge: *MFA v The Queen* (2002) 213 CLR 606 at 617 [34]; *JS* [2022] NSWCCA 145 at [44].”

For an analysis of the difference between tendency evidence and context evidence see the judgment of the Court of Appeal in *Clayton (a pseudonym) v The King* [2024] VSCA 203 at [122]-[129].

See also *Harlen (a pseudonym) v The King* [2023] VSCA 269 at [61]-[85]; *Sharman (a pseudonym) v The King* [2024] VSCA 5 at [67]-[68]; *Lee v The King* [2024] VSCA 10 at [54]-[61]; *Rhodes (a pseudonym) v The King* [2024] VSCA 15; *Gibson (a pseudonym) v The King* [2024] VSCA 33 at [26]‑[43]; *Healy (a pseudonym) v The King* [2024] VSCA 80 at [50]-[65]; *Callaway (a pseudonym) v The King* [2024] VSCA 103 at [19]-[43]; *Fares v The King* [2024] VSCA 108 at [90]-[127]; *Milky v The King* [2024] VSCA 136 at [13]-[33]; *R v Lynn (Ruling 7)* [2024] VSC 376 at [22]-[30]; *Franklin (a pseudonym) v The King* [2024] VSCA 213 at [66]-[81], [89]-[104], [109]-[123] & [127]-[141]; Rulings 2 & 3 in *DPP v Alhassan (Rulings 1 to 5)* [2024] VSC 573 at [46]-[82] & [83]-[99].

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### **3.5.3.8 Conflicting evidence – Dangers of demeanour – Fallibility of human memory**

Resolution of many cases requires a judicial officer to choose between two or more conflicting pieces of evidence. How does the judicial officer decide which version of the evidence to accept? It used to be said that the primary method of resolving conflicts in evidence was to rely on the demeanour of witnesses in the witness-box. But generally speaking, a judicial officer is not a particularly efficient ‘lie detector’. Sir Harry Gibbs, a former Chief Justice of the High Court, acknowledged this when he observed:

“I sometimes think the power of a judge to divine the hidden truth simply by observing a witness is exaggerated and I am sure that where inferences can be drawn from established facts, one is on much stronger ground in reaching the truth than by reliance on the demeanour of witnesses.”

In an article in 72 ALJ 21 the then editor Justice Peter Young issued a similar warning to judicial officers:

* “Don’t think you have some innate ability to spot a fraud or a liar.”
* “Try not to judge a case wholly on observation of demeanour.”

In *“Guilt and the Consciousness of Guilt: The Use of Lies, Flight and other ‘Guilty Behaviour’ in the Investigation and Prosecution of Crime”* (1997) 21 Melbourne University Law Review 95, Andrew Palmer explored the notion that an accused’s guilt can be determined by examining his or her behaviour and/or demeanour in the aftermath of a crime and during its investigation. Although the primary focus of the article was on the investigative phase of the criminal process, much of the author’s analysis is no less relevant to the adjudicative phase. In particular, at 119-120, he says:

“Because an innocent person may find the experience of interrogation stressful they may display the same indicators of emotional arousal as the guilty person. Other emotions which may lead to the conclusion that a truthful suspect is lying include 'extreme emotional tension or nervousness'; 'overanxiety'; anger or resentment at being the subject of an investigation; 'concern over neglect of duty or responsibility that made possible the commission of the offence by someone else'; and 'involvement in other similar acts or offenses': John Reid & Fred Inbau, *Truth and Deception. The Polygraph (“Lie Detector”) Technique* (1966) 169-176). The ambiguity of emotional arousal, and the possibility of concealing it through behaviour, means that any confidence that deception can be detected through a person's demeanour is probably misplaced. Ekman, for example, tested a range of professional groups whose jobs involved the detection of lies in order to assess their accuracy at this task. Of all the professional groups – which included judges, trial attorneys, police, polygraph operators, and agents of the CIA and FBI – only US Secret Service agents did better than they would have if they had simply tossed a coin: Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (1992) 45. Given the extent to which criminal interrogators tend to assume the guilt of suspects, their errors are likely to be all in the same direction, with the interrogator invariably, and sometimes falsely, interpreting any symptoms of emotional arousal as indicating that the suspect is lying and hence guilty.

These clues to deception also play a role in the courtroom in terms of the decision the tribunal of fact must make about whether or not a witness is telling the truth. The importance of being able to observe a witness' demeanour is constantly put forward as a reason for an appellate court to refuse to overturn a jury verdict: see e.g. *M v R* (1994) 181 CLR 487,531; *Edwards* (1993) 178 CLR 193, 213; it is also one of the commonly-advanced justifications for the hearsay rule: see e.g. *Teper v R* [1952] AC 480, 486. In fact, as Ekman argues at 291-2, this belief in the ability of the judge or jury to successfully detect deceit from demeanour is largely unfounded:

‘The criminal justice system must have been designed by someone who wanted to make it impossible to detect deceit from demeanour. The guilty suspect is given many chances to prepare and rehearse her replies before her truthfulness is evaluated by jury or judge, thus increasing her confidence and decreasing her fear of being detected. Score one against the judge and jury. The direct examination and cross-examination take place months, if not years, after the incident, thereby blunting emotions associated with the criminal event. Score two against the judge and jury. Because of the long time delay before the beginning of the trial, the suspect will have repeated her false account so often that she may start to believe her own story; when that happens she is, in a sense, not lying when she testifies. Score three against the judge and jury. When challenged in cross-examination, the defendant typically has been prepared if not rehearsed by her own attorney, and the questions asked often allow a simple yes or no reply. Score four against the judge and jury. And then there is the innocent defendant who comes to trial terrified of being disbelieved. Why should the jury and judge believe her, if the police, prosecutor, and the judge, in pretrial moves for dismissal, did not? The signs of fear of being disbelieved can be misinterpreted as a guilty person's fear of being caught. Score five against the judge and jury.’”

Palmer also footnoted at n.69 on p.117 a fascinating case of a police officer who believed that he could prevent a polygraph lie-detector from working by placing bullets under the pneumograph tube and the blood pressure-pulse cuff. In fact, the bullets had no such effect but the fact that the police officer believed that they did resulted in him giving no discernible indications of deception when he lied.

Nowadays less weight is given to demeanour and more weight to logic and objective fact-finding. In *Fox v Percy* (2003) 214 CLR 118 at 128-9 Gleeson CJ and Gummow & Kirby JJ said:

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

In *3 Apples Childcare Centre Pty Ltd v MMC Pacific International Pty Ltd* [2023] VSC 21 at [143]-[145] M Osborne J said:

[143] “Even if I were to accept that Lucy’s account of the events on that day could be accurately characterised as clear and vivid, which I do not, for reasons adverted to below, the submission proceeds on the premise that a purported independent actual recollection is a more reliable account of events than a recollection assisted by or arrived at following a consideration of objective surrounding material.

[144] In my view, such an approach to the consideration of competing evidence is unsafe. The more appropriate course in evaluating competing evidence is ‘to place primary emphasis on the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence’ {*Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599, [15]-[16], upholding the approach of Tamberlin J in the Federal Court of Australia, in *Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd (trading as Uncle Ben’s of Australia)*(Federal Court of Australia, Tamberlin J, 29 June 1995) 122-3)} and make ‘inferences drawn from the documentary evidence and known or probable facts’ {*Gestmin SGPS SA v Credit Suisse (UK) Ltd*[2013] EWHC 3560 (Comm), [22]; see also *Camden v McKenzie* [2008] 1 Qd R 39, 48 [34] (‘[u]sually, the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation.’)}. Such a preference in approach has been stated on many occasions in various judgments of a weighty nature among them that of Lord Goff in *Grace Shipping Inc v C F Sharp & Co (Malaya) Pte Ltd* (1987) 1 Lloyds Rep 207, 215-216 where in delivering the judgment of the Privy Council, His Lordship endorsed an earlier passage from the House of Lords in *Armagas Ltd v Mundogas SA (the Ocean Frost)* (1985) 1 Lloyds Rep 1, 57:

Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities.  It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witness’s motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth …

That observation is, in their Lordships’ opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

[145] Closer to home in *Fox v Percy* (2003) 214 CLR 118, 129 [30] the High Court of Australia cautioned against the dangers of drawing conclusions about truthfulness or reliability solely by reference to the appearance of witnesses, reciting an observation of Atkin LJ in *Société d’Avances Commerciales (Société Anonyme Egyptienne) v Merchants’ Marine Insurance Co (The Palitana)* (1924) 20 LI L Rep 140, 152:

I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.”

In his dissenting judgment in *Pell v The Queen* [2019] VSCA 186 at [897] Weinberg JA made it clear that demeanour was only one in a number of factors relevant to an assessment of a witness’ evidence:

“The factors that any trier of fact, whether judge or jury, will ordinarily take into account when deciding whether the evidence of a particular witness is credible and reliable include: the inherent consistency of the witness’ account; the consistency of that account with those of other witnesses; the consistency of that account with undisputed facts; the ‘credit’ of the witness (based upon matters which include, for example, demeanour); any relevant infirmities of the witness; and, importantly, the inherent probability or improbability of the evidence in question.”

See also *Insurance Manufacturers of Australia v Villella* [2007] VSC 94 at [26] per King J; *Re Cassar* [2022] VSC 126 at [200] per Moore J; *Re Klapsas; Klapsas v Muscat* [2022] VSC 755 at [108]-[128] per Walker JA; *China Insurance Group Finance Company Limited v Kingston (No 3)* [2023] VSC 6; *Double v The Salvation Army (Victoria) Property Trust* [2023] VSC 452; *Salehi v Salehi* [2023] VSC 535 at [119]-[151] per Daly AsJ; *Glideware Pty Ltd v Hadad & Anor* [2024] VSC 34 at [46]-[62] per Daly AsJ.

A practical example of Sir Harry Gibbs’ observation and of the dicta in *Fox v Percy* is to be found in the judgment of M Osborne J in *Pacreef Investments Pty Ltd v GTW Investments (Aust) Pty Ltd* [2022] VSC 56 at [15]:

“As is common in modern commercial disputes, a significant body of contemporaneous documentation, including a proliferation of emails, was produced. This established a reliable and near comprehensive account of the events necessary to resolve the dispute. In the fact-finding exercise which I have been required to undertake, I have found the contemporaneous documents of far greater assistance than the oral evidence, which was given by witnesses some years after the event.”

A very interesting illustration of Sir Harry Gibbs’ observation – and an acknowledgement that conflicting evidence does not necessarily mean that a witness is lying – is to be found in the judgment of Incerti J in *Archer v Garcia* [2022] VSC 57. This was an action in negligence brought by a motocross rider against the event manager and promotor of a monster truck and freestyle motocross event in country Victoria. The rider – held by Incerti J to be an independent contractor – had been injured when he overshot the down ramp while completing an FMX jump. The down ramp was supposed to be positioned at a distance of 75 feet from the up ramp. In fact it was positioned at a distance of less than 75 feet. A major factual issue was whether the plaintiff was warned of the ramp misplacement by a ‘stunt clown’, Mr Bowen. Ultimately this case developed into something akin to an experiment into the functioning of the human brain. Nine witnesses gave *viva voce* evidence, five for the plaintiff and four for the defendant. At the time they gave evidence they were unaware of the existence of a one-hour-long video of the event. Subsequently the defendant (who had no solicitor and was represented by a barrister briefed directly pursuant to Victorian Bar Pro Bono Scheme) became aware of this video and was granted leave to reopen his case for the purpose of adducing the video evidence. The plaintiff, the defendant and the clown – who was one of the defendant’s witnesses – were recalled. Incerti J dismissed the plaintiff’s action. At [127]-[135] her Honour said:

[127] “Relevantly, the footage is not entirely consistent with the *viva voce* evidence of any one witness. Of course, this is not surprising — it is well established that memory formation is a complex phenomenon that does not operate in the manner of a mechanical recording device. Honestly held memories can be unreliable and memories change with the passage of time. In an oft-quoted passage from *Watson v Foxman* (1995) 49 NSWLR 315, 318-9*,* a case concerning allegedly misleading spoken words, McClelland CJ said:

‘[H]uman memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.’

[128] In *Graham v The Queen,* Gaudron, Gummow and Hayne JJ (1998) 195 CLR 606, 608 [5] similarly noted that, ‘whatever a person may believe, and no matter how earnestly that person may try to be accurate, experience demonstrates that the memory of events does change as time passes.’ In the present case, almost six years had passed between the events in question and the witnesses giving evidence of those events.

[129] By chance of fate, this case included a rare opportunity to test the accuracy of witness memories by comparing their *viva voce* evidence to a relevant videorecording, the existence of which was unknown to the witnesses when they gave their evidence.

[130] Broadly, discrepancies between the *viva voce* and video evidence may go to either reliability or credit — either the witness was honestly mistaken about precisely what occurred (including for the reasons outlined in the extracts above), or the witness was deliberately dishonest in recalling the relevant events.

[131] In the present case, I consider that discrepancies between Mr Bowen’s evidence and the video footage go to reliability, whereas the discrepancies between the plaintiff’s evidence and the video footage go to credibility.

[132] The main discrepancy between Mr Bowen’s evidence and the video footage is the location of the plaintiff when Mr Bowen is conversing with Mr Schubring [another FMX rider] on the perimeter of the oval. Whereas Mr Bowen remembered speaking with Mr Schubring alone when the plaintiff completed the jump that resulted in his injuries, the footage shows that the plaintiff was present during that conversation, and that it was not until the conversation concluded that the plaintiff rode away to complete his jump. The footage also indicates that Mr Schubring, and not the plaintiff, rode away from Mr Bowen first.

[133] In my view, this discrepancy can be explained by the efflux of time and does not undermine the substance of Mr Bowen’s evidence — that he ran across the field and intercepted the plaintiff, that he warned the plaintiff that the ramps were too close, and that he went over to Mr Schubring after the plaintiff said that ‘Schuey measured it’. These key events are all consistent with the video footage and I am satisfied that they occurred substantially as Mr Bowen described them.

[134] Mr Bowen’s recollection of the plaintiff coming to a stop on carpet is also inconsistent with the footage, which shows that the carpet was laid on the approach to the up ramp that was not ultimately used. However, again, this is not a discrepancy that I regard as undermining the substance of Mr Bowen’s evidence. The footage clearly shows that carpet was laid, and it is therefore unsurprising that Mr Bowen recalled that it was used by the riders. Notably, the plaintiff’s original evidence was consistent with Mr Bowen’s in this respect.

[135] On the other hand, the major discrepancies between the plaintiff’s evidence and the video footage cannot be explained by the fallibility of memory. During his original evidence, the plaintiff categorically denied having any interaction with Mr Bowen at the base of the up ramp, or of being warned that the ramps were too close. He repeated this denial when told that four witnesses would attest to this version of events. The footage demonstrates that the plaintiff’s denial was untrue. The plaintiff’s attempts at explaining away his interaction with Mr Bowen when shown the footage — including that he was just ‘cruising around’ at the base of the up ramp and that the footage shows ‘contact’ but no ‘conversation’ between the plaintiff and Mr Bowen — were wholly unconvincing. His insistence that Mr Bowen, the defendant, Mr Brunner and Mr O’Neill were all mistaken about his being stopped, in face of footage to the contrary, was nothing short of remarkable.”

In *Singh v Ward* [2022] VSC 155 the plaintiff had stopped his car in an emergency lane because his two year old daughter was crying and could not be settled. He opened the door, got out, closed his door and was walking towards the front of his car intending to change drivers when he was struck from behind by a car being driven at approximately 100kph by the defendant and sustained a broken leg. Evidence was given by both drivers and their passengers and by an independent couple who had been in a car driving behind the defendant. At [8]-[9] Gorton J set the scene as follows:

“None of these people had made a statement at the time of or shortly after the accident, and so each was giving evidence in March 2022 as to what had happened in December 2014 unassisted by any contemporaneous record of events. Some of the witnesses had in more recent years been interviewed for the purposes of this case, and the persons interviewing had typed up their versions of what the witnesses had said. On two occasions, those versions were signed by the person interviewed. There were many inconsistencies, or tensions, in the evidence.

There are starkly diverging views on how and where the accident occurred. I am required to form a view having regard to the whole of the evidence, but I am not required either to accept or reject the entirety of any particular witness’s evidence, and am able to accept some parts of it and to reject other parts of it: see e.g. *Cubillo v Commonwealth* (2000) 103 FCR 1, 45 [118]-[125] (O’LoughlinJ). I can use the impressions I formed of the way in which the witnesses gave their evidence, and the extent to which their evidence accords with what I consider to have been likely behaviour in the circumstances having regard to human experience and commonsense. Also, as Mr Ward pointed out, I must bear in mind that recollections with the passage of time may, with the best will in the world, become distorted by unconscious bias {see *Onassis and Calogeropoulos v Vergotis* [1968] 2 Lloyd’s LR 403, 431 (Lord Pearce)} and even through the process of coming to court to give evidence for one side, rather than the other side, in a dispute: *Nominal Defendant v Cordin* (2017) 79 MRV 210, 240-46 [165]-[166] (Davies J). Ultimately, my decision is to be on the balance of probabilities, doing the best I can on the evidence led, with the onus remaining on Mr Singh to establish any negligence on the part of Mr Ward, and the onus on Mr Ward to establish any contributory negligence on the part of Mr Singh.”

Gorton J ultimately found that the accident happened because Mr Ward momentarily lost concentration and drifted from the northbound left lane into the emergency lane as he passed Mr Singh and that Mr Singh was 10% contributorily negligent by not stopping further to the left in the emergency lane.

In *Gurappaji v Duncan & Anor* [2023] VSC 558 the plaintiff – who had been in a relationship with the deceased which had ended six years prior to the deceased’s death in – failed to prove that she had an equitable interest in a property in which the deceased held title. At [231]-[232] Forbes J said of the plaintiff’s evidence:

“I formed the view that Kavitha was an unimpressive witness and that her evidence was largely unreliable. In part, Kavitha acknowledged that her memory was adversely affected by health issues and the passage of time. However, she also made grand and unsubstantiated statements that were not corroborated and were often contradicted by other evidence including contemporaneous documentary evidence. On occasion her own oral evidence was contradictory. Faced with many contradictions she took refuge in the explanation that she left such matters to others or did not read or understand the documents that she signed. I found such explanations frankly implausible, for a woman who on the one hand describes herself as having left school at 17 to become a farmer, but on the other hand in her oral evidence before me described herself as having a Masters in Economics. Moreover in the course of giving her evidence she displayed a profound sense of entitlement.”

Under the heading “**Fact-finding**” Forbes J said at [227]-[230]:

conversations on the one hand, and inconsistent or incomplete documentary evidence on the other, the principles by which a court approaches the fact-finding exercise are worth restating. These principles apply to recollections of conversations where all parties give evidence of what was said and done, as well as specific cautions where one person, subsequently deceased, cannot give evidence as to conversations.

[228] The observations of McClelland J in *Watson v Foxman* (1995) 49 NSWLR 315, 319 are frequently quoted as to the difficulty generally with evidence of recollection of spoken words:

In many cases (but not all) the question of whether spoken words were misleading may depend on what, if examined at the time, may have been seen as relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or conditions. Furthermore human memory of what was said in a conversation is fallible for a variety of reasons and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervened and the process of memory are overlaid, often subconsciously, by perceptions or self interest as well as conscious consideration of what should have been said or could have been said, all too often what is remembered is little more than an impression from which plausible details are then, often subconsciously, constructed. All this is a matter of ordinary human experience.

[229] In the context of fact-finding where credit findings assume significance, Hallen J summarised the principles in *Pollock v NSW Trustee and Guardian* [2022] NSWSC 923, [73]-[93]. Relevant to this case those principles include:

(a) Proof of a fact requires the court to feel actual persuasion of the existence of that fact, not simply a mechanical comparison of probability: *Pollock* at [74], citing *Warner v Hung* (2011) 297 ALR 56; and *NOM v Director of Public Prosecutions* (2012) 38 VR 16, [106]-[109].

(b) The credibility, veracity or motives of a witness may be tested by reference to objective facts proved independently of the oral evidence given and in particular by reference to documents: *Pollock* at [76], quoting *Re Kit Digital Australia Pty Ltd (in liq)* [2014] NSWSC 1547 at [7].

(c) Evidence of the words and actions of the person subsequently deceased, given by those who carry the onus of proof, should be approached with ‘suspicion’ given the other person cannot give their own version of what took place: *Pollock* at [78], quoting *Thomas v Times Book Co* [1966] 2 All ER 241 at 244. Suspicion in this context means the evidence is approached with great care and scrutiny such that ‘the evidence ought be thoroughly sifted, and in the mind of any judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witness is made perfectly clear and apparent’, and the court believes their evidence, then it may act on that evidence.

(d) In particular, evidence of conversations with a deceased is treated with care given the deceased is not available to confirm or deny, or to expand or explain the conversations. Memories of such conversations deteriorate with time. Additional caution is needed and the expectation that independent evidence of such conversations, where available, is led.

(e) In relation to such conversations, there is a significant risk of reconstruction {*Pollock* at [83], quoting *Webb v Ryan* [2012] VSC 377, [22]} and the process of litigation itself subjects memories to powerful biases: *Pollock* at [85]. The prospect not only of unconscious reconstruction, but of a self-interest to give evidence favourable to one’s case, requires a court to proceed with caution.

[230] As a result of the cautions attaching to present recollection of words and conversations, greater weight is usually accorded to contemporaneous documents as ‘safer repository of reliable fact’ {*Pollock* at [88]}, subject to consideration of who has prepared those documents. This is not to discount recollection but to assess it in ‘its proper place alongside contemporaneous documentary evidence and other evidence upon which undoubted or probable reliance can be placed’ {*Pollock* at [88], quoting *Kogan v Martin* [2019] EWCA Civ 1645}.”

### **3.5.3.9 Adducing evidence of confidential communication or protected health information**

The provisions of Division 2A of the *Evidence (Miscellaneous Provisions) Act 1958* [the EMPA] provide that leave of a court is generally required to compel the production of – and to adduce evidence of – confidential communications and protected health information. However, in *HM v Sister Mary Monaghan* [2024] VSC 257 Keogh J held that s.32E(1)(a) operates to make an application for leave unnecessary if the protected person consents to the production.

Section 32AB sets out the guiding principles to which a court is required to have regard when deciding whether or not to grant leave to compel production of or adduce evidence of a confidential communication or protected health information.

Under s.32B(1) of the EMPA a ‘confidential communication’ includes an oral or written communication made in confidence by a person against whom a sexual offence has been committed to a counsellor in the course of the relationship of counsellor and client and a ‘protected person’ is the person who made the confidential communication.

Under s.32BA ‘**health information**’ has the same meaning as in the *Health Records Act 2001* and is ‘**protected health information**’ for the purposes of Division 2A if–

1. the proceeding is a criminal proceeding; and
2. the proceeding relates (wholly or partly) to a charge for a sexual offence; and
3. the health information is about a person against whom that sexual offence is alleged to have been committed or any against whom any other sexual offence has been committed or is alleged to have been committed; and
4. the person who recorded or collected the information (or, if the information is an opinion, formed that opinion) did so in a professional capacity.

Section 32C of the EMPA – headed “**Exclusion of evidence of confidential communications and protected health information**” – provides:

(1AA) This section applies to the following information—

1. in a civil proceeding, a confidential communication;
2. in a criminal proceeding, a confidential communication or protected health information.

(1) In a legal proceeding—

1. a party cannot seek to compel another party to produce a document containing information to which this section applies;
2. a document is not to be produced if it would disclose information to which this section applies;
3. evidence is not to be adduced if it would disclose—

(i) information to which this section applies; or

(ii) the contents of a document recording information to which this section applies—

unless the court grants leave to compel the production of the document or to produce it or to adduce the evidence, and the party seeking to have the document produced or to produce it or to adduce the evidence has complied with the requirements under section 32CA or 32CC (as the case requires) that are not waived.

Subsections (2) to (6) have been repealed.

(7) Evidence that, because of subsection (1), is not to be compelled to be produced, produced or adduced in a legal proceeding is not admissible in the proceeding.

Section 32D of the EMPA restricts the circumstances in which leave can be granted. It provides:

1. A court must not grant leave to compel the production of, to produce or to adduce protected evidence unless it is satisfied, on the balance of probabilities, that–
2. the evidence will, either by itself or having regard to other evidence produced or adduced or to be produced or adduced by the party seeking leave, have substantial probative value to a fact in issue; and
3. other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available; and
4. the public interest in preserving the confidentiality of confidential communications and protected health information and protecting a protected person from harm is substantially outweighed by the public interest in admitting, into evidence, evidence of substantial probative value.

…

1. Without limiting the matters that the court may take into account for the purposes of subsection (1)(c), the court must take into account–
2. the likelihood, and the nature or extent, of harm that would be caused to the protected person if the protected evidence is produced or adduced;
3. the extent to which the protected evidence is necessary to allow the accused to make a full defence;
4. the need to encourage victims of sexual offences to seek counselling and the extent to which victims may be discouraged to do so, or the extent to which the effectiveness of counselling may be diminished, if the protected evidence were produced or adduced;
5. whether the party seeking to compel the production of or to produce or adduce the protected evidence is doing so on the basis of a discriminatory belief or bias;
6. whether the protected person objects to the disclosure of the protected evidence;
7. the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.
8. A court may grant leave to compel the production of, or to produce or adduce, part of—
9. a confidential communication or protected health information; or
10. the contents of a document recording a confidential communication or protected health information—

and, if so, that part of the document may be made available, or that part of its contents disclosed, in any manner that the court thinks fit to the party seeking to compel its production or to produce or adduce it in evidence.

1. The court must state its reasons for giving or refusing to give leave under this section.
2. If leave is refused under this section, that fact must not be referred to in the presence of the jury, if any.

Section 32E(1) of the EMPA provides that Division 2A does not prevent the production or adducing of evidence in any of 5 specified circumstances. See *Skarbek v The Society of Jesus in Victoria & Ors* [2016] VSC 622; *KR v BR* [2018] VSCA 159; *HM v Sister Mary Monaghan* [2024] VSC 257.

In *Duncan (a pseudonym) v The King* [2024] VSCA 27 the appellant was facing a pending trial for sexual offences involving a stepchild. The complainant claimed to have repressed memories and a psychologist assisted the complainant to remember. The applicant had applied to the trial judge under s.32C of the EMPA for leave to issue subpoenas compelling the production of–

* documents in the possession of a psychologist; and
* other documents in the possession of the Centre Against Violence [CAV]–

containing counselling notes relating to the complainant.

The trial judge had refused to grant leave to compel the production of confidential communications pursuant to s.32C of the EMPA. Holding that–

* the confidential communications in the counselling notes had substantial probative value; and
* production of the counselling notes was required for the applicant to make a full defence; and
* other evidence of similar or greater probative value was not available–

the Court of Appeal granted leave to appeal, allowed the appeal and set aside the interlocutory decision of the trial judge. At [33]‑[35] Priest & Beach JJA said:

[33] “Turning first to the psychologist’s notes, in his ruling the judge observed at least one reference in the notes containing the confidential communications possesses substantial probative value. It does not appear from his reasons, however, that the judge gave any consideration to the issue whether other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available. Had the judge done so, he could not have failed to conclude that other evidence of similar or greater probative value concerning the matter to which the protected evidence — the confidential communications recorded in the notes — was not available. Indeed, it is plain that there is no other evidence available which possesses the substantial probative value of the confidential communications in the psychologist’s counselling notes.

[34] Moreover, having regard to the guiding principles referred to in s 32AB, we consider that, proper consideration of the criteria in s 32D(2) should have led to the judge making orders effecting disclosure of the protected evidence in the psychologist’s notes. Accepting that disclosure might cause the complainant some anxiety, distress and emotional harm, and that the complainant’s privacy may be prejudiced, we are of the view that production of the protected evidence is absolutely necessary for the applicant to make a full defence. Without disclosing the contents of the psychologist’s documents (see s 32CF(2) of the Act), it is clear to us that the counselling notes are replete with confidential communications which have significant probative value with respect to the credibility and reliability of the complainant’s memory, and hence the principal fact in issue on each charge. To make a ‘full defence’, the applicant must be capable of adducing material that will bear directly on the credibility and reliability of the complainant’s memory of critical events. In our opinion, the applicant will not be able to make a full defence without access to the documents, and we are satisfied that other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available (none of substance being pointed to by the prosecution).

[35] We take a different view with respect to the CAV documents. Although we consider the ‘cryptic’ note referred to by the judge possesses significant probative value, other evidence of similar or greater probative value concerning the matters to which the protected evidence relates will be available in the form of the psychologist’s notes. Further, we agree with the submissions made by counsel for the CAV that the ‘second category’ of documents sought by the applicant do not fall within the definition of ‘confidential communication’, and thus do not fall to be considered through the prism of s 32D.”

See also *Todd (a pseudonym) v The Queen* [2016] VSCA 29, [32]–[33]; *KR v The Queen* [2018] VSCA 159, [34], [41]–[42]; *Bowers (a pseudonym) v The Queen* [2020] VSCA 246, [14]–[16].

### **3.5.3.10 Common knowledge**

Section 144 of the *Evidence Act 2008* (Vic) provides:

**Matters of common knowledge**

1. Proof is not required about knowledge that is not reasonably open to question and is—

(a) common knowledge in the locality in which the proceeding is being held or generally; or

(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

(3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.

(4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

In *Pelligra v Forbes* [2024] VSC 311 a magistrate found the applicant guilty of the offence of exceeding a speed limit of 100 kph contrary to r 20(2) of the Road Safety Road Rules 2017. On appeal the applicant contended that the magistrate erred in finding that the Mercedes sports utility vehicle (‘SUV’) driven by the applicant was ‘other than a heavy vehicle’ — that being an element of the offence — and in finding that his speed exceeded the applicable speed limit of 100 kph. Watson J dismissed the appeal, finding that it was not reasonably open to question and was common knowledge generally that a Mercedes SUV of the kind driven by the applicant was a vehicle that could be driven with a car licence and did not require any form of heavy vehicle licence. At [19]-[21] Watson J said of s.144:

[19] “The section speaks of common knowledge that is not reasonably open to question. It does not require universal knowledge. It is not necessary that literally ‘all persons’ must be aware of a fact for it to be common knowledge.

[20] In this regard, statements to the effect that a fact would be common knowledge or capable of judicial notice if it is ‘of a class that is so generally known as to give rise to the presumption that all persons are aware of it’ {*Holland v Jones* (1917) 23 CLR 149, 153 [Isaacs J]; *Properjohn v Gaughan* [1998] ACTSC 26, [13]} do not require that all persons are actually aware of the fact. The fact need only be sufficiently generally known that it gives rise to a presumption that it is something overwhelmingly understood and accepted within the community as true.

[21] If complete universality were required then even on issues such as whether the Earth is round, a court would not be permitted to treat the matter as common knowledge because of the potential existence of some infinitesimal proportion of the community who believed in a flat Earth. This cannot have been the intention of Parliament in enacting s 144.”

Subsequently the Court of Appeal allowed the applicant’s appeal from the order of Watson J and dismissed the charge. In [2024] VSCA 242 at [52]-[63] Niall, Macaulay & T Forrest JJA explained their conclusion that the prosecution had failed to prove that the applicant’s car was not a heavy vehicle, saying in particular at [57]-[58] & [62]-[63]:

[57] “The judge concluded that, as a matter of common knowledge, a car of this type, namely an SUV, does not require a special licence. In our opinion, the licencing requirements that attach to particular kinds of vehicles are not matters of common knowledge that are not reasonably open to question within the meaning of s 144(1) of the Evidence Act. That is so because the fact of which there is said to be common knowledge elides the practical understanding of how the law operates with the true legal position. Moreover, it relies upon a contestable inference. Rather than an assertion of direct common knowledge of a fact — such as that Christmas Day falls on 25 December — here, it is an assertion of common knowledge of a common practice (that SUVs are generally driven using a car licence) from which to infer that, as a matter of law, drivers of SUVs do not require a special licence.

[58] Further, whether or not that understanding or knowledge is reasonably open to question depends on whether it is legally correct. In turn, that would require establishing the correct legal position. In this case, that would require proving that the vehicle is not a heavy vehicle. The vice also flows from treating people’s common understanding of the law as establishing the state of the law in the context of a criminal prosecution, where the standard of proof attracting to elements of the offence is beyond reasonable doubt.

…

[62] In our opinion, there is an insufficient factual foundation to prove beyond reasonable doubt by inference that any specification or statement of the GVM of the applicant’s car would have been no more than 4.5 tonnes. It is likely that, if there was a specification or statement, it would have been less than that, but any firmer conclusion would entail impermissible speculation or guesswork based on unstated and unproved assumptions. It requires assumptions regarding how the registration authority might or might not have viewed the appropriate maximum loaded mass. Attempting to infer how a specialist regulatory agency might have approached the question of whether to specify a maximum loaded mass and, if so, what that mass might be is an entirely inadequate basis to make a finding beyond reasonable doubt as to the GVM of the applicant’s car or whether it exceeded 4.5 tonnes.

[63] In conclusion, the prosecution made no attempt to prove by direct evidence that the applicant’s car was not a heavy vehicle and, although not impermissible in principle, the evidence did not sustain an inference beyond reasonable doubt that the car was not a heavy vehicle. Since proof that the car was ‘other than a heavy vehicle’ was an element of the offence, this conclusion means that the charge was not proved.”

See also *Fox v Feltham* [2024] VSC 310; *Theodoridis v DPP* [2021] VCC 2050.

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### **3.5.4 Contested Criminal Division case**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[151] It is important in the interests of justice that cross-examination be conducted within reasonable limits. For example, previous convictions are ordinarily only likely to bear upon credibility where they are capable of showing a propensity to be untruthful: R v Hanson [2005] 2 Cr App R 21. Thus convictions for traffic offences would not normally be put to a witness by way of an attack upon credibility: Compare *Bugg v Day* (1949) 79 CLR 442.

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

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

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

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

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

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

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

The *Criminal Procedure Act 2009* makes provision for the use of recorded evidence in certain criminal cases, some of which involve witnesses who are children or have a cognitive impairment or both. For the purposes of the following subsections, “sexual offence” is defined in s.4(1) of that Act as-

1. an offence against-
2. a provision of Subdivision (8A), (8B), (8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part I of the *Crimes Act 1958*; or
3. s.327(2) (failure to disclose a sexual offence committed against a child under the age of 16 years) of the *Crimes Act 1958*; or
4. ss.5(1), 6(1), 7(1), 8(1), 9(1) or 11(1) of the *Sex Work Act 1994*;
5. an offence an element of which involves-
6. any person engaging in sexual activity; or
7. any person taking part in a sexual act; or
8. commercial sexual services; or
9. a sexual performance involving a child;
10. an offence an element of which involves-
11. an intention that any of the conduct referred to in paragraph (b) is to occur; or
12. soliciting, procuring, enabling or threatening any of the conduct referred to in paragraph (b); or
13. inducing or knowingly allowing a child to enter or remain on premises so that any of the conduct referred to in paragraph (b) may occur;
14. an offence an element of which involves child abuse material; or
15. an offence an element of which involves indecency; or
16. an offence of attempting to commit, or of incitement or conspiracy to commit, an offence referred to in paragraphs (a), (b), (c), (d) or (e); or
17. an offence against s.49C(2) (failure by a person in authority to protect child from sexual offence) of the *Crimes Act 1958* as in force before the commencement of s.16 of the *Crimes Amendment (Sexual Offences) Act 2016*.

See also s.368A & ss.387J-387K of the *Criminal Procedure Act 2009* and **section 3.5.8** below for a discussion of the use of recorded evidence in cases in the Family Division of the Children’s Court.

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

### **3.5.5.1 Use of recorded evidence-in-chief of a child or cognitively impaired witness**

**Division 5 (ss.366-368) of Part 8.2** of the *Criminal Procedure Act 2009* applies to a criminal proceeding (other than a committal hearing) that relates (wholly or partly) to a charge for-

1. a sexual offence; or

(ab) an offence where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008*; or

1. an indictable offence which involves an assault on, or injury or a threat of injury to, a person; or
2. …; or
3. any offences against ss.23 or 24 of the *Summary Offences Act 1966* if those offences are related offences to an offence specified in paragraph (a), (ab) or (b), despite whether any such related offences are withdrawn or dismissed before an offence against ss.23 or 24 is heard and determined.

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

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

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

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

**Division 6 (ss.369-376) of Part 8.2** of the *Criminal Procedure Act 2009* applies to a special hearing and/or a trial in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence. These provisions have no application to summary hearings.

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

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

at the time at which the proceeding commenced must be-

(a) given at a special hearing and recorded as an audio visual recording; and

(b) presented to the trial court in the form of that recording.

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

(a) is aware of the right to have his or her evidence taken at a special hearing under Division 6 of Part 8.2 and audiovisually recorded; and

(b) is able and wishes to give direct testimony in the proceeding.

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

### **3.5.5.2 Use of recorded evidence of complainants generally**

**Special hearing and/or trial:** **Division 7 (ss.378-387) of Part 8.2** of the *Criminal Procedure Act 2009* applies-

* to a special hearing and/or a trial in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence; and
* to a recording of the evidence (including cross-examination and re-examination) of a complainant (other than one whose evidence has been taken at a special hearing under Division 6).

These provisions have no application to summary hearings.

Under s.379 a recording is admissible in evidence as if its contents were the direct testimony of the complainant-

(a) in the proceeding; and

(b) unless the relevant court otherwise orders, in-

(i) in any new trial of, or appeal from, the proceeding; or

(ii) another proceeding in the same court for the charge for a sexual offence or a related offence; or

1. a civil proceeding arising from the same facts as those for which the charge for a sexual offence is founded.

Under s.381(2) the court may admit the whole or any part of the contents of a recording and may direct that the recording be edited or altered to delete any part of it that is inadmissible. Under ss.381(1AB) & 381(1) there is a presumption in favour of admitting a recording of the evidence of a complainant to a charge for a sexual offence, a presumption which is rebutted only if the court considers it is in the interests of justice that the recording not be admitted. Under s.384(1), on the application of the prosecution, the court may direct that the complainant is to give direct testimony additional to a recording if the court is satisfied that-

(a) the complainant is able and wishes to give direct testimony; and

(b) it is in the interests of justice to do so.

**Summary hearing of sexual offence in Children’s Court:** **Division 7A (ss.387A & B) of Part 8.2** of the *Criminal Procedure Act 2009* applies to a summary hearing by the Children’s Court of a criminal proceeding that relates (wholly or partly) to a charge for–

(a) an offence against any of the following provisions of the *Crimes Act 1958*–

(i) s.38 (rape);

(ii) s.39 (rape by compelling sexual penetration);

(iii) s.49A (sexual penetration of a child < 12);

1. s.49B (sexual penetration of a child < 16);
2. s.49C (sexual penetration of a child aged 16 or 17 under care, supervision or authority);
3. s.49D (sexual assault of a child < 16);
4. s.49E (sexual assault of a child aged 16 or 17 under care, supervision or authority);

(viii) s.49F (sexual activity in presence of a child < 16);

(ix) s.49G (sexual activity in presence of a child aged 16 or 17 under care, supervision or authority);

(x) s.49H (causing a child < 16 to be present during sexual activity);

(xi) s.49I (causing a child aged 16 or 17 under care etc to be present during sexual activity);

(xii) s.49J (persistent sexual abuse of a child < 16);

(xiii) s.50C (sexual penetration of a child or lineal descendent);

(xiv) s.50D (sexual penetration of a step-child);

(xv) s.50E (sexual penetration of a parent, lineal ancestor or step-parent);

(xvi) s.50F (sexual penetration of a sibling or half-sibling);

(b) an offence of attempting to commit, or of incitement or conspiracy to commit, an offence referred to in paragraph (a).

Division 7 (other than s.378) applies with relevant modifications to the admissibility of a recording of the complainant’s evidence in a summary hearing in the Children’s Court.

**Hearing of family violence offence:** **Division 7B (ss.387C-387P) of Part 8.2** of the *Criminal Procedure Act 2009* applies to a criminal proceeding (including a summary hearing, a committal proceeding and a trial) that relates (wholly or partly) to a charge for a family violence offence but does not apply if the accused was under 18 years of age at the time the family violence offence is alleged to have been committed. A ‘family violence offence’ is defined as-

(a) an offence against s.37(2), 37A(2), 123(2), 123A(2) or 125A(1) of the *Family Violence Protection Act 2008*; or

(b) an offence where the conduct of the accused is family violence within the meaning of that Act.

Under s.387E a complainant may give evidence-in-chief (wholly or partly) in the form of a recorded statement. In determining whether or not to have a complainant give evidence-in-chief in this way, the prosecution must take into account-

(a) the wishes of the complainant; and

(b) any evidence of intimidation of the complainant by the accused; and

(c) the purpose of the *Family Violence Protection Act 2008*.

Under s.387F a recorded statement is admissible in evidence as if its contents were the direct testimony of the complainant-

(a) in the proceeding; and

(b) unless the relevant court otherwise orders, in any new trial of, or appeal from, the proceeding-

provided that the provisions of ss.387F(2), 387F(3) & 387G are complied with.

Under s.387F(4) the court may rule as inadmissible the whole or any part of the content of a recorded statement and, if so, the court may direct that the recorded statement be edited or otherwise altered to delete any part that is inadmissible. Other bases on which a recorded statement may be edited or otherwise altered are set out in s.387I.

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

### **3.5.6.1 The usual procedure**

Each party or his or her legal representative usually outlines what they are seeking in the case. Each in turn often calls one or more witnesses to give oral and/or documentary evidence about the case. Witnesses who are experts in a particular area of knowledge may be called to support a party’s case. For example, a psychologist may be called to give evidence about a child’s psychological state. The Department’s witnesses are usually called first. Each witness who gives evidence for one party can be cross-examined by every other party. The purpose of cross-examination is to allow the accuracy and truth of the witness’ evidence to be tested or challenged by the other parties: see *Libke v The Queen* [2007] HCA 30 especially at [117]-[131] per Heydon J. Where there are conflicting accounts or material, the judicial officer must make a decision about which is the more probable account, bearing in mind the dicta of Gleeson CJ and Gummow & Kirby JJ in *Fox v Percy* (2003) 214 CLR 118 at 128‑9: see **subsection 3.5.3.8** above; see also *Eumeralla Estate Pty Ltd v Chen* [2022] VSCA 78 at [42]-[68]. The law is then applied to those facts to arrive at a decision.

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

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

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

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

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

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

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

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

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

*Re Watson; Ex parte Armstrong* was a financial dispute. The case of *Lonard* (1976) FLC 90-098, also decided in 1976, was a custody dispute. The Full Court of the Family Court drew a distinction between the two and held that judges would find it necessary to exercise more extensive powers of inquiry in children’s matters. However, in *Wood v Wood* (1976) FLC 90-098, the Full Court of the Family Court set aside an order of a trial judge which had dispensed with both *viva voce* evidence and cross-examination, on the basis that the best available evidence had not been available at first instance which, it noted, was of particular importance in cases in involving children.

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

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

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

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

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

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

**Section 215(1)(d) of the CYFA** is also expressed very broadly, empowering the Family Division of the Children’s Court to “inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary”. However, see *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193.

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

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

(1) An **independent** skilled investigative team that is not a **party** to the action with appropriate training and an understanding of how the legal system works;

(2) A statutory power available to the Court to direct the attendance of a party or the production of a document;

(3) A court hearing that was an inquiry rather than an adversarial battle;

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

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

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

The third of Judge Coate’s recommended changes – namely a “court hearing that was an inquiry rather than an adversarial battle” – was finally partly addressed in late 2013 by the introduction of s.215B of the CYFA. This section gives judicial officers much greater power to manage the conduct of child protection proceedings in a less adversarial way than the power granted by ss.215(1)(a) & 215(1)(b) as diluted by cases like *Re Watson; Ex parte Armstrong* and *Wood v Wood.* Section 215B provides:

“(1) Without limiting Part 1.2 [‘best Interests’ principles] or s.215(1), in any proceeding before the Family Division under this Act, the Court may–

(a) consider the needs of the child and the impact that the proceeding may have on the child;

(b) conduct proceedings in a manner that promotes cooperative relationships between the parties;

(c) ask any person connected to the proceeding whether that person considers that-

(i) the child has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence within the meaning of the *Family Violence Protection Act 2008*;

(ii) he or she or any other person connected to the proceeding has been, or is at risk of being subjected to family violence;

1. actively direct, control and manage proceedings;
2. narrow the issues in dispute;
3. determine the order in which the issues are decided;
4. give directions or make orders about the timing of steps that are to be taken in proceedings;
5. in deciding whether a particular step is to be taken, consider whether the likely benefits justify the costs of taking it;
6. make appropriate use of technology, such as videoconferencing;
7. deal with as many aspects of the matter on a single occasion as possible;
8. where possible, deal with the matter without requiring the parties attend Court;
9. do any other thing that the Court thinks fit.”

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

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

Seven years prior to the commencement of s.215B, an amendment to the *Family Law Act 1975* (Cth) had enabled the Family Court of Australia – now entitled the Federal Circuit and Family Court of Australia – to apply a less adversarial approach to Family Court hearings generally and to develop processes to support this less adversarial trial approach (LAT). A detailed discussion of the development of the LAT and the case law which underpins it is contained in Margaret Harrison’s book “Finding A Better Way” (Family Court of Australia, April 2007). In her introduction Ms Harrison describes the LAT as follows:

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

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

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

“[T]here was never any suggestion that a complete departure from the traditional adversarial processes in children’s cases would be supported. The issue was always seen as one of balancing procedural fairness with a recognition of the special nature of children’s matters. In *Northern Territory of Australia v GPAO* (1999) 196 CLR 553, the High Court made it clear that there were limits to the way in which the paramountcy principle of the welfare of the child enabled the Court to depart from ordinary rules of procedure and evidence…In *T and S* (2001) FLC 93-086 at 88,522…Nicholson CJ, Ellis & Mullane JJ commented that, although proceedings involving the welfare of children are not strictly adversarial in the usual sense, they should not be equated with inquisitorial proceedings, and noted that ‘the Court and its procedures are simply not equipped to conduct inquisitorial proceedings’.”

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

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

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

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

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

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

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

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

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

*DOHS v Sanding* [2011] VSC 42; (2011) 36 VR 221 is in many ways a watershed Supreme Court decision on the relationship between the “best interests” principle, the court’s procedural discretion and the rules of natural justice/procedural fairness. In that case four Aboriginal children aged 9, 7, 4 & 2 had been residing in the care of their maternal grandmother under custody to Secretary orders. At [279] Bell J described “the real risk to the wellbeing of the children” as “the drug-taking activity of their mother and her disturbance of the home of the grandmother in which the family was living”. Nine weeks after the custody to Secretary orders were made by consent, the Department removed the children from the care of their grandmother and placed them separately in out of home care with non-Aboriginal families. No family was available to take the four children together and no Aboriginal family was available to take any of them. Within a week of their separation, the behaviour of the two oldest children substantially regressed. The mother made applications to revoke each of the custody to Secretary orders on the basis that the children would live with her mother and that she would not live in the home. A Children’s Court magistrate conducted a “submissions contest” in which he obtained information, but not *viva voce* evidence, from DOHS’ reports and the legal representatives of DOHS, the grandmother and the mother. He then revoked the custody to Secretary orders and placed the children on interim accommodation orders in the grandmother’s care with various conditions. The Department appealed, submitting that the magistrate should have conducted a formal hearing at which at least some formal *viva voce* evidence was taken. The appeal was dismissed. In the course of his extensive judgment, Bell J discussed the impact of the best interests of the child on the court’s procedural discretion, saying *inter alia* at [129]-[130], [135]-[137] & [146]-[147]:

[129] “By the established principles, any statutory exclusion of the rules of natural justice must be by express words or plain intendment: see *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395, per Dixon CJ and Webb J and *Annetts v* McCann (1990) 170 CLR 596, 598 per Mason CJ, Deane & McHugh JJ. There are no such express words and there is no such plain intendment in s 215(1) of the *Children, Youth & Families Act*. Therefore the obligation of the Children’s Court to observe the rules of natural justice has not been overridden.

[130] While a court or tribunal operating under flexible procedural provisions must observe the rules of natural justice, this does not mean that those rules can be used to admit the rules of evidence through a side door or, as Brennan J put it in *Re Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492 to allow the rules of evidence to ‘creep back in through a domestic procedural rule’.  **It is well‑established that the rules of evidence ‘form no part of the rules of natural justice’**: *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456, 488 per Diplock LJ; see also *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, 249 per Starke J and 252 per Evatt J; *Mahon v Air New Zealand* [1984] 1 AC 808, 821; *Hayward v Minister for Immigration and Citizenship* [2009] FCA 1313, [64].  **Certainly the rules of evidence may be valuable and should not be lightly discarded, particularly where there is a serious dispute over a matter which may be of importance to the outcome of the proceeding**: *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, 256 per Evatt J; *Kostas v HIA Insurance Services Pty Ltd* (2010) 84 ALJR 228 [17] per French CJ; *Re Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 493 per Brennan J; *Martin v Medical Complaints Tribunal* (2006) 15 Tas R 413, [14]; *A and B v Director of Family Services*(1996) 20 I LR 549, 553; *Pearce v Button* (1985) 8 FCR 408, 422; *Clean Ocean Foundation v Environment Protection Authority* (2003) 20 VAR 227, 235.  But courts or tribunals operating under such provisions are not required to apply court‑like rules or to act on evidence alone: *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, 248 per Starke J and 256 per Evatt J; *Wajnberg v Raynor and Melbourne Metropolitan Board of Works* [1971] VR 665, 678.  The provisions are intended to be ‘facultative, not restrictive’ (*Wecker v Secretary, Department of Education, Science and Training* (2008) 168 FCR 272, [95] per Greenwood J) and are intended to free a court or tribunal ‘from constraints otherwise applicable to courts of law and regarded as in appropriate’: *Minister for Immigration and Multicultural Affairs* v *Eshetu*(1999) 197 CLR 611, [49] per Gleeson CJ and McHugh J. As Davies J said as the president of the federal tribunal in *Re Barbaro and Minister for Immigration and Ethnic Affairs*[(1980) 3 ALD 1, 5], flexible procedural provisions allow ‘the nature of the procedures adopted at the hearing and the nature of the evidence which is received … [to] be adapted to the functions which [the tribunal] performs.’”

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

[136] Thus, in *J v Leischke* (1987) 162 CLR 447 at 457, it was held by Brennan J (with whom Mason, Wilson, Deane & Dawson JJ agreed) that in ‘some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy of the welfare of the child’, but only ‘so far as necessary to avoid frustration of the purpose for which the jurisdiction is conferred’. That principle was applied in the Family Court of Australia in *Separate Representative v E* (1993) 114 FLR 1 by Nicholson CJ and Fogarty J, who held at 14:

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

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

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

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

At [276]-[284] Bell J concluded his judgment in *DOHS v Sanding* with the following summary [emphasis added]:

[276] “Four Aboriginal children were removed from their grandmother’s home by the Secretary of the Department of Human Services because they were in need of protection. They were then placed separately in out of home care with non-Aboriginal families. No family was available to take the four of them together and no Aboriginal family was available to take any of them at all.

[277] The mother applied to the Children’s Court for the revocation of the custody to orders under which the secretary moved the children. The magistrate determined that application on the first mention day after conducting a submissions contest hearing in which his Honour obtained information, but not actual evidence, from the department’s reports and the legal representatives of the parties. His Honour revoked the orders and made interim accommodation orders (on strict conditions) returning the children to the care of the grandmother, pending the further consideration of the matter by the court in six weeks.

[278] The Secretary has appealed against the magistrate’s decision on the ground of error of law. She submits the magistrate should have conducted a formal hearing at which at least some formal evidence was taken.

[279] On the information given to the magistrate, the real risk to the wellbeing of the children was the drug-taking activity of their mother and her disturbance of the home of the grandmother in which the family was living. Through her legal representative, the mother informed the magistrate she was leaving the grandmother’s home. In my view, that was new and significant information which made it open to his Honour to make conditional orders returning the children to the grandmother’s care pending the further consideration of the matter by the court.

[280] **Although this and other relevant information was not given to the court as sworn evidence, the facts which it revealed were not in serious dispute. The mother, the grandmother and the Secretary were all represented at the submissions contest hearing. The magistrate made clear he was considering making revocation orders on that day. No party sought an adjournment. The main debate at the hearing concerned the orders which the court should make (if any). In the circumstances, the information was sufficiently reliable and probative to form a proper basis for the magistrate’s decision.**

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

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

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

[284] Accordingly the appeal will be dismissed.”

In *DHHS v Children’s Court of Victoria & Ors* [2020] VSC 520 McMillan J quashed an order of the Children’s Court striking out – after hearing submissions – an application by DFFH to extend a care by Secretary order for an 8 year old orphaned autistic Aboriginal child who had been cared for by the same carers for 7 years. The application was subsequently dismissed by a different magistrate after a lengthy evidence-based contested hearing [see **sections 5.2.3, 5.14.2 & 5.18.7** for some further details of this case known as *Re CL*]. At [61] McMillan J had said:

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

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

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

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

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

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

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

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

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

### **3.5.6.5 Tips for advocates and witnesses in contested Family Division cases**

So far as the involvement of counsel and witnesses in contested Children’s Court Family Division cases are concerned, here are some ‘tips’ which may be of assistance. These ‘tips’ also have substantial relevance to contested criminal cases. They are not intended to be exhaustive.

1. Most cases in Victorian Courts are conducted on an ‘adversarial’ basis. However, child protection cases are partly inquisitorial since the Court has an obligation – independent of the parties – under s.8(1) CYFA to have regard to ‘best interests’ provisions in making any order or taking any action under the CYFA. Hence, in most child protection cases judicial officers are more interventionist – and ask more questions of witnesses and counsel – than in other types of cases.
2. Section 215(1) CYFA requires the Family Division of the Children’s Court to conduct proceedings in an informal manner and allows it to inform itself as it thinks fit despite any rules of evidence to the contrary. However, see *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 (discussed in **subsection 3.5.3.3** above) where the Court of Appeal held that dispensation with the rules of evidence was “subject to a requirement to accord procedural fairness”.
3. Expert witnesses are entitled not only to give evidence of observed facts but also evidence in the form of opinion and/or inference. The relevant principles are discussed and applied in *HG v R* (1999) 197 CLR 414 at [39] & [44] per Gleeson CJ. Whether or not a witness is qualified to give opinion evidence is a matter for the judge or magistrate who must determine:

* whether the field of knowledge in which the witness professes expertise is a recognized and organized body of knowledge; and
* whether the witness has sufficient expertise (as a result of qualifications and/or relevant experience) in such field as would enable him or her to assist the court.

**SOME TIPS FOR ADVOCATES**

1. Ensure you have read all statements, inspected any subpoenaed materials and have up to date instructions prior to the hearing commencing.
2. It is rarely effective and often counter-productive to question a witness or address the Court in an aggressive, rude, sarcastic or disrespectful way.
3. Remember that you are not a proxy for your client. Your primary duty is to the Court and only secondarily to your client. You cannot wilfully mislead the Court. If you are found to have done so, your entitlement to practise law may be withdrawn.
4. It is very unusual for professional witnesses in child protection cases to be untruthful. Where there is – as there often is – a conflict of opinion between witness X and witness Y, the explanation is usually that the opposing professionals have honestly held but conflicting opinions. However, it is sometimes worthwhile cross-examining a professional witness to ensure that he or she is expressing his or her own professional opinion rather than merely endorsing the opinion of some other professional.
5. *Prima facie*, it might be thought that the Court is more likely to accept the opinion of an expert who does not have a monetary-based relationship with the party who has called him or her to give evidence. Examples of such independent experts are witnesses from the Children’s Court Clinic, VIFM or VFPMS. However, ‘independence’ is only one of the many factors which the Court will weigh. Other no less important factors include the qualifications and experience of the witness, the factual sub-stratum on which the opinion is based and the circumstances in which the witness has been involved with the subject of his or her evidence (sometimes described as ‘snapshot’ compared with a ‘long-standing professional relationship’, e.g. G.P., counsellor or child’s teacher).
6. The most effective way to cross-examine an unfavourable expert witness is to try to impugn the reliability of the witness’ opinion(s). Sometimes this can best be done by challenging the facts on which the opinion is based. Sometimes by identifying a divergence between the witness’ opinion and the facts on which the witness has relied to come to that opinion. Sometimes by challenging the witness’ expertise in the area of claimed expertise. Sometimes by highlighting a gap between the witness’ own opinions and opinions expressed by other experts in the field either in the particular case or in the literature. Sometimes by all of the above if there is a proper basis for such a challenge.
7. There is no property in a witness. Try to speak to the witness beforehand and try not to ask a question for which you don’t know – or have a reasonable expectation of – the answer.
8. Remember that: “Under **the rule in *Browne v Dunn*** (1893) 6 R 67, 70-1 (Lord Herschell) it is the duty of counsel before impeaching the evidence of a witness to put to the witness in cross-examination the version of events for which counsel contends.” See the judgment of Nettle JA in *R v Coswello* [2009] VSCA 300 at [3].

**SOME TIPS FOR WITNESSES**

1. Try to come to Court clear-headed but don’t be surprised if you are nervous and ultimately find the experience rather nerve-wracking and isolating.
2. Make sure you are ‘on top of’ the evidence you are going to give. It is prudent to peruse any reports and/or the file in advance but as close as possible in time to the court case.
3. Be aware of the order of questioning: Evidence-in-chief involves questions by the calling party. Cross-examination involves questions by the other parties. Re-examination involves very limited questioning by the calling party to clear up any ambiguities.
4. You will be asked at the outset of evidence-in-chief to make an oath or an affirmation. If you don’t understand the difference, ask the legal representative of the party calling you.
5. An expert witness will then be asked to list his or her professional qualifications and experience. Ensure you have properly prepared to answer this question. It will often help if this information is in the form of an unsworn document which can be handed up.
6. A witness will be asked to adopt the truth of any document which the party calling him or her wishes to tender to the Court. If there are any errors of which the witness is aware he or she should identify and correct them before adopting the document.
7. Listen very carefully to the questions asked. If you don’t understand the question, don’t guess but ask for the question to be put again. If it becomes apparent at a later stage that you may have misunderstood an earlier question, don’t be scared to say so otherwise you risk giving the Court the impression that you haven’t given evidence accurately.
8. Make sure that you have a sound factual basis to justify all opinions expressed.
9. Try to present as objective, unbiased and humble and not as an advocate for any party. In this regard it is important to make any reasonable concessions in cross-examination.
10. Feel confident to ask the judicial officer for permission to look at a file/report if you need to. At least for expert witnesses it should generally not be a memory test.
11. If you need a short break at any stage, don’t hesitate to ask the judicial officer.
12. It may be useful for both advocates and witnesses to be aware of the material in **subsection 3.5.3.8** above which is entitled “**Conflicting evidence – Dangers of demeanour – Fallibility of human memory**”.

See *DFFH v West (a pseudonym)* [2022] VChC 2 for an interesting illustration of how the Court balances the conflicting evidence of professional witnesses.

### **3.5.7 Compelling production of a prisoner/detainee at court – Remand warrant/Gaol order**

The effect of a **remand warrant** is to require a prisoner/detainee who had been remanded in custody to be brought before a court (either in person or via audio visual link as specified) to face a charge–

* the hearing of which had been adjourned; or
* in respect of which the person had been committed to stand trial.

See Form 20 & Rule 5.02(3) of the *Children’s Court Criminal Procedure Rules 2019* [S.R. No.161/2019] for the form of a remand warrant for a child issued under s.419 CYFA. See Form 21 & Rule 43 of the *Magistrates’ Court Criminal Procedure Rules 2019* [S.R. No.143/2019] for the form of a remand warrant for an adult issued under s.79 of the *Magistrates’ Court Act 1989*.

Although a ‘**gaol order**’ also compels production of a prisoner/detainee at court, it may be issued in broader circumstances than a remand warrant. A **gaol order** is an order made under regulation 23 of the *Corrections Regulations 2019* [S.R. No.27/2019] to remove a prisoner and bring him or her before a court or coroner to answer a charge or give evidence or for any other purpose, in a civil or criminal proceeding:

23 Absence to attend court or a hearing

(1) If a court or coroner so orders, a prisoner may be removed from a prison and brought before the court or coroner to answer a charge or give evidence or for any other purpose, in a civil or criminal proceeding.

(2) An order for the removal of a prisoner under subregulation (1) must be in the form of Form 1 of Schedule 2.

(3) A notice in the form of Form 2 of Schedule 2 must be completed by the person in charge of the prison from which the prisoner is to be removed.

(4) Subject to section 55I(3) of the Act, while a prisoner who is ordered to be brought before a court or coroner is absent from a prison, the prisoner is in the legal custody of the person or persons having custody of the prisoner under the order made under subregulation (1).

(5) The person who has custody of a prisoner under subregulation (4) must return the prisoner to the prison from which the prisoner was removed unless the prisoner is discharged by process of law in respect of all matters requiring the prisoner's detention or is released on bail.

(6) This regulation does not apply if a prisoner who is required to appear before a court is directed by the court to make the prisoner's appearance by audio visual link or audio link from a prison under Part IIA of the **Evidence (Miscellaneous Provisions) Act 1958**.

Section 42E of the *Evidence (Miscellaneous Provisions) Act 1958* [EMPA] provides that subject to s.42F (which is not relevant for an appearance by an adult) and to any rules of court, a court may, on its own initiative or on the application of a party to the legal proceeding, direct that a person may–

* appear before; or
* give evidence; or
* make a submission to–

the court by audio visual link [AVL] or audio link [AL] from any place within or outside Victoria, or outside Australia, that is outside the courtroom or other place where the court is sitting.

If a Victorian prisoner is directed under s.42E of the EMPA to appear before the Magistrates’ Court of Victoria [MCV] or Children’s Court of Victoria [ChCV] by AVL or AL, reg.23(6) makes it clear that the gaol order prescribed in Form 1 of Schedule 2 does not apply. In the case of a prisoner appearing by AVL or AL no prescribed form is used. Instead, an entry is made by the relevant Court in an online “AVL Scheduler” designed by the MCV and to which the Department of Corrections, MCV & ChCV all have access.

The Form issued under ss.39, 67 or 79 of the *Service and Execution of Process Act 1992* (Cth) is used for the purpose of bringing an interstate prisoner/detainee before a Victorian court to answer a subpoena to give evidence or produce documents.

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

In the case of *The H Children* [Children’s Court of Victoria, unreported, 04/02/1999], the Court held that although s.37B of the *Evidence Act 1958* [as amended] and the *Evidence (Recorded Evidence) Regulations 1994* did not apply to protection proceedings in the Family Division, audio visual recordings of a child’s evidence may be admitted, at the discretion of the presiding judicial officer, pursuant to s.82(1)(d) of the CYPA.

Despite significant legislative changes since then, the writer has no doubt that audio or audio visual recordings of a child’s evidence – colloquially called “VARE tapes” – may still be tendered in proceedings in the Family Division of the Court (whether protection proceedings, intervention order proceedings or any other sorts of proceedings) even if they have been specifically prepared for use in criminal proceedings. This is now authorised by s.368A of the *Criminal Procedure Act 2009* (inserted by Act 48/2012) and ss.387J-387K (inserted by Act 33/2018).

Section 367 provides that a witness who is under the age of 18 years or who has a cognitive impairment may give evidence-in-chief (wholly or partly) in the form of a VARE in a criminal proceeding that relates (wholly or partly) to a charge for-

1. a sexual offence; or

(ab) an offence where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008*; or

1. an indictable offence which involves an assault on, or injury or a threat of injury to, a person; or
2. any offences against ss.23 or 24 of the *Summary Offences Act 1966* if those offences are related offences to an offence specified in paragraph (a), (ab) or (b), despite whether any such related offences are withdrawn or dismissed before an offence against ss.23 or 24 is heard and determined.

Section 368A provides: “A court may order that a recording referred to in s.367 be produced for use in a proceeding (other than a [criminal] proceeding referred to in s.368) before that court if the court is satisfied that it is in the best interests of the witness to do so.” Section 368A(3) provides that in making an order under s.368A(1), the court must have regard to the need to protect the privacy of the witness. If the court makes an order under s.368A(1), it is required by s.368A(2) to specify-

1. the persons who may view or listen to the recording; and
2. when and where the recording is required to be produced; and
3. if necessary, any requirements as to the destruction of the recording.

Further, there are two additional powers in relation to use of a complainant’s recorded statement which was produced for the purposes of a charge for a family violence offence:

* s.387J provides that a court or tribunal may order that such a recorded statement be produced for use in any proceeding – whether or not the proceeding relates to a charge for a family violence offence – if the court or tribunal is satisfied that it is in the interests of justice to do so; and
* s.387K(2) provides that such a recorded statement may be used as evidence in a proceeding for a family violence intervention order in the circumstances set out in s.387K(1).

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

It is becoming increasingly common in the Children’s Court for parties to obtain production of documents in the possession of the prosecuting agency, including DFFH’s files, DFFH’s “notes” and Victoria police files. Sometimes these are obtained by means of a subpoena issued under s.532 CYFA, as to which see **section 3.5.10** below. In the Criminal Division they are usually obtained pursuant to the “Pre-hearing disclosure” provisions of ss.35-49 & 107-117 of the *Criminal Procedure Act 2009*. In “apprehension cases” in the Family Division they are usually obtained by what is colloquially referred to as a “request for notes”.

Documents obtained as a result of the compulsory processes of the court may only be used for the purposes for which they were disclosed and must not be used for a collateral or ulterior purpose without leave of the court. This is the so-called *Harman* undertaking, an implied undertaking whose name derives from the decision of the Court of Appeal in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, and which is now recognised in Australia as a substantive legal obligation: see *Hearne v Street* (2008) 235 CLR 125 at [96] per Hayne, Heydon & Crennan JJ [citations omitted]:

“Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, witness statements served pursuant to a judicial direction and affidavits.”

See also *Williams v TT Line* [2021] VSC 150 at [31]-[36] per Digby J; *Williams v TT-Line (No 2)* [2022] VSC 413 at [18]-[24] per Connock J.

In *Re Clarinda Pty Ltd (in liq)* [2023] VSC 109 Connock J:

* noted at [39] that only the court can release a party from the implied [*Harman*] undertaking and that “the question of being released from the implied undertaking or statutory obligation is not a matter that can be addressed solely between the parties by consent or non-opposition”;
* referred at [20] to the following dicta of the Full Federal Court in *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283 at [31]: “In order to be released from the implied undertaking it has been said that a party in the position of the appellants must show ‘special circumstances’: see for example, *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217”; and
* was satisfied at [29] that “there are special circumstances which afford good reason for releasing the plaintiffs and the defendants from their respective [*Harman*] obligations”.

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

In *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No.4)* [2011] VSC 269 Vickery J summarized the common law in relation to subpoenas at [57]-[59] as follows:

“(1) A person served with a subpoena to produce, requiring the production of specified documents, must attend at the place directed by the subpoena and produce such of the specified documents which he or she is able to produce, unless he or she can establish some good reason why the documents should not be produced.

(2) Production of documents under subpoena to produce means production to the court, not to a party.

(3) Upon the production of a document to the court, the court takes the document into its custody to use it for the temporary purpose of resolving disputed questions of fact. That power is essential to the proper administration of justice and prevails over private property rights.

(4) The court has a discretion to allow a party to inspect a document that appears to be relevant to the issues, whether or not it is in admissible form.

(5) A party having a legitimate forensic purpose in seeing a document will not ordinarily be denied inspection by the circumstance of the document not being admissible in evidence.

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

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

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

On the issue of “a legitimate forensic purpose”, in *Smith v Trustees of the Christian Brothers* [2023] VSC 171 John Dixon J said at [13]-[14]:

[13] “Where a subpoenaed party applies to set aside a subpoena, the issuing party must satisfy a two-part test. It must:

(a) identify precisely a legitimate forensic purpose for categories of documents sought pursuant to the subpoena, bearing in mind that both the production of documents or the absence of produced documents may assist a forensic purpose; and

(b) demonstrate that it is ‘on the cards’, or that there is a ‘reasonable possibility’, that the documents will ‘materially assist’ the issuing party’s case.

[14] The primary judge applied the summary of principles identified by Derham AsJ in *ACN 096 450 770 (fka AJH Lawyers Pty Ltd) v Mathieson Nominees* [2017] VSC 559, following his Honour’s review of the cases, and neither party submitted that it was inappropriate for the primary judge to do so. There was no dispute before me as to the principles governing the application. In *Mathieson*, the court said at [20] (citations omitted):

(a) it is necessary for the party at whose request the subpoena was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;

(b) except in cases where the subpoena is plainly too broad or merits the description of a fishing expedition, the judge should normally inspect the documents for the purpose of making a final decision as to whether a legitimate forensic purpose exists;

(c) however, the Court will not require production of subpoenaed documents, and will not permit access to subpoenaed documents, if the subpoena is expressed so broadly that the applicant cannot demonstrate, having identified a forensic purpose, that it is ‘on the cards’ or that there is a ‘reasonable possibility’ that the documents will materially assist the case of the party;

(d) a ‘fishing expedition’ is not a legitimate forensic purpose and will not be permitted;

(e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her case;

(f) a mere assertion of bad faith by an applicant or that something might be found demonstrating bad faith is not enough – the criteria set out in (c) must be satisfied; and

(g) where a party fails to demonstrate a legitimate forensic purpose, the Court should refuse access to the documents and set aside the subpoena.”

In relation to the obligation on the party seeking the issue of a subpoena to show “a legitimate forensic purpose” see also *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 19)* [2018] VSC 144, [27], citing *R v Saleam* (1989) 16 NSWLR 14, 18C; *Ryan v The Diocese of Wagga Wagga (Subpoena and discovery ruling)* [2023] VSC 607 at [18]-[19]; *Peers v AHPRA* [2024] VSC 110 at [4]-[15].

Although the case of *Monash University v EBT* [2022] VSC 651 involved how electronically stored documents are to be dealt with for freedom of information purposes in Victoria, the analysis of Cavanough J also has some relevance to the proposition that electronic documents can be the subject of a subpoena issued under s.532 CYFA. His Honour categorically rejected the extraordinary submission of the plaintiff university that “documents that are stored only in electronic form by or on behalf of a government agency are not ‘documents of an agency’ at all within the meaning of the Victorian freedom of information (FOI) legislation”. In coming to the conclusion that they were ‘documents of an agency’ his Honour relied in part on dicta of Sir Victor Scott & Chadwick LJ in *Victor Chandler International v Customs & Excise Commissioners (UK)* [2000] 1 WLR 1296, noting at [110] that this case “is instructive not only as to the general principle that legislation is ‘always speaking’, but also as to whether an electronic record may be a ‘document’ and as to the distinctions that may be drawn between electronic impulses, information and documents.” Cavanough J also held at [114] & [116] that “Even more significant for present purposes – indeed, virtually conclusive of the fate of this proposed appeal – are certain passages in judgments of the members of the High Court of Australia delivered in 2002 in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, especially the remarks of McHugh J” about giving ‘document’ a purposive construction covering “any information that is stored or recorded on paper or electronically”. At [124] Cavanough J held that: “The notion, embedded in Monash’s submissions, that a document of an agency stored only electronically is not a document of the agency at all for FOI purposes is not only out of harmony with the text, context and purpose of the FOI Act itself (as I have sought to demonstrate), it is also out of harmony with three other statutes that deal with related matters.” One of these 3 statutes is the *Electronic Transactions (Victoria) Act 2000* (ETVA) about which his Honour commented at [132]:

“The stated purposes of the ETVA include ‘To provide for the meeting of certain legal requirements as to writing and signatures by electronic communication’ and ‘to permit documents to be produced to another person by electronic communication’ and ‘to permit the recording and retention of information and documents in electronic form’. Section 5 provides an ‘outline’ of the Act. The outline states, in part, that certain requirements imposed under a law of Victoria can generally be met in electronic form, including ‘a requirement to give information in writing’, ‘a requirement to produce a document’, ‘a requirement to record information’ and ‘a requirement to retain a document’. Section 11(1) provides, in part, that if under a Victorian law a person is required to record information in writing, that requirement is taken to have been met if the person records the information in electronic form, where at the time of the recording of the information, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference. Correspondingly, s 11(2) provides that if, under Victorian law, a person is required to retain a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person retains, or causes another person to retain, an electronic form of the document. Plainly, s 11 authorises the ‘digital strategy’ of the Public Record Office of Victoria, including the publication of standards for electronic record keeping. This in turn renders quite artificial the submission by Monash in this case that the FOI Act does not recognise an electronically stored record of information as a document.”

Part 3.10 of the *Evidence Act 2008* (Vic) details various privileges which may be claimed by persons seeking that production of particular documents not be ordered. Sections 117-126 deal with ‘Client legal privilege’ formerly known as ‘legal professional privilege’. Section 127 deals with religious confessions. Sections 128 & 128A deal with privilege in respect of self-incrimination. Sections 129‑131 deal with evidence sought to be ‘excluded in the public interest’, also known as ‘public interest immunity’.

In *Andrianakis v Uber Technologies Inc & Ors; Taxi Apps Pty Ltd v Uber Technologies Inc & Ors* [2022] VSC 196 an issue arose in respect of a claim of client legal privilege. Matthew AsJ said at [47]:

“The common law principles inform the content and application of ss 118 and 119: *Samenic Ltd v APM Group (Aust) Pty Ltd* [2011] VSC 194, [19]. In the context of applying the Evidence Act, in *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311 at [47], Elliott J stated that the principles applicable to privilege ‘are not controversial’ and summarised them as follows:

1. The party claiming the privilege bears the onus. That onus will only be discharged if the party establishes facts from which the court may determine that the privilege is being properly claimed.
2. “Purpose” in “dominant purpose” means the purpose which led to the creation of the document or the making of the communication.
3. The “dominant purpose” is the purpose which was the ruling, prevailing or most influential purpose at the time the document was brought into existence.
4. There can be only 1 dominant purpose. If there are 2 purposes of equal weight, neither fits the description of a “dominant purpose”.
5. If a dominant purpose existed, that dominant purpose must be determined objectively, having regard to the evidence, the nature of the document and the parties’ submissions. That said, evidence of the subjective purpose of the person making the communication or creating the document is relevant.
6. Ordinarily, the relevant purpose is that of the person who brings into existence the document which includes the privileged communication, but this will not always be the case.
7. As the test is directed towards the purpose of bringing the document into existence, a copy of a non-privileged document may be privileged.
8. The material relied upon by the person claiming privilege must be focused and specific. Formulaic and bare conclusory assertions are not sufficient.
9. With respect to advice privilege, in considering whether a communication is for the purposes of legal advice, the purposes must be construed broadly. Although it does not extend to pure commercial advice, legal advice, in this context, includes any advice as to what should prudently and sensibly be done in the particular legal circumstances in which the client finds itself.
10. Further to subparagraph (9), a document created by a lawyer that records her or his legal work carried out for the benefit of the client, such as a research memorandum, a summary of documents or a chronology, will be protected by privilege whether or not the document is provided to the client. Similarly, notes and other material created by the client that relate to the legal advice sought (whether or not actually communicated to the lawyer), or that relate to communications with the lawyer, may be privileged where such documents meet the relevant “dominant purpose” test.
11. With respect to litigation privilege, for a proceeding to be “anticipated or pending” for the purposes of s 119, there must be more than a mere possibility of litigation. As a general rule, there must be a real prospect of litigation, but it does not have to be more likely than not.
12. Many claims for privilege may be determined by the court without the need to inspect the documents. Further, ordinarily, the court will not examine the documents if the party claiming privilege has not established a basis for the claim in an affidavit in support. However, in an appropriate case, the court may examine the documents to make a decision about privilege, particularly where the parties agree to this course.
13. A law firm or a company may be a “client” if it engages or employs its own employee lawyer, but privilege will only attach to the relevant communication or document if the employee is consulted confidentially in her or his professional capacity, with the requisite degree of independence, in relation to a professional matter.”

See also *Andrianakis v Uber Technologies; Taxi Apps Pty Ltd v Uber Technologies (Appeal)* [2022] VSC 643 where John Dixon J dismissed Uber’s appeal and allowed the cross-appeal on one ground; *Andrianakis v Uber Technologies Inc & Ors; Taxi Apps Pty Ltd v Uber Technologies Inc & Ors (third party privilege)* [2023] VSC 366; *Grant v Downs* (1976) 135 CLR 674; *Huang v Frankston City Council* [2022] VSC 733 at [31]-[34] & [75]-[85]; *Quebani Pty Ltd & Anor v McDonald’s Australia Limited* [2023] VSC 16 & [2023] VSC 439; *Re Sleeping Duck Pty Ltd (Appeal)* [2023] VSC 541; *Re SLKALT Pty Ltd (in liq)* [2024] VSC 250; *Tarasova v State of Victoria (subpoena ruling)* [2024] VSC 543 at [12]-[24].

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

“(a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;

(b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;

(c) the applicant for the witness summons must also satisfy the court that it is ‘on the cards’, or that there is a ‘reasonable possibility’ that the documents sought under the subpoena ‘will materially assist the defence’;

(d) a ‘fishing expedition’ is not a legitimate forensic purpose and will not be permitted;

(e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence;

(f) a mere assertion of bad faith by an applicant or that something might be found demonstrating bad faith is not enough – the criteria set out in (c) must be satisfied;

(g) in criminal proceedings a ‘more liberal’ view is taken by a court in respect of the application of the test. Special weight is to be given to the fact that the documents may assist the defence of the accused;

(h) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.”

See also *R v Saleam* (1989) 16 NSWLR 14 at 16 *et seq* where Hunt J discussed the question of legitimate forensic purpose, *Alister v The Queen* (1984) 154 CLR 404 at 414 where Gibbs CJ enunciated his well-known test that the judge must be satisfied that it is “**on the cards**” that the documents sought will materially assist the accused in his defence, *Zirilli v The Queen* [2021] VSCA 174 and *Chief Commissioner of Police v Zammit* [2023] VSC 635 at [25]-[66]. See also the judgments of Kyrou J in *Victoria v Lane* [2012] VSC 328 at [17]-[21], *R v Debono* [2012] VSC 350 at [194]-[224] and *Dolheguy v Lane* [2012] VSC 328 at [16]-[23]. Further, see *Smith v Trustees of the Christian Brothers; Pearce v The Corporation of the Society of the Missionaries of the Sacred Heart* [2022] VSC 343; *Commissioner of the Australian Federal Police v Song & Ors (Subpoena Objection)* [2023] VSC 273; *Madafferi v The King [No 2]* [2024] VSCA 14; *Wawryk v Mercedes-Benz Australia/Pacific Pty Ltd (Subpoena Ruling)* [2024] VSC 120 at [11]-[27].

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

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

Public interest immunity is occasionally claimed by the Crown in relation to certain documents sought in criminal proceedings. In *R v Mokbel (Ruling No.1)* [2005] VSC 410 & *R v Mokbel (Ruling No.2)* [2005] VSC 502 Gillard J discussed in detail the basis of subpoenas and discovery in criminal matters and the categories, principles and competing public interests involved in public interest immunity.

In *R v Cox & Ors (Ruling No.3)* [2005] VSC 249 Kaye J set out one possible procedure for determining a claim for public interest immunity and discussed the underlying principles requiring the Court to balance the extent, if any, to which harm would be done to the public interest by the production of the documents against the extent, if any, to which the administration of justice would be frustrated or impaired if the documents were withheld from a party to the litigation. See also *Arnautovic v The King* [2024] VSC 235, especially at [25]-[31] per Kaye JA. A similar issue arose in *State of Victoria v Orman & Anor* [2024] VSCA 190 where the Court of Appeal held at [44]-[48]–

* that the judge had erred by failing to treat the plaintiff’s confidential affidavit and submissions as entitled to the same level of protection as the subject material; and
* that disclosure of the confidential affidavit and submission would destroy or significantly impair the public interest in confidentiality.

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

* [35]-[44] **International human rights**: *International Covenant on Civil and Political Rights* [opened for signature 16/12/1966, 999 UNTS 171, entered into force 23/03/1976].
* [45]-[66] **“Equality of arms”**: *Foucher v France* (1998) 25 EHRR 234, [34]; *Edwards v United* *Kingdom* (1993) 15 EHRR 417*; Fitt v United* *Kingdom* (2000) 30 EHRR 480; *Mallard v R* (2005) 224 CLR 125 per Kirby J.
* [67]-[83] **Prosecutor’s duty of fairness**: *Connelly v DPP* [1964] AC 1254, 1357; *Cannon v Tahche* (2002) 5 VR 317, 339-340; *R v Higgins* (unreported, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne & Eames JJ, 2 March 1994), I9406132, 74; *R v H* [2004] 2 AC 134; *Attorney General’s Reference (No 3 of 1999)* [2001] 2 AC 91, 118 per Lord Steyn.
* [84]-[116] **Striking out summons to produce issued by the defence in criminal cases**: *R v Saleam* (1989) 16 NSWLR 14, 19-20; *Sobh* (1993) 65 A Crim R 466, 473; *Clarkson v DPP* [1990] VR 745, 759; *R v Mokbel (Ruling No 1)* [2005] VSC 410, [33]-[42]; *Alister v R* (1983) 154 CLR 404; *Roads and Traffic Authority of New South Wales v Conolly* (2003) 57 NSWLR 310; *Felice v County Court of Victoria and Anor* [2006] VSC 12; *DPP v Selway* [2007] VSC 244.

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

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

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

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

“The principles governing applications [for an order that documents not be produced] are no different from those governing applications for access to documents produced in answer to a subpoena. Before access is granted (or an order to produce made) the applicant must (i) identify a legitimate forensic purpose for which access is sought; and (ii) establish that it is ’on the cards’ that the documents will materially assist his case.”

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

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

An order by the Court of Appeal under s.317 of the *Criminal Procedure Act 2009* for the production of documents is akin to an order for a subpoena for production: see *Zirilli v The Queen* [2021] VSCA 174 at [59d] citing *R v Saleam* [1999] NSWCCA 86, [11] (Hunt J, Carruthers and Grove JJ agreeing); *Zirilli* (n 5) [2021] VSCA 2, [98]; *Madafferi v The Queen* [2021] VSCA 1, [98]. See also *Higgs v The Queen* [2021] VSCA 301 at [28a]; *Polimeni v The Queen* [2021] VSCA 329 at [25b].

In *Madafferi v The Queen* [2021] VSCA 1 the appellant sought the release of documents under s.317 *Criminal Procedure Act 2009* in an attempt to find out whether his solicitor Mr Acquaro and his barrister Ms Gobbo were police informers at certain relevant times and accordingly that he did not receive independent legal advice from either. The Chief Commissioner of Police opposed the release on the grounds of public interest immunity (PII), specifically the so-called public interest in protecting the anonymity of police informers. The Court of Appeal (Emerton, Weinberg & Osborne JJA) ordered the release of the documents, discussing the legal framework at [27]-[40] as follows:

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

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

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

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

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

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

1. the importance of the information or the document in the proceeding;
2. if the proceeding is a criminal proceeding―whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor;
3. the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
4. the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
5. whether the substance of the information or document has already been published;
6. if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused―whether the direction is to be made subject to the condition that the prosecution be stayed.

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

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

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

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

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

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

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

[36] His Honour continued:

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

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

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

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

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

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

In *Chief Commissioner of Police v Crupi* [2024] HCA 34 the High Court–

* set aside the primary judge’s order – which was supported by inadequate reasons {see [15]-[19] & [24]} – for the production of documents concerning an informer in circumstances where it was found that the information in at least some of the documents was likely to be of substantial assistance to the defence of a person charged with murder; and
* remitted the matter to the Supreme Court of Victoria to be decided afresh.

At [20] Gageler CJ, Edelman & Beech-Jones JJ) said:

“In *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59; 362 ALR 1 at [12], this Court observed that ‘it is of the utmost importance that assurances of anonymity’ given to informers are honoured and that, ‘[i]f they were not, informers could not be protected and persons would be unwilling to provide information to the police which may assist in the prosecution of offenders’. The precise operation of s 130 need not be considered in this case as, on any view, the proper application of the provision involves a balancing exercise {*Madafferi v The Queen* (2021) 287 A Crim R 380 at 389 [41]}, and an extremely weighty consideration in that exercise is whether the material sought to be disclosed has any tendency to reveal the identity of a police informer, especially in circumstances where there is a risk to the informer's safety from disclosure.”

See *Zirilli v The Queen* [2021] VSCA 2 where a similar Court of Appeal (McLeish, Emerton & Weinberg JJA) rejected the Chief Commissioner’s PII claim in a case which was very similar to *Madafferi*. See also *R v Benbrika (Ruling No 3)* [2007] VSC 283 at [11] & [15]-[22] per Bongiorno J; *State of Victoria v Brazel* [2008] VSC 37 per Maxwell P, Buchanan & Vincent JJA; *R v Rich (Ruling No.5)* [2008] VSC 435 per Lasry J; *Deputy Commissioner of Taxation v Law Institute of Victoria Ltd* [2010] VSCA 73; *Arico v The Queen* [2022] VSCA 35 per Beach JA; *Zirilli v The King* [2023] VSCA 64; *Farachi v The King* [2023] VSCA 253; *Arico v The King* [2023] VSCA 268; *Re Mokbel (Ruling No 1)* [2024] VSC 26 at [22]-[35]; *Madafferi v The King [No 1]* [2024] VSCA 12.

In *Visy Board Pty Limited v Stephen D’Souza & Ors* [2008] VSC 572 at [15]-[24] Forrest J discussed the nature of the obligation of a party who obtains material pursuant to the compulsory processes of the Court, relying in particular on *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125 at [96] where Hayne, Heydon & Crennan JJ had held:

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

This statement of principle is derived from the decision of the House of Lords in *Harman v Home Department State Secretary* [1983] 1 AC 280 and is often referred to as the “implied undertaking”. In *Crest Homes PLC v Marks* [1987] AC 829, 860 Lord Oliver (with whom the other members of the House agreed) said that “the Court will not release or modify the implied undertaking given of discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery.” See also *Khoury v Kirwan (No 4)* [2021] VSC 333 at [4].

The Court may order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the subpoena. The Court may fix the amount or direct that it be fixed in accordance with the Court’s usual procedure in relation to costs. See r.42.11 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic), discussed and applied by Gorton J in *Esposito v The Victorian Legal Services Board* and by Irving AsJ in *BEUT Property Pty Ltd v Bunnings Group Ltd* [2023] VSC 31.

For a discussion of whether and to what extent redactions are permissible in discovered documents – in particular in proceedings concerning historical child sexual abuse – see *Erenshaw v The State of Victoria* [2024] VSC 626.

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

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

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

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

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

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

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

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

### **3.5.9.3 Production of “notes” in “apprehension cases” in the Family Division**

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

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

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

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

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

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

(a) the inherent power of the Court seised of a matter triable summarily in its discretion to direct that documents be provided to the accused by the prosecution; and

(b) the power of the Court to require production of documents on the return of a subpoena or a call for production of documents in court.

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

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

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

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

As from 20/03/2023 Practice Direction No. 1 of 2023 provides in paragraphs [26]-[27]:

[26] “A party seeking an Order for the release of CRIS notes or updated CRIS notes or any other document(s) (properly redacted), must do so as soon as practicable prior to the submissions hearing. In the case of reserved submissions, the party seeking access to the CRIS notes should make an application for the release or retention of the CRIS notes when the matter is being adjourned for Reserved Submissions. Updated CRIS notes must be provided by DFFH to the parties or their legal representatives by midday of the Court working day preceding the Reserved Submissions.

[27] At the conclusion of the hearing, all electronic copies of the CRIS notes and other documents must be permanently deleted, and any hard copies returned to the legal representative of DFFH, unless the Court otherwise orders.”

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### **3.5.10 Witnesses in court cases**

### **3.5.10.1 Ensuring attendance of a witness and/or production of documents or things at court**

A party generally ensures the attendance of the party’s witness at court and/or the production of documents or things by obtaining and serving a witness summons (also known as a subpoena). The Family Division of the Children’s Court can also compel the attendance of a witness at court and/or the production of documents or things on its own motion.

### **A WITNESS SUMMONSES IN THE FAMILY DIVISION**

Section 532 of the CYFA provides:

“(1) The Family Division (on the application of a party or without that application) or a registrar may issue the following witness summonses–

1. summons to give evidence;
2. summons to produce documents or things;
3. summons to give evidence and produce documents or things.

(2) Any party to a proceeding in the Family Division may apply for the issue of a witness summons.

(3) A witness summons may be directed to any person who appears to the Court or registrar issuing the summons to be likely—

(a) to be able to give material evidence for any party to the proceeding or the Court; or

(b) to have in the person's possession or control any documents or things which may be relevant on the hearing of the proceeding; or

(c) both to be able to give material evidence and to have in the person's possession or control any relevant documents or things.

(4) A witness summons must require the person to whom it is directed to attend at a specified venue of the Court on a certain date and at a certain time—

(a) to give evidence in the proceeding; or

(b) to produce for examination at the hearing any documents or things described in the summons that are in the person's possession or control; or

(c) both to give evidence and produce for examination any documents or things described in the summons that are in the person's possession or control.

(5) A witness summons must be served on a person a reasonable time before the return date by—

(a) delivering a copy of the summons to the person personally; or

(b) leaving a copy of the summons for the person at the person's last or most usual place of residence or of business with a person who apparently resides or works there and who apparently is not less than 16 years of age.

(6) If it appears to the Court, by evidence on oath or by affirmation or by affidavit, that service cannot be promptly effected, the Court may make an order for substituted service.

(7) If the person to be served with the witness summons is a company or registered body (withinthe meaning of the Corporations Act), thesummons may be served on that person in accordance with section 109X or 601CX of that Act, as the case requires.

(8) A person to whom a witness summons is directed is, subject to subsection (9), excused from complying with the summons unless conduct money is given or tendered to the person at the time of service of the summons or a reasonable time before the return date.

(9) It is not necessary to give or tender conduct money to a person to whom a witness summons is directed if the person will not reasonably incur any expenses in complying with the summons.

(10) Unless the Court or the registrar issuing the summons otherwise directs, a summons to produce documents or things or a summons to give evidence and produce documents or things permits the person to whom the summons is directed, instead of producing the document or thing at the hearing, to produce it, together with a copy of the summons, to the Court not later than 2 days before the first day on which production is required.

(11) If requested to do so, the Court must give a receipt to a person who produces a document or thing to the Court under subsection (10).

(12) The production of a document or thing to the Court under subsection (10) in answer to a summons to give evidence and produce documents or things does not remove the requirement on the person to whom the summons is directed to attend for the purpose of giving evidence.

(13) The Court may direct that a witness who has attended before the Court in answer to a witness summons is entitled to receive from the party who applied for the issue of the witness summons conduct money for each day of attendance.

(14) Nothing in this section derogates from the power of the Court to certify that a witness be paid his or her expenses of attending before the Court.”

The following prescribed forms are contained in the *Children, Youth and Families (Children's Court Family Division) Rules 2017* [S.R. No. 20/2017]:

Form 41 Witness summons to attend to give evidence

Form 41A Witness summons to produce

Form 41B Witness summons to produce and to attend to give evidence

### **B WITNESS SUMMONSES IN THE CRIMINAL DIVISION**

Pursuant to s.43 of the *Magistrates’ Court Act 1989* – read in conjunction with s.528(2)(a) of the CYFA – the Criminal Division may also issue the following witness summonses–

1. summons to give evidence;
2. summons to produce documents or things;
3. summons to give evidence and produce documents or things.

Section 43 of the Magistrates’ Court Act 1989 is in generally similar terms to s.532 of the CYFA but it does not permit the Court to compel the attendance of a witness at court and/or the production of documents or things on its own motion.

Under rule 2.03 of the *Children’s Court Criminal Procedure Rules 2019* [S.R. No. 161/2019], a witness summons in the Criminal Division must be in prescribed Form 3 and must be directed to one person.

### **C NOTICES TO AUTHORS OF REPORTS IN BOTH DIVISIONS**

Part 7.8 of the CYFA applies to the following types of Family Division reports–

(a) protection reports;

(b) disposition reports;

(c) additional reports, including Children’s Court Clinic reports;

(d) therapeutic treatment application reports; and

(e) therapeutic treatment (placement) reports.

It also applies to the following types of Criminal Division reports–

(f) pre-sentence reports;

(g) group conference reports;

(h) progress reports;

(i) youth control order planning meeting reports; and

(j) reports under s.409L(3) (child’s compliance with youth control order).

Section 550 of the CYFA governs the attendance at court of the author of any of the above reports. It provides:

“(1) The author of a report to which this Part applies may be required to attend to give evidence at the hearing of the proceeding to which the report is relevant by a notice given in accordance with subsection (2) by–

1. the child in respect of whom the report has been prepared;
2. a parent of that child;
3. the Secretary DFFH; or
4. the Court.

(2) A notice under subsection (1) must be—

(a) in writing; and

(b) filed in the Court as soon as possible and, if practicable, not later than 2 working days before the hearing.

(3) On the filing of a notice under subsection (1) the Court must immediately notify the author of the report that the author’s attendance is required on the return date.

(4) A person is guilty of contempt of court if, being the author of a report who has been required to attend the Court under subsection (1), he or she fails, without sufficient excuse, to attend as required.

(5) The author of a report who has been required under subsection (1) by the child or a parent of the child or the Secretary to attend at the hearing of a proceeding must, if required by the child or the parent or the Secretary (as the case requires), be called as a witness and may be cross-examined on the contents of the report.”

### **3.5.10.2 Competence and compellability**

Section 12 of the *Evidence Act 2008* provides:

“Except as otherwise provided by this Act-

1. every person is competent to give evidence; and
2. a person who is competent to give evidence about a fact is compellable to give that evidence.”

Although s.190 of the *Evidence Act 2008* permits a court, if the parties consent, to dispense with some of the provisions of the Act, the provisions of ss.12-20 concerning the competence and compellability of witnesses may not be waived: *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 at [51] per French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ and at [114] per Heydon J.

### **A COMPETENCE**

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

1. A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)-
   1. the person does not have the capacity to understand a question about that fact; or
   2. the person does not have the capacity to give an answer which can be understood to a question about that fact-

and that capacity cannot be overcome.

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

See *Martin v Amaca Pty Ltd & Ors* [2023] VSC 165.

### **B COMPELLABILITY**

As stated above. s.12 of the *Evidence Act 2008* provides that except as provided by that Act a person who is competent to give evidence about a fact is **compellable** to give that evidence.

In *DPP v Roberts (Ruling No 10)* [2022] VSC 96 – prior to the retrial of Mr Roberts who had been convicted of the murder of two police officers some 20 years before – a witness Mr Graham Thwaites sought to be excused from giving evidence on the basis of mental ill health dating back to being a witness at the scene of the killing of two police officer colleagues. In rejecting the submission made on behalf of Mr Thwaites to be excused from giving evidence Kaye JA said at [2] & [11]-[15]:

[2] “The evidence of Mr Thwaites is plainly relevant to the trial and important to the issues that will be raised during the trial. He, with then Senior Constable Poke, attended the dying Senior Constable Miller shortly after they arrived at the scene…

[11] However, [counsel appearing for Mr Thwaites] has submitted that if I were to find that the witness were unavailable then in some way I could declare that he should be excluded from being subpoenaed

[12] In my view there is no authority that supports such a submission and it is I consider against the scheme of the whole of the *Evidence Act*. As I said, s 12 describes which categories of witnesses are compellable to give evidence.

[13] Mr Thwaites falls within that category and one could not by proper statutory construction define some form of implicit power to excuse a witness who is compellable on the basis that he is unavailable.

[14] In reaching the conclusion, that Mr Thwaites is compellable, I have particular sympathy for his position and the distress he is suffering and has suffered over the last 24 years. That distress is understandable and is a matter of concern.

[15] There are steps which we will take to endeavour to alleviate that distress. First as discussed it is my intention that Mr Thwaites give evidence this week by audio visual link that will be pre-recorded without the presence of a jury.”

Section 14 of the *Evidence Act 2008* – under the heading “**Compellability – reduced capacity**” provides:

“A person is not compellable to give evidence on a particular matter if the court is satisfied that-

* 1. substantial cost of delay would be incurred in ensuing that the person would have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter; and
  2. adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources.”

Section 15 provides that the sovereign and nominated others are not compellable. Section 16 deals with the competence and compellability of judges and jurors in a proceeding.

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

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

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

1. to give evidence; or
2. to give evidence of a communication between the person and the defendant-

as a witness for the prosecution.

Section 18(4) requires the court to satisfy itself that a person who may have a right to make an objection under s.18(2) is aware of the effect of the section. See *DPP v Fuller (a pseudonym)* [2023] VSCA 121.

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

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

### **3.5.10.3 Children as witnesses in court cases**

Both at common law and under the repealed s.23 of the *Evidence Act 1958*, there were specific requirements about which the presiding judicial officer had to be satisfied before accepting the evidence of a child witness. Although there was no fixed age below which a child was deemed incompetent to give evidence on oath nor was there any precise rule as to the degree of knowledge or intelligence which would exclude such evidence, the common law test for the competency of a child depended on whether the child possesses “a sufficient knowledge of the nature and consequences of [the] oath [and] on the sense and reason they entertain of the dangers and impiety of falsehood”. See e.g. *R v Brasier* (1779) 1 Leach 199 at 200; *R v Lyons* (1889) 15 VLR 15*; R v Brooks* (1998) 44 NSWLR 121 at 124 per Grove J. This is no longer the law in Victoria. There is no longer any special category of “child witness” as far as competence and compellability is concerned and ss.12 & 13 apply to both child and adult witnesses.

### **3.5.10.4 Claim of privilege by a witness**

In **subsection 3.5.9.1** – in the context of the production of documents under sub-poena – the writer referred to Part 3.10 of the *Evidence Act 2008* (Vic) which details various privileges which may be claimed by persons seeking that production of particular documents not be ordered. The same provisions also apply to a claim of privilege by a witness giving evidence in court proceedings.

Sections 117-126 deal with ‘Client legal privilege’ formerly known as ‘legal professional privilege’: see e.g. *Re Mokbel (No 4)* [2024] VSC 68 at [49]. Section 127 deals with religious confessions. Sections 128 & 128A deal with privilege in respect of self-incrimination: see *Timeless Sunrise Pty Ltd v BigJ Enterprises Pty Ltd (No 7)* [2022] VSC 549; *Re Mokbel (No 3)* [2024] VSC 50. Sections 129-131 deals with evidence sought to be ‘excluded in the public interest’, also known as ‘public interest immunity’.

In *DPP v Roberts (Ruling No 7)* [2022] VSC 60 – prior to the retrial of Mr Roberts who had been convicted of the murder of two police officers some 20 years before – a witness Mr George Buchhorn had objected, pursuant to s.128(1) of the *Evidence Act 2008*, to giving evidence on the ground that it may tend to prove that he had committed an offence arising under an Australian law. Prior to the first trial Mr Buchhorn had been a Detective Sergeant of police stationed at the Homicide Squad whose duties included the preparation of a prosecution brief which itself involved the coordination of witness statements and evidence. He had given evidence in a compulsory examination before the Independent Broad-based Anti-corruption Commission which had conducted an investigation into the compilation of statements by the police members who gave evidence relating to the dying declarations of Senior Constable Miller, and in particular, concerning relevant alterations that had been made to those statements before they were included in the police brief. The findings made by IBAC, and the evidence that was adduced before it, constituted the basis of Mr Roberts’ second and successful appeal to the Court of Appeal against his conviction for the murders of Sergeant Silk and Senior Constable Miller: see [2020] VSCA 277, especially at [149]. In *Ruling No 7* Kaye JA held at [38]-[39] that if counsel for Mr Roberts were precluded from questioning Mr Buchorn in relation to the matters that are the subject of objection, Mr Roberts would not be afforded a fair trial. Accordingly, the interests of justice required that Mr Buchhorn give evidence concerning each of those matters. His Honour concluded at [40]:

1. I uphold the objection by Mr Buchhorn to giving evidence in relation to the nine matters specified in paragraph 14 of these reasons.
2. It is in the interests of justice that Mr Buchhorn give evidence concerning each of those matters. Accordingly, I direct that Mr Buchhorn be required to give evidence in relation to those matters, and I shall cause Mr Buchhorn to be given a certificate under s 128 of the *Evidence Act* in respect of that evidence.

See also *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Villan v State of Victoria* [2021] VSC 354 & *State of Victoria* *v Villan* [2022] VSCA 106; *Lucciano v R* [2021] VSCA 12; *Kontis & Anor v Coroners Court of Victoria* [2022] VSC 422 esp. at [142].

### **3.5.11 Oaths and affirmations**

***Viva voce* evidence**

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

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

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

**Documents**

The purposes of the *Oaths and Affirmations Act 2018* include:

* the re-enactment and modernisation of the law relating to oaths, affirmations, affidavits and statutory declarations; and
* the establishment of a scheme for the certification of copies of documents.

Sections 25-27 of the OAA permit affidavits and statutory declarations to be validly made by audio visual link subject to various provisos. In connection with this the *Electronic Transactions (Victoria) Act 2000* now permits witnessing by audio visual link and the use of electronic signatures subject to various provisos.

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

In addition to the provisions (discussed in **sections 3.5.5 & 3.5.8**) which relate to the giving of evidence by audio or audio visual recording in certain cases, there are three sets of legislative provisions which govern appearances and/or the giving of evidence in other than the traditional manner in the courtroom:

1. Sections 42D to 42I of the *Evidence (Miscellaneous Provisions) Act 1958* [‘EMPA’] provide for the appearance, the giving of evidence or making of a submission in a legal proceeding by audio visual link or audio link by any person other than the accused in a criminal proceeding.
2. Sections 42J to 42T of the EMPA provide for the appearance by audio visual link of an accused person in a criminal proceeding in certain circumstances.
3. Sections 359-365 of the *Criminal Procedure Act 2009* provide alternative arrangements for certain witnesses to give evidence in certain criminal proceedings in limited circumstances.

As a consequence of the health risks associated with the COVID-19 pandemic in 2020/21, the EMPA was temporarily amended to enable remote hearings to be held by Victorian courts, generally using an off-the-shelf computer application known as **Webex**. Experience gained in court operations and community public health during the pandemic has led to some of the EMPA amendments being made permanent, either in an unchanged or amended form. These include:

* **A child who is not an accused** may not be directed to appear, give evidence or make a submission by audio link unless exceptional circumstances exist [s.42F(7)].
* **A child accused** is required to appear physically unless the ChCV directs appearance by audio visual link. The ChCV may give such a direction if exceptional circumstances exist or an appearance by audio visual link 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 *Children’s Court (Evidence – Audio Visual and Audio Linking) Rules 2018* [S.R. No.15/2018] facilitate applications to the Children’s Court pursuant to ss.42E, 42L, 42M, 42N & 42P of the EMPA for the giving of evidence and/or the appearance of a person at court by means of an audio visual link.

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

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

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

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

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

“1. The question for the court is whether it is in the interests of justice that an order be made under s.42E.

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

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

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

See also *Grege v Grege & Ors (Ruling)* [2024] VSC 475 and the cases cited therein: *ASIC v Rich* (2004) 49 ACSR 578; *Wilson v Bauer Media (Ruling No 3)* [2017] VSC 311; *Kirby v Centro Properties* (2012) 288 ALR 601; *Ghosn v Principle Focus Pty Ltd & Ors (Ruling)* [2008] VSC 454; *Joyce v Sunland Waterfront (BVI) Ltd* (2011) 195 FCR 213.

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

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

1. consistent with the interests of justice; and
2. reasonably practicable in the circumstances.

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

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

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

1. a sexual offence; or
2. an offence where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008*.

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

(a) permitting the evidence to be given from a place other than the courtroom by closed-circuit television or other facilities that enable communication between that place and the courtroom;

(b) using screens to remove the accused from the direct line of vision of the witness;

(c) permitting a person, chosen by the witness and approved by the court for this purpose, to be beside the witness while the witness is giving evidence, for the purpose of providing emotional support to the witness;

(d) permitting only persons specified by the court to be present while the witness is giving evidence;

(e) requiring legal practitioners not to robe;

(f) requiring legal practitioners to be seated while examining or cross-examining the witness.

Under s.363(1), the court **must** direct use of closed-circuit television or other facilities [pursuant to s.360(a)] for a witness who is a complainant in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence unless-

1. the prosecution applies for the complainant to give evidence in the courtroom; and
2. the court is satisfied that the complainant is aware of the right to give evidence remotely and is able and wishes to give evidence in the courtroom.

Under ss.363(2) & 363(3), the court **must** direct use of closed-circuit television or other facilities [pursuant to s.360(a)] for a witness who is a complainant in a proceeding that relates (wholly or partly) to a charge for an offence where the conduct constituting the offence consists of family violence within the meaning of the FVPA if-

1. closed-circuit television or other facilities that enable communication between the courtroom and the other place are available; and
2. it is practicable to do so-

unless-

* the prosecution applies for the complainant to give evidence in the courtroom; and
* the court is satisfied that the complainant is aware of the right to give evidence remotely and is able and wishes to give evidence in the courtroom.

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

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

In *Males v The Queen* [2021] VSCA 159 the applicant was on trial in the County Court on multiple charges of rape, threat to kill and intentionally causing injury. The prosecution applied under s.363(a) for the first complainant K to give evidence in the courtroom. Having permitted the evidence to be given in the courtroom the trial judge directed in accordance with s.360(b) that a screen was set up between the witness box and the dock, blocking the line of vision between the two. K gave evidence for about an hour before the court adjourned for the day. The following morning the prosecutor informed the judge that K now wanted to give her evidence from the remote facility. When her Honour indicated that she proposed to allow that change to occur, counsel for the applicant sought a discharge of the jury. The basis for the application was that the jury would inevitably draw an adverse inference from the change of arrangements. The judge refused the discharge application. The Court of Appeal (Maxwell P & Emerton JA) granted leave to appeal and allowed the appeal, holding that the jury was likely to infer that K was in fear of the accused: “The availability of that inference created a very significant risk of prejudice, in our view. K’s decision to withdraw to the remote facility — to ‘take flight’ from the courtroom — was capable of being seen by the jury as confirmatory of the truth of her evidence about the applicant’s violent conduct towards her.” Further, it was “at best uncertain” whether jury directions would “eradicate the danger to the fairness of the trial”: see *Crofts v The Queen* (1996) 186 CLR 427 at 442.

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

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

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

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

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

‘In a criminal trial the rule will become relevant during the cross-examination of any prosecution or defence witness whose evidence is to be contradicted by other evidence called by cross-examining counsel or otherwise challenged. … The rule rests upon notions of fairness. It is designed to give the witness and the party calling that witness, an opportunity to meet that challenge and to facilitate the tribunal’s assessment of the reliability and accuracy of the witness. (*R v Demiri* [2006] VSCA 64 at [36]) Where matters in controversy are not ‘put’ to the witness in cross-examination, the tribunal’s capacity to assess the credit of the witness is likely to be impeded. (*Johnson Matthey (Australia) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171 at [200]) Any relaxation of the obligation to comply with this rule increases the risk of injustice to the witness and the party calling that witness.

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

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

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

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

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

For further discussion of the rule, see *R v Arnott* [2009] VSCA 299 at [105]-[109]; *R v Edward Drash* [2012] VSCA 33 at [64]-[89]; *R v Michael Peter Smith* [2012] VSCA 187 at [49]-[53]; *Pasqualotto v Pasqualotto* [2013] VSCA 16 at [177] & [221]-[273]; *Gant v The Queen; Siddique v The Queen* [2017] VSCA 104 at [59] & [113]; *Hofer v The Queen* [2021] HCA 36 at [26]-[28] & [74]; *Wilson (a pseudonym) v The King* [2023] VSC 276 at [43]-[64]. See also *R v Morrow* [2009] VSCA 291 at [2]-[6] per Nettle JA, [36]-[71] per Redlich JA and in particular at [59] where his Honour said:

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

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

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

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

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

In *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 384-385, the plurality (Heydon, Crennan & Bell JJ) described the rule as follows at [63]-[64]:

“The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness: *Dilosa v Latec Finance Pty Ltd* (1966) 84 WN (Pt 1) (NSW) 557 at 582. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn: [*Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)*](https://jade.io/article/122435) (2009) 264 ALR 201 at [225](https://jade.io/article/122435/section/215) [[102]](https://jade.io/article/122435/section/215). These principles have been extended from instances where a witness has not been called at all to instances where a witness has been called but not questioned on particular topics. Where counsel for a party has refrained from asking a witness whom that party has called particular questions on an issue, the court will be less likely to draw inferences favourable to that party from other evidence in relation to that issue: [*Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd*](https://jade.io/article/800857) (1991) 22 NSWLR 389 at [418-419](https://jade.io/article/800857/section/2615). Handley JA stated some stronger propositions in those passages, but what he said is at least authority for what is stated above. That problem did not arise here. The plaintiff's counsel did ask the plaintiff relevant questions.

The rule in *Jones v Dunkel* permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party: *Dilosa v Latec Finance Pty Ltd* (1966) 84 WN (Pt 1) (NSW) 557 at 582…”

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

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

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

(a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; and

(b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken.

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

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

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

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

[46] “The unexplained failure of the party to call the witness cannot be used to reason that the evidence of the witness would not have been favourable to the party. The trier of fact cannot allow the inference which may (not must) be drawn to be elevated that high. It is limited to the inference that, if called, the evidence would not have assisted the case of the party failing to call the witness: *O’Donnell* v *Reichard* [1975] VR 916, 929; *R v Buckland* [1977] 2 NSWLR 452, 458, approved in *Azzopardi v R* (2001) 205 CLR 50. As was held in *Weissensteiner v The Queen* (1993) 178 CLR 217, that inference is available when evaluating all of the evidence which is before the court, including the evidence given by witnesses whose credibility and reliability has been attacked. As applied in the case of evidence of that kind, Mason CJ, Deane and Dawson JJ held this to be the principle at 227-228:

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

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

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

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

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

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

In *Milky v The King* [2024] VSCA 136 the Court of Appeal discussed at length the test referred to by the High Court in *Dyers v The Queen* and held that the trial judge was obliged, but failed, to give a direction under s.43 of the *Jury Directions Act 2015*. At [70]-[76] Emerton P, Priest & Kaye JJA said:

[70] “The principle, which is ordinarily referred to as the ‘rule in *Jones v Dunkel*’, may be stated in short terms. In essence, an unexplained failure by a party to call a witness, or to tender evidence, may, in appropriate circumstances, lead to an inference that the witness, who is not called to give evidence, or the evidence that was not adduced, would not have assisted that party’s case: *Jones v Dunkel* (1959) 101 CLR 298, 308, 312 & 320–321; *O’Donnell v Reichard* [1975] VR 916, 929; *Brandi v Mingot* (1976) 12 ALR 551, 559–60.

[71] In *Dyers v The Queen* (2002) 210 CLR 285, the High Court (McHugh J dissenting) held at [6], [52] & [121]-[123] that, save as in exceptional circumstances, the principle in *Jones v Dunkel* does not apply to an accused person, so that, ordinarily, a trial judge should not give such a direction to the jury in a case in which the accused might be expected to give evidence personally or call a particular witness to give evidence in support of the defence.

[72] Gaudron and Hayne JJ (with whom Kirby J agreed) also considered that, as a general rule, a trial judge should not direct a jury that the prosecution would be expected to have called persons to give evidence other than those it did call as witnesses. Their Honours stated at [6]:

‘Further, as a general rule, a trial judge should not direct the jury in a criminal trial that the prosecution would be expected to have called persons to give evidence other than those it did call as witnesses. It follows that, as a general rule, the judge should not direct the jury that they are entitled to infer that the evidence of those who were not called would not have assisted the prosecution. A direction not to speculate about what the person might have said should be given. Again, exceptions to these general rules will be rare and will arise only in cases where it is shown that the prosecution's failure to call the person in question was in breach of the prosecution's duty to call all material witnesses.’

[73] Gaudron and Hayne JJ elaborated on that point at [17] as follows:

‘As was held in *R v Apostilides*, it is for the prosecution to decide what evidence it will adduce at trial. The trial judge may, but is not obliged to, question the prosecution in order to discover its reasons for declining to call a particular person, but the trial judge is not called upon to adjudicate the sufficiency of the reasons that the prosecution offers. Only if the trial judge has made such an inquiry and has been given answers considered by the judge to be unsatisfactory, would it seem that there would be any sufficient basis for a judge to tell the jury that it would have been reasonable to expect that the prosecution would call an identified person. There would then be real questions about whether, and how, the jury should be given the information put before the judge and then a further question about what directions the jury should be given in deciding for itself whether the prosecution could reasonably have been expected to call the person. Only when those questions had been answered would further directions of the kind contemplated by *Jones v Dunkel* have been open and they are not questions which arise in the present matter. Nor is it necessary to consider whether some direction of this kind can be given when a party, who has called a witness, does not ask questions of that witness about a particular topic.’

[74] As was thus noted in *Dyers*, the critical question, in a case in which the prosecution has failed to call a particular person to give evidence, is whether that failure constitutes a breach of the prosecution’s duty to call all material witnesses. It is a fundamental principle of our criminal justice system that the prosecution, in a criminal trial, must act with fairness, with the objective of establishing the whole truth and of ensuring that an accused person is accorded a fair trial: *Whitehorn v The Queen* (1983) 152 CLR 657, 663–4 . In accordance with that duty, the prosecution is required to call all available witnesses, whether they are favourable to the prosecution case or otherwise, unless there is good reason not to do so: *Whitehorne v The Queen* at 674; *Dyers* at 292-293.

[75] Section 43 of the JDA makes provision for a case in which the prosecution, without satisfactory explanation, fails to call or question a particular witness in circumstances in which the judge is satisfied that the prosecution was reasonably expected to call or question that witness. Section 43 provides as follows:

**Direction on prosecution not calling or questioning witness**

1. If the prosecution does not call or question a particular witness, defence counsel may request under section 12 that the trial judge direct the jury on that fact.
2. The trial judge may direct the jury as referred to in subsection (1) only if the trial judge is satisfied that the prosecution—

(a) was reasonably expected to call or question the witness; and

(b) has not satisfactorily explained why it did not call or question the witness.

1. In giving a direction referred to in subsection (1), the trial judge may inform the jury that it may conclude that the witness would not have assisted the prosecution’s case.

**Note** Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Section 43(2) qualifies the threshold for giving a requested direction. Section 16 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

[76] For the purposes of determining the present application, it is not necessary to consider whether s 43 of the JDA qualifies or affects the principles stated by the majority in *Dyers*. For the reasons that follow, we are persuaded that, applying the test referred to in *Dyers*, the judge, in the circumstances of the case, was obliged, but failed, to give a direction under s 43 in respect of the failure of the prosecution to call a particular witnesses who were relevant to the determination by the jury of charge 7 and charge 8.”

In *DFFH v West (a pseudonym)* [2022] VChC 2 the central issue was the cause of a fractured rib found on each of two non-identical twins. The underlying facts are set out in **section 5.5.3** below. The evidentiary contest essentially involved a number of medical professionals. In dismissing the protection applications Stead M also rejected the DFFH’s submission that an adverse *Jones v Dunkel* inference should be drawn against the parents for not giving evidence. At [138] her Honour said:

“In the circumstances where the objective evidence does not support an adverse finding against the parents, I do not draw an adverse inference against either of them. The onus of proof rests with the Secretary. It is not for the parents to disprove the suspicions of the Secretary, nor to fill in any deficiencies of the Secretary’s evidence. The precedent in *Jones v Dunkel* as set out by Menzies J (at p.312) is:

‘(i) that the absence of the defendant … as a witness cannot be used to make up any deficiency of evidence;

(ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence;

(iii) that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.’

There are cases where direct evidence presented by the Secretary invites inferential reasoning that may tend to support the Secretary’s assertions. In such cases if the parents can contradict this evidence and fail to do so, the inference may be more confidently made. This is not such a case.”

In *Hicks v Slater and Gordon Ltd* [2024] VSCA 298 the Court of Appeal noted at [156] that “the principle permitting an adverse inference to be drawn where a party fails to call a witness cannot be used to fill an evidentiary gap, or to convert suspicion into inference.”

See also *Cayford v Let Danny Do It Pty Ltd* [2021] VSC 707; *Archer v Garcia* [2022] VSC 57 at [73]‑[86]; *Re Cassar* [2022] VSC 126 at [282]-[290]; *Reynolds v Patel* [2022] VSC 211 at [31]-[52]; *National Express Group Australia (Bayside Trains) Pty Ltd v McDonald* [2022] VSCA 109 at [39]-[41]; *Thompson v Marks* [2002] VMC 25 at [10]-[25]; *China Insurance Group Finance Company Limited v Kingston (No 3)* [2023] VSC 6 at [343]-[353]; *Gunawardana v GMA Environmental Services Pty Ltd* [2023] VSC 281 at [73]-[81]; *Alphington Developments Pty Ltd v Amcor Pty Ltd (No 5)* [2023] VSC 637 at [569]-[586]; *Moore v Goldhagen* [2024] VSCA 25 at [79]-[91]; *Transonic Travel Pty Ltd v Tilakee Nominees Pty Ltd & Ors* [2024] VSC 86 at [679]-[685]; *Kelly v The King* [2024] VSCA 69 at [31]-[36] & [52]-[58]; *Shininggarden Pty Ltd v Omega Building Group Pty Ltd* [2024] VSC 583 at [30]-[42].

### **3.5.15 Unfavourable witnesses**

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

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

(a) evidence given by the witness that is unfavourable to the party; or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or

(c) whether the witness has, at any time, made a prior inconsistent statement.”

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

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

**Part 3.5** is a simplified summary of the Court process. For more details about Court hearings, see **Part** **4.9 Family Division Court hearings** or **Part 10.3 Criminal Division summary proceedings**.

## **3.6 Statutory interpretation**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

‘Although a Court is entitled to have regard to the legal and historical context must always be exercised in using all extrinsic material, including in particular assumed historical facts, to ensure that those facts are accurately and relevantly completely stated.’

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

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

See also *Abraham Abbas v Department of Transport and Planning* [2024] VMC 11 at [48]-[55]; *Owners Corporation v Buckley* [2024] VMC 12 at [27]-[34]; *DPP (Cth) v Falco (a pseudonym)* [2024] VSCA 247 at [51]-[71].

In *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 13 the High Court (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ) discussed the consequence for the validity of the exercise of statutory jurisdiction of non-compliance with a condition precedent to the exercise of that jurisdiction. In the process their Honours discussed and applied dicta from *Project Blue Sky* *Inc v Australian Broadcasting Authority*, saying at [24] & [26]:

[24] “In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91], McHugh, Gummow, Kirby and Hayne JJ explained:

‘An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.’

…

[26] The principle of statutory construction expounded in *Project Blue Sky* operates in the same way in respect of a condition that is a condition precedent to the exercise of a statutory jurisdiction as it does in respect of a condition that is a condition of the exercise of a statutory jurisdiction. Contrary to another theme of the argument of the Minister, a condition precedent to the exercise of jurisdiction neither stands outside the principle nor calls for any modification of its operation.”

In *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2024] HCA 10, the High Court (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) said at [26]:

“The nature of a decision-maker's powers and their capacity to affect a person's rights and interests not only bears upon the existence and informs the content of any duty of procedural fairness {*Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Ainsworth* (1992) 175 CLR 564 at 576 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78 at 100 [117] per Weinberg J.}, but also informs the proper construction of statutory provisions that create analogous rights and obligations in that ‘all statutes are construed ... against a background of common law notions of justice and fairness’: *Kioa v West* (1985) 159 CLR 550 at 609 per Brennan J; see also *Italiano v Carbone* [2005] NSWCA 177 at [80] per Basten JA.”

In *Azizi v DPP* [2022] VSCA 71 the Court of Appeal (Priest, T Forrest & Walker JJA) granted leave to appeal but refused the appeal against a trial judge’s refusal to have the applicant wife’s interest in property excluded from a serious drug offence restraining order made under s.18(1) of the *Confiscation Act 1997*. The applicant and her accused husband had purchased property and were registered as joint proprietors simultaneously. The property was the family home of the applicant, the accused, their two children, and the accused’s mother. The husband had contributed the entire purchase price. The husband was convicted of serious drug offences related to the serious drug offence in reliance of which the restraining order was made. The wife was not in any way involved in the commission of the serious drug offence by the accused. Section 22A of the Act provides that the court may make an order excluding property from a serious drug offence restraining order if the court is satisfied of various matters, including where the applicant had acquired the interest from the accused, directly or indirectly, that it was acquired for sufficient consideration. In holding that s.22A(1) of the Act did not require the husband to have had a prior interest in the property and that the applicant had acquired the property indirectly from her accused husband, the Court of Appeal said at [51]-[56]:

[51] In our opinion the respondent’s submissions are to be accepted. A consideration of the text, context and purpose of s 22A(1)(c) reveals that the statutory language is sufficiently broad to capture the circumstances of the present case, where the accused contributed the entirety of the purchase price of the property, from funds in which the applicant had no legal or beneficial interest.

[52] Legislation is to be interpreted by reference to its text, context and purpose: See, eg, *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 149 [20] (Kiefel CJ, Bell and Nettle JJ), 157 [41] (Gageler J), 162–3 [64] (Edelman J); [2018] HCA 55; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); [2009] HCA 41. And, of course, s 35(a) of the *Interpretation of Legislation Act 1984* provides that a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object. In Victoria it is also necessary to have regard to s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*, which provides that, so far as it is possible to do so consistently with its purpose, a statutory provision ‘must be interpreted in a way that is compatible with human rights’.

[53] Further, as the plurality observed in *Lordianto* (2019) 266 CLR 273, 301–2 [61]–[62] (Kiefel CJ, Bell, Keane and Gordon JJ); [2019] HCA 39, which concerned the Commonwealth analogue to the Act, the *Proceeds of Crime Act 2002 (Cth)* (‘POCA’), it is not appropriate to interpret a legislative provision as if it ‘comprised separate elements which are to be construed in isolation from one another’. Rather, a legislative provision should ‘be read as a whole and in the context provided by the whole of the statutory framework’. Although their Honours were considering a specific provision of the POCA, these statements reflect general principles of statutory interpretation.

…

[55] In our opinion the applicant’s submissions require interpreting s.22A(1)(c) in precisely the manner against which the plurality cautioned in *Lordianto*. Although the words ‘directly or indirectly’ appear after the words ‘acquired the interest from the accused’, it is plain that the words ‘directly or indirectly’ apply to the acquisition earlier referred to.

[56] That is, read as a whole, rather than in a piecemeal fashion, s 22A(1)(c) applies in two distinct contexts: (a) first, where the exclusion applicant acquired their interest in the property directly from the accused; and (b) secondly, where the exclusion applicant acquired their interest in the property indirectly from the accused.”

In *Re Mokbel (No 2)* [2024] VSC 39 at [81] Fullerton J said:

“It is recognised in the authorities that where two construction of a piece of legislation are reasonably open, the consequences that would flow from competing constructions may be of assistance in informing Parliament’s intention.”

And at [62]-[80] her Honour discussed the use of extrinsic materials as an aid to statutory construction, concluding at [79]:

“[T]he use of extrinsic materials in a construction exercise should not displace the task of giving meaning to the words of the text under consideration, but…they are available to be used to elucidate, where possible, the statutory purpose of a statutory provision in context”.

See also *The King v Rohan (a pseudonym)* [2024] HCA 3 where the two judgments made numerous references to the relevant Explanatory Memorandum and Second Reading Speech.

In *Brissenden v Victorian Institute of Teaching* [2024] VSC 580 O’Meara J said at [83]:

“It is, of course, permissible to refer to extrinsic materials in order to consider whether a construction would promote the purpose or object underlying the Act: *Interpretation of Legislation Act 1984 (Vic)*, s 35. That said, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 Hayne, Heydon, Crennan and Kiefel JJ stated at [47] that–

‘… the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.’

See also *R v A2* (2019) 269 CLR 507 [32]-[37] & [124].”

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## **3.7 Judgments & Orders**

### **3.7.1 Explanation of and reasons for orders**

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

An outstanding example of an explanation of an order in a way in which the child will understand is to be found in Appendix One to the judgment of Recorder McKendrick QC in the English Family Law case of *Ms D v Mr D* [2022] EWFC 164. The case primarily involved an application by the mother to replace shared-care orders made in March 2018 by sole care orders for two brothers A & B, aged 11 & 8 respectively. In refusing the mother’s application for relocation his Honour said at [7], [55] & [63]:

[7] “…Both Ms D and Mr D need to stand back and appreciate their boys are well cared for by both parents. From everything I have read, they are generally happy, healthy, well-educated and content boys. As I set out below, if they have frustrations it is with their parents and their poor relationship which at times is negatively visited on the boys’ wellbeing, to their detriment.”

[55] “I do not doubt that A and B have expressed the view that they want to move to Somerset. I consider, however, that they have been subject to quite significant influencing both from what their mother has told them and also by her actions. There has also been some influencing from Mr D…”

[63] “I end by urging Mr D and Ms D to work together for A and B to improve their communication with each other to accept this decision made for A and B to ensure the co-parenting the boys’ needs is a success for them. A and B are fortunate to have parents with so much to offer each of them.”

Appendix One contains a letter dated 30 August 2022 which his Honour wrote to the two boys:

Dear [A] and [B],

My name is John and I am a judge. I met your Mum and Dad at court in London last week. Your Mum and Dad have asked me to make decisions for you both about where you should live.

Your Mum asked me to decide that you should both come and live with her in Somerset and see your Dad only every second weekend and at holidays. Mum wants you to go to schools in Somerset.

Your Dad asked me to decide that things should stay as they are. That you spend one week with him and the other week with your Mum in London. Dad wants you to go to schools in London.

I think you met a lady called Shelley in July and you told her what you wanted. She told me you both liked the idea of living with your Mum in Somerset. Shelley spoke to me as well last week.

I hope you both understand that I have made the decision and not your Mum or your Dad. Judges sometimes have to make decisions when parents cannot agree.

I have decided you should both continue to live in London with one week in the care of your Dad and then one week in the care of your mum. This means you will both go to school in London from next week. I have decided you should have nice holidays in Somerset and I will speak with your Mum and Dad again to sort that out.

I have made this decision after considering who you both are, what you both need and things like your education, happiness and your welfare. I have decided you need each other – I think you are good brothers to each other. I also think you need to spend time with your Mum and with your Dad. They both need to play an important role in caring for you. I was worried your Dad might not have a full and proper role in your lives if you lived in Somerset. Looking at all these things in the round I felt this was the best decision for you both, although of course I considered what you both wanted.

I have also asked your Mum and Dad to behave a bit better. I know you both find the arguing that happens between them difficult. Although it is a naughty word, [A], you are right to describe it to Shelley as ‘crap’.

I have told your parents to stop ‘the crap’. I hope you can both settle down with the new school term with week about with Mum and Dad in your London homes. I hope you will enjoy nice holidays in Somerset. I wish you both good luck.

Judge John”

Neither the explanation given of an order nor the statement of reasons for an order is part of the order [s.527(10)]. The explanation given of an order is not part of the reasons for the order [s.527(11)].

Section 527(12) of the CYFA provides that an order made by the Court in a proceeding is not invalidated by, nor liable to be challenged, appealed against, reviewed, set aside, quashed or called in question in any court on account of the failure of the Children’s Court to comply with a provision of s.527 in the proceeding.

### **3.7.2 Provision of orders to parties**

Section 527(3) of the CYFA provides:

“Immediately after the Court makes an order [referred to in s.527(4)], the Court must provide a written copy of the order in the prescribed form to–

1. the child; and
2. if the order is [an order described in paragraphs (a)-(j) of s.527(4)] made by the Family Division–

(i) unless the Court otherwise orders, the child’s parents; and

(ii) if the Court so orders, any other person with whom the child is living; and

1. if the order is [an order described in paragraphs (k)-(n) of s.527(4)] made by the Criminal Division–

(i) unless the Court otherwise orders, the child’s parents if the child is under the age of 15 years; or

(ii) if the Court so orders, the child’s parents if the child is of or above the age of 15 years; and

1. the Secretary [or the principal officer of an authorised Aboriginal agency], in appropriate cases; and
2. in the case of a permanent care order, the person who has, or persons who have, been granted parental responsibility under the order.”

Pursuant to s.527(5) of the CYFA, the Secretary or the principal officer of an authorised Aboriginal agency (as the case may be) must provide a written copy of a temporary assessment order made without notice to the child and the parent of the child, to the child and the parent of the child immediately on exercising any power given under the order.

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

(a) to state in writing the reasons for the order;

(b) to cause the statement of reasons to be entered in the register; and

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

Neither the explanation given of an order nor the statement of reasons for an order is part of the order [s.527(10)].

### **3.7.3 Judgments**

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

* *ex tempore*, that is the decision and the associated reasons are given orally in Court immediately
* reserved, that is given orally or in writing in Court on a later day.

For a discussion of the dilemma facing a judge deciding between an *ex tempore* judgment and a reserved judgment see *Hadid v Redpath* [2001] NSWCA 416 at [40]-[52] per Heydon JA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* At [99]: "The obligation to provide reasons is 'a normal not universal' incident of the judicial process": *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-7; *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 19; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 per Meagher JA at 441; *R v Arnold* [1999] 1 VR 179 per Phillips JA at 182; *Perkins v County Court of Victoria* (2000) 2 VR 246.
* At [101]: In any case in which reasons are required, the necessary content will depend upon the circumstances of the particular matter. In *Beale*, Meagher JA suggested at 443-4 that while reasons need not be lengthy of elaborate, there were three fundamental elements of a statement of reasons:

1. A judge should refer to relevant evidence albeit not necessarily in detail especially where it is clear that the evidence has been considered.

2. A judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached.

3. A judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found.

* At [103]: The failure of a judge or magistrate to refer to relevant evidence may result in an appeal court properly drawing the inference that it was overlooked or ignored: *Yendall v Smith Mitchell & Co Ltd* [1953] VLR 369 at 379; *Sun Alliance Insurance v Massoud* [1989] VR 8 at 17; *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728; *NRMA Insurance Ltd v Tatt* (1989) 92 ALR 299.
* At [157]: "The duty to deal with facts or evidence is not absolute. The evidence must be significant in the sense that, unless disposed of, it stands in the way of the court's conclusions. The court need not deal in terms with evidence when its importance falls away because of the manner in which the court disposes of the case. Nevertheless, if evidence is significant, it is not to be peremptorily shunted aside or ignored: *Sun Alliance Insurance* [1989] VR 8 at 18; *Beale* 48 NSWLR 430 at 443."

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

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

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

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

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

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

In *Warburton Environment Inc v VicForests* [2021] VSCA 194 – holding that the reasons of Garde J in [2021] VSC 35 were adequate – the Court of Appeal (Niall, Emerton & Kennedy JJA) held at [89]-[94]:

[89] “The obligation to give reasons for a decision is a hallmark of the exercise of judicial power. It is well established that the nature of the obligation and the content of the duty to give reasons depends on the nature of the hearing and the issues that must be determined. In the context of a decision in a criminal trial before a judge alone Nettle J said in *DL v The Queen* (2018) 266 CLR 1, 44–5 [131]; [2018] HCA 26 (citations omitted):

‘Since parties must be able to see the extent to which their cases have been understood and accepted, a trial judge will ordinarily be expected to expose his or her reasoning on points critical to the contest between the parties. This applies both to evidence and to argument. If a party relies on relevant and cogent evidence which the judge rejects, the judge should provide a reasoned explanation for the rejection of that evidence. If the parties advance conflicting evidence on a matter significant to the outcome, both sets of evidence should be referred to and reasons provided for why the judge prefers one set of evidence to the other. Similarly, while a judge is not required to deal with every argument and issue that might arise in the course of a trial, if a party raises a substantial argument which the judge rejects, the judge should refer to it and assign reasons for its rejection. And in providing reasons, the judge is required to make apparent the steps he or she has taken in reaching the conclusion expressed, for reasons are not intelligible if they leave the reader to speculate as to which of a number of possible paths of reasoning the judge may have taken to that conclusion. Failure sufficiently to expose the path of reasoning is therefore an error of law.’

[90] In the paragraph preceding the one just quoted, Nettle J said that the extent of the obligation may depend on the circumstances of the case, but that reasons must identify the relevant principles of law, refer to relevant evidence, state the judge's findings upon material questions of fact, and provide an explanation for those findings and the ultimate conclusions reached by the judge.

[91] In considering an argument about the adequacy of a judge’s reasons in a serious injury application under the s 134AB of the *Accident Compensation Act 1986*, Kaye JA emphasised the importance of the nature of the exercise, and the manner in which the hearing is conducted, to any assessment of the adequacy of reasons: *Woolworths Ltd v Warfe* [2013] VSCA 22; *Bedeux v Transport Accident Commission* (2016) 76 MVR 50; [2016] VSCA 127. After setting out a passage from the oft cited reasons of Nettle JA in *Hunter v Transport Accident Commission* [2005] VSCA 1 at [21], Kaye JA referred to the fact that in a serious injury application there is often little cross examination, and the legal test of serious injury is highly evaluative and does not finally determine rights. He went on to say that, in an appropriate case, reasons can be assessed to be adequate by a combination of what is expressly stated, and the inferences that necessarily arise from what is expressly stated.

[92] As Warburton accepted, the level of detail and analysis that is expected of reasons following a trial may not be required in reasons for interlocutory decisions. Indeed, applications: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 270 (Mahoney JA), 279 (McHugh JA).

[93] It may be accepted that, absent some special reason, a judge is required to give reasons for granting or refusing an interlocutory injunction. Those reasons should address the critical issues in the application, which will usually revolve around whether the plaintiff has established a serious question to be tried and explain where the balance of convenience lies. Without wishing to be prescriptive, reasons on an injunction application are unlikely to require any detailed recitation of the evidence and, having regard to the nature of the exercise, there may be no occasion to resolve factual questions. It will generally be necessary for the reasons to disclose an understanding of the allegations and the basis on which the serious question arises, identify the status quo, and give a brief explanation for why the order is made. It will also usually be important that the judge reveal, through his or her reasons, an understanding of the impact that the making or refusal of the injunction is likely to have on the affected party.

[94] Of course, these general observations have to be seen in the light of individual circumstances…”

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

[27] "At the end of a trial the judge will normally do no more than direct who is to pay the costs and upon what basis…Swinton Thomas LJ, in a judgment with which Scott V-C, who was the other member of the court, agreed said this in *Brent London BC v Aniedobe* [1999] CA Transcript 2003, in relation to an appeal against an order for costs:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Karabagias v Katopodis* [2022] VSCA 191 the applicant alleged representations were made to him by the parents of his ex-wife as a result of which he had expended the majority of his sole asset renovating her parents’ property prior to separation. The judge held that the alleged representations were not made and dismissed the applicant’s claim for a constructive trust and equitable compensation. In allowing the appeal and remitting the matter for rehearing, the Court of Appeal held that the judge’s reasons do not reveal the basis on which the findings were made nor why the respondent’s evidence was preferred over the applicant’s. In relation to the duty to give reasons, Sifris, Kennedy & Walker JJA said at [10]-[14] (citations simplified):

[10] “It is well-settled that, ordinarily, a judicial officer is under a duty to give reasons: see *Wainohu v New South Wales* (2011) 243 CLR 181, 213–14 at [54]. The qualification ‘ordinarily’ is a recognition that the duty ‘does not apply to every interlocutory decision, however minor’. The content and detail of the reasons to be provided will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision: *Wainohu* at [56]. Fundamentally, the duty is an obligation to explain, however briefly, why the judge came to the conclusion that is sought to be challenged. That is, the reasoning process by which the impugned conclusion was reached must be apparent: *Intertransport International Private Ltd v Donaldson* [2005] VSCA 303 [18], citing *Fletcher Construction Australia Ltd v Lines Macfarlane and Marshall Pty Ltd (No 2)* (2002) 6 VR 1, 30–1; [2002] VSCA 189; *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 18; *Pettit v Dunkley* [1971] 1 NSWLR 376, 382, 387–8; *De Iacovo v Lacanale* [1957] VR 553, 557–9. Thus, where there are issues of fact posed for judicial decision, ‘the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose.’: *NRMA Insurance Ltd v Tatt* (1989) 92 ALR 299, 312.

[11] There are several reasons for this requirement. First, and importantly, the parties, particularly the losing parties, are entitled to know the basis on which the judge came to his or her conclusion, so that consideration can be given to whether the conclusion might be challenged on appeal: *Intertransport* [2005] VSCA 303 at [18]. Further, reasons for the decision are necessary in order for an appellate court to determine if there was relevant error: *Fletcher* (2002) 6 VR 1, 31 at [100]; [2002] VSCA 189. In that regard, reasons for judgment will be inadequate if ‘the appeal court is unable to ascertain the reasoning upon which the decision is based [or if] justice is not seen to have been done’: *Sun Alliance* [1989] VR 8, 18. Finally, an adequate statement of reasons provides ‘the foundation for the acceptability of the decision by the parties and the public as well as fostering judicial accountability’: *Intertransport* [2005] VSCA 303, [18], quoting *Fletcher* (2002) 6 VR 1, 31 at [100]; [2002] VSCA 189.

[12] Reasons may be brief, but nonetheless adequate, if they reveal the steps in the reasoning of the court by which it reached its decision: *Kiama Constructions Pty Ltd v Davey* (1996) 40 NSWLR 639, 647–8. In some cases, it may be that the basis for the decision can be inferred from the whole of the judge’s reasons, having regard to the circumstances of the case. Thus, as Gray J explained in *Sun Alliance* [1989] VR 8, 19:

‘The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge’s conclusion will sufficiently indicate the basis of a decision. … In such cases, the foundation for the judge’s conclusion will be indicated as a matter of necessary inference.’

[13] However, as Nettle JA observed in *Hunter v Transport Accident Commission* [2005] VSCA 1 at [28], a ‘mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings’, is inadequate. In that case his Honour also observed at [21] the importance of exposing the ‘path of reasoning’ as follows:

‘[W]hile the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. It should also be understood that the requirement to refer to the evidence is not limited to the evidence that has been accepted and acted upon. **If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected.** There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which is relevant and cogent, it is simply not possible to give fair and sensible reasons for the decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the argument or the resolution of the issue. Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. **Failure to expose the path of reasoning is an error of law.**’

[14] This includes an obligation to give a rational and analytical explanation for preferring one witness’s evidence over another’s where there is a conflict of evidence.”

At [47]-[57] their Honours explained their conclusion that the trial judge’s reasons were not adequate as follows:

[47] In our opinion the trial judge’s reasons for her conclusions were not adequate. We accept that the trial judge came to various conclusions, particularly as set out in paragraphs [41] and [45], which are quoted above. It is plain from those paragraphs that the judge accepted Chrysoula’s and Georgia’s evidence that Theo had not been a party to any conversations with Georgia and Petros concerning him and Chrysoula moving into and renovating Unit 1. She thus must have rejected Theo’s evidence that such a conversation did occur.

[48] However, the key difficulty is that the judge’s reasons contain no explanation of why is particularly striking given the following matters.

[49] *First*, the only finding resembling a credit finding was the judge’s statement that she did not accept Georgia’s evidence concerning why she had changed her will in 2020.35 In substance, the trial judge rejected Georgia’s evidence on that issue and there is no challenge to that aspect of the trial judge’s reasons on the appeal. Notwithstanding this finding, her Honour did not explain why she accepted as truthful Georgia’s evidence concerning the events in 2012, nor why she preferred Georgia’s evidence over that of Theo.

[50] *Secondly*, it is notable that the trial judge made no findings (whether positive or adverse) concerning the credit of either Theo or Chrysoula. In the absence of such findings, it is impossible to understand why the judge preferred Chrysoula’s evidence over and above Theo’s evidence.

[51] *Thirdly*, the judge did not address the various inconsistencies between Georgia’s witness statement and her oral evidence. Those inconsistencies included the following: (a) In her witness statement, Georgia said that she had been told about the proposal to renovate in June or July of 2012, but in oral evidence she denied that Chrysoula had told her that Unit 1 would be renovated until the works had commenced. (b) In her witness statement, Georgia said that she ‘used to go over to see the progress of the works’ on Unit 1. But in her oral evidence she denied that she would check the progress of the works.

[52] While it may be accepted that the Zoom hearing, the use of an interpreter, and Georgia’s advanced age could have provided some basis for putting aside those inconsistencies, the judge simply did not engage with the inconsistencies at all. It would be speculation on the part of this Court to conclude that these were the reasons why the trial judge was not troubled by the inconsistencies in Georgia’s evidence.

[53] *Fourthly*, Chrysoula’s evidence differed from Georgia’s evidence on some significant issues, including the timing of the conversation where Chrysoula had discussed the renovations with her mother.

[54] These were all matters raised by Theo in his closing submissions to the judge. Yet they do not appear to have been considered by her Honour in reaching her conclusions.

[55] *Finally*, the trial judge did not find, and in our opinion it cannot be said, that one version of events was inherently more plausible than the other. This was consistent with the general absence of objective contemporaneous documentation favouring one version over the other.

[56] In our opinion, to adopt the words of Nettle JA in *Hunter* at [28], the trial judge engaged in a mere recitation of evidence followed by a statement of findings, without any explanation of why the evidence is said to lead to the findings. Although the judge made material findings of fact, she did not provide an explanation of the process of reasoning that led from the evidence to those findings.

[57] This was also not a case where the basis for the decision can be inferred from the whole of the judge’s reasons, having regard to the circumstances of the case, or where the simplicity of the context or the state of the evidence was such that a mere statement of conclusion was sufficient to reveal the basis of the trial judge’s decision. Rather, the case called for an explanation of why the trial judge preferred Georgia’s and Chrysoula’s evidence over that of Theo. Such explanation also needed to deal with Theo’s arguments in his closing submissions concerning the flaws in Georgia’s and Chrysoula’s evidence.”

In *JV v Children’s Court of Victoria & Anor* [2023] VSC 656 the accused had been found guilty – after a 5-day trial before a magistrate – of one charge of rape and one each of production, possession and distribution of child abuse material. The magistrate had provided only oral reasons and had not delivered anticipated written reasons. JV sought judicial review under Order 56 of the *Supreme Court (Civil Procedure) Rules 2015* (Vic) on the sole ground that the Magistrate failed to give adequate reasons for his decision. At [52]-[56] Forbes J outlined the legal principles relevant to the adequacy of judicial reasons as follows:

[52] “The duty of a judicial officer to give reasons for the decision reached is integral to the exercise of judicial power: *Wainohu v New South Wales* (2011) 243 CLR 181, [54]; *Karabagias v Katopodis* [2022] VSCA 191, [10]; *Makeham v Sheppard* [2020] VSCA 242. The adequacy of those reasons is measured by their sufficiency in explaining the basis for the decision: *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 666-667. Adequate reasons must expose a path of reasoning: *Hunter v Transport Accident Commission* [2005] VSCA 1, [21] (Nettle JA). Reasons should identify the material factual findings upon which the outcome is based and the ultimate factual conclusion reached. Where there are conflicts or discrepancies in the evidence, it is not generally sufficient to rehearse the different evidence. An explanation of the basis for preferring one piece of evidence over another should also be provided: *Bookless v Smith* [2020] VSC 56, [24].

[53] What amounts to adequate content of reasons will be informed by the nature of the matter under consideration and the way in which the parties identified the issues in dispute and their importance. Reasons may be adequate even though they do not deal with the detail of every submission advanced in a hearing if they sufficiently deal with the issues necessary to reach the ultimate conclusion: *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430, 443-444.

[54] The importance of reasons underpins the proper administration of justice. Reasons inform a superior court asked to determine whether a decision below contains an error of law or appealable error. They support the decision of the Court being accepted by the parties; in other words they allow parties (and in particular a losing party) to understand why the case has been decided in favour or adverse to them. They promote public confidence in the process of decision making and promote accountability of judicial officers. They support consistency in decision making and provide guidance as to the applicable law and its application to particular factual circumstances.

[55] Section 4A of the *Jury Directions Act 2015* confirms that a judicial officer hearing a criminal matter without a jury must reason in a manner consistent with how a jury would be directed on the evidence and its use. It provides:

**4A Application of Act to criminal proceedings without juries**

* 1. This section applies to –
     1. a summary hearing or committal proceeding under the **Criminal Procedure Act 2009**; and

…

* 1. The court’s reasoning with respect to any matter in relation to which Part 4, 5, 6 or 7 makes provision –
     1. must be consistent with how a jury would be directed in accordance with this Act; and
     2. must not accept, rely on or adopt –

(i) a statement or suggestion that this Act prohibits a trial judge from making, or

(ii) a direction that this Act prohibits a trial judge from giving.

[56] In *Makeham v Sheppard* [2020] VSCA 242, the Court of Appeal considered the adequacy of a magistrate’s reasons for conviction and in particular their adequacy in light of s 4A of the Jury Directions Act. The Court upheld the appeal on the ground that the availability of a de novo appeal to the County Court did not lessen the need for adequate reasons for the initial decision of the magistrate. The appellant, who was the accused before the Magistrate, had submitted that the Magistrate should direct herself, identifying five particular directions. On appeal, while the reasons did adequately deal with four of the directions sought, the direction as to the accused’s good character was not adequately exposed by the reasons. After setting out generally the principles relevant to the adequacy of reasons of a judicial officer exercising summary jurisdiction, Priest JA (with whom Kyrou and Weinberg JJA agreed) turned to the impact on these principles of the obligation in s 4A stating at [50]:

‘First, the language of s 4A(2) makes clear that a magistrate’s *reasoning* in relation to any matter provided for in Parts 4, 5, 6 or 7 of the JDA, ‘must be *consistent* with how a jury would be directed in accordance with the Act (and must not accept, rely or adopt a statement or suggestion that the Act prohibits a trial judge from making, or a direction that the Act prohibits a trial judge from giving). Section 4A does not, however, provide that a magistrate’s *reasons* necessarily must recite that he or she has directed himself or herself in accordance with the provisions of Parts 4 to 7. The obligation to give adequate reasons continues as an ordinary incident of the judicial process recognised at common law, rather than as a statutory obligation arising under the JDA. Hence, the content and extent of a magistrate’s reasons will continue to be dictated by the nature of the matter under consideration; the evidence in the case; and the important issues raised (some or all of which in a given case may invoke consideration of provisions of the JDA).’”

At [58] her Honour noted that JV had identified the following four deficiencies in the magistrate’s reasons:

1. On the central question of consent, the reasons did not identify factual conflicts between the complainant’s recollection of events and the evidence of other witnesses.
2. The Magistrate made no ruling on JV’s state of mind relevant to his defence of reasonable belief in consent and addressed this defence only to say that the accused relies on an understanding that the complainant had ‘given general consent’.
3. The reasons did not set out the evidence upon which the child abuse material charges were found proven and the Magistrate made no factual findings upon which to base a finding of guilt.
4. There was no indication in the reasons as to how the Magistrate had directed himself in accordance with the Jury Directions Act and in particular how he had resolved the legal issue as to the direction in relation to incriminating conduct. The parties were entitled to a ruling on this issue and to have its resolution exposed by the actual path of reasoning to a finding of guilt.

Ultimately at [71] her Honour found that “the reasons are inadequate in the ways identified in paragraphs [58](b) and (d) above.” At paragraphs [72]-[80] her Honour also elaborated on “the way in which the reasons dealt with the need to make factual findings and deal with the factual conflicts as raised by paragraphs [58](a) and (c) above."

At [81]-[102] her Honour rejected the second respondent’s submission that as a matter of discretion relief should be refused because the applicant has two alternative remedies: (a) an appeal to the Supreme Court on a question of law under s.430P(1) of the CYFA; and (b) a rehearing appeal to the County Court under s.424 of the CYFA. In her reasoning her Honour discussed the cases of *Kuek v Victoria Legal Aid* (2001) 3 VR 289; *Perkins v Victorian Bar* [2007] VSCA 107; *Garde-Wilson v Legal Services Board* (2008) 19 VR 398.

Her Honour concluded at [103]: “I will make orders quashing the Magistrate’s orders and remitting the matter back to the Children’s Court to be heard before a different magistrate.”

Other cases in which impugned reasons were discussed include *Sun Alliance Insurance v Massoud* [1989] VR 8; *Pettitt v Dunkley* (1971) 1 NSWLR 376; *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28; [2001] VSCA 167 at [18]-[19]; *Sam Agresta v Franco Agresta & Commercial Union Assurance Co of Australia Ltd* [2002] VSCA 23 at [28]; *The Royal Dental Hospital of Melbourne v Birsel Akbulut* [2002] VSCA 88 at [21]; *Dura (Australia) Constructions v Girgin* [2002] VSC 449 at [10]-[14]; *Smyth v Shire of Murrundindi* [2003] VSCA 75 at [13], [16]-[17]; *Day v Electronik Fabric Makers (Vic) Pty Ltd & Anor* [2004] VSC 24 at [25] citing *Perkins v County Court of Victoria* (2000) 2 VR 246 at p. 273; *Barlow & Anor v Hollis* [2000] VSCA 26 at [15]-[16]; *Hunter v TAC* [2005] VSCA 1 at [21]-[22]; *Fox v Percy* (2003) 214 CLR 118 esp at 124; *VCP Investments Pty Ltd v J McCubbin & Sons Pty Ltd* [2006] VSCA 50 at [4] & [9]-[12]; *Waterways Authority v Fitzgibbon* [2005] HCA 57; *BHP Billiton Ltd & Ors v Oil Basins Ltd* [2006] VSC 402 at [9]-[15] esp at [13]; *Hamidi v KAB Seating Pty Ltd* [2007] VSCA 151 at [32] per Ashley JA; *Collins v Nave & Ors* [2008] VSC 85 at [31]-[34]; *BR v VOCAT* [2009] VSC 152 at [25]-[36] per Kaye J; *Dimatos v Coombe & Ors* [2011] VSC 619 at [20]-[25] per Beach J; *Ta v Thompson & Anor* [2012] VSC 446 per Whelan J; *Helou v Shaya* [2013] VSC 297 at [23]-[27] per Beach J: *LG v Melbourne Health* [2019] VSC 183 at [42]-[54] per Richards J; *Ata Dundar v. Yucel Bas (trading as Bas Brothers Marble and Granite) & Ors* [2019] VSCA 315 at [44]-[73]; *Celsius Fire Services Pty Ltd v Magistrates’ Court of Victoria & anor* [2019] VSC 835 at [25]-[35]; *Makeham v Sheppard* [2020] VSCA 242; *A & L Windows Pty Ltd v Yildrim & Ors* [2022] VSCA 46 at [29]-[44]; *AB v Paulet* [2022] VSC 414; *Salmon-Urbani v The Queen* [2022] VSCA 170; *Ah Fook v Transport Accident Commission* [2022] VSCA 199 at [67]-[72]; *Griffiths v Nillumbik Shire Council* [2022] VSCA 212 at [115]-[118]; *Cotton On Group Services Pty Ltd v Monica Golowka* [2022] VSCA 279 at [173]-[174]. *Hu v Commissioner of the Australian Federal Police* [2023] VSCA 32 at [98]-[118]; *Grujovska v Dr Caroline Brand & Ors* [2023] VSCA 59 at [25]-[29]; *Chief Commissioner of Police v Zammit* [2023] VSC 635 at [100]-[107]; *Gray v Brimbank City Council* [2014] VSC 13 at [35]-[56] per Rush J; *Re Kordos* [2024] VSCA 84 at [45]-[48]; *McKechnie v State of Victoria* [2024] VSCA 171 at [17]‑[23]; *Chief Commissioner of Police v Crupi* [2024] HCA 34 at [15]-[19] & [24]; *Jurd v The King* [2024] VSCA 224 at [50]-[65].

The following papers contain useful discussion about the provision of reasons by judicial officers:

* Kirby J: "Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory" (1994) 12 Australian Bar Review 121;
* Weinberg J: “Adequate, sufficient and excessive reasons” (Judicial College of Victoria, 4 March 2014) especially at [30]-[53].

Inordinate delay in providing a judgment may, in very exceptional circumstances, vitiate a judgment. See *Nais v Minister* [2005] HCA 77 [delay of nearly 5 years].

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

* It is "eminently desirable" that reasons generally be given at the same time as judgment is pronounced. The reasons for this include:

(1) The parties are entitled to a decision which is based on the reasoning process of the judge which has been concluded by the time the decision is pronounced. The court should not reserve to itself the opportunity to mould reasons after the pronouncement of judgement, so as to make them appear consistent with the decision. However that is not to say that a judge cannot review the reasons after they have been published.

(2) The unsuccessful party should be in a position to determine within the time constraints imposed by the rules whether to appeal against the decision.

See per Chernov JA at [31] & Charles JA at [2].

* However there is no common law requirement that a judge of the Supreme Court must give reasons contemporaneously with pronouncing judgement. Where the interests of justice required it, a court may properly pronounce judgment and give reasons for it later. See per Chernov JA at [38] & [40], citing with approval dicta of Mahoney JA in *Mulvena v Government Insurance Office of NSW* [Court of Appeal NSW, unreported, 16/06/1992] at p.11. Chernov JA added at [38]:

"Judges are frequently requested to grant relief as a matter of urgency. Many such applications raise difficult issues and call for complex reasons for the decision to grant or refuse the remedy sought. If the court were to wait before making the appropriate orders in such applications until the reasons have been formulated to the point where they can be published, the delay may defeat the whole purpose of seeking the order in the first place. It is not uncommon, therefore, in appropriate cases, for judges to grant the relief sought and to deliver reasons for it later. That this is an accepted practice in civil and criminal cases is illustrated by reference to several randomly selected recent cases of the High Court and this Court".

* The trial judge was not *functus officio* after pronouncement of judgment: see per Chernov JA at [43]-[45] and see paragraph 3.9 below.

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

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

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

* *Bar Mordecai v Rotman* [2000] NSWCA 123 at [93]-[95] per Sheller, Stein & Giles JJA where it was held that *ex tempore* reasons can be altered by a judge provided the substance of them is not changed, nor are the orders they sustain;
* *Jay Moore (a pseudonym) v The King* [2022] VSCA 233 where at [14], citing *R v Lazarus* (2017) 270 A Crim R 378, 402 [122]–[124], Priest AP & Niall JA said: “A judge should be circumspect when revising a written version of reasons orally delivered. He or she must be extremely cautious when adding to, excising from, or otherwise changing, what is supposed to be the written embodiment of the judge’s oral reasons. Certainly a judge must not, in revising his or her reasons, effect any alteration in substance.”
* *Duke of Buccleuch v. Inland Revenue Commissioners* [1967] 1 AC 506 where Lord Reid & Lord Guest did not question the correctness of the action of Sankey J in deleting in the version that was later published in the authorized reports [1918] 2 KB 735 a paragraph of his reasons in *Ellesmere (Earl of) v. Inland Revenue Commissioners,* which had been published in the Law Times (119) LT 568.

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

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

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

## **3.8 Amending judgments – The 'slip rule'**

Section 412 of the *Criminal Procedure Act 2009* – which applies in the Children’s Court by virtue of s.528(2)(b) CYFA – provides:

“For the purpose of correcting any defect or error in substance or in form, a court may amend any summons, warrant, plea, judgment or order.”

For example, s.412 has been used to enable a sentencing court to-

* declare the correct figure of pre-sentence detention: see *McDonald v The Queen* [2013] VSCA 89 at [17]; *Smith v The Queen; Droste v The Queen* [2012] VSCA 133 at [32];
* amend the commencement date of a term of imprisonment or detention: see *R v Bembo* [2019] VCC 1352.

However, although s.412 seems very broad on its face, its application is much more constrained and it cannot be relied upon in cases where a judge is *functus officio*. In *DPP v Edwards* [2012] VSCA 293 Weinberg & Williams AJA stated at [238]:

“The judge sought to rely upon [s 412](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/cpa2009188/s412.html) of the[*Criminal Procedure Act 2009*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/cpa2009188/) in recalling the first sentence. In our respectful opinion, the section cannot be used in that way. It should not be read as a ‘cure all’, enabling any error, of any kind, to be rectified at any time. It was not intended to, and does not, abrogate the doctrine of functus officio. One would need unmistakably clear language to bring about such a far-reaching, and remarkably radical, result.”

See also *CMG v The Queen* [2013] VSCA 243 at [129]; *Dimovski v The Queen* [2022] VSCA 6 at [40]‑[44].

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

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

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

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

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

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

In *Funston v CCSS Pty Ltd (Costs)* [2021] VSC 100 at [3]-[4] Quigley J discussed some circumstances in which an authenticated court order may be rescinded and replaced by a new order:

“The instances where an authenticated order of a court should be rescinded are rare, in service of the general public interest that there be an end point to litigation: *Lollis v Loulatzis & Anor (No 3)* [2008] VSC 231 [30]. One such instance is where the hearing that leads to an order was affected by an irregularity so severe as to render the outcome a nullity, for instance where one party is not notified of a hearing date: *Cameron v Cole* (1943) 68 CLR 571,589. Another such instance, as has been held in another jurisdiction, is where parties consent to set aside an order of the court, provided that no third party sustains injury: *Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976)28 FLR 195, 201.

In the present circumstances, arguably both of these circumstances apply. Firstly, drafting reasons in Chambers without considering the submissions of one party is akin to not providing a party with an opportunity to present its arguments at a hearing. Secondly, by correspondence sent to Chambers on 4 March 2021, both parties consented to the proposal to set aside the orders and reasons of 2 March 2021, and for fresh orders and reasons to be provided in lieu. Further, there is no third party who would be adversely affected by this course of action. It is therefore preferable to issue new orders and reasons.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The power to correct an error contained in r 36.07 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) extends to include an error in reasons for judgment: see per Moore J in *Attorney-General v Hadashah Sa’adat Khan (No 4)* [2024] VSC 62 at [7]-[9] applying dicta of Chernov JA in *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd* (2001) 4 VR 28 at [49] & [51].

See also *Achurch v The Queen* (2014) 253 CLR 141 at 154 per French CJ, Crennan, Kiefel & Bell JJ quoting *Gould v Vaggelas* (1985) 157 CLR 215 at 275; *Certain Lloyd’s Underwriters v Cross & Ors* [2015] HCA 52 per French CJ; *Vinton v Sim (No.2)* [2015] VSC 79 per Mukhtar AsJ; *Zirilli v The King* [2022] VSCA at [48]-[58]; *Merrion B Pty Ltd v Donchiod Pty Ltd (in liq)* [2023] VSC 111; *Lindholm v Elliott & Ors (No 2)* [2023] VSC 572 at [8]-[10].

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## **3.9 Costs**

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

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

Section 131(1) is expressed in very broad terms and is not limited to costs orders against parties to the proceeding: “The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.” For discussion of the principles governing the ordering of costs against non-parties, see *Knight v FP Special Assets Ltd* (1992) 174 CLR 178; *Bischof v Adams* [1992] 2 VR 198; *Victorian Workcover Authority v Roman Catholic Trusts Corporation for Archdiocese of Melbourne & Anor* [2013] VSC 26; *Lindholm v Elliott & Ors* [2023] VSC 442 at [9]-[27].

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

Section 132(3) of the MCA prohibits the Court from making an order without giving the legal practitioner a reasonable opportunity to be heard: see *Lethbridge v Coburn & Knight* [2003] VSC 259 at [16]‑[17], [26].

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

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

In relation to the awarding of costs in civil proceedings generally, in *Millsave Holdings Pty Ltd & Ors* v *Slea Pty Ltd & Ors* *[No 2]* [2024] VSCA 28 the Court of Appeal (McLeish, Macaulay & Lyons JJA) said at [12]:

“In exercising our discretion as to costs, we apply the principles summarised by this Court in *Chen v Chan [No 2]* [2009] VSCA 233 at [10], to which [the respondent] Slea drew attention in its written submissions:

(1) The general rule is that costs should follow the event. Absent disqualifying conduct, the successful party should recover its costs even where it has not succeeded on all heads of claim.

(2) The Rules of Court permit significant flexibility in determining questions of costs. In particular, the Court is entitled to examine the realities of the case and will attempt to do ‘substantial justice’ as between the parties on matters of costs.

(3) Where there is a multiplicity of issues and mixed success has been enjoyed by the parties, a Court may take a pragmatic approach in framing the order for costs, taking into consideration the success (or lack of success) of the parties on an issues basis. Generally, if such an order is made, it is reflected in the successful party being awarded a proportion of its costs but not the full amount.

(4) A Court may, when fixing costs in a claim where there has been mixed success, take into account complications which it considers will arise in the taxation of costs, as part of its consideration of the overall interests of justice.

(5) Where a Court determines to make an order apportioning costs, then it does so primarily as ‘a matter of impression and evaluation,’ rather than with arithmetical precision, having considered the importance of the matters upon which the parties have been successful or unsuccessful, the time occupied and the ambit of the submissions made, as well as any other relevant matter.”

in *Huang v Frankston City Council (Costs Ruling)* [2023] VSC 41 Tsalamandris J said at [10]-[13]:

“Section 24 of the Supreme Court Act 1986 and Part 4.5 of the Civil Procedure Act 2010 confer a broad discretion on the court to award costs. This discretion must be exercised judicially and in accordance with Order 63 of the Rules.

It is well established at common law that, as a general rule, costs follow the event. See for example *Oshlack v Richmond River Council* (1998) 193 CLR 72. This means that a successful party is generally entitled to an award of costs absent special circumstances: *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* (2010) 31 VR 46, 50 [15].

The justification for this general rule was explained by McHugh J in the High Court decision of *Oshlack v Richmond River Council* at [67]:

The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

As to whether special circumstances exist to justify a departure from this general rule, Riordan J in *Siemens Gamesa Renewable Energy Pty Ltd v Bulgana Wind Farm Pty Ltd (Orders and Costs)* [2020] VSC 267 said at [10] as follows:

The touchstone for departing from the general rule is what is required to do justice between the parties. Circumstances which may justify a departure from the usual rule include where the successful party:

(i) contested many issues on which they failed;

(ii) required the losing party to contest issues abandoned during trial;

(iii) took unnecessarily technical points;

(iv) inappropriately prolonged the litigation;

(v) pressed a substantially exaggerated claim;

(vi) caused the real issues to be obscured or unnecessary evidence to be led; or

(vii) facilitated the loss of the opportunity to expeditiously dispose of the case.”

In *Myers v VCAT* [2024] VSCA 206 Walker JA had dismissed as ‘totally without merit’ an application for leave to appeal against the refusal by Watson J of the applicant’s application for a McKenzie friend (as to which see **section 3.4.5** above). In *Myers v VCAT [No 2]* [2024] VSCA 277 Walker JA ordered that the unrepresented applicant pay the costs of the second and third respondents, saying at [6]-[10]:

[6] “This Court has a broad discretion to award costs pursuant to section 24(1) of the *Supreme Court Act 1986*. The ‘usual order as to costs’ is that costs will follow the event: see e.g. *Northern Territory v Sangare* (2019) 265 CLR 164, 173 [25] (citations omitted):

A guiding principle by reference to which the [costs] discretion is to be exercised — indeed, ‘one of the most, if not the most, important’ principle — is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party.

The usual rule may, of course, be departed from in the exercise of the Court’s discretion. As the High Court held in *Oshlack v Richmond River Council* (1998) 193 CLR 72, 88 [40], 121 [134]; [1998] HCA 11, there is no absolute rule with respect to the exercise of the discretion.

[7] In the present case, none of the matters raised by the applicant justify departing from the usual rule.

[8] In relation to the contention that the proceeding concerned the ‘public interest’, I accept that this may provide a basis for departing from the usual rule (although it does not require such departure): see *Oshlack* at [40] & [134]; *Cumming v Minister for Planning [No 2]* [2020] VSCA 231, [9]. However, in the present case I do not accept the applicant’s submission that his application for leave to appeal was one that concerned the public interest. Fundamentally the application concerned the applicant’s personal desire to have a lay person (often referred to as a ‘McKenzie friend’) who has no legal qualifications make oral submissions on his behalf at trial. In my view that did not raise an issue of public interest that would justify a decision not to award the successful parties their costs. For completeness, nor do I consider that the underlying subject matter of the proceeding before Watson J concerns the public interest. Rather, while the litigation involves the operation of the *Freedom of Information Act 1982*, the applicant seeks to advance a private interest in access to documents: see *Chopra v Department of Education and Training [No 2]* [2021] VSCA 112, [27]; *Anderson v Stonnington City Council [No 2]* [2020] VSCA 238, [6]-[7].

[9] In relation to the applicant’s reliance on his financial position and his dependence on a disability support pension, I do not consider those matters sufficient to justify a departure from the usual rule in the present case. **Absent exceptional circumstances, the financial position of a party is not a matter relevant to the exercise of the costs discretion**: *Board of Examiners v XY* [2006] VSCA 190, [33]-[34], referred to with approval in *Sangare* at [27]. In the latter case the High Court observed as follows at [27]:

The successful party, whether rich or poor, did not ask to be subjected to the expense of unmeritorious litigation. The statutory power to order costs affords the successful party necessary protection against unmeritorious litigation; and unmeritorious litigation is no less unmeritorious because it is pursued by a person who is poor or who is a litigant-in-person.

The applicant did not demonstrate any exceptional circumstances.

[10] **In relation to the applicant’s status as a self-represented litigant and the fact that the second and third respondents are government agencies, these matters have no relevance to the exercise of the costs discretion** – Sangare at [27] – (putting to one side the potential for matters of public interest to arise in cases involving government agencies, which I have dealt with at [5] above).” [emphasis added]

In relation to the awarding of costs on an indemnity basis, in *Shout Rock Cafes Pty Ltd v City of Port Phillip & Anor (Costs Ruling)* [2023] VSC 23 Tsalamandris J said at [18]-[19]:

“It is well established that for a court to depart from the usual order and award costs on an indemnity basis, special circumstances must be demonstrated: see, for example, *Ugly Tribe Co Pty Ltd v Sikola & Ors* [2001] VSC 189, [7].

In *Banksia Securities Ltd v Insurance House Pty Ltd (Costs)* [2020] VSC 234 at [15], John Dixon J restated the principles applicable to an award of indemnity costs as follows:

(a) Costs are to be assessed on a standard basis unless the circumstances of the case justify a departure from the usual course.

(b) The making of an indemnity costs order is in the unlimited discretion of the court, with such discretion to be exercised judicially and not unreasonably.

(c) The court may order indemnity costs where the circumstances warrant departing from the usual rule that costs be payable on a standard basis.”

See also *Love v Kempton & Anor* [2010] VSC 254 at [19]; *Mole v Mole (No 2)* [2021] VSC 802; *M C Wholesaling Pty Ltd & Anor v Che & Ors (No 5)* [2023] VSC 267; *Sandpiper Developments Pty Ltd v Main Beach Developments Qld Pty Ltd & Ors* [2024] VSC 469; *Maglio v Hino Motor Sales Australia Pty Ltd; McCoy v Hino Motors Ltd (No 2)* [2024] VSC 479 at [8].

Since 01/01/2010 the Court’s power to order costs against a person in **criminal** proceedings is also governed by ss.401 & 410 of the *Criminal Procedure Act 2009*, sections which are in similar terms to ss.131 & 132 of the *Magistrates’ Court Act 1989*. See *Piccolotto v The Queen (No 2)* [2015] VSCA 182.

As read in conjunction with s.528(2) of the CYFA, s.401 provides:

(1) Unless otherwise expressly provided by this or any other Act or by the rules of court, the costs of, and incidental to, all criminal proceedings in the Children’s Court are in the discretion of the court and the court has full power to determine by whom, to whom and to what extent the costs are to be paid.

(2) In exercising its discretion under subsection (1) in a criminal proceeding, the Children’s Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the court is satisfied resulted in prolonging the proceeding.

(3) If the Children’s Court strikes out a charge under s.14(3), the court may award costs against the informant.

(4) This section and s.410 [which provides for a costs liability of a legal practitioner] apply to a purported proceeding in the Children’s Court which is beyond the jurisdiction of the court as if the purported proceeding were within jurisdiction.

(5) If the Children’s Court determines to award costs against an informant who is a member of the police force, the order must be made against the Chief Commissioner of Police.

In *Manderson v Bensons Property Group Pty Ltd* [2021] VSCA 227 at [49] the Court of Appeal said: “[W]here a trial is conducted in stages, which is often desirable, it is preferable to wait until the end of the trial, before entertaining any costs applications.”

In *DPP v Tuteru (Application for suppression order)* [2023] VSC 241 Forbes J dismissed Mr Tuteru’s application for a suppression order but at [22]-[46] also refused Channel Nine’s application for costs in detailed reasons, including an analysis of the nature of the proceeding.

Section 131A of the *Magistrates’ Court Act 1989* (read in conjunction with s.528(2) of the CYFA) gives the Children’s Court power to order that the costs of, and incidental to, a proceeding in the Children’s Court be assessed, settled, taxed or reviewed by the Costs Court. The writer doubts that this provision will often be used by the Children’s Court. For discussion of the power of the Costs Court to quantify costs incurrent in proceedings in a Magistrates’ Court see the judgment of Daly AsJ in *Brown v Glen Eira (No. 2)* [2012] VSC 273 and Williams J in *Easwaralingam v Davis & Anor* [2013] VSC 651.

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### **3.9.1 Criminal Division** **(costs of defendant / *amicus curiae*)**

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

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

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

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

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

|  |  |  |
| --- | --- | --- |
| **CASE** | | **COSTS** |
| *Latoudis* | *Latoudis v Casey* (1991) 170 CLR 534 | ALLOWED |
| *Redl* | *Redl v Toppin* (Full Court Supreme Court of Victoria, unreported, 01/04/1993) | REFUSAL DISAPPROVED |
| *Larrain* | *Larrain v Clark* (Smith J, unreported, 13/07/1995) | ALLOWED |
| *Alexander* | *Alexander v Renney* (Batt J, unreported, 21/08/1995) | REFUSED |
| *Oshlack* | *Oshlack v Richmond River Council* (1997-1998) 193 CLR 72 | ALLOWED |
| *Nguyen* | *Nguyen v Hoekstra* (1998) 99 A Crim R 497 | REFUSED |
| *Junek* | *Junek v Busuttil* (Kellam J, unreported [2004] VSC 115, 07/04/2004) | REFUSAL DISAPPROVED |

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

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

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

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

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

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

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

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

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

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

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

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

[33] On my analysis of his reasons, the magistrate said, in short: 'The defendants brought these charges on themselves. They chose to take a part in a piece of reprehensible conduct at the expense of those running a service station. They then chose to decline to assist the police in a way that might have avoided any charges being laid.' On my analysis of the guidance provided by appellate decisions, those considerations were relevant and warranted the discretion being exercised as it was exercised. As I am not satisfied that the magistrate did err, the appeals will be dismissed, with the usual order as to costs."

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

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

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

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

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

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

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

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

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

[20] [T]here is nothing which establishes that NG unreasonably induced the informant, IP, to think that a charge could be successfully brought against him: cf. *Latoudis v Casey* at 569 per McHugh J. Further, there is nothing to suggest that the conduct of NG ‘occasioned unnecessary expense in the institution or conduct of the proceedings: *ibid*…

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

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

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

By contrast, it should be noted that in superior courts – as a matter of longstanding general practice – costs are not awarded in favour of or against the Crown in criminal proceedings brought by the Crown (including appeals and most interlocutory proceedings): see *R v Payara* [2012] VSCA 266 at [6] per Nettle JA citing *R v Goia* (1988) 19 FCR 212, 213; *R v J* (1983) 49 ALR 376,379; *McEwen v Siely* (1972) 21 FLR 131,135. However, in the ‘exceptional cases’ of *Madafferi v The Queen [No.2]* [2021] VSCA 4 and *Zirilli v The Queen [No.2]* [2021] VSCA 5 the Court of Appeal ordered the Chief Commissioner of Police to pay the *amicus curiae’s* costs of the Commissioner’s unsuccessful public interest immunity application. And in the ‘exceptional case’ of *AB v Paulet (No 2)* [2022] VSC 646 Croucher J ordered – for reasons detailed at [60]-[64] – that the Chief Commissioner of Victoria Police pay the *amici curiae’s* costs of the application in the Supreme Court on the standard basis.

### **3.9.2 Criminal Division (costs of prosecution)**

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

### **3.9.3 Family Division (protection proceedings)**

In protection proceedings in the Family Division it is very uncommon for the Court to order that one party bears another party's costs. This is notwithstanding the general rule in civil proceedings that “costs follow the event” unless exceptional circumstances exist: see *Danyl Hammond (a pseudonym) v Secretary to the Department of Health and Human Services; The Attorney-General of Victoria v DPP [No 2]* [2019] VSCA 45 at [3]; *Anderson v Stonnington City Council (No 2)* [2020] VSCA 238. A test for the exercise of the power to order costs in protection proceedings is set out in the unreported judgment of Hampel J. in *Secretary to the Department of Human Services* v. *His Worship Mr Hanrahan and Maher and Others* [Supreme Court of Victoria, {MC21/97}, 10/12/1996] where his Honour held [emphasis added]-

“This is an appeal against an order made by the Magistrate of the Children’s Court sitting at Warrnambool awarding costs of the respondents of $1,680.

On 27 February 1996 the appellant issued a protection application pursuant to the *Children and Young Persons Act 1989*. On 9 August 1996 the Magistrate in a reserved decision ordered costs against the appellant after the protection application was withdrawn and struck out with the consent of the parties.

The power of the Magistrate to order costs was not disputed but a submission was made on behalf of the appellant that costs should not be ordered. The substance of those submissions appears from the affidavit material in this appeal and is not in dispute. In summary it was put that such orders are rarely made because the Department’s job was a difficult one, that the Department was justified in becoming involved in the matter and issuing a protection application when it did, that the circumstances of the child had changed and the changes justified the withdrawal of the application which was properly issued originally, and that the history of the matter militated against the grant of costs. It was conceded that the amount of costs, if granted, was appropriate.

In my opinion the combined effect of s.24 of the *Children and Young Persons Act* [in similar terms to s.528 of the CYFA] and s.131 of the Magistrates’ Court Act is to provide a statutory basis for the jurisdiction in the Magistrates’ Court to award costs in cases such as the present. (See also *Wilson v McDougall* (1987) 11 NSWER. 241.)

The question remains whether this Court should in this case interfere with the Magistrate’s discretion in awarding costs. In my opinion, the ‘strong presumption in favour of the correctness of the decision appealed from’ particularly where it relates to the discretion in respect of costs has not been displaced. It has not been demonstrated that irrelevant considerations have been taken into account or relevant considerations have not been taken into account. Nor is the decision on its face plainly wrong. (See *Australia Coal and Shale Employees Federation v Commonwealth* (1953) 94 CLR 621.)

There was argument before me as to the nature of the discretion to be exercised in relation to proceedings under the *Children and Young Persons Act* where a protection application is involved. I agree with the appellant’s submissions that the discretion is to be exercised on grounds different from those referred to in *Latoudis v Casey* (1991) 170 CLR 534. **Protection application proceedings are not criminal proceedings and by their very nature are for the benefit of the children with whom they are concerned: see *M & Ors v M* [1993] 1 VR 391.) A protection application may be appropriately brought but by the time the matter comes up for hearing circumstances may have changed so that it may then be equally appropriately withdrawn. This is one matter which may, in an appropriate case, affect the exercise of the costs discretion. Other relevant considerations, given the nature of the jurisdiction, may include the extent of investigation by the Secretary when the application is made, the circumstances in which it is withdrawn, the amount of notice given of the intention to withdraw and whether the action taken by the Secretary is in any way irresponsible or mischievous.**

The appeal stands dismissed with costs.”

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

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

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

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

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

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

In *DHHS v Smith (Costs)* [2020] VSC 268 the Department brought an unsuccessful appeal against an interim accommodation order made by the Children’s Court allowing the father of a 2 month old child to have contact with the child subject to supervision by the child’s mother. In granting the applications of the mother and father for costs of the appeal, Riordan J said at [20]-[26]:

[20] “In my opinion, it is appropriate that the Secretary be ordered to pay the respondents’ costs as sought, for the following reasons.

[21] There is no dispute that the Court has jurisdiction under s 24 of the Supreme Court Act 1986 (Vic) to order the payment of costs in the exercise of its discretion.

[22] With few exceptions, the usual order is that a successful party is entitled to an award of costs in its favour. As McHugh J said (in dissent but not with respect to these principles) in *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97 [67]:

The expression the ‘usual order as to costs’ embodies the important principle that, subject to certain exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party.

His Honour went on to say at 98 [70] that ‘there are very few, if any, exceptions to the usual order as to costs outside the area of disentitling conduct’.

[23] Although it can be readily accepted that the Secretary has a significant role in acting in the public interest for the protection of children, as the above authorities demonstrate, that does not make the Secretary immune from the application of the principles for the usual order of costs in this Court.

[24] In my opinion, the role of the Secretary is not significantly different to the role of other regulatory authorities who conduct litigation. In *Quinn v Law Institute of Victoria Ltd (No 2)* (2027) 27 VAR 13, the Court of Appeal (Maxwell P, Chernov & Nettle JJA) rejected a submission of the Law Institute that there should be no order as to the costs of an appeal because of the public function served by the Law Institute with respect to disciplinary proceedings. The Court said at 14-15 [7]:

The institute’s position in this respect is no different from that of any other regulatory agency which is a party to proceedings before a domestic tribunal. The Transport Accident Commission, the Victorian WorkCover Authority and the Environment Protection Authority Victoria regularly appear as respondents to review proceedings in the Victorian Civil and Administrative Tribunal in respect of decisions made in the exercise of their statutory powers. Decisions of that Tribunal are appellable on a question of law. If the decision-making agency seeks unsuccessfully to defend such an appeal, it will be ordered to pay the appellant’s costs.

[25] Similarly, with respect to the proposition that costs on appeal should follow the practice with respect to costs in the tribunal below, the Court of Appeal said at 15 [9]-[10]:

Nor is the present costs question to be likened to the question which arises at the conclusion of disciplinary proceedings in which the institute is prosecutor. As counsel for the institute pointed out, s 162 of the *Legal Practice Act 1996* provided that no order for costs is to be made against the institute in such proceedings except in exceptional circumstances. The evident policy of that provision is that the institute should not be deterred by the risk of an adverse costs order from prosecuting charges of misconduct before the tribunal. That is a very important function, carried out in the public interest.

No such provision was made, and no such considerations apply, in relation to an appeal like the present. For the reasons already given, the institute must decide, as any respondent to such an appeal must decide, whether the decision under appeal is likely to be affirmed or quashed. If it defends the appeal and loses, it should pay the appellant’s costs.

[26] Although I do not consider that the Secretary’s decision to appeal was unreasonable, or that the Secretary misconducted itself in the conduct of the appeal, in my opinion, these factors are not sufficient to justify a departure from the usual rule as to costs or deprive the respondents of their rights to indemnity.”

### **3.9.4 Family Division (intervention order proceedings)**

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

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

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

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

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

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

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

The principal costs arguments raised by the parties before Richards J had concerned the costs of the successful appeal before Richards J where EG had relied upon the *Chorley* exception. EG did not pursue that issue before the Court of Appeal as he accepted that the *Chorley* exception no longer exists in Australia following the subsequent decision of the High Court in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29. In *Bell Lawyers* at [1]-[3] Kiefel CJ, Bell, Keane & Gordon J (with whom Gageler & Edelman JJ agreed) said:

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

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

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

In *McKechnie v State of Victoria (Costs Judgment)* [2023] VSC 234 at [7]-[10] – in refusing costs to the unrepresented plaintiff following the dismissal of the defendant State’s summary dismissal summons – Ginnane J also discussed the decisions of the High Court in *Cachia v Hanes* (1994) 179 CLR 403 & *Bell Lawyers v Pentelow* (2019) 269 CLR 333; [2019] HCA 29:

[7] “*Cachia v Hanes*, which concerned the Supreme Court Rules 1970 (NSW), does not support Mr McKechnie’s submissions. In the High Court’s judgment, Mason CJ, Brennan, Deane, Dawson and McHugh JJ stated at 410:

To use the Rules to compensate a litigant in person for time lost would cut across their clear intent. Costs, within the meaning of the Rules, are reimbursement for work done or expenses incurred by a practitioner or practitioner’s employee. Compensation for the loss of time of a litigant in person cannot be said to constitute costs within the meaning of the Rules.

[8] Their Honours also stated at 414:

Even less do the Rules provide for the substitution of an antithetical basis for the accepted basis upon which a taxation of party and party costs is conducted. We speak of antithesis because, as we have said, the accepted basis for an award of costs is that they are by way of indemnity. They are intended to reimburse a litigant for costs actually incurred, they are not intended to compensate for some other disadvantage or inconvenience suffered by the litigant.

[9] In the later decision in *Bell Lawyers Pty Ltd v Pentelow* at 339, Kiefel CJ, Bell, Keane and Gordon JJ described the general rule as:

a self-represented litigant may not obtain any recompense for the value of his or her time spent in litigation.

[10] Their Honours cited *Cachia v Hanes* for that proposition.”

In *Ganesh v National Australia Bank* [2021] VSCA 45 the Court of Appeal (McLeish, Sifris & Kennedy JJA) – considering the cases of *Cachia v Hanes* (1994) 179 CLR 403, *Bell Lawyers v Pentelow* (2019) 93 ALJR 1007 and *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 – held at [85] that although *Cachia v Hanes* precludes self-represented litigants from being awarded costs to compensate for their own time in preparing and conducting a case, it does not preclude the recovery of other costs, including disbursements and expenses. See also *Di Lorenzo v The Magistrates’ Court of Victoria* [2021] VSC 475 at [26].

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

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

(1) ‘Order for costs’ means an order for costs made by the Court in proceedings in the Family Division or under s.154 of the FVPA or s.111 of the PSIA.

(2) A person in whose favour an order for costs is made may enforce the order by filing in the appropriate court [viz. a court that has jurisdiction to enforce an amount of costs equivalent to that required to be paid under an order for costs] a copy of the order certified by the principal registrar of the Children’s Court to be a true copy.

(3) On filing, the order must be taken to be an order of the appropriate court for payment of costs and may be enforced accordingly.

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

### **3.9.7 Costs against the Court**

In *Magistrates’ Court of Victoria at Heidelberg v Robinson* (2000) 2 VR 233; [2000] VSCA 198 at [13] & [10]-[11] Brooking JA, with the agreement of Charles and Buchanan JJA, surveyed the authorities from Victoria, New South Wales and England and identified the following principles:

[13] “…A settled practice has developed of not awarding costs against an inferior court merely because that court has made a mistake. The practice has been to require a clear case of serious misconduct – misconduct of such a nature as to justify an award of costs. Categories of such misconduct have come to be recognised. They are not exhaustive. What the courts have done is lay down principles or guidelines for the exercise of the discretion: *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 at 975 per Lord Goff; *Symphony Group Plc v Hodgson* [1994] QB 179 at 192 per Balcombe LJ; Norbis v Norbis (1986) 161 CLR 513; *Latoudis v Casey* (1990) 170 CLR 534 at 541-2 per Mason CJ, 544-5 per Brennan J, 558-9 per Dawson J and 562 per Toohey J; *El Deeb v Magistrates’ Court of South Australia* (1999) 72 SASR 596 at 599.”

[10] “…In my view, the notion of serious misconduct or serious impropriety may be said to underlie the award of costs against inferior courts provided that it is understood that there may be misconduct or impropriety notwithstanding the absence of any *knowing* departure from elementary principles. By this I mean that the person or persons constituting the court may be said to be guilty of serious misconduct or serious impropriety if they failed to observe some fundamental principle of justice notwithstanding that they were ignorant of that principle. Some principles are so fundamental that it may be regarded as misconduct or impropriety in the necessary sense for an inferior court not to observe them notwithstanding that the court is unaware of them. There is, I think, here to be drawn a distinction between rules of substantive law and the fundamental rules of natural justice. The superior court may be prepared to regard even ‘an astounding blunder’ in a matter of substantive law as not exhibiting ‘gross ignorance’ in a necessary sense and, in the absence of ‘perversity’, may decline to make an order for costs against the inferior court, although a stage might be reached at which the rule of substantive law that had, albeit through ignorance, not been applied was so fundamental as to require the case to be viewed as one of misconduct or impropriety and so as making an award of costs appropriate. But when one is concerned, not with some “ordinary” rule of substantive law, but with the fundamental principles concerning procedural fairness or natural justice, the inferior court may be held not to be excused by its own ignorance. In considering the suggestion of ‘gross ignorance’, and what is to be excused, one cannot overlook the fact that the lay and honorary justice has given way to the legally qualified professional magistrate. But in saying this I do not wish to suggest that a mere blunder should attract an award of costs: the approach should still be benign, or reasonably so, where a bona fide mistake has been made.

[11] …Marks J in *Edwards v Hutchins* (Supreme Court of Victoria, unreported, 31/10/1990) said that [the New South Wales authorities] supported the proposition that an order for costs would not ordinarily be made against a magistrate in the absence of perverse or shameful in conduct…In *Munro v West* (Supreme Court of Victoria, unreported, 07/03/1997) Smith J derived from them the test of whether there was a clear case of serious misconduct. Chernov J, in *Charter Homes Pty Ltd v Housing Guarantee Fund Ltd* (Supreme Court of Victoria, unreported, 07/03/1997) used a number of expressions to be derived from the decisions in New South Wales, as did Charles JA, speaking for the court, in *Psychologists’ Registration Board of Victoria v Herald & Weekly Times Ltd* [2000] VSCA 118 at [111].”

In *Travis v Rando & Anor* [2022] VSC 782, in refusing applications by both parties for costs against the Magistrates’ Court of Victoria in a case in which the presiding magistrate had made “an error relating to the fundamental principles concerning procedural fairness and natural justice”, Irving AsJ-

* cited at [8] the above dicta of Brooking JA in *Magistrates’ Court of Victoria at Heidelberg v Robinson* at [10] & [13]; and
* noted at [9] that Brooking JA had considered at [7] that the word ‘perverse’ was used in the New South Wales cases to “suggest something more than error, or manifest error, and conveys some such notion as obstinacy or persistence in error”.

At [14] Irving AsJ concluded:

“In refusing to allow Travis to make submissions or to stand the matter down to allow Travis to obtain the relevant authority, the Magistrate was clearly acting on his own, albeit incorrect, understanding of the law. I cannot however be satisfied that the Magistrate acted in a way that meant his manifest error can be regarded as serious misconduct. The consequence of the Magistrate’s actions was serious in that the prosecution was denied procedural fairness.  In my view the brief extract of the transcript provided does not clearly show that the Magistrate acted with obstinance or persisted in error when viewed in the context of his own misunderstanding of the law.  Bearing in mind the caution with which the Court should approach ordering costs against an inferior court, I am not satisfied that it is appropriate to make such a costs order in this matter.”

See also *Swebbs v Magistrates’ Court of Victoria (No 2)* [2017] VSC 339 (Ginnane J); *DDD v Magistrates’ Court of Victoria* [2023] VSC 89 at [167] (Croucher J).

### **3.9.8 Costs indemnity certificates under the Appeal Costs Act**

The *Appeal Costs Act 1998* [ACA] – which re-enacts with amendments the *Appeal Costs Act 1964*. – empowers the issue of an indemnity certificate [IC] to cover limited or specific costs of specified parties in certain circumstances. There are essentially 4 separate categories of applications pursuant to which indemnity certificates under the ACA may be issued by various courts:

1. **Part 2-Entitlement to payment in civil matters**

Application by respondent for IC in respect of successful appeal – s.4

Application by successful appellant for grant of IC in certain circumstances – s.7

Appellant ordered to pay costs of new trial entitled to be indemnified – s.8

Application for IC if civil proceeding discontinued and new trial ordered – s.10

1. **Part 3-Entitlement to payment in criminal matters involving appeals/cases stated**

Application by appellant for IC if appeal against conviction is successful – s.14

Application by respondent for IC if the Crown or DPP appeals – s.15

Application for IC if interlocutory appeal by the accused is successful – s.15A

Application by respondent for IC if interlocutory appeal by prosecution– s.15B

Application by accused for IC if case stated for Court of Appeal – s.15C

Application by accused for IC if criminal proceeding discontinued and new trial ordered – s.16

Application by accused for IC if DPP applies for continuation of prosecution of person previously acquitted – s.17A

1. **Part 4-Indemnity certificates in cases stated**

Application by any party other than the Crown for IC in any proceeding in which a case is stated or a question of law is reserved – s.19

1. **Indemnity certificate if a criminal proceeding is adjourned – s.17**

Note that there is no equivalent provision where a civil proceeding is adjourned

In relation to whether an application for an order under the Sex Offenders Registration Act 2004 is a criminal or a civil proceeding for the purposes of the ACA, see *Kostiuk v KH (a pseudonym) (No 2)* [2024] VSC 636.

### **3.9.9 Costs of an intervener/contradictor**

In *In the matter of Border Express Pty Ltd (No 2)* [2024] VSC 41 the plaintiff’s proceeding had been dismissed. There was an intervener who protected the intervener’s interests but who also took on the role as a contradictor on all issues. Attiwill J ordered that the plaintiff pay the intervener’s costs on a standard basis. At [3] his Honour summarised the applicable law as follows:

“Pursuant to s 24 of the *Supreme Court Act 1986* (Vic), the costs of and incidental to the proceeding are in the discretion of the Court, and the Court has full power to determine by whom and to what extent the costs are to be paid. The discretion must be exercised judicially. The applicable principles concerning the costs of an intervener were not in dispute and may be relevantly summarised as follows:

1. an intervener has the rights, duties and liabilities of a party to a proceeding, but an intervener’s interests are in no way the same as those of other parties to a proceeding; see *Motor Trades Association of Australia Superannuation Fund Pty Ltd v Rickus* [2007] FCA 1878 [34] and *Johnston v Cameron* [2002] FCAFC 301 [18]–[19], citing *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 [53];
2. as a general rule an intervener neither pays nor receives costs: *Mandalinic v Stone (Liquidator) (No 2)* [2023] FCAFC 176 [4];
3. there is no ‘usual practice’ of ordering costs in an intervener’s favour when the outcome of a proceeding accords with submissions advanced by the intervener: see *Johnston* at [18]-[19]; this is in contrast to the position of a party to a proceeding, such as a plaintiff or a defendant;
4. an intervener cannot expect, as a matter of course, that an unsuccessful party to the proceeding in which the intervener has intruded should bear the extra burden of the intervener’s costs even if the intervention was well intentioned and proved to be of assistance to the court: *City of Burnside v Attorney-General of South Australia* (1994) 63 SASR 65, 67;
5. private litigants should not have to pay additional sums in legal fees for the general good of the administration of justice and in the elucidation of a statute of particular concern to an intervenor: *Tonto Home Loans Australia Pty Ltd v Tavares (No 2)* [2012] NSWCA 129 [7];
6. there are instances in which courts have made a costs order in favour of an intervener where the intervention was necessary to protect the interests of the intervener: *Mandalinic* at [4]-[5]; in *City of Burnside v Attorney-General of South Australia*, Debelle J observed at 67 that ‘generally speaking, a successful intervener will recover costs only if the intervention was necessary to protect his interest’;
7. there are instances in which courts have made an order for costs in favour of an intervener in circumstances in which the intervener had a ‘special interest’ {*Xat Ky v Australvic Property Management Pty Ltd (No 2)* [2007] FCA 1785 [22]} or a ‘legitimate interest’ {*Motor Trades* at [34]–[35] & [38]} or an ‘interest’ in the proceeding {*Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358 [235]} where those interests were different to a parties’ interests {*Motor Trades* at [38]}; and
8. an order for costs either in favour or against an intervener must also take into account the role the intervener assumed and the intervener’s participation in the proceeding: *Motor Trades* at [34].”

## **3.10 Appeals/Reviews**

### **[3.10.1 Appeals to higher courts](#_3.10.1_Appeals_to)**

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

In *O’Bryan v Lindholm* [2024] VSCA 130, in dismissing the applicant’s appeal as incompetent, the Court of Appeal (Kennedy, Walker & Macaulay JJA) said at [48]-[49]:

[48] “…[T]he short answer to the applicant’s submission is that there is no common law right to appeal. As stated by the High Court in *Dwyer v Calco Timbers Pty Ltd*:(2008) 234 CLR 124, 128 [2]; [2008] HCA 13:

The issues which arise illustrate the proposition, emphasised in a number of decisions of this Court, that an ‘appeal’ is not a procedure known to the common law, but, rather, always is a creature of statute.

[49] The footnote to this passage records that the authorities for this proposition are collected in *Fox v Percy* (2003) 214 CLR 118, 124 [20]; [2003] HCA 22. Those authorities are longstanding and span the years from 1864 through to 2000. Being *Attorney-General v Sillem* (1864) 10 HLC 704, 720–721 [11 ER 1200, 1207–1208]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523, 552–553; *CDJ v VAJ* (1998) 197 CLR 172, 196-197 [91]–[95], 230 [184]; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306, 322 [72]; 160 ALR 588, 609; *DJL v Central Authority* (2000) 201 CLR 226, 245–6 [40]; Allesch v Maunz (2000) 203 CLR 172, 179–180 [20]–[22], 187 [44].”

Section 17(2) of the *Supreme Court Act 1986* provides:

“Unless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge of the Court.”

In relation to the meaning of ‘determination’ in s.17(2), the Court of Appeal in *O’Bryan v Lindholm* explained at [94]-[97]:

[94] “Critically, then, as the High Court explained in *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674, 686 [34]-[35]; [2023] HCA 26 an appeal is not against reasons for judgment. Moreover, there is nothing in the text, or context of s 17, or its predecessor, which would suggest that an appeal right should extend to a right to separately challenge individual findings made in reasons given by a judge.

[95] We also agree with the respondent that an examination of potential consequences supports the construction that we have reached. Consistent with the concerns raised in *Lake v Lake* [1955] P 336; [1955] 2 All ER 538; it is unclear what consequences would flow if any one of the findings in the relevant paragraphs was to be ‘set aside’. The ability to attack individual findings would also considerably increase the volume of appeals (and potentially remittals) without clear justification. Such fragmentation undermines principles of finality and should not be adopted absent express and clear words.

[96] Having regard, then, to the text, context and purpose [of s.17(2)], together with the relevant authorities, we consider that a ‘determination’ connotes the finalisation of a matter or other operative decision that affects rights, duties or liabilities. It would not include the making of findings of fact prior to the making of an operative decision of that kind. It is otherwise unnecessary to explore the precise parameters of a ‘determination’. Whatever its precise scope, it does not extend to the findings made in the relevant paragraphs that the applicant seeks to challenge.

[97] The appeal in respect of which leave is sought is thus incompetent.”

As and from 04/12/2021 the right of *de novo* appeal against a final order made in child protection proceedings in the Family Division of the Children’s Court – formerly created by s.328 of the CYFA – has been removed, following the repeal of that section by s.3 of the rather misleadingly-named *Justice Legislation Amendment (Criminal Appeals) Act 2019*. The only avenues of “appeal” in relation to orders made by judges or magistrates in child protection proceedings are:

* appeals under s.329 CYFA or judicial reviews under Order 56 Supreme Court Rules where there is an alleged error of law; or
* IAO appeals pursuant to s.271 CYFA.

Purposes of the aforementioned *Justice Legislation Amendment (Criminal Appeals) Act 2019* include in s.1(c) amendments of both the CYFA and the *Criminal Procedure Act 2009*:

* to abolish de novo appeals against convictions recorded in summary proceedings and to provide instead for those appeals to be by way of rehearing; and
* to abolish de novo appeals against sentences imposed in summary proceedings and to provide instead for a different kind of appeal against those sentences.

However, the amendments referred to in s.1(c) are not yet in effect. Their default commencement date was originally extended from 03/07/2021 to 01/01/2023. Their default commencement date has been further extended to 05/07/2025 by s.9(1) of the *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022*.

Using the word "appeal" in a broad sense, there are–

* five different types of appeal to a higher court (see the table below) from a decision of the President or a magistrate of the Children’s Court; and
* three different paths (see the diagram below).

In *JV v Children’s Court of Victoria & Anor* [2023] VSC 656 Forbes J discussed an aspect of the relationship between these types of “appeal”. The accused JV had been found guilty – after a 5-day trial before a magistrate – of one charge of rape and one each of production, possession and distribution of child abuse material. The magistrate had provided only oral reasons and had not delivered anticipated written reasons. JV sought judicial review under Order 56 of the *Supreme Court (Civil Procedure) Rules 2015* (Vic) on the sole ground that the Magistrate failed to give adequate reasons for his decision. Her Honour found that the magistrate’s reasons were inadequate and made orders quashing the Magistrate’s orders and remitting the matter back to the Children’s Court to be heard by a different magistrate. In so doing, for reasons detailed at [81]-[102] her Honour:

* rejected the second respondent’s submission that as a matter of discretion relief should be refused because the applicant had two alternative remedies: (a) an appeal to the Supreme Court on a question of law under s.430P(1) of the CYFA; and (b) a rehearing appeal to the County Court under s.424 of the CYFA; and
* discussed the cases of *Kuek v Victoria Legal Aid* (2001) 3 VR 289; *Perkins v Victorian Bar* [2007] VSCA 107; *Garde-Wilson v Legal Services Board* (2008) 19 VR 398.

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1. **Qn of law**
2. **IAO appeal**
3. **O.56**
4. ***Rehearing***

***(Criminal Div)***

1. ***Rehearing (IVO)***

**HIGH COURT OF AUSTRALIA**

**CHILDREN'S COURT**

**[President]**

**CHILDREN'S COURT**

**[Magistrate]**

HIERARCHY OF APPEALS FROM THE CHILDREN'S COURT

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**COUNTY COURT**

**COURT OF APPEAL**

**SUPREME COURT**

1. **Question of law**
2. **IAO appeal**
3. **O.56**
4. ***Rehearing***

***(Criminal Division)***

***5. Rehearing (IVO)***

***5.IVO***

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| --- | --- | --- |
| **APPEAL TYPE** | | **NOTES** |
| 1 | Appeal on a question of law  [appeal *stricto sensu*] | A right of appeal to the Supreme Court on a question of law from a final order of the CCV (other than in a committal proceeding) is granted and regulated by s.329 (Family Division) and s.430P (Criminal Division) of the CYFA. This is an appeal “in the strict sense”. It is not a re-hearing. The appellant must show that the trial judge/magistrate has made an error of law, some examples of which are detailed below. |
| 2 | IAO appeal | A right of appeal to the Supreme Court pursuant to s.271 of the CYFA on a decision to make or refuse to make an interim accommodation order in the Family Division. |
| 3 | Order 56  judicial review | Order 56.01(1) of Supreme Court Rules provides that the jurisdiction of the Supreme Court to grant any relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto shall be exercised only by way of judgment or order (including interlocutory order) and in a proceeding commenced in accordance with these Rules. |
| 4 | Rehearing Criminal Division | * A right of appeal by certain persons against certain orders of the Criminal Division of the CCV is granted and regulated by ss.424-430O of the CYFA. * An appeal from a decision of the President is heard by a single judge in the Trial Division of the Supreme Court. An appeal from a decision of a Magistrate is heard in the County Court. * The appellant need show no error by the trial judge/magistrate. * The appeal proceeds by way of a rehearing, not by a determination of whether the orders made by the Children's Court should or should not have been made [see ss.426(1) & 429(1)] |
| 5 | Intervention order appeal | A detailed discussion of ss.114-121 of the FVPA and ss.91-98 of the PSIA relating to appeals against an order of the Family Division of the CCV making or refusing to make an intervention order is contained in **Part 6.14** of these Research Materials. |

For an analysis of the nature of appeals by way of rehearing and a discussion of the procedure to be followed on such appeals, see *Neill v County Court of Victoria & Anor.* [2003] VSC 328 at [12]-[14] per Redlich J; *H v R & Ors* [2008] VSC 369 at [9]-[10] per Forrest J citing *Humphries v Poljak* (1992) 2 VR 129, 139 per Crockett & Southwell JJ.

Examples of appealable/reviewable errors of law are-

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

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

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

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

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

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

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

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

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

### **[3.10.2 Reviews of judicial registrars’ determinations](#_3.10.1_Appeals_to)**

Rule 3.02 of the *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* enables a party to a proceeding or matter in the Children’s Court determined by a judicial registrar to apply to the Children’s Court constituted by a magistrate or the President for a review – and optionally for a stay – of that determination. Under rule 3.03 the review Court:

1. must determine an application for review by way of a hearing *de novo*; and
2. must have regard to the interests of justice and, if applicable, the principles set out in Part 1.2 CYFA.

## **3.11 Case stated**

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

(1) If a question of law arises in a proceeding, the Court, of its own motion or on the application of any party, may, with the consent of the President, reserve the question in the form of a special case stated for the opinion of the Supreme Court.

(2) If a question of law has been reserved for the opinion of the Supreme Court, the Children’s Court cannot-

(a) finally determine the matter until the opinion of the Supreme Court has been given; or

(b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question of law.

## **3.12 The Children’s Court’s information-sharing role**

The Child Information Sharing Scheme (CISS) allows authorised organisations, known as Information Sharing Entities (ISEs), to share information to support child wellbeing or safety without the need to seek consent. The CISS explicitly recognises that a child’s safety takes precedence over any individual’s privacy. It ensures that professionals working with children can gain a more complete view of the children they work with, making it easier to identify wellbeing or safety needs earlier, and to act on them sooner.

The CISS is established under Part 6A of the *Child Wellbeing and Safety Act 2005* [‘CWSA’] which contains the following 6 Divisions:

|  |  |  |
| --- | --- | --- |
| **DIVISION** | **SECTIONS** | **SUBJECT MATTER** |
| **1** | **41P-41U** | Definitions & meanings, application to courts and tribunals & principles |
| **2** | **41V-41Z** | **INFORMATION SHARING**  Voluntary disclosure, request for information, further disclosure of information & collection and use of confidential information |
| **3** | **41ZA-41ZC** | **GUIDELINES, PROTECTED DISCLOSURES AND RECORDING REQUIREMENTS** |
| **4** | **41ZD-41ZJ** | **RELATIONSHIP OF PART 6A WITH OTHER ACTS** |
| **5** | **41ZK-41ZM** | **OFFENCES** |
| **6** | **41ZN-41ZO** | **REVIEW OF OPERATION OF PART 6A** |

**The CISS operates in parallel with the Family Violence Information Sharing Scheme (FVISS) which is established under Parts 5A & 5B (ss.144A to 144SA & 144SB to 144SG) of the *Family Violence Protection Act 2008* (FVPA). Where an ISE is prescribed as an ISE under the CISS and also the FVISS, the ISE may collect, use or disclose confidential information either under and in accordance with Part 5A of the FVPA or Part 6A of the CWSA: see s.41ZD of the CWSA. For further details of the FVISS see Part 6FV.15 of these Research Materials.**

Secrecy and confidentiality provisions in other laws continue to apply unless they have been expressly overridden for the purposes of the CISS (see Division 4, Part 6A CWSA). This mirrors the approach taken in the FVISS. For example, reports prepared by the Children’s Court Clinic remain subject to the relevant confidentiality provisions in the CYFA, FVPA and PSIO Act.

The CISS applies to all Victorian children and young people up to the age of 18 years. The Children’s Court (CCV) and the Magistrates’ Court (MCV) – together with a number of other organisations – are prescribed as ISEs under the *Child Wellbeing and Safety (Information Sharing) Amendment Regulations 2021*. DFFH is also a prescribed ISE under both the CISS and the FVISS.

However, it is important to note that the operation of Part 6A CWSA is narrower in relation to, or for the purposes of, the judicial or quasi-judicial functions of courts and tribunals than it is for government/statutory agencies prescribed as ISEs generally: see **s.41T** CWSA which provides:

“If any of the following persons or bodies are prescribed to be information sharing entities or restricted information sharing entities, nothing in this Part applies to the collection, use or disclosure of confidential information by those persons or bodies in relation to, or for the purposes of, their judicial or quasi‑judicial functions—

(a) a court or tribunal;

(b) the holder of a judicial or quasi-judicial office or other office pertaining to a court or tribunal in their capacity as the holder of that office;

(c) a registry or other office of a court or tribunal;

(d) the staff of such a registry or other office in their capacity as members of that staff.”

Under the CISS and the FVISS the CCV and the MCV each have the authority to disclose and request confidential information – other than ‘excluded information’ – about any person with other ISEs for the purpose of promoting the wellbeing or safety of a child or group of children. However, given the limitations provided by s.41T on information sharing in relation to the courts’ judicial/quasi-judicial functions, the main role of the MCV & CCV Central Information Sharing Team is responding to requests from other ISEs (e.g. for copies of IVOs etc).

It should also be noted that the concept of ‘excluded information’ is broader for both the CCV and the MCV than it is for ISEs generally: see **s.41Q** CWSA. The CISS information sharing thresholds set out in Part 6A of the CWSA are as follows:

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| --- | --- | --- |
| ➊ | **s.41W(1) PROMOTING CHILD WELLBEING OR SAFETY** | An ISE can request or disclose information about any person for the purpose of promoting the wellbeing or safety of a child or group of children. |
| ➋ | **s.41W(3) SHARING TO ASSIST ANOTHER ISE** | The disclosing ISE must reasonably believe that sharing the information may assist the receiving ISE to carry out one or more of the following activities:   1. making a decision, an assessment or a plan relating to a child or group of children; 2. initiating or conducting an investigation relating to a child or group of children; 3. providing a service relating to a child or group of children; 4. managing any risk to a child or group of children. |
| **Courts cannot be compelled to provide information under the CISS: see s.41W(5) CWSA.** |
| ➌ | **s.41Q EXCLUDED INFORMATION** | The information being disclosed or requested is not known to be ‘excluded information’ under Part 6A of the CWSA*.* |
| **s.41Q** provides that confidential information is ‘**excluded information’** if-   1. the collection, use or disclosure of that information could be reasonably expected to- 2. endanger a person’s life or result in physical injury; or 3. prejudice the investigation of a breach or possible breach of the law, or prejudice the enforcement or proper administration of the law, in a particular instance; or 4. prejudice a coronial inquest or inquiry; or 5. prejudice the fair trial of a person or the impartial adjudication of a particular case; or 6. disclose the contents of a document, or a communication, that is of such a nature that the contents of the document, or the communication, would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege; or 7. disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or 8. contravene a court order or a provision made by or under this Act or any other Act that— 9. prohibits or restricts, or authorises a court or tribunal to prohibit or restrict, the publication or other disclosure of information for or in connection with any proceeding; or 10. requires or authorises a court or tribunal to close any proceeding to the public; or 11. be contrary to the public interest; or 12. the information is prescribed to be excluded information for the purposes of Part 6A. | |

If the thresholds of the CISS (as set out in the table above) are met, an ISE-

* can share proactively with other ISEs;
* can request information from another ISE;
* must respond to requests for information from another ISE and provide relevant information; however, ss.41T & 41W(5) CWSA provide that the mandatory requirement to respond does not apply to the CCV and MCV.

## **3.13 Interstate execution of warrants issued by Australian state courts**

Division 1 of Part 5 [ss.81-90] of the *Service and Execution of Process Act 1992* (Cth) sets out a procedure by which a warrant issued by an Australian State Court may be executed in another Australian State. Sections 82(2) & 82(3) provide that a person the subject of an Australian State Court warrant (other than a person who is in prison) may be apprehended by-

* an officer of the police force of the State in which the person is found; or
* the Sheriff of that State or any of the Sheriff’s officers; or
* a member or special member of the Australian Federal Police.

Section 83 provides that as soon as practicable after being apprehended the person must be taken before a magistrate of the State in which the person was apprehended. The warrant or a copy thereof must be produced to the magistrate if it is available. If the warrant or copy is not produced, the magistrate may-

* order that the person be released; or
* adjourn the proceeding for such reasonable time as the magistrate specifies and remand the person on bail or in such custody as the magistrate specifies; if the warrant or a copy is not produced when the proceeding resumes a further adjournment may be granted if reasonable cause is shown; the total time of any such adjournment(s) must not exceed 5 days.

For the purposes of a proceeding under s.83, the magistrate is not bound by the rules of evidence and – in the event of an adjournment – it is not necessary that a magistrate before whom the proceeding was previously conducted continue to conduct the proceeding [s.83(14)]. The law of the state in which the person is apprehended applies with respect to the granting of bail [s.88].

If the warrant or a copy is not produced when the proceeding resumes after the further adjournment, the magistrate must order that the person be released [s.83(7)].

If a warrant or copy is produced, the magistrate must order-

* [s.83(10)] that the person be released if the magistrate is satisfied that the warrant is invalid; or
* [ss.83(8) & 83(9)] that subject to any other specified conditions-

1. the person be remanded on bail on condition that the person appear at such time and place in the place of issue of the warrant as the magistrate specifies; or
2. that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant.

Under ss.83(11) & 83(12) the magistrate may suspend an order made under s.83(8)(b) for a specified period and remand the person on bail or in such custody as the magistrate specifies until the end of that period.

Although these provisions seem primarily to relate to warrants to arrest issued in criminal proceedings, the writer considers that they are also relevant to the execution of child protection warrants issued under the CYFA or an equivalent interstate law, noting for instance that s.83(8)(b) does not necessarily require a child apprehended under an interstate warrant to be taken “in custody” to the issuing state.

Section 86 empowers an apprehended person or a person to whom an interstate warrant is directed to apply to the Supreme Court of the executing State for a review – by rehearing – of the order. For an example of such a review see [*Re Taleb* [2021] VSC 427](https://urldefense.proofpoint.com/v2/url?u=https-3A__jade.io_viewArticle.html-3Faid-3D824417-26pid-3D60654385-26h-3D1107164396&d=DwMCAg&c=JnBkUqWXzx2bz-3a05d47Q&r=GtQXq1oqGhAiTLjCBSq6Gkyvjjd-yppTKu0RR1JCFBQ&m=RS0Rw1AQ2WqMvPZbQkJKQfNT1siCTCG8zjgRqG21POs&s=nPRCBpmncTbsgt-BhU7JXXnSjs0APifo0g7RB2Uhib8&e=).

