Chapter 3
Current Law and Practice in Victoria

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INTRODUCTION

3.1 The *Children, Youth and Families Act 2005* (Vic) governs child protection proceedings in Victoria.[1] The Secretary[2] of the Department of Human Services ('the Department' or 'DHS') may bring a protection application in the Family Division of the Children's Court if he or she considers a child to be 'in need of protection'.[3] The Court may make a protection order if it finds that at least one of six separate grounds[4] for determining a child is in need of protection exists.[5]

3.2 This chapter outlines the key institutions and participants in the child protection legal system, including the status and role of children in the process, the principles that key decision makers must apply, and the role of lawyers. This chapter also describes how a case progresses through the Court. Most cases are resolved by agreement, with only three per cent of applications resulting in a final defended hearing. Finally, this chapter considers the relationship between the *Charter of Human Rights and Responsibilities 2006* (Vic) (the Charter)[6] and the child protection legislative scheme.

INSTITUTIONS AND PARTICIPANTS INVOLVED IN CHILD PROTECTION PROCEEDINGS

THE CHILDREN'S COURT OF VICTORIA

3.3 The *Children, Youth and Families Act 2005* (Vic) (the CYF Act 2005) provides for the continuing operation of the Children's Court of Victoria.[7] As discussed in Chapter 2, the Court was originally established under enabling legislation in 1906.[8] The Court comprises a President (who is a judge of the County Court), magistrates, and registrars.[9]

3.4 The Court has four Divisions:

- Family Division
- Criminal Division
- Koori Court (Criminal Division)
- Neighbourhood Justice Division.

3.5 The Family Division deals with proceedings for the protection of children.[10] Under the *Family Violence Prevention Act 2008* (Vic) (FVP Act) and *Stalking Intervention Orders Act 2008* (Vic) (SIO Act), the Family Division has powers to make, vary, revoke or extend intervention orders if either the affected family member, protected person or respondent is under the age of 18 at the time the order was made.[11]

3.6 In practice, most people refer to the Children's Court as having two Divisions—the Family Division and the Criminal Division. This is because the Koori Court (Criminal Division) and the Neighbourhood Justice Division exercise certain powers from either or both the Family Division and Criminal Division.[12] In addition, the Melbourne Children's Court is physically divided into two areas—albeit in the one building—that separate Family Division proceedings from criminal law matters.

Definition of child

3.7 The definition of a 'child' varies under the Act depending on the power the Court is exercising. In the Family Division, a child, for the purposes of initiating a protection application, is a person under the age of 17.[13] An existing protection order may last until a child is 18 years old.[14] When exercising powers under the FVP Act and the SIO Act, a 'child' is a person under the age of 18 at the time the application is made.[15]

3.8 When exercising powers in criminal matters in the Criminal Division, Koori Court (Criminal Division) or Neighbourhood Justice Division, a person is a child if they are between the ages of 10 and 18, but under 19 years old when proceedings commence.[16]

3.9 The Criminal Division has jurisdiction to hear and determine all charges against children summarily (without a jury) with the exception of murder, attempted murder, manslaughter, child homicide, defensive homicide, arson causing death and culpable driving causing death.[17] It also has power to conduct committal hearings for indictable (serious) offences, bail applications and applications for variation or breach of sentencing for children.[18]

3.10 The Koori Court (Criminal Division) has jurisdiction to deal with Aboriginal children who consent to the jurisdiction of the Koori Court and either intend to plead guilty or have been found guilty of an offence. A sentencing conversation takes place between the judge or magistrate and two Aboriginal Elders or Respected Persons before the judicial officer decides on the appropriate sentence. The Koori Court usually sits at the Melbourne Children's Court once a fortnight. It also sits in some regional centres.

3.11 The Neighbourhood Justice Division deals with some criminal law proceedings for children as well as intervention order hearings for children or their family members who have a connection to a particular location.[19] Currently, if a suspected juvenile offender is charged in the City of Yarra, the Neighbourhood Justice Division will sit at the Neighbourhood Justice Centre (NJC) in Collingwood. The Neighbourhood Justice Division does not have jurisdiction to hear protection applications.[20]

1 Also relevant are the *Children, Youth and Families Regulations 2007* (Vic) and the *Children, Youth and Families (Children's Court Family Division) Rules 2007* (Vic).

2 The Secretary's powers may be delegated: *Children, Youth and Families Act 2005* (Vic) s 17.

3 In 2008-09, protection applications comprised over 99 per cent of the five different primary applications relating to the protection of children: percentage derived from statistics in Children's Court of Victoria, *Annual Report 2008–2009* (2009) (*Annual Report*). The other primary applications are irreconcilable difference applications, temporary assessment order applications, therapeutic treatment applications and permanent care order applications.

4 *Children, Youth and Families Act 2005* (Vic) s 162.

5 *Children, Youth and Families Act 2005* (Vic) s 274. Protection orders range from those involving minimum state intervention in the life of a family (such as an undertaking) to those that give the Department the decision-making power that a parent would ordinarily have in relation to a child (for instance a guardianship to Secretary order). The various orders are described in this chapter.

6 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

7 *Children, Youth and Families Act 2005* (Vic) s 504(1).

8 *Children's Court Act 1906 (Vic).*

9 *Children, Youth and Families Act 2005* (Vic) s 504(2).

10 *Children, Youth and Families Act 2005* (Vic) s 515(1).

11 *Children, Youth and Families Act 2005* (Vic) s 515(2).

12 The Koori Court (Criminal Division) deals with criminal law proceedings in prescribed circumstances for Aboriginal children: *Children, Youth and Families Act 2005* (Vic) ss 518–20. The Neighbourhood Justice Division deals with criminal law proceedings and intervention orders for children or parties with a connection to a particular location (currently the City of Yarra): *Children, Youth and Families Act 2005* (Vic) ss 520A–520E.

13 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'child'.

14 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'child'.

15 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'child'; *Family Violence Protection Act 2008* (Vic) ss 4,146–7; *Stalking Intervention Orders Act 2008* (Vic) s 6. Under the latter two pieces of legislation a child is a person under 18 years.

16 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'child'.

17 *Children, Youth and Families Act 2005* (Vic) s 516(1).

18 *Children, Youth and Families Act 2005* (Vic) s 516(2)–(3); submission 46 (Children's Court of Victoria) 16.

19 *Children, Youth and Families Act 2005* (Vic) ss 520A–520E. Children's Court Criminal Division matters sit one day per month. The number of cases initiated has steadily increased since the Neighbourhood Justice Centre (NJC) was established. Statistics gathered indicate that 100 matters were initiated from 1 May 2009 to 30 April 2010. These matters accounted for 2.3 per cent of all matters at the NJC during this period: Neighbourhood Justice Centre (Victoria), *Neighbourhood Justice Centre Statistics 2006–2010*, received 26 May 2010; Neighbourhood Justice Centre (Victoria), *Number of Matters Initiated at the Neighbourhood Justice Centre from 1/05/2009 to 30/04/2010 and Application Type*, received 26 May 2010.

20 Section 515 of the *Children, Youth and Families Act 2005* (Vic) confers jurisdiction relating to protection applications on the Family Division only.

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The Children's Court metropolitan and regional operations

3.12 The judicial members of the Melbourne Children's Court currently comprise the President (a County Court judge) and 11 magistrates,[21] two of whom are acting magistrates. Magistrates in regional areas also sit as Children's Court magistrates in their regions.

3.13 There are two metropolitan venues for the Children's Court: Melbourne and Moorabbin. The Children's Court sits at Melbourne every day for criminal proceedings and Family Division cases. Since June 2009, the Children's Court has been sitting at the Moorabbin Justice Centre to hear protection applications from the Department's southern region.[22]

3.14 The Children's Court also sits in 38 different courts in the following regions: the Grampians, Loddon Mallee, Barwon South West, Gippsland and Hume. If a regional magistrate needs assistance with a Family Division hearing of several days' duration, a Melbourne Children's Court magistrate will travel to the region for the hearing.[23]

3.15 The Children's Court of Victoria is a busy state court: in 2008–09 the Family Division heard over 10 000 applications relating to child protection matters, and over 13 000 matters were initiated in the Criminal Division.[24]

THE DEPARTMENT OF HUMAN SERVICES—CHILD PROTECTION SERVICE

3.16 The Child Protection Service operates within the Children, Youth and Families Division of the Department of Human Services. It is responsible for responding to reports about children who may be the subject of abuse. The Secretary holds the most senior executive position within the Department and has numerous powers and functions under the CYF Act 2005. Most of these powers and functions have been delegated to employees or classes of employees under section 17 of the Act.[25] Throughout this report, when referring to powers and responsibilities of the Secretary and his or her delegates under the Act, we use the terms 'Secretary', 'Child Protection', 'the Department', 'the Department of Human Services' and 'DHS'.

3.17 The Child Protection Service is managed through eight separate regions (three metropolitan regions and five rural regions)[26] and one central office. Each region is responsible for delivering a full range of child protection services, from receiving reports and referrals through to applying for and managing court orders.

3.18 The Child Protection Service also includes the statewide After Hours Child Protection Emergency Service, which responds to reports of child abuse and neglect out of business hours, and the Streetwork Outreach Service, which provides an outreach service to young people engaged in high risk activities in St Kilda and Melbourne's central business district.

3.19 A court officer role (classified as a child protection worker at team leader level) has been introduced in some regions to assist child protection practitioners to prepare for court and to attend court on behalf of the child protection practitioner.[27] There are currently six court officer roles throughout the state, based mainly in metropolitan areas.[28]

The role of protective intervener

3.20 People classed as 'protective interveners' may bring a protection application to court and, in certain circumstances, have the power to apprehend a child without parental consent.[29] Protective interveners are the Secretary and all members of the police force.[30] In practice, police do not bring applications in the Children's Court as protective interveners. The Secretary has delegated the power to be a protective intervener, with the exception of bringing appeals,[31] to employees holding a range of positions in the Department including child protection staff at various levels.[32] A description of Child Protection roles, classifications and teams is set out in Appendix G.

CHILDREN, PARENTS AND OTHER PARTIES WITH A DIRECT INTEREST IN PROCEEDINGS

3.21 Children who are the subject of protection applications are named in those applications. From the age of 12 years, they receive their own copies of court applications, as do their parents.[33] Children do not have the legal status of being a party to a protection application. Children considered mature enough to give instructions to a lawyer are legally represented. Guidelines suggest that children from about the age of seven years generally have sufficient capacity to instruct a lawyer.[34]

3.22 Approximately 45 per cent of children who are the subject of protection applications are of or above seven years old.[35] For the 55 per cent who are less than seven years old, separate legal representation is provided only in exceptional circumstances.[36]

3.23 Parents are provided with rights to legal representation under the Act and are usually eligible for grants of legal aid in protection proceedings.[37] In addition, people who are considered to have a 'direct interest in the proceeding' (for example, proposed carers and foster carers), have specified rights to appear in court.[38] The Attorney-General also has the power to appear in protection applications.[39]

21 Two of the magistrates sit at Moorabbin. It is the Commission's understanding that due to recent retirement, there are currently only 11 sitting judicial officers. The Commission also understands that the Court has been given an allocation in the recent 2010 budget for one additional magistrate. This would bring the total number of judicial officers allocated to the Children's Court to 13.

22 Provided these cases do not require the additional security only available at the Melbourne Children's Court.

23 Submission 46 (Children's Court of Victoria) 16.

24 Boston Consulting Group, *Child Protection Proceedings Taskforce: Children's Court Data* (2010) 3; Children's Court of Victoria, *Annual Report*, above n 3, 14: Criminal Division statistics include the Divisions with criminal law jurisdiction; Michael King et al, *Non-Adversarial Justice* (2009) 257.

25 By instrument signed by the Secretary on 29 August 2009.

26 See Appendix F for list of Child Protection regions and offices.

27 It has been suggested that this court officer role followed from a recommendation by the Boston Consulting Group, in their 2007 review of the Children's Court, to pilot a regional court liaison officer (court officer) model: Office of the Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) 54–5.

28 This includes two officers in the NW Metro region, two in Eastern Metro, one in Southern Metro and one in the Gippsland region.

29 *Children, Youth and Families Act 2005* (Vic) s 240.

30 *Children, Youth and Families Act 2005* (Vic) s 181.

31 Instrument of Delegation, signed 26 August 2009, 117. Copy provided by email from the Department of Human Services on 24 March 2010.

32 This includes level 2 child protection workers—the entry level for child protection practitioners who have case management responsibility. See Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Child Protection Workforce: Structure and Roles', Advice No 1043 (23 April 2007), from CD-ROM provided at 23 March 2010.

33 *Children, Youth and Families Act 2005* (Vic) ss 242(1)(a), 243(2)(c).

34 *Children, Youth and Families Act 2005* (Vic) s 524; Springvale Legal Service, *Lawyers Practice Manual Victoria* (2009) [6.2.3010].

35 Statistics provided by the Children's Court of Victoria on 9 March 2010. The Children's Court of Victoria has gathered statistics on the age of children on protection applications filed at Melbourne and Moorabbin Children's Courts. Of the 1674 primary applications filed in metropolitan Melbourne in 2008–09, 49 per cent of children were under the age of seven.

36 *Children, Youth and Families Act 2005* (Vic) s 524(4).

37 This is discussed in greater detail below.

38 *Children, Youth and Families Act 2005* (Vic) s 522(1)(c).

39 *Children, Youth and Families Act 2005* (Vic) s 215(2).

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VICTORIA LEGAL AID

3.24 Victoria Legal Aid (VLA) is an independent statutory authority established under the *Legal Aid Act 1978* (Vic). VLA provides funding for parents and children in Children's Court proceedings if they satisfy a means and merits test.[40] Funding is subject to limits set out in the *Victoria Legal Aid Grants Handbook*. Both lawyers employed directly by the Youth Legal Service of VLA and private lawyers who are on a VLA-approved panel represent people in Family Division cases.

CHILDREN'S COURT CLINIC

3.25 The Children's Court Clinic, located at the Melbourne Children's Court, is maintained by the Secretary to the Department of Justice pursuant to section 546 of the CYF Act 2005. The Children's Court Clinic 'may make clinical assessments of children; submit reports to courts and other bodies and provide clinical services to children and their families'.[41] The Director of the Clinic employs a limited number of clinicians and also engages a number of private sector clinicians on a sessional basis.

3.26 The Court may request Clinic reports (called 'additional reports') under section 560 of the CYF Act 2005. In 2008–09, the Court referred 712 child protection cases to the Clinic for assessment. The Children's Court states:

> *The most usual type of referral from the Family Division is for an assessment of child and family functioning, often including assessment of bonding and attachment. The Clinic also makes recommendations to the Court about what should happen in the child's best interests. Another common referral is to assist the Court in determining whether a child is mature enough to provide instructions to a legal representative.*[42]

3.27 A Clinic assessment is not usually ordered at an early stage of proceedings unless parties agree. A Clinic assessment *may* provide recommendations on disposition or outcomes that differ from those recommended by the Department.

3.28 In consultations, the Commission heard that the Court was often inclined to prefer Clinic recommendations to those made by Child Protection. As noted in Chapter 1, the Clinic's role and operations are the subject of a separate review by the Department of Justice.

ABORIGINAL AGENCIES

3.29 The Victorian Aboriginal Child Care Agency (VACCA) and the Mildura Aboriginal Corporation (MAC) are Aboriginal organisations that deliver child and family welfare services to Aboriginal communities within Victoria. A protocol between the DHS Child Protection Service and VACCA—together with an agreement between Child Protection and MAC[43]—established a culturally informed consultation process to respond to reports concerning Aboriginal children at risk of harm.

3.30 The protocol established the Aboriginal Child Specialist Advice and Support Service (ACSASS), which commenced operation in 2002 under the management of VACCA and MAC. ACSASS workers strive to:

- ensure an Aboriginal perspective in risk and safety assessments of Aboriginal children
- develop case planning and decision making for Aboriginal children
- improve engagement of Aboriginal families with support services
- increase the involvement of family and community members in supporting Aboriginal children.[44]

3.31 Section 18 of the CYF Act 2005 enables the Secretary to delegate some functions and powers in relation to Aboriginal children to the principal officer of Aboriginal agencies. To date, there has been no delegation by the Secretary. The Commission understands, however, that the Department and Aboriginal agencies are currently negotiating how Aboriginal agencies may have custody and guardianship responsibilities for Aboriginal children on protection orders.

VICTORIA POLICE

3.32 Victoria Police and Child Protection Service are sometimes jointly involved in particular cases. A protocol established in 1992 under the previous legislation still governs the relationship between the services.[45] The protocol acknowledges that the *Children and Young Persons Act 1989* (Vic) (CYP Act 1989), like the current CYF Act 2005, authorises the police to issue a protection application and take a child into safe custody. It has been agreed that

> *Police will only do so when there is an emergency response required or the child is at imminent risk of significant harm. A protection application will be initiated by Child Protection while arrangements for the child or young person to be taken into safe custody will be organised with the Police.*[46]

3.33 Child Protection must report all new allegations of sexual abuse, physical abuse or serious neglect, in new and existing cases, to Victoria Police.[47] In these cases, Child Protection may investigate child abuse reports jointly with the Sexual Offences and Child Abuse Unit (SOCAU) of Victoria Police. More recently, two multi-disciplinary SOCIT (Sexual Offences and Child Abuse Investigation Team) services have been established in Frankston and Mildura. SOCIT co-locates child protection practitioners, police officers and sexual assault and abuse counsellors in a service to better coordinate professional responses to investigations about serious abuse.

3.34 Joint visits between Child Protection and police may also occur where there are concerns for the safety of a child protection practitioner or a warrant needs to be executed. In 2008–09, a warrant was obtained in nine per cent of the cases in which Child Protection took a child into safe custody.

THE ROLE OF CHILD PROTECTION IN BRINGING PROTECTION APPLICATIONS TO COURT

REFERRALS AND REPORTS RELATING TO CONCERNS ABOUT A CHILD

3.35 Professionals, including mandatory reporters, and members of the public report concerns about children by directly reporting to Child Protection[48] or by a referral to Child FIRST[49]—the intake service for community-based child and family services.

Reports (including mandatory reporters)

3.36 Any person who has significant concern about the wellbeing of a child may make a report directly to Child Protection.[50] A report may also be made before a child is born.[51] Certain professionals, including doctors, nurses, principals, teachers and police officers are classified as 'mandatory reporters'.[52] The legislation sets out people in other occupations—including psychologists and post-secondary qualified workers in childcare, youth work, social work and welfare work—who will be classed as mandatory reporters from a particular date or dates that have not yet been set.[53]

40 See Appendix M for details about Victoria Legal Aid grants for representation in the Family Division of the Children's Court.

41 *Children, Youth and Families Act 2005* (Vic) s 546(2).

42 Submission 46 (Children's Court of Victoria) 21.

43 Department of Human Services (Victoria), *Protocol between the Department of Human Services Child Protection Service and the Victoria Aboriginal Child Care Agency* (2002); Department of Human Services (Victoria), *Protocol between the Department of Human Services and Victoria Police* (1992) 25. The Commission understands that this protocol came into effect on 25 August 1998 and is currently in the process of being updated by DHS and Victoria Police.

44 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Responding to Aboriginal Children', Advice No 1059 (21 August 2007) from CD-ROM provided at 23 March 2010, 235.

45 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Joint Visits with the Police', Advice No 1184 (23 April 2007) from CD-ROM provided at 23 March 2010.

46 Department of Human Services (Victoria), *Protocol between the Department of Human Services and Victoria Police*, above n 43, 25.

47 Department of Human Services (Victoria), 'Joint Visits with the Police', above n 45.

48 *Children, Youth and Families Act 2005* (Vic) s 28.

49 *Children, Youth and Families Act 2005* (Vic) ss 31–2.

50 *Children, Youth and Families Act 2005* (Vic) s 28.

51 *Children, Youth and Families Act 2005* (Vic) s 29.

52 *Children, Youth and Families Act 2005* (Vic) s 182.

53 *Children, Youth and Families Act 2005* (Vic) s 182(1)(e)–(l), (2)–(3).

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3.37 Mandatory reporters must report concerns that a child is in need of protection from physical or sexual abuse[54] and may report concerns that a child is in need of protection on any other grounds, such as a concern about emotional abuse or neglect.[55] Reports made in good faith do not constitute unprofessional conduct or a breach of professional ethics by the person making the report.[56]

3.38 A report may be classified as a 'protective intervention report' if a child protection practitioner considers the child in need of protection.[57] This classification has implications for how the case progresses through the child protection system and is discussed below. Otherwise, the Secretary or his or her delegate may provide advice to the person who made the report, provide advice and assistance to the child, mother of an unborn child or family, or refer the matter to a community-based service.[58]

Referral to Child FIRST (Child and Family Information, Referral and Support Teams)

3.39 Child FIRST operates from 25 sites[59] across the Victorian regions as the intake service for referrals to community-based child and family services under section 31 of the CYF Act 2005. After receiving a referral from a person with concerns about the wellbeing and safety of a child, Child FIRST must report the matter to Child Protection if they consider the child in need of protection. Alternatively, they may provide advice to the person who made the report, provide advice and assistance to the child, mother of unborn child or family, or refer the matter to a community-based service.[60] In addition, if the referral relates to concerns for an unborn child, Child FIRST or the community-based service may seek advice from Child Protection.[61]

PRINCIPLES APPLIED BY CHILD PROTECTION

3.40 Child protection practitioners and community service providers must act compatibly with the Charter in deciding upon appropriate action or when making a decision about a child. The relevance of the Charter to child protection work is discussed below.

3.41 The Secretary and his or her delegates must consider a number of best interests and decision-making principles when making any decision or taking any action in relation to children.[62] There are additional decision-making principles for Aboriginal children.[63] These principles also apply to community organisations that provide services to children under the CYF Act 2005.[64] The principles operate from the time of the first report until case closure. If a matter goes to court, child protection workers will be required to demonstrate that they have considered these principles in actions and decisions taken in relation to a child. The principles are summarised below and are set out in full in Appendix I.

Best interests principles

3.42 Section 10(1) of the CYF Act 2005 requires the Secretary, community service providers and the Court to consider the child's best interests as the paramount consideration when making any decision or taking any action.[65] In deciding what is in a child's best interests, it is necessary to consider the need:

- to protect the child from harm
- to protect the child's rights
- to promote the child's development (taking into account his or her age and stage of development).[66]

3.43 Practitioners also need to consider, where relevant, an additional 17 matters listed in section 10(3) of the CYF Act 2005, as well as 'any other relevant consideration'.[67] Eight of the considerations under section 10(3) relate to promoting and supporting the family, with intervention into the family relationship being limited to that necessary to secure the safety and wellbeing of the child.[68] Other matters include:

- protecting and promoting the Aboriginal culture of an Aboriginal child
- the child's views and wishes
- the effects of cumulative harm
- desirability of stable care
- the child's unique identity
- maintaining a connection to culture
- social, educational, health and housing support for the child
- desirability of uninterrupted education or employment for the child and the possible harmful effects of delay in taking action.[69]

3.44 The complete list of best interests principles in section 10 is set out in Appendix I.

Decision-making principles

3.45 Section 11 of the CYF Act 2005 requires the Secretary or a community service, but not the Court, to consider nine decision-making principles when making a decision or taking an action in relation to a child. These decision-making principles emphasise:

- supporting and assisting parents
- consulting out-of-home caregivers
- fairness and transparency
- collaboration and consensus where possible
- family participation
- understandable processes and meetings
- access to support and information (including provision of interpreters where necessary, provision of copies of case plans and notices of meetings and the opportunity to involve support persons)
- where relevant, the attendance at meetings by a person from the child's cultural community as chosen or agreed by the child or parents.

3.46 The complete list of decision-making principles in section 11 is set out in Appendix I.

Additional decision-making principles for Aboriginal children

3.47 Section 12 of the CYF Act 2005 requires the Secretary or a community service, but not the Court, to consider particular principles when making a decision about an Aboriginal child in recognition of the principle of Aboriginal self-management and self-determination.[70] There are three broad principles:

- Members of the child's Aboriginal community and other respected Aboriginal people should be given an opportunity, where relevant, to contribute their views.[71]

54 *Children, Youth and Families Act 2005* (Vic) s 184.

55 *Children, Youth and Families Act 2005* (Vic) s 183.

56 *Children, Youth and Families Act 2005* (Vic) s 189(a). Section 189 also provides other protections for people making reports in good faith.

57 *Children, Youth and Families Act 2005* (Vic) s 34. Note that a report on an unborn child under s 29 may not be classified as a 'protective intervention report'.

58 *Children, Youth and Families Act 2005* (Vic) s 30.

59 Department of Human Services (Victoria), *How to Make a Referral or Report* (2009) <www.cyf.vic.gov.au/family-services/how-to-make-a-referral-or-report/first-children> at 19 January 2010.

60 *Children, Youth and Families Act 2005* (Vic) s 33.

61 *Children, Youth and Families Act 2005* (Vic) s 33(3)(a).

62 *Children, Youth and Families Act 2005* (Vic) ss 8(2), 10–11.

63 *Children, Youth and Families Act 2005* (Vic) ss 12–14.

64 *Children, Youth and Families Act 2005* (Vic) s 8(3).

65 Read with s 8 of the *Children, Youth and Families Act 2005* (Vic).

66 *Children, Youth and Families Act 2005* (Vic) s 10(2).

67 *Children, Youth and Families Act 2005* (Vic) s 10(3)(r). For the full list of best interests principles, see Appendix I.

68 *Children, Youth and Families Act 2005* (Vic) s 10(3)(a)–(b), (g)–(k), (q).

69 *Children, Youth and Families Act 2005* (Vic) s 10(3)(c)–(f), (l)–(p).

70 *Children, Youth and Families Act 2005* (Vic) s 12(1).

71 *Children, Youth and Families Act 2005* (Vic) s 12(1)(a).

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- For a decision in relation to placement of an Aboriginal child and for all significant decisions, a meeting convened by an approved Aboriginal convenor should be held and, where possible, attended by the child, the child's parents and extended family, and other appropriate members of the Aboriginal community as determined by the child's parents.[72] This process is known as Aboriginal Family Decision Making (AFDM).
- For out-of-home care decisions, except voluntary child care agreements, an Aboriginal agency[73] must be consulted and the Aboriginal Child Placement Principle must be applied.[74]

Aboriginal Child Placement Principle

3.48 The Aboriginal Child Placement Principle in section 13 of the CYF Act 2005 is not limited to the Secretary and community services, but has broad application under the Act. If it is in an Aboriginal child's best interests[75] to be placed in out-of-home care, the following must be considered:

- the advice of the relevant Aboriginal agency, except if the decision concerns a voluntary child care agreement[76]
- the criteria set out in section 13(2) and the principles in section 14.

3.49 Both the section 13(2) criteria and the section 14 principles emphasise the need to ensure that the child maintains the closest possible connection to his or her Aboriginal family, community and culture if placement within the child's Aboriginal extended family is not possible.

3.50 Sections 12, 13 and 14 of the Act are set out in Appendix I.

PHASES OF CHILD PROTECTION PROCESSES

3.51 There are five phases of Child Protection processes: intake, investigation, protective intervention, protection order and case closure. The first three phases are described in this chapter to illustrate the circumstances in which some cases progress to court.

Phase one: Intake—is the report a 'protective intervention report'?

3.52 All new Child Protection work, including fresh reports about previously reported children, begins with intake.[77] Intake involves gathering and clarifying information about the nature and seriousness of concerns. If the child is Aboriginal, intake responsibilities include consulting with the ACSASS.[78] Intake can include contacting agencies, services and professionals who may be involved with the family to assess information received.

3.53 Intake involves making an assessment about whether a report is a 'protective intervention report', where a child protection practitioner considers a child in need of protection.[79] For a report that does not meet this classification, the intake worker will provide advice or referral to Child FIRST or another relevant service, and close the file.

3.54 If a matter is assessed as a protective intervention report, the protective worker will decide whether the report is urgent or non-urgent. If a report contains clear information that a child is likely to be at risk of significant harm, the report will be classified as urgent. The case will then progress to the investigation and assessment phase to enable a visit within two days. If the report is not considered urgent, the case will progress to the next phase to enable a visit within 14 days.

Phase two: Investigation and assessment—is harm substantiated?

3.55 During this phase, the child protection worker will assess whether the child is in need of protection under section 162 of the CYF Act 2005, ensure the immediate safety of the child and siblings, and assess the level of any cumulative harm to the child by checking any previous reports. A protective intervener must investigate the case in a way that will be in the child's best interests.[80]

3.56 A child protection practitioner is required to attempt a visit with parents and children as early as possible in this phase.[81] This phase should be concluded within 28 days.

3.57 At this stage, the child protection worker decides whether harm to the child's safety, stability and development is substantiated, and what further intervention is required. If a matter is not substantiated, but there are still significant concerns for the child's wellbeing, information, advice and referral assistance may be provided. If there are no concerns and the matter is not substantiated, the case is closed.

3.58 If a matter is substantiated, the child protection worker may consider filing a protection application. Under the CYF Act 2005, a child protection practitioner exercises a broad discretion about whether to initiate a protection application. Section 240 states that if a protective intervener is satisfied on reasonable grounds that a child is in need of protection, he or she may initiate proceedings.[82]

3.59 The Child Protection Practice Manual provides guidance to child protection practitioners about the discretion to initiate proceedings. A protection worker is to bring a protection application before the Children's Court where:

- alleged harm to a child is substantiated
- a child is assessed as being '*at significant risk of harm* and is in need of protection'[83] (italics added).

3.60 Under section 162, a child can be considered 'in need of protection' as a result of suffering past significant harm, without this necessarily involving a risk of future harm.[84] The Child Protection Practice Manual requires the child protection practitioner to assess whether the child is at risk of future harm before bringing a protection application.[85]

3.61 In 2008–09, of the 6344 reports in which harm to the child's safety, stability and development was considered substantiated by Child Protection, 3048 protection applications were filed in court.[86]

Phase three: Protection intervention—best interests plan formulated and risk assessment

3.62 This phase involves working with families and other agencies where harm to a child has been substantiated in the investigation and assessment phases. It involves cases that have progressed to court with a protection application and those that have not. A child protection application will not have been made if future risk of harm to a child has not yet been assessed.[87]

Best interests plans

3.63 In cases where a protection application has not been made, the child protection practitioner seeks to work intensively with the family and assess the capacity of parents to protect the child in the future and meet his or her safety, stability and developmental needs. The practitioner seeks to engage the family in developing a best interests plan to address protective concerns. Plans are to be developed following principles of collaboration and participation set out in section 11 of the CYF Act 2005.

72 *Children, Youth and Families Act 2005* (Vic) s 12(1)(b).

73 An 'Aboriginal agency' is one declared by Order of the Governor in Council under s 6 of the *Children, Youth and Families Act 2005* (Vic). Aboriginal agencies include Victorian Aboriginal Child Care Agency (VACCA).

74 *Children, Youth and Families Act 2005* (Vic) s 12(1)(c), (2).

75 'Aboriginal person' is defined under s 3(1) of the *Children, Youth and Families Act 2005* (Vic) as a person who is descended from an Aborigine or Torres Strait Islander, and identifies as an Aborigine or Torres Strait Islander and is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community.

76 *Children, Youth and Families Act 2005* (Vic) s 13(1)(a), (3).

77 Reports are made pursuant to ss 183–4 of the *Children, Youth and Families Act 2005* (Vic). For intake processes, see Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition and Purpose of Intake Phase', Advice No 1119 (23 April 2007), from CD-ROM provided at 23 March 2010. See also Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition and Purpose of Investigation and Assessment Phase', Advice No 1171 (23 April 2007), from CD-ROM provided at 23 March 2010.

78 Department of Human Services (Victoria), 'Definition and Purpose of Intake Phase', above n 77.

79 *Children, Youth and Families Act 2005* (Vic) ss 3, 34, 187.

80 *Children, Youth and Families Act 2005* (Vic) s 205.

81 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Investigation: Planning and Preparation', Advice No 1182 (23 April 2007), from CD-ROM provided at 23 March 2010.

82 *Children, Youth and Families Act 2005* (Vic) s 240.

83 Department of Human Services (Victoria), 'Investigation: Planning and Preparation', above n 81.

84 *Children, Youth and Families Act 2005* (Vic) s 161(1)(c)–(f) and see discussion below under the heading 'Grounds for determining that a child is in need of protection'.

85 Department of Human Services (Victoria), 'Investigation: Planning and Preparation', above n 81.

86 Children's Court of Victoria, *Annual Report*, above n 3, 20.

87 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition and Purpose of Protective Intervention and Assessment Phase', Advice No 1224 (23 April 2007), from CD-ROM provided at 23 March 2010, 284.

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3.64 For Aboriginal children, the principles in section 12 of the CYF Act 2005 apply and ACSASS is to be consulted. Under section 12(1)(b) of the Act, significant decisions in relation to an Aboriginal child 'should involve a meeting convened by an Aboriginal convener'. The Child Protection Practice Manual suggests that an AFDM can take place at this stage of protective intervention.[88] The Commission heard that AFDM conferences did not take place for many Aboriginal children during this period of DHS's involvement.[89]

3.65 In some regions, family decision making or family group conferencing (FGC) for children other than Aboriginal children sometimes take place at an early stage.[90]

3.66 The best interests plan contains details of all significant planning decisions and actions. The plan should:

- outline evidence of harm or risk of harm to the child
- make Child Protection's ongoing review and assessment clear
- identify any additional assessments that may be required
- identify immediate goals to determine parental strengths and capacity
- indicate how Child Protection will support the family.[91]

The plan is completed in the client information system and must be endorsed by the unit manager. The child protection practitioner then monitors the best interests plan and works toward assigning a level of risk to the child.

Assigning a level of risk to the child

3.67 At the end of the protective intervention phase, the practitioner will assign a risk level of either 'no further risk of significant harm' or 'risk of significant harm—child in need of protection'. With a 'no further risk of significant harm' classification, the protection worker will make referrals as appropriate and close the case. With a 'risk of significant harm—child in need of protection' classification, a protection application must be issued.[92]

3.68 The maximum timeframe for protective intervention without a protection application is 90 days from initial receipt of the report, unless a unit manager approves an extension for a further 60 days. After 150 days, a unit manager must decide whether to close and refer the case to other services or issue a protection application. In 2008–09, in 38 per cent of protection applications initiated by the removal of the child (safe custody), Child Protection had been working with the family for 30 or more days.[93]

CHILD CARE AGREEMENTS

3.69 The CYF Act 2005 provides for child care agreements. Through these agreements, arrangements are made for placing children in out-of-home care without a court order.[94] These agreements are often referred to as 'voluntary placements' or 'voluntary agreements'. Child care agreements are either short-term or long-term written agreements between a parent and service provider—a community service organisation, disability service or Child Protection—to place a child in the care of a service provider or suitable person.

3.70 In 2009, 771 child care agreements were made.[95] However, Child Protection do not generally consider child care agreements appropriate during a protective investigation. The Child Protection Practice Manual states that voluntary placements are 'generally inappropriate where children require immediate removal from home … and do not offer sufficient protection where children are at significant risk from a parent's actions'.[96]

3.71 The Lawyers Practice Manual takes a very negative view of these voluntary agreements, advising lawyers that these

> *voluntary agreements can be extremely intrusive … [and are] often presented to parents in a way which suggests the parents have no alternative but to agree to the proposals. Very often the agreements are considerably more adverse for families than what the Children's Court would have ordered had the matters been the subject of court applications.*
>
> *If the Department of Human Services proposes that any family members be kept apart from other family members or proposes an expert assessment of any family members, then you should advise your clients not to agree. You should advise your clients to force the department to decide whether it wishes to apply to the Children's Court for orders.*[97]

PROTECTION (AND OTHER) APPLICATIONS IN THE CHILDREN'S COURT

PRIMARY APPLICATIONS

3.72 The Children's Court hears and determines five types of primary applications concerning the protection of children: protection applications, irreconcilable difference applications, permanent care applications, temporary assessment applications and therapeutic treatment order applications. In 2008–09, there were 3048 primary applications filed in the Children's Court.[98] For an outline of each type of primary application, see Appendix H.

Protection application

3.73 The most common primary application is the protection application. In these cases, a child protection worker may bring an application if the practitioner considers, on reasonable grounds, that a child is in need of protection.[99] Child protection practitioners initiate proceedings if they consider that a court order is required to protect a child. In 2008–09, there were 3034 protection applications initiated by the Child Protection Service, out of a total 3048 primary applications.[100]

3.74 If the Court finds that a child is in need of protection,[101] often referred to as 'proof' of the protection application,[102] the Court may make one of the following protection orders if certain pre-conditions are satisfied:

- an undertaking under section 278 of the Act
- a supervision order
- a custody to third party order
- a supervised custody order
- a custody to Secretary order
- a guardianship to Secretary order
- a long-term guardianship to Secretary order
- an interim protection order.

The range of protection orders, also called dispositions, is discussed in detail below.

88 Ibid 286.

89 Consultations 11 (FCLC), 27 (FVPLS Victoria).

90 Information provided to the Commission from a family group conference convenor employed by the Department of Human Services in the Eastern region.

91 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Planning in Best Interests Case Practice', Advice No 1282 (17 July 2008), from CD-ROM provided at 23 March 2010, 87.

92 Department of Human Services (Victoria), 'Definition and Purpose of Protective Intervention and Assessment Phase', above n 87, 286.

93 *Boston Consulting Group, Child Protection Proceedings Taskforce*, above n 24, 25. In 25 per cent of the protection applications initiated by safe custody, that is, removal of the child from the home, Child Protection had been working with the family for 70 or more days.

94 Child care agreements are described in pt 3.5 of the *Children Youth and Families Act 2005* (Vic).

95 Department of Human Services (Victoria), *Placement and Support: Children, Youth and Families Act 2005 Child Care Agreements* (2010) <www.cyf.vic.gov.au/placement-support/home/children-youth-and-families-act-2005-child-care-agreements> at 19 January 2010.

96 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Voluntary Placements', Advice No 1531 (23 April 2007), from CD-ROM provided at 23 March 2010.

97 Springvale Legal Service, above n 34, [6.2.102A].

98 Children's Court of Victoria, *Annual Report*, above n 3, 20–1.

99 *Children, Youth and Families Act 2005* (Vic) ss 240, 181. Members of Victoria Police may also initiate protection applications but in practice the Department has this function: Department of Human Services (Victoria), *Protocol between the Department of Human Services and Victoria Police*, above n 43.

100 Children's Court of Victoria, *Annual Report*, above n 3, 20–1.

101 *Children, Youth and Families Act 2005* (Vic) s 274. Grounds for finding that a child is in need of care and protection are discussed below under the heading 'Grounds for determining that a child is in need of protection'. Irreconcilable difference applications are found proven if 'there is a substantial and irreconcilable difference between the person who has custody of the child and the child to such an extent that the care and control of the child are likely to be seriously disrupted': s 274(b). The orders that the Court may make for protection applications are also available for irreconcilable difference applications.

102 This is also referred to as 'establishment' in other jurisdictions.

SECONDARY APPLICATIONS

3.75 Once a primary application has been initiated, further secondary applications may be made either before or after a protection application is made. Secondary applications include the following:

- Interim accommodation order (IAO) applications, both original and new.[103] These relate to placement of a child pending determination of the primary application.
- Applications for revocation, variation, extension or breach of various protection orders.[104]
- Applications by joint custodians or guardians of a child regarding the exercise of any right, power or duty.[105] This could arise if there is a dispute between two people with custody and guardianship of a child under a permanent care order who cannot agree on an important decision concerning the child.
- Applications regarding interstate orders.[106]
- Application for therapeutic treatment (placement) order.[107] This concerns the placement of a child, if necessary, where the court makes a therapeutic treatment order.

3.76 Excluding initial IAO applications, the Court dealt with 6866 secondary applications in 2008–09.[108]

GROUNDS FOR DETERMINING THAT A CHILD IS IN NEED OF PROTECTION

3.77 Section 162 of the CYF Act 2005 contains six grounds for finding that a child is in need of protection:

(1) For the purposes of this Act a child is in need of protection if any of the following grounds exist—

(a) the child has been abandoned by his or her parents and after reasonable inquiries—

(i) the parents cannot be found; and

(ii) no other suitable person can be found who is willing and able to care for the child;

(b) the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;

(c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

> (f) *the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.*
>
> (2) *For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.*[109]

3.78 The first two grounds in section 162(1) concern situations where there is no suitable carer for the child following the abandonment of the child or death or incapacity of the parents or carers.[110] The remaining four grounds concern situations where a parent or caregiver is unlikely to or has failed to protect the child from certain specified harm. The harms are categorised as physical harm; sexual harm; emotional or psychological harm; and harm to physical development or health. This last harm is often used in cases of serious neglect. Any of these four grounds may be proved on the basis of actual harm or likelihood of harm, or both. The Court states that '[n]early all of the protection applications that come before the Court' are brought on one of the latter four grounds.[111]

3.79 The harm caused or considered likely to occur must be 'significant'[112] or be of a kind that has resulted in or may result in 'significant damage'.[113] The term 'significant' was interpreted in a similar provision in the previous Act by a Supreme Court judge as meaning, '"important" or "of consequence" to the child's emotional or intellectual development' and need not require proof of some lasting or permanent effect.[114]

3.80 In deciding whether significant harm is 'likely', the Court interprets likelihood as whether there is a 'real possibility that cannot sensibly be ignored having regard to the nature and the gravity of the feared harm in the particular case'.[115]

3.81 The harm need not relate to a single instance. It may be harm that has accumulated through 'a series of acts, omissions or circumstances',[116] otherwise known as cumulative harm. Cumulative harm is not a separate ground for finding that a child is in need of protection but a concept of harm that encompasses 'multiple adverse circumstances and events in a child's life'.[117]

TWO PATHWAYS TO COMMENCE PROTECTION APPLICATION PROCEEDINGS

INTRODUCTION

3.82 Proceedings commence in the Children's Court through two separate pathways, known as protection applications 'by notice' and 'by safe custody' or apprehension.[118] In 2008–09, 78 per cent of the protection applications filed in the Melbourne Children's Court were commenced by safe custody, and in regional Victoria, 48 per cent of protection applications were commenced by safe custody.[119] In both pathways, a protective intervener, who is generally a child protection worker,[120] needs to be satisfied on reasonable grounds that a child is in need of protection as defined by section 162 of the CYF Act 2005.[121]

3.83 Although each pathway offers very different entries into the Children's Court system (in one case the child is involuntarily removed from their parents and in the other case the child is not), the legislation provides little guidance about which procedure to adopt.

103 *Children, Youth and Families Act 2005* (Vic) ss 515(1)(a), 262, 270.

104 *Children, Youth and Families Act 2005* (Vic) ss 515(1), 255–258, 273, 279, 293, 303, 311.

105 *Children, Youth and Families Act 2005* (Vic) ss 515(1)(n), 283(3), 325.

106 *Children, Youth and Families Act 2005* (Vic) s 515(1)(o), sch 1.

107 *Children, Youth and Families Act 2005* (Vic) ss 515(1)(f), 252. See also Appendix H.

108 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 24, 7. It appears that 241 permanent care orders in cases in 2008–09 were categorised as secondary applications. Although permanent care applications are technically primary applications, when an application for permanent care follows on from other orders it appears to be considered as a secondary application. For instance the Children's Court documents five permanent care orders as finalised primary applications for 2008–09, out of a total of 233 permanent care orders for the same period: *Children's Court* of Victoria, *Annual Report*, above n 3, 19, 22.

109 *Children, Youth and Families Act 2005* (Vic) s 162.

110 *Children, Youth and Families Act 2005* (Vic) s 162(1)–(2). 'Parent' is broadly defined in s 3 of the Act.

111 Submission 46 (Children's Court of Victoria) 18.

112 *Children, Youth and Families Act 2005* (Vic) s 162(1)(c)–(d), (f).

113 *Children, Youth and Families Act 2005* (Vic) s 162(1)(e).

114 *Director-General of Community Services Victoria v Buckley & Ors* (Unreported, Supreme Court of Victoria, O'Bryan J, 11 December 1992) [5].

115 See, for example, *DOHS v Mr K and Ms D* (Unreported, Children's Court of Victoria, Magistrate Power, 15 June 2009) [17]–[18] in reliance on the English authority of *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

116 *Children, Youth and Families Act 2005* (Vic) s 162(2).

117 Leah Bromfield and Robyn Miller, *Specialist Practice Guide: Cumulative Harm* (2007).

118 *Children, Youth and Families Act 2005* (Vic) s 240. For a diagram of current commencement proceedings and outline of court process see Appendix J.

119 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 24, 2.

120 *Children, Youth and Families Act 2005* (Vic) s 181 defines protective interveners as the Secretary and all members of the police force. The Secretary has delegated his or her powers to classes of employees and most protective interveners are child protection workers.

121 *Children, Youth and Families Act 2005* (Vic) s 240.

3.84 Section 241(1) states that if it is 'inappropriate' to make an application by notice, the protective intervener may take the child into safe custody, either with or without a warrant.[122] While the best interests and decision-making principles must be considered, the most directly applicable best interests principle lies in section 10(3)(g) of the Act: 'that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child'.

3.85 The Child Protection Practice Manual advises child protection workers to immediately remove a child only where:

- the consequences of harm for the child are assessed as 'serious' or 'extreme' and
- the probability of further harm is assessed as 'highly likely' and
- the child's safety needs cannot be met by available resources and supports.[123]

3.86 The Child Protection Practice Manual also instructs workers to consider other factors, including whether:

- there is an 'immediate and unacceptable risk of harm to the child'
- 'sufficient measures can be put in place to effectively reduce the level of risk and safely maintain the child at home, for example, an intervention order'
- there is time for consultation with specialist practitioners or services[124]
- the best interests of a child are served by immediate removal.[125]

3.87 A child protection practitioner must consult his or her supervisor by mobile phone regarding the risk assessment, rationale and required action in order to obtain the approval of a unit manager (or team leader at the After Hours Child Protection Emergency Service and Streetworks Outreach Service) to remove a child.[126]

3.88 There has been a steady increase in the proportion of applications commenced by removal of a child. In 2002–03, 58 per cent of applications in the Melbourne Children's Court commenced by safe custody, whereas in 2008–09, the proportion was 78 per cent.[127] In regional areas, applications by safe custody have grown in the same period from 16 to 48 per cent.[128]

PROCESS FOR PROTECTION APPLICATIONS BY SAFE CUSTODY

3.89 The removal of a child by safe custody results in a hearing within 24 hours.[129] If the Court is not open, the first hearing will take place before a bail justice.[130] Any bail justice hearing will be followed by a court hearing on the next working day.[131] During the hearings, the protective intervener makes an application to place the child on an IAO until a further order is made. The parents and older children are not provided with any specific documents regarding the application for an IAO. There is, in fact, no court form for the original IAO application.[132]

3.90 When taking a child into safe custody, the protective intervener must give the child's parents (unless they cannot be found after reasonable inquiries) and the child, if he or she is 12 years of age or older, a written statement containing specific information,[133] including:

- the contact details of the protective intervener
- advice that the child has been taken into safe custody
- contact details for a person who can advise of the child's wellbeing while in safe custody

- the time, date and location of the court hearing or bail justice hearing
- the address and telephone number of VLA.[134]

3.91 The protective intervener must make a protection application to the Court 'as soon as possible' after taking the child into safe custody and give the child's parents (unless they cannot be found after reasonable inquiries) and the child, if he or she is 12 years of age or older, a copy of that application.[135] In practice, the protection application is often given to the parents and the child at court. Unless a child is 'of tender years', generally under six years old,[136] they must be physically brought to the Court or the bail justice unless the Court or bail justice orders otherwise.[137]

Safe custody process also applies to secondary applications

3.92 The process of removing a child by safe custody, with or without a warrant, also applies to some secondary applications. These include an application to vary, breach or apply for a new IAO,[138] or an application to breach a supervision order, supervised custody order or interim protection order.[139] The protective intervener applies the same considerations in deciding whether to bring one of these secondary applications by safe custody as those applied in commencing proceedings.[140] In addition, for applications concerning breach of an order or a new IAO, the protective intervener needs to be satisfied 'that there is good reason not to proceed' by way of notice.[141]

Removal of a child by safe custody with a warrant

3.93 The Children's Court noted in its submission that the CYF Act 2005 'is silent on the basis for deciding between taking a child into safe custody and applying for a warrant'.[142] Child protection workers may seek a warrant if they consider police assistance will be required in order to remove the child.[143] In the year 2008–09, 81 per cent of applications commenced by safe custody did not require a warrant.[144] In cases where a magistrate issues a search warrant, the magistrate has the power to make an IAO placing the child back with his or her parents.[145]

122 *Children, Youth and Families Act 2005* (Vic) s 241(1)(a)–(b).

123 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Circumstances for Immediate Risk Removal', Advice No 1199 (23 April 2007), from CD-ROM provided at 23 March 2010.

124 Such as specialist infant protective practitioners (SIPW), high risk adolescent (HRA) program or Intensive Case Management Service (ICMS), Aboriginal Child Specialist Advice and Support Service (ACSASS).

125 Department of Human Services (Victoria), 'Circumstances for Immediate Risk Removal ', above n 123.

126 Ibid.

127 Boston Consulting Group, *Child Protection Proceedings Taskforce*, above n 24, 2.

128 Ibid 3.

129 *Children, Youth and Families Act 2005* (Vic) s 242(2)–(3). The interaction between s 242(2) and s 242(3) is not particularly clear. Section 242(2) directs that applications by safe custody are brought before the Court 'as soon as practicable and, in any event, within one working day after the child was taken into safe custody'. Section 242(3) directs that there must be a bail justice hearing if a child is not 'brought before the Court under subsection (2) within 24 hours'. Subsection (3) applies when a child taken into safe custody cannot be taken before the Court within 24 hours because the Court is not open during this period.

130 *Children, Youth and Families Act 2005* (Vic) s 242(3).

131 *Children, Youth and Families Act 2005* (Vic) s 242(2). An IAO made by a bail justice remains in force until the application is heard by the Court on the next working day: *Children, Youth and Families Act 2005* (Vic) s 264(3).

132 Forms 15 and 16 of the *Children, Youth and Families (Children's Court Family Division) Rules 2007* (Vic) relate, respectively, to an application to vary an interim accommodation order or for a new order, and a notice with respect to breach of an interim accommodation order.

133 *Children, Youth and Families Act 2005* (Vic) s 242(1).

134 *Children, Youth and Families Regulations 2007* (Vic) reg 15.

135 *Children, Youth and Families Act 2005* (Vic) s 240(3).

136 A child less than 6 years old is generally regarded as being of tender years: Springvale Legal Service, above n 34, [6.2.205]. Judge Coate, the previous President of the Children's Court of Victoria, 'has expressed the view that it meant a child of less than 5 years of age': Children's Court of Victoria, *Research Materials* (2009) [4.9.1].

137 *Children, Youth and Families Act 2005* (Vic) s 242(2)–(4).

138 *Children, Youth and Families Act 2005* (Vic) ss 268(1), (6), 269(1), (6), 270(1), (7).

139 *Children, Youth and Families Act 2005* (Vic) ss 311, 313, 315.

140 *Children, Youth and Families Act 2005* (Vic) ss 268(6), 269(6), 270(7), 315.

141 *Children, Youth and Families Act 2005* (Vic) ss 314(1)(a), 269(4), 270(6).

142 Submission 46 (Children's Court of Victoria) 52.

143 *Children, Youth and Families Act 2005* (Vic) s 241(1)(b), (2).

144 Statistics provided by the Department of Human Services on 22 March 2010.

145 *Children, Youth and Families Act 2005* (Vic) s 241(2)(b).

Chapter 3

Current Law and Practice in Victoria

APPLICATION FOR INTERIM ACCOMMODATION ORDER AFTER TAKING CHILD INTO SAFE CUSTODY

3.94 IAO applications concern the placement of the child until the primary application has been finalised.[146] IAOs may include any conditions that the Court considers to be in the child's best interests.[147] Conditions may relate to access of a parent or other person to the child.[148] The Children's Court states that '[d]etermining interim placement is a significant part of the Court's workload', noting that in 2007–08, the Court made 5820 IAOs.[149]

3.95 An IAO provides for the following placement options until the next hearing, or resumption of the hearing:

- release of the child, on the undertaking of the child to appear at the next hearing;[150] the Commission understands that this step is uncommon and is only used with older children
- release of the child into the care of his or her parent, on the undertaking of the parent to produce the child before the Court at the next hearing[151]
- placement with a suitable person, on the undertaking of the suitable person to produce the child before the Court at the next hearing[152]
- placement of the child in an out-of-home care service[153]
- placement of the child in secure welfare if there is a substantial and immediate risk of harm to the child[154]
- placement of the child in a declared hospital[155]
- placement of the child in a declared parent and baby unit.[156]

PROTECTION APPLICATIONS COMMENCED BY NOTICE

3.96 A protective intervener who believes that a child is in need of protection may file a protection application in the Children's Court and serve it on a child's parent and the child. The application contains a notice advising of a court hearing on a future date, usually about three weeks from filing.[157] When protection applications are commenced by notice, parents and children must be served with a protection application at least five days before the listed court date.[158] Children are not removed from their parents or caregivers at this stage without parental consent.

3.97 The protection report (application report) and a disposition report are usually provided to Department lawyers and other parties on the first date (the mention) that the case is listed in the Court.

3.98 On this date, parties may either consent to final orders, which is rare, or adjourn the case for further mention or for a dispute resolution conference (DRC). Although the Court may make an IAO for protection applications commenced by notice,[159] this does not generally occur in Melbourne. Because of the prevalence of safe custody applications, and the number of urgent IAO contests associated with these cases, it is difficult for the protective intervener to argue for an IAO on the first return date when the application has been commenced by notice.

3.99 A child protection practitioner who has commenced an application by notice may seek an IAO to secure conditions considered necessary to ensure the child's protection. Conditions sought may include, for example, requiring a parent to undergo drug and alcohol counselling or attend psychiatric assessment. An IAO contest by evidence needs to be booked and in Melbourne there is usually a waiting period of several weeks. Earlier 'stand-by' contest dates are usually available but, if other listed cases fail to settle, there is no guarantee that the matter will be heard on the stand-by date. It can take months to obtain an IAO when an application is commenced by notice.

PROTECTION APPLICATIONS COMMENCED BY SAFE CUSTODY

3.100 This section deals with protection applications commenced by safe custody in the Melbourne Children's Court. The processes and practices followed in other Children's Court venues differ from those in Melbourne, and some are discussed below.

3.101 The Melbourne Children's Court conducts IAO hearings each weekday for protection applications filed by 2 pm.[160] VLA has a clerk at court to allocate a separate lawyer to children—generally only to those who are seven years and older—and each parent.[161] VLA duty lawyers represent the child unless a previous solicitor–client relationship exists with a parent. Members of a panel of private legal practitioners who undertake duty lawyer work attend the Children's Court in readiness to represent parents and children. Lawyers employed by the Department in the Court Advocacy Unit (CAU) also attend the Court to represent protective interveners.

3.102 The protective intervener or authorised child protection practitioner usually provides the assigned CAU lawyer with information concerning the protection application, as well as instructions about the type of IAO sought, including any conditions. In some cases, reports may be available from medical practitioners or other specialists in relation to concerns about a child. The CAU lawyer may provide advice to the protective intervener about whether the order and conditions sought are arguable under the CYF Act 2005 before relaying the protective intervener's final instructions to practitioners for the represented child or children and parents.

3.103 After consulting with the CAU lawyer, lawyers for represented children and parents obtain instructions from their clients. Negotiations about the interim placement of the child and any conditions, such as access conditions if the child is being placed outside of the home, generally take place in the corridors of the Children's Court.

3.104 A standard list of conditions, from which parties can select appropriate conditions and add any relevant others, is provided on a pink form at the Melbourne and Moorabbin Children's Courts. A copy of this form is found at Appendix K. If agreement is reached, the parties' lawyers then appear in court to seek an IAO by consent.

INTERIM ACCOMMODATION ORDER SUBMISSIONS CONTEST

3.105 If no agreement is reached in relation to an IAO, the Court will hear what is referred to as a 'submissions contest'.

146 IAOs may be made in numerous circumstances as set out in s 262 of the *Children, Youth and Families Act 2005* (Vic).

147 *Children, Youth and Families Act 2005* (Vic) s 263(7).

148 *Children, Youth and Families Act 2005* (Vic) s 263(8).

149 Submission 46 (Children's Court of Victoria) 18.

150 *Children, Youth and Families Act 2005* (Vic) s 263(1)(a).

151 *Children, Youth and Families Act 2005* (Vic) s 263(1)(b).

152 *Children, Youth and Families Act 2005* (Vic) s 263(1)(c), (6). A person's suitability follows from a report from the Secretary, or his or her delegate, having regard to particular matters, including criminal history checks, set out in the *Children, Youth and Families Regulations 2007 (Vic)* reg 16. Suitable persons are often extended family members.

153 *Children, Youth and Families Act 2005* (Vic) ss 3, 263(1)(d). Out-of-home care services are operated by the Department or a community service and include foster care and residential care in a group home.

154 *Children, Youth and Families Act 2005* (Vic) s 263(1)(e). Note that inadequate accommodation is not, of itself, a sufficient reason for placing a child in secure welfare: *Children, Youth and Families Act 2005* (Vic) s 263(5). Two gender-separated secure welfare services operate in Victoria.

155 *Children, Youth and Families Act 2005* (Vic) s 263(1)(f). The hospital chief executive provides a Form 13 statement under *Children, Youth and Families (Children's Court Family Division) Rules 2007* stating that a bed is available.

156 *Children, Youth and Families Act 2005* (Vic) s 263(1)(g). The chief executive of the parent and baby unit provides a form 13 statement under *Children, Youth and Families (Children's Court Family Division) Rules 2007* stating that a place is available.

157 Children's Court of Victoria, *Research Materials*, above n 136, [4.9.2].

158 *Children, Youth and Families Act 2005* (Vic) s 594; *Children, Youth and Families (Children's Court Family Division) Rules 2007* (Vic) form 10. The application must be served on the child only when he or she is 12 years of age or older.

159 *Children, Youth and Families Act 2005* (Vic) s 262(1)(b).

160 Children's Court of Victoria, *Practice Note No 1 of 2008 — Applications by Apprehension*, 29 May 2008, 1: issued pursuant to s 592 of the *Children, Youth and Families Act 2005* (Vic).

161 Parents and older children generally have their own separate lawyers as their interests may not coincide and conflicts of interest are to be avoided: *Children, Youth and Families Act 2005* (Vic) s 524(6). The issue of conflict of interest in relation to representation is dealt with in Chapters 8 and 9.

Current Law and Practice in Victoria

3.106 Submissions contests involve oral arguments from lawyers, based on their client's instructions, concerning why a particular outcome should be ordered by the Court. For the most part, witnesses do not give evidence.[162] Child protection workers and family members, often including children, sit behind their lawyers and generally do not directly talk to the magistrate or judge. In Melbourne and Moorabbin, lawyers for children or parents will generally seek the release of DHS case notes before commencing a submissions contest. Lawyers for the Department generally refuse to provide these notes without an order from the Court. Until recently, the Court usually ordered the release of the notes pursuant to section 11 of the *Evidence Act 1958* (Vic). Since the repeal of that Act, a subpoena must now be filed to gain access to the notes, because there is no equivalent provision in the *Evidence Act 2008* (Vic).[163]

3.107 IAO submissions contests take place in a highly charged, emotional environment because they concern the living arrangements for children recently removed from the care of their parents. The high volume caseload, less than desirable working conditions and congested space all add to the stress of the participants in these hearings. The Lawyers Practice Manual discusses the advantage for parents and children in contesting the initial application for an IAO:

> *Although it may be traumatic for the parties, contesting the application for an interim accommodation order can provide a useful dry run for later hearings and a valuable indication of the type of evidence to be produced later. Because delays of some months between the time the protection application is made and the hearing of a contested application are common, the placement of the child away from the parents for such a period under an interim accommodation order can be traumatic. It can also establish a new status quo of the child being away from home which may prejudice the case of the child or parents at a later date when the hearing is held. Obtaining an interim accommodation order that involved the child remaining with their parents can therefore be important if the finding or disposition sought by the department is to be contested.*[164]

3.108 The Lawyers Practice Manual describes the role of the lawyer for the child in a contested IAO hearing as similar to that 'in bail applications', stating that

> *the role of the child's advocate will generally be to seek to show how the child's best interest may be served while having the least restrictive terms incorporated in the order. This will often be a matter for negotiation and discussion with the protective intervener or the department's legal representative, but where they have formed the view that the child was in danger when apprehended and that that situation has not altered, then cross-examination and argument needs to be directed to countering the bases of these objections.*[165]

How does the Court decide interim accommodation order hearings?

3.109 When determining the outcome of an IAO application, the Court must consider the best interests principles in section 10 of the Act, as well as the principles for placement of Aboriginal children under sections 13 and 14 of the Act if the child is Aboriginal. While a child may have been at unacceptable risk of harm at the time of removal from his or her parents, the Court must assess risk at the time of the hearing.[166]

3.110 The Court exercises a broad discretion in balancing the many principles in section 10 of the Act. There is a need to ensure that intervention in the family relationship is limited to that necessary to secure the safety and wellbeing of the child,[167] and that a child is only to be removed from the care of a parent if there is unacceptable risk of harm to the child.[168] The Court may make an IAO returning a child to the parents with conditions concerning their conduct.[169]

3.111 The Children's Court states:

> *It is the experience of the Court that in matters where children are apprehended and brought to court, a significant percentage are returned home on an interim accommodation order (approximately 50%). In many of those cases, the Court, having found that the child was at risk of harm in the care of his or her parent or parents, determined that the risk could be ameliorated and rendered acceptable by court-imposed conditions.*[170]

INTERIM ACCOMMODATION ORDER CONTEST WITH EVIDENCE

3.112 If a party to an IAO submissions contest is not satisfied with the outcome, they may book a hearing for an IAO by evidence.[171] The evidence called at these hearings is limited to that relevant to determine placement of the child or disputed conditions of an IAO.

DURATION OF AN INTERIM ACCOMMODATION ORDER MADE BY THE COURT

3.113 If an older child is released on their own undertaking, or a child is placed with a parent on an IAO, there is no limit to the length of the order.[172] IAOs of this nature may be extended for any length of time subject to the child's best interests.[173]

3.114 If a child is placed out of the home, in circumstances other than an older child being released on their own undertaking, an IAO may be no longer than 21 days.[174] If the parties agree to a period longer than 21 days, the case will be listed on the 22nd day for 'rollover', at which time the IAO is extended. Only a DHS lawyer attends this mention before the Court. Other than placement of a child in secure welfare, this type of IAO may be repeatedly extended for 21-day periods, subject to the child's best interests.[175]

3.115 For children placed on an IAO in secure welfare—a lock-up facility—a 21-day IAO may only be extended once, for no longer than 21 days.[176]

PRACTICE AT CHILDREN'S COURTS OTHER THAN MELBOURNE

3.116 The Moorabbin Children's Court hears contested initial interim accommodation applications on the day of filing the protection application following the removal of children by safe custody. Duty lawyers from VLA and the private profession, as well as DHS lawyers, are based at Moorabbin to represent parties each weekday. The CAU lawyers at Moorabbin have been providing lawyers for parents and children with a Statement of Grounds and Summary Information Form (known as 'Form B') for protection applications brought by safe custody. These forms (set out at Appendix L) provide some written detail of DHS protective concerns. They are supplied as a communication tool, and a disclaimer on the form indicates that the document 'does not constitute the basis of all the protective concerns and or evidence DHS intends to, or may seek to rely upon in proceedings before the Court'.

162 *Grandell v Hartrick (No 1)* (Unreported, Supreme Court of Victoria, Beach J, 1 February 1994): evidence may be limited to that of the child protection applicant.

163 Advice to legal practitioners for parents and children in the *Lawyers Practice Manual Victoria*, Springvale Legal Service, above n 34: [6.2.404] states that the 'notes often provide information in support of the client's position or inconsistent with the departmental position'.

164 Ibid [6.2.404].

165 Ibid [6.2.403].

166 *DOHS v W* (Unreported, Children's Court of Victoria, 20 April 2004) cited in Children's Court of Victoria, *Research Materials*, above n 136, [5.11.6].

167 *Children, Youth and Families Act 2005* (Vic) s 10(3)(a).

168 *Children, Youth and Families Act 2005* (Vic) s 10(3)(g).

169 *Children, Youth and Families Act 2005* (Vic) s 263(7). See *Purcell v RM* [2004] VSC 14 per Gillard J at [36] when considering appropriate conditions for an interim accommodation order under the previous legislation: *Children and Young Persons Act 1989* (Vic).

170 Submission 46 (Children's Court of Victoria) 53.

171 *Grandell v Hartrick (No 2)* (Unreported, Supreme Court of Victoria, Beach J, 2 August 1994) is accepted as authority for the right of parties to an interim accommodation hearing with evidence.

172 *Children, Youth and Families Act 2005* (Vic) s 264(1).

173 *Children, Youth and Families Act 2005* (Vic) s 267(2).

174 *Children, Youth and Families Act 2005* (Vic) s 264(2). The order lasts until the 22nd day.

175 *Children, Youth and Families Act 2005* (Vic) s 267(2)(b).

176 *Children, Youth and Families Act 2005* (Vic) ss 264(2), (4), 267(2)(c).

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3.117 In regional areas, parents and children rarely have an opportunity to contest an IAO on the first court date, as legal representation is not readily available and court time may also be unavailable.[177] In those circumstances, the Court will make an IAO for up to 21 days and list the case for an IAO submissions hearing.

3.118 During that period, a child is generally placed out of the home following the initial removal by safe custody. In practical terms, for parents and children in regional areas, the first real opportunity to contest the initial out-of-home placement decision by a protective intervener may be several days or up to three weeks after the initial intervention.

COURT REPORTS

INTRODUCTION

3.119 After the first court event (the IAO hearing for protection applications commenced by safe custody, or the first mention for protection applications commenced by notice), the child protection practitioner assigned to a child's case will prepare protection (or application) and disposition reports for the Court.

3.120 Part 7.8 of the CYF Act 2005 concerns reports to the Court in both Family Division and Criminal Division cases. The relevant reports to the Court for protection applications include:

- protection reports, commonly referred to as 'application reports'
- disposition reports, relating to the type of order the Department seeks
- additional reports, including reports from the Children's Court Clinic and other experts.[178]

3.121 Written reports are a central part of the information provided to the Court in child protection cases. The authors of reports for the Court must inform people they interview that any information provided may be included in the report.[179] Report authors must be available to give evidence about their reports if required to.[180] The Court must not take into consideration any disputed matter in a report unless satisfied that it is true on the balance of probabilities.[181] If a report author does not attend court after proper notification, then the report, or the disputed part of the report, cannot be considered by the Court unless the child or parent consents.[182]

3.122 The Court may order or approve the restriction of access to reports, or parts of reports, to a child, parent, party or other specified person. Non-release of reports or parts of reports occurs if access to information in the report would prejudice the physical or mental health of the child or parent.[183] The Commission understands that it is rare for the Department to seek to restrict access to a protection report or disposition report. The Children's Court Clinic is more likely to apply to limit access to its reports.[184]

PROTECTION REPORTS (APPLICATION REPORTS)

3.123 Although the legislation provides that the Court may order the Secretary to submit a protection report concerning the child,[185] in practice the Department usually provides a protection report without a specific court order.

DISPOSITION REPORTS

3.124 The Court must not make a protection order, other than an undertaking, unless it has received and considered a disposition report.[186] The Secretary must submit a disposition report if the Court is satisfied that a child is in need of protection.[187] In practice, the Department generally prepares and submits a disposition report with the protection report.

3.125 A disposition report must include a number of matters that are set out in section 558 of the CYF Act 2005. They include:

- any draft case plan that exists for a child
- recommendations concerning the order that the Secretary seeks and services that ought to be provided to the child and family
- a statement setting out the steps taken to provide services to enable the child to remain in the custody or guardianship of a parent, if an order is sought for the removal of custody or guardianship from a parent
- any other information the Court requires.

ADDITIONAL REPORTS—INCLUDES CLINIC REPORTS AND OTHER EXPERT REPORTS

3.126 Under section 560 of the CYF Act 2005, the Court has power to order additional reports in any proceeding in which a disposition order is required or in circumstances in which the Court has ordered a disposition report.[188] The Court's power to order reports from the Children's Court Clinic is found in section 560(b).[189] The Court may also order additional reports from the Secretary of the Department or an independent expert.

COURT EVENTS AND PROGRESSION OF CASES THROUGH COURT

3.127 Once a protection application is filed, a case progresses through the Court via various court 'events'. A diagram of the current court process is at Appendix J. These events include mentions, DRCs, directions hearings and judicial resolution conferences (JRCs). Parties may reach agreement and the Court may make final orders at any stage of the process. There are very few Practice Directions issued by the Court to guide parties through the process.

3.128 If the parties are unable to agree on proof of the protection application or disposition, then the matter is listed for contested hearing. In practice, less than three per cent of all primary and secondary protection applications proceed to a final hearing.[190]

MENTIONS

3.129 A mention is a case management hearing. When protection applications begin by notice, the first listing is a mention. Cases may be listed for mention at any time throughout the court process. A case may be listed for mention, rather than another specific court event, to assess whether certain actions have been taken.

DISPUTE RESOLUTION CONFERENCES (DRCS)

3.130 Most contested protection applications are referred to a DRC.[191] The purpose of the DRC is to give the parties 'the opportunity to agree or advise on the action that should be taken in the best interests of the child'.[192] An independent convenor chairs the conference.[193] Sessional convenors with social science qualifications are employed at the Melbourne Children's Court. Registrars or court project officers have been appointed as convenors at Moorabbin Children's Court and rural courts.

3.131 Under section 217(3) of the Act, a convenor may choose to preside over an 'advisory conference' or a 'facilitative conference'. The purpose and role of the convenor differs in each type of conference. In practice, convenors adopt the facilitative conference only. In a facilitative conference, the convenor helps parties identify issues, consider alternatives and try to reach agreement in the child's best interests.[194] A written report of any conclusions reached is provided to the Court.[195]

177 Consultation 27 (FVPLS Victoria).

178 *Children, Youth and Families Act 2005* (Vic) s 547(a)–(c). Subsections (d) and (e) concern reports for therapeutic treatment applications and therapeutic treatment (placement).

179 *Children, Youth and Families Act 2005* (Vic) s 549.

180 *Children, Youth and Families Act 2005* (Vic) s 550.

181 *Children, Youth and Families Act 2005* (Vic) s 551(1)(a).

182 *Children, Youth and Families Act 2005* (Vic) ss 550, 551(2).

183 *Children, Youth and Families Act 2005* (Vic) ss 556, 559, 561–2.

184 Under s 562(4) of the *Children, Youth and Families Act 2005* (Vic).

185 *Children, Youth and Families Act 2005* (Vic) s 553.

186 *Children, Youth and Families Act 2005* (Vic) s 276(1)(a).

187 *Children, Youth and Families Act 2005* (Vic) s 557(1)(a)(i). Disposition reports must also be provided on proof of irreconcilable difference applications and applications relating to breaches of a supervision order, supervised custody order or an interim protection order: *Children, Youth and Families Act 2005* (Vic) s 557(1)(a)(ii)–(iii).

188 Under s 557(1) of the *Children, Youth and Families Act 2005* (Vic).

189 The request is made to the Secretary of the Department of Justice under s 560(b) of the *Children, Youth and Families Act 2005* (Vic). The Children's Court Clinic is responsible to the Secretary of the Department of Justice.

190 Submission 46 (Children's Court of Victoria) 23.

191 *Children, Youth and Families Act 2005* (Vic) s 217.

192 *Children, Youth and Families Act 2005* (Vic) s 217(2).

193 Convenors are appointed under s 227(1) and (2) of the *Children, Youth and Families Act 2005* (Vic) by the Governor in Council on the recommendation of the Attorney-General. Convenors must be of good character and have appropriate qualifications and experience.

194 *Children, Youth and Families Act 2005* (Vic) s 218.

195 *Children, Youth and Families Act 2005* (Vic) s 218(2)(c).

Current Law and Practice in Victoria

3.132 The purpose of an advisory conference is to 'recommend to the Court the action to be taken in the best interests of the child'.[196] However, the advisory conference model has proved highly problematic, and, as a result, parties have avoided using it. The Children's Court notes that

> *families and lawyers for families will not participate in advisory conferences. It seems the report back provisions for these conferences are regarded as problematic and compromising fundamental principles around confidentiality. This has meant that virtually all conferences in Victoria are currently conducted as facilitative conferences. With the failure of the advisory conference, approaches that prevailed under the old pre hearing system have continued under the facilitative conference model. It is the Court's view that the legislative provisions around facilitative and advisory conferences will need to be amended in recognition of the failings of the current model.*[197]

3.133 Both the Secretary (in practice the child protection practitioner) and the child's parents are required to attend a DRC.[198] The Court may order, in addition, that the following people attend:

- the child
- the child's relatives
- if the child is Aboriginal, a member of the child's community as agreed by the parents
- if the child is from an ethnic background, a member of the relevant ethnic community
- disability advocates if required
- any support person requested by the child
- legal representatives for the parents and child.[199]

3.134 The Children's Court has issued guidelines for DRCs. These guidelines set out the roles of participants and the process for conducting proceedings.[200] Consultations revealed that the ideals set out in the guidelines do not generally align with practice.[201]

3.135 A review conducted by the Boston Consulting Group in 2007 found that the 'settlement' rate for DRCs (then called 'pre-hearing conferences') in Melbourne was a low 31.2 per cent.[202] In response, on 1 June 2009 the Children's Court implemented a new DRC model at the Moorabbin Children's Court. Of the 167 DRCs that were conducted using this new model between 1 June 2009 and 18 March 2010, 39.5 per cent settled at the DRC.[203]

DIRECTIONS HEARINGS

3.136 If a case has failed to resolve following a DRC or other court event, it is listed for directions hearing and given a date for final hearing. The directions hearing takes place approximately two weeks before the final hearing.

3.137 Directions hearings are case management events attended by legal representatives for the parties. The Children's Court website research materials indicate that directions hearings:

- give parties a further opportunity to negotiate a resolution
- enable the magistrate or judge to informally mediate to achieve an outcome

- enable the case to be ready for hearing if it is unable to be resolved, with the narrowing of issues and 'settling the mechanics of the case'. Examples include ascertaining the witnesses to be called, the length of proceedings, whether an interpreter is required and whether proof of the application is conceded.[204]

3.138 The Children's Court advised the Commission that directions hearings 'are now being conducted in a way that anticipates how the Court may operate a judicial conferencing process'.[205] The Court suggested that directions hearings could be improved if the delay between a DRC and a directions hearing was reduced, if the barristers briefed for the final hearing were the lawyers appearing at the directions hearing, and if updated reports from the Department were lodged prior to this hearing.[206]

3.139 In consultations and submissions, legal practitioners confirmed a trend towards more court intervention at directions hearings. While this approach was generally supported, there was criticism of the lack of adequate remuneration for the time and skill required to prepare for the directions hearings.[207]

JUDICIAL RESOLUTION CONFERENCES (JRCS)

3.140 Judicial resolution conferences now occur in some cases in the Children's Court following an amendment to the CYF Act 2005 that came into operation on 14 September 2009.[208]

3.141 A JRC is presided over by the President or a magistrate for the purposes of negotiating settlement of a dispute by way of mediation, early neutral evaluation, settlement conference or conciliation.[209] Discussions are confidential; anything said or done in a JRC is not admissible as evidence in any further hearing in the Family Division of the Court.[210] If the case does not resolve, the presiding magistrate or judge does not go on to hear the case and cannot be compelled to give evidence.[211]

3.142 A JRC can occur at any time between commencement of a protection application and final orders. There are no rules as yet, although the Court has prepared a draft Practice Direction.[212]

CONTESTED HEARING

3.143 Cases that fail to resolve by negotiation proceed to final hearing. Only three per cent of all applications require a judicial officer to hear evidence, make findings and make orders.[213] Child protection workers and any additional expert who has prepared a report may be required for cross-examination. Parents generally give evidence and may be cross-examined. It is rare for a child to give evidence.[214]

3.144 Some contested hearings can be quite lengthy.[215] At times, parents and children may concede that the grounds for the application are made out, that is, that a child is in need of protection, but they may disagree with the Department about disposition. This concession may limit the number of witnesses required for cross-examination. The Lawyers Practice Manual contains the following advice for legal practitioners:

> *Tactically it may often be better to contest the protection application, which means that all the witnesses for the applicant will give oral evidence and be subject to cross-examination, rather than simply consent to written reports prepared by the applicant's witnesses being tendered in whole without comment. In practice the number of protection applications that are dismissed are minimal, but a strongly contested application can lay the groundwork for a favourable disposition … A protection application, like the hearing of a criminal charge, calls first for an adjudication on whether the grounds have been made out and the subsequent disposition of the matter.*[216]

196 *Children, Youth and Families Act 2005* (Vic) s 219(1). Convenors, when adopting the advisory model, are to appraise matters in dispute and provide a written report on outcomes of the dispute and how outcomes might be achieved: *Children, Youth and Families Act 2005* (Vic) s 219(2).

197 Submission 46 (Children's Court of Victoria) 36.

198 *Children, Youth and Families Act 2005* (Vic) s 222(1).

199 *Children, Youth and Families Act 2005* (Vic) s 222(2)–(6).

200 *Children, Youth and Families Act 2005* (Vic) s 220.

201 DRCs are discussed in greater detail in relation to Option 1 in Chapter 7.

202 Submission 46 (Children's Court of Victoria) 37.

203 Ibid 38.

204 Children's Court of Victoria, *Research Materials*, above n 136, [4.9.4].

205 Submission 46 (Children's Court of Victoria) 72.

206 Ibid.

207 Consultation 6 (Private Practitioners 1).

208 *Courts Legislation Amendment (Judicial Resolution Conference) Act 2009* (Vic).

209 *Children, Youth and Families Act 2005* (Vic) s 3.

210 *Children, Youth and Families Act 2005* (Vic) s 527A(1). However, the Children's Court is of the view that there is currently no 'bar to admissibility in any other court processes of anything said or done by a person in the course of a JRC': submission 46 (Children's Court of Victoria) 41.

211 *Children, Youth and Families Act 2005* (Vic) s 527A(2).

212 Submission 46 (Children's Court of Victoria) 41.

213 Ibid 23.

214 It is more common for older children to give evidence in a contested interim accommodation order hearing where the Department is seeking that the child be placed in secure welfare (that is, in a locked facility).

215 A recent case lasted longer than 70 days.

216 Springvale Legal Service, above n 34, [6.2.505].

Current Law and Practice in Victoria

CONDUCT OF PROCEEDINGS

3.145 Part 4.7 of the CYF Act 2005 contains procedures that are specific to the Family Division of the Children's Court.[217] Section 215(1) of the Act, which governs the conduct of proceedings, provides that the Court

(a) *must conduct proceedings before it in an informal manner; and*

(b) *must proceed without regard to legal forms; and*

(c) *must consider evidence on the balance of probabilities; and*

(d) *may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary.*

CONDUCTING PROCEEDINGS IN AN INFORMAL MANNER, WITHOUT REGARD TO LEGAL FORMS

3.146 Sections 215(1)(a) and (b) require informality of proceedings.[218] The Court suggests that historically, judicial interpretation of these types of provisions has been restrictive.[219] Provisions of this nature do not allow courts to dispense with the rules of procedural fairness.[220] The Court's submission highlighted recent decisions of the High Court and Family Court which 'appear to have approved a somewhat more informal approach in children's matters'.[221] Some of these decisions, relying upon the overriding 'best interests' consideration, suggest that proceedings concerning children's welfare are 'not entirely *inter partes*'[222] and 'not strictly adversarial'.[223]

3.147 The Court's submission acknowledged that the same overriding best interests consideration has meant some of its Family Division matters are not fully adversarial, and that 'the Court has the power—and in some instances a duty—to inquire about issues which it considers relevant to the best interests of the subject child'.[224] In its submission, the Children's Court commented that its current operating model is adversarial and not the 'optimal stage' for the decision making it undertakes in the Family Division.[225] The Court stated that its power to 'make a proper inquiry about best-interest matters is quite limited'[226] and that it needs to be enabled to 'run less adversarial trials without being fettered by a restrictive interpretation of [these] sections'.[227]

3.148 The submission suggested that relevant sections from the *Family Law Act 1975* (Cth) relating to less adversarial trials, if amended appropriately, would provide a 'sound platform' for such trials in the Family Division of the Children's Court.[228]

COURT MAY INFORM ITSELF IN ANY MANNER IT SEES FIT, DESPITE RULES OF EVIDENCE

3.149 Section 215(d) of the CYF Act 2005, which provides that the Court may inform itself on a matter as it sees fit and is not bound by the rules of evidence, 'appears to give the Court free rein in determining the admissibility of evidence and the weight to be afforded to it'.[229] Section 532 of the CYF Act 2005 gives the Court the power, on its own motion, to issue a summons for a witness to give evidence, or produce documents or things, or both. The parties to the proceeding may also apply to the Court for such a summons to be issued.[230]

3.150 In its submission, the Court stated that judicial interpretation of similar provisions have somewhat 'fettered the plain words of [section 215(1)(d)]'.[231] The Court suggested that these judgments have held that such provisions do not render the rules of evidence irrelevant and that they should still be applied unless there is a sound reason for dispensing with them.[232] While there is competing case law to suggest that this view of an evidentiary freedom power is too narrow,[233] the Children's Court has not interpreted its powers in section 215(1) of the CYF Act 2005 expansively.

Use of expert evidence

3.151 Expert evidence is often led in contested cases.[234] The Lawyers Practice Manual advises lawyers that

> *The grounds listed in s 162 involve the court at times in making speculative decisions and value judgments. However, in contested cases the court can be assisted by expert evidence from a range of professionals, including social workers, psychiatrists, psychologists, maternal and child heath nurses and doctors, in relation to matters in dispute, eg behavioural indicators of sexual abuse, developmental milestones in children, the impact of psychiatric condition of the parent or alcohol/drug use on child's emotional development, etc.*[235]

3.152 These expert witnesses may give evidence of facts from observation, or opinions or inferences.[236] The Court decides if a particular witness is qualified to give an opinion and determines the weight given to evidence of this nature.[237]

THE STANDARD OF PROOF

3.153 Section 215(1)(c) of the CYF Act 2005 provides that the Family Division of the Court 'must consider evidence on the balance of probabilities'. In cases involving sexual abuse allegations, reference has often been made to the common law '*Briginshaw* test',[238] which is sometimes erroneously seen as requiring a standard of proof that is higher than the usual civil standard in cases where there is an allegation of grave wrongdoing.[239]

3.154 This issue is now governed by section 140 of the *Evidence Act 2008* (Vic), which provides that in a civil proceeding, the Court must be satisfied that the case has been proved on the balance of probabilities, but that in deciding whether it is so satisfied, the Court must take into account

> *(a) the nature of the cause of action or defence; and*
>
> *(b) the nature of the subject-matter of the proceeding; and*
>
> *(c) the gravity of the matters alleged.*

LEGAL REPRESENTATION AT THE CHILDREN'S COURT

INTRODUCTION

3.155 Lawyers generally represent the Department, parents, children who are considered mature enough to give instructions, and other interested parties in protection application proceedings before the Children's Court. Other interested parties may include potential or actual permanent carers, foster carers or kinship carers.[240] In exceptional circumstances, children who are not of an age considered mature enough to give instructions have separate legal representation in proceedings.[241]

217 *Children, Youth and Families Act 2005* (Vic) pt 4.7. Note other areas of the Act relating to court procedure: pt 7.3 governs general court procedures; s 522 imposes procedural guidelines on the Court that include ensuring that the proceedings are comprehensible to, and allow for the full participation of, the child, parents and other parties with a direct interest.

218 *Children, Youth and Families Act 2005* (Vic) s 215(1)(a)–(b).

219 Submission 46 (Children's Court of Victoria) 76; Children's Court of Victoria, *Research Materials*, above n 136 [4.8.1].

220 Children's Court of Victoria, *Research Materials*, above n 136, [4.8.1].

221 Submission 46 (Children's Court of Victoria) 76.

222 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, cited in submission 46 (Children's Court of Victoria) 76.

223 *Re Lynette* (1999) FLC 92–863, cited in submission 46 (Children's Court of Victoria) 76.

224 Submission 46 (Children's Court of Victoria) 77.

225 Ibid 78.

226 Ibid 77.

227 Ibid 78.

228 Ibid 79–80.

229 Ibid 80.

230 *Children, Youth and Families Act 2005* (Vic) s 532(2).

231 Submission 46 (Children's Court of Victoria) 80.

232 *A & B v Director of Family Services* (1996) 20 Fam LR 549, cited in submission 46 (Children's Court of Victoria) 80.

233 See, for example, *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492.

234 Springvale Legal Service, above n 34, [6.2.602]; Children's Court of Victoria, *Research Materials*, above n 136, [4.8.4].

235 Springvale Legal Service, above n 34, [6.2.602].

236 Children's Court of Victoria, *Research Materials,* above n 136, [4.8.4].

237 Ibid.

238 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

239 See, for example, *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47, 50.

240 *Children, Youth and Families Act 2005* (Vic) s 524. The Attorney-General may also be legally represented if choosing to intervene in a proceeding: *Children, Youth and Families Act 2005* (Vic) s 215(2).

241 *Children, Youth and Families Act 2005* (Vic) s 524(4).

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3.156 Under the CYF Act 2005, the Secretary is 'a party to any proceeding before the Family Division'.[242] Child protection practitioners may appear personally in court, and the Secretary may be represented by another authorised employee, including non-legally qualified court officers, or by a legal practitioner.[243] At Melbourne and Moorabbin Children's Courts the Secretary is usually represented by lawyers from the Department's CAU.

REPRESENTATION FOR CHILD PROTECTION PRACTITIONERS—COURT ADVOCACY UNIT (CAU)

3.157 The CAU is a legal unit within the Department. The CAU is staffed by approximately 25 lawyers, and may employ senior advocates—in-house counsel. In contested cases, a CAU lawyer or a barrister briefed by the CAU will appear for the child protection practitioner.

3.158 Many different CAU lawyers may appear for a child protection practitioner throughout the course of proceedings. Child protection practitioners often do some of the preparatory legal work for contested hearings, such as issuing and serving subpoenas and formulating witness lists.[244] The CAU also provides a statewide daily telephone duty service to assist child protection practitioners in relation to Children's Court proceedings.

3.159 The Child Protection Practice Manual states that the role of CAU lawyers and court officers is to act on the child protection practitioner's instructions and advise the practitioner on all aspects of the case.[245] The Manager of the CAU advised the Commission that all lawyers employed or engaged by the Department are bound by the Model Litigant Guidelines published by the Victorian Government Solicitors Office. The guidelines direct government lawyers to exercise independent legal judgment when assessing a client's instructions and presenting a case.

3.160 The CAU sits within the Legal Services Branch of the Department of Human Services, which is responsible for all legal advice and policy for the Department.[246]

Lawyers for child protection practitioners in rural areas

3.161 DHS offices in rural regions employ lawyers to act in child protection matters. For instance, in the Hume region two in-house lawyers, directly managed by the child protection regional office, represent the Department in child protection proceedings. Child protection practitioners often appear in person in urgent applications in regional Children's Courts.[247]

LAWYERS FOR PARENTS

3.162 Parents are usually legally represented in protection applications. The Court may adjourn proceedings to enable a parent to obtain legal representation.[248] Most of the parents who are parties to protection applications are eligible for a grant of legal assistance from VLA and are represented by either a private lawyer from a panel overseen by VLA or an in-house VLA lawyer.[249] See Appendix M for details of the guidelines for VLA funding for proceedings in the Family Division of the Children's Court.

3.163 Other interested persons, such as actual or potential foster carers, permanent carers and kinship carers, are sometimes legally represented.[250]

LAWYERS FOR CHILDREN AND TYPES OF LEGAL REPRESENTATION

3.164 A child who, in the opinion of the Court, is considered mature enough to give instructions, must be legally represented in child protection proceedings.[251] A child who, in the opinion of the Court, is not mature enough to give instructions, is only legally represented if, in exceptional circumstances, the Court determines it is in the child's best interests for the child to be represented.[252] At the time of the Children's Court submission, this power to have children represented on a best interests basis had been exercised in only 33 cases since the CYF Act 2005 commenced operations.[253]

3.165 If a child is entitled to legal representation, the Court 'must' adjourn the hearing of the proceeding to enable the child to obtain legal representation.[254] There are limited exceptions to this general rule for a child considered mature enough to give instructions.[255] VLA will fund lawyers for all children who are entitled to representation under the CYF Act 2005.[256] According to VLA's funding guidelines, a child aged seven years or older is generally considered mature enough to give instructions and is eligible for a grant of legal aid.[257]

3.166 The age of seven is a guide and lawyers are expected to assess each child's capacity to give instructions. Assistance in this task is provided by the Victoria Law Foundation's 1999 publication, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court*.[258] In practice, most children are assessed as having sufficient maturity to instruct a lawyer from the age of seven and the Court accepts the lawyer's assessment of the child's capacity. In cases of uncertainty, the Court may refer the child to the Children's Court Clinic for an assessment of the child's capacity to instruct a lawyer.

Direct representation

3.167 A lawyer acting for a child considered mature enough to give instructions[259] 'must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child'.[260] Under this direct representation or 'instructions' model of representation, a child may also be represented by a layperson who is not a legal practitioner or a parent of the child.[261]

242 *Children, Youth and Families Act 2005* (Vic) s 215(3)–(6).

243 *Children, Youth and Families Act 2005* (Vic) s 215(3).

244 Consultations 3 (CAU), 10 (VFPMS).

245 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Court Advocacy Unit', Advice No 1070 (23 April 2007), from CD-ROM provided at 23 March 2010.

246 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Legal Services Branch', Advice No 1337 (23 April 2007), from CD-ROM provided at 23 March 2010.

247 Consultations 13 (DHS CP Workers Hume), 18 (DHS CP Workers Gippsland).

248 *Children, Youth and Families Act 2005* (Vic) s 524(1)(c).

249 For an outline of the functions of Victoria Legal Aid in child protection proceedings see para 3.24.

250 *Children, Youth and Families Act 2005* (Vic) s 524(1)(d).

251 *Children, Youth and Families Act 2005* (Vic) ss 524(2), 525(1). Section 525(1) sets out 30 types of protection proceedings in which a child must be legally represented, subject to s 524. The Children's Court submission points out that s 525(1) fails to include 7 types of child protection applications as a result of a drafting error: submission 46 (Children's Court of Victoria) 82. The omitted applications are: applications to extend therapeutic treatment orders, therapeutic treatment (placement) orders, and interim accommodation orders under ss 255(1)(a)–(b) and 267; applications to vary undertakings and interim protection orders under ss 279 and 299(e); and, applications to revoke undertakings and interim protection orders in ss 279 and 303(g). In practice, if children are entitled to representation for primary applications they continue to be represented for these particular omitted secondary applications.

252 *Children, Youth and Families Act 2005* (Vic) s 524(4).

253 Submission 46 (Children's Court of Victoria) 61.

254 *Children, Youth and Families Act 2005* (Vic) s 524(2), (4).

255 The Court may continue with the hearing if the child failed to obtain legal representation given the opportunity, or if a lay advocate, who is not a parent, is given leave of the Court to appear for the child: *Children, Youth and Families Act 2005* (Vic) s 524(3), (8).

256 Victoria Legal Aid, *Grants Handbook* (12th ed, 2001) 30. Refer to Appendix M for details of Victoria Legal Aid funding.

257 The view that children plus or minus the age of seven are generally capable of giving instructions appears to have originated from advice contained in a 1992 protocol between the Department of Health and Community Services and the Legal Aid Commission. Andrew McGregor, then manager of Victoria Legal Aid's Youth Legal Service, states that 'The age of seven is used solely as a guide in terms of the age at which it is likely for the child to have developed maturity sufficient to instruct, and is based on expert opinion provided by the Director of the Children's Court Clinic, Dr Pat Brown': 'The Representation of Young Children in the Family Division of the Children's Court in Victoria' (2000) 24 *Australian Children's Rights News* 19, 19.

258 The guidelines, although written prior to the proclamation of the *Children, Youth and Families Act 2005* (Vic), are still considered relevant by practitioners.

259 Under s 524(2) of the *Children, Youth and Families Act 2005* (Vic).

260 *Children, Youth and Families Act 2005* (Vic) s 524(10).

261 *Children, Youth and Families Act 2005* (Vic) s 524(8)–(9).

Best interests representation

3.168 A child who, in the opinion of the Court, is not mature enough to give instructions, will be represented on a 'best interests' basis only in 'exceptional circumstances'.[262] The Court must determine if it is in the child's best interests for the child to be represented.[263] A lawyer must 'act in accordance with what he or she believes to be in the best interests of the child'.[264] Legal practitioners must also communicate to the Court the wishes expressed or instructions given by the child to the extent that it is practicable to do so.[265]

3.169 The Commission is not aware of any Victorian guidelines to assist legal practitioners represent children on a best interests basis in child protection cases. The Children's Court submitted that in the limited number of instances in which the Court has appointed a lawyer, legal representatives have generally assisted the Court in making its decisions in the best interests of the represented child.[266]

Children's participation

3.170 The CYF Act 2005 provides that, 'as far as practicable', the Court must allow the child 'to participate fully in the proceeding'.[267] Legally represented children sometimes attend proceedings or parts of proceedings and directly participate.

PROTECTION ORDERS (DISPOSITIONS)

INTRODUCTION

3.171 If the Court finds that a child 'is in need of protection',[268] it may make a protection order if certain pre-conditions are satisfied. The Court must have received and considered a disposition report from the Child Protection Service and be satisfied that the Child Protection Service has taken all reasonable steps to provide the services necessary in the best interests of the child.[269]

3.172 If a protection order requires removing a child from the custody of his or her parent, the Court must be satisfied that all reasonable steps have been taken by the Child Protection Service to enable the child to remain at home.[270] Lack of suitable accommodation is not by itself a sufficient reason.[271]

ORDER UNDER SECTION 272—'NO PROOF' UNDERTAKING

3.173 The Court may order the child, a parent, or the person with whom the child is living to enter into a written undertaking to do, or refrain from doing, certain things.[272] An order of this nature is not technically a protection order.[273] The undertaking may last for up to six months or a maximum of 12 months if special circumstances exist.[274] The order may include any conditions that the Court considers in the child's best interests.[275] This order may only be made with the consent of the person giving the undertaking.[276] The order may be varied or revoked, but no application may be made for non-compliance with the undertaking.[277]

3.174 These section 272 orders may be made in cases where Child Protection is withdrawing the protection application and the application is subsequently struck out by the Court. In 2008–09, the Court made a section 272 order in 113 out of the 397 cases that were struck out.[278] In the same year, the Court made 36 orders under section 272 after either dismissing the protection application or refusing to make a protection order.

PROTECTION ORDER UNDERTAKING

3.175 The Court also has the power to order an undertaking if it finds the protection application proven.[279] The person giving the undertaking must consent to the order.[280] The undertaking requires a child, parent or person caring for a child to agree in writing to do or refrain from doing certain things.

3.176 The undertaking may be made for six months, or up to 12 months in special circumstances.[281] This undertaking may be varied or revoked.[282] There are no 'breach' applications for undertakings. Child Protection only considers an undertaking appropriate where the future risk of significant harm can be adequately managed in the community.[283] In 2008–09 the Court made 121 undertakings under section 278 in 2849 finalised primary applications.[284]

SUPERVISION ORDER

3.177 A child remains in the care of his or her parents when a supervision order is made under section 280 of the CYF Act 2005. Under this order, Child Protection has powers to visit the child at home and carry out supervisory functions.[285] Supervision orders may be made for 12 months, or up to two years in special circumstances.[286] A supervision order may impose conditions on the child or parent as needed in the child's best interests,[287] for example, that parents attend counselling for drug and alcohol abuse, undergo drug testing, or attend a parenting course.

3.178 While a supervision order may be extended for up to two years from the date the extension is granted,[288] the Secretary must review the operation of the order before the end of 12 months for the order to continue.[289] If, within that period, the Secretary fails to provide a notice to the Court, the child and parents that the order continues to be in the child's best interests, the order lapses.[290] Supervision orders may be continually extended.[291]

3.179 Secondary applications may be made for varying, revoking or breaching a supervision order.[292] In 2008–09, the Court made 1160 supervision orders out of the 2849 finalised primary applications.[293]

262 *Children, Youth and Families Act 2005* (Vic) s 524(4).

263 *Children, Youth and Families Act 2005* (Vic) s 524(4).

264 *Children, Youth and Families Act 2005* (Vic) s 524(11)(a).

265 *Children, Youth and Families Act 2005* (Vic) s 524(11)(b).

266 Submission 46 (Children's Court of Victoria) 61.

267 *Children, Youth and Families Act 2005* (Vic) s 522(1)(c).

268 *Children, Youth and Families Act 2005* (Vic) s 274. Irreconcilable difference applications are found proven if 'there is a substantial and irreconcilable difference between the person who has custody of the child and the child to such an extent that the care and control of the child are likely to be seriously disrupted': *Children, Youth and Families Act 2005* (Vic) s 274(b). The orders that the Court may make for protection applications are also available for irreconcilable difference applications.

269 *Children, Youth and Families Act 2005* (Vic) s 276(1). Note that a disposition report is not required if the Court makes an undertaking.

270 *Children, Youth and Families Act 2005* (Vic) s 276(2).

271 *Children, Youth and Families Act 2005* (Vic) s 276(3).

272 *Children, Youth and Families Act 2005* (Vic) s 272(2).

273 *Children, Youth and Families Act 2005* (Vic) s 3, definition of 'protection order'; compare s 272 to s 278. A s 272 undertaking is an order that the Court may make in the absence of proof of the protection application.

274 *Children, Youth and Families Act 2005* (Vic) s 272(3).

275 *Children, Youth and Families Act 2005* (Vic) s 272(4).

276 *Children, Youth and Families Act 2005* (Vic) s 272(5).

277 *Children, Youth and Families Act 2005* (Vic) s 273.

278 Children's Court of Victoria, *Annual Report*, above n 3, 22. In 2008–09, a total of 2849 primary applications were finalised.

279 *Children, Youth and Families Act 2005* (Vic) s 278(1).

280 *Children, Youth and Families Act 2005* (Vic) s 278(4).

281 *Children, Youth and Families Act 2005* (Vic) s 278(2).

282 *Children, Youth and Families Act 2005* (Vic) s 279.

283 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition: Protection Order Descriptions', Advice No 1336 (23 April 2007), from CD-ROM provided at 23 March 2010.

284 *Children's Court* of Victoria, *Annual Report*, above n 3, 22.

285 *Children, Youth and Families Act 2005* (Vic) ss 280(1), 282.

286 *Children, Youth and Families Act 2005* (Vic) s 280(2).

287 *Children, Youth and Families Act 2005* (Vic) s 281.

288 *Children, Youth and Families Act 2005* (Vic) s 280(2)(b).

289 *Children, Youth and Families Act 2005* (Vic) s 280(3)(a).

290 *Children, Youth and Families Act 2005* (Vic) s 280(3)–(4).

291 *Children, Youth and Families Act 2005* (Vic) ss 293, 296(1).

292 *Children, Youth and Families Act 2005* (Vic) ss 299, 300, 311.

293 Children's Court of Victoria, *Annual Report*, above n 3, 22.

CUSTODY TO THIRD PARTY ORDER

3.180 A custody to third party order, which is relatively rare, causes a child to be placed in the care and custody of a named person, and not a community service, for a period up to 12 months.[294] The order may include any condition in the child's best interests, including access to a parent, and, for an Aboriginal child, it may incorporate a cultural plan.[295] Conditions must not give any powers or duties to Child Protection.[296] This order cannot be extended or breached.[297] An application may be made to vary or revoke the order, but not by Child Protection.[298] Sometimes this order is made where the person caring for the child is a proposed long-term carer and the carer is yet to make an application to the Family Court for parental responsibility orders. In 2008–09, the Court made only eight custody to third party orders out of the 2849 finalised primary applications.[299]

SUPERVISED CUSTODY ORDER

3.181 A supervised custody order is made where a child has a definite named carer or carers and custody of the child is transferred to that person or persons for the period of the order.[300] In making this order, the ultimate objective is reunification of the child with his or her parents and the Court must direct the parties to take all reasonable steps to achieve this goal.[301]

3.182 The order may last up to 12 months and may be extended for up to two years from the date the extension is granted, provided the Court considers reunification is still achievable.[302] If an order is granted for more than 12 months, the Secretary must review the order within 12 months and notify the Court and parties that it is still in the child's best interests, or the order lapses.[303]

3.183 Conditions in the best interests of the child may be attached to the order, including conditions for access by parents and a cultural plan if the child is Aboriginal.[304] The Secretary may direct that the child return to the custody of his or her parents during the period of the order if it is in the child's best interests.[305] The order is then deemed to be a supervision order instead of a supervised custody order.[306] A supervised custody order may be varied, revoked or breached.[307]

3.184 In 2008–09, the Court made 107 supervised custody orders out of the 2849 finalised primary applications that year.[308]

CUSTODY TO SECRETARY ORDER

3.185 Under a custody to Secretary order, the Department determines where a child will live. This usually involves placement of the child in foster care or community care. The Department may place a child with a parent, although this is 'relatively uncommon, at least in the early life of such order'.[309] In deciding whether or not to make an order, the Court must consider advice from Child Protection about whether it is a 'workable option'.[310] Unlike a supervised custody order, there is no necessary 'ultimate objective' to work towards reunification between child and parent when making a custody to Secretary order.[311]

3.186 Goals regarding reunification or out-of-home care may be made in a case plan prepared by Child Protection following the making of a custody to Secretary order.[312] A custody to Secretary order may be made for 12 months.[313] It may include any conditions in the child's best interests, including access conditions for parents or other people, and, if the child is Aboriginal, a cultural plan.[314]

3.187 The Secretary may apply to extend a custody to Secretary order.[315] Considerations for extending a custody to Secretary order and a guardianship to Secretary order are discussed below. In 2008–09, the Court made 684 custody to Secretary orders out of the 2849 finalised primary applications that year.[316]

GUARDIANSHIP TO SECRETARY ORDER

3.188 Under a guardianship to Secretary order, the Secretary is granted custody and guardianship of a child to the exclusion of everyone else.[317] Although this order may be made for up to two years, for the order to continue beyond 12 months the Secretary must, within 12 months, review the operation of the order and provide a notice to the Court, the child and parents that the order continues to be in the child's best interests.[318] Under this order, the Secretary has rights that a parent would ordinarily have in relation to a child. As there are no conditions concerning the conduct of parents or children attached to a guardianship order, the order cannot be varied or breached.

3.189 The Secretary, a parent or child may apply to revoke a guardianship order.[319] If the Court revokes a guardianship to Secretary order and a child is still in need of protection, the Court may only make a supervision order or an order for an undertaking.[320] A guardianship to Secretary order may be extended in accordance with provisions described below. In 2008–09, the Court made 74 guardianship orders out of the 2849 finalised primary applications that year.[321]

Applications for extensions of custody to Secretary orders and guardianship to Secretary orders

3.190 The Secretary may apply to extend a custody to Secretary order or guardianship to Secretary order.[322] In cases where the original order has been in force for less than 12 months, custody can be extended for an additional 12 months.[323] If the order has been in force for 12 months or more, custody can be extended for up to two years at a time.[324] An extension of two years is, however, limited. The Court can extend the order for a maximum period of 12 months if it is satisfied that:

- it is not in the child's best interests to be returned to the custody of his or her parents
- a permanent care or similar order made by another court would be in the child's best interests, for example, an adoption order or parenting order
- there is no likelihood of reunification.[325]

294 Ibid; *Children, Youth and Families Act 2005* (Vic) s 283.

295 *Children, Youth and Families Act 2005* (Vic) s 283(1)(e).

296 *Children, Youth and Families Act 2005* (Vic) s 283(1)(f).

297 *Children, Youth and Families Act 2005* (Vic) ss 293(1), 311.

298 *Children, Youth and Families Act 2005* (Vic) ss 299, 300(d), 303, 304(1)(c).

299 Children's Court of Victoria, *Annual Report*, above n 3, 22.

300 *Children, Youth and Families Act 2005* (Vic) s 284.

301 *Children, Youth and Families Act 2005* (Vic) s 284(4).

302 *Children, Youth and Families Act 2005* (Vic) ss 295(1), 296(1).

303 *Children, Youth and Families Act 2005* (Vic) s 298.

304 *Children, Youth and Families Act 2005* (Vic) s 284(1)(e).

305 *Children, Youth and Families Act 2005* (Vic) s 284(1)(f).

306 *Children, Youth and Families Act 2005* (Vic) s 286(1)(c).

307 *Children, Youth and Families Act 2005* (Vic) ss 299, 303, 311.

308 Children's Court of Victoria, *Annual Report*, above n 3, 22.

309 Submission 46 (Children's Court of Victoria) 112.

310 *Children, Youth and Families Act 2005* (Vic) s 287.

311 Compare *Children, Youth and Families Act 2005* (Vic) s 284(4).

312 The Act requires that a case plan must contain all 'significant' decisions concerning the child and decisions that 'relate to the present and future care and wellbeing of the child, including the placement of, and access to, the child': *Children, Youth and Families Act 2005* (Vic) s 166(2).

313 *Children, Youth and Families Act 2005* (Vic) s 287(1)(c).

314 *Children, Youth and Families Act 2005* (Vic) s 287(1)(d).

315 *Children, Youth and Families Act 2005* (Vic) s 296(2).

316 Children's Court of Victoria, *Annual Report*, above n 3, 22.

317 *Children, Youth and Families Act 2005* (Vic) s 289(1)(a).

318 *Children, Youth and Families Act 2005* (Vic) s 289(1)(b), (2)–(3).

319 *Children, Youth and Families Act 2005* (Vic) s 305.

320 *Children, Youth and Families Act 2005* (Vic) s 310(5). The Court does not have power in this circumstance to make a custody to Secretary order, for instance.

321 Children's Court of Victoria, *Annual Report*, above n 3, 22.

322 *Children, Youth and Families Act 2005* (Vic) s 296(2).

323 *Children, Youth and Families Act 2005* (Vic) s 297(1)(e).

324 *Children, Youth and Families Act 2005* (Vic) s 296(2).

325 *Children, Youth and Families Act 2005* (Vic) s 297.

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3.191 In these circumstances, the Court may direct the Secretary to take steps to ensure that another person applies to a court in relation to custody or guardianship of the child within the 12-month period.[326]

3.192 A custody to Secretary order or guardianship order is suspended when an application, with the prior consent of the Secretary, is made for relevant parenting orders under the *Family Law Act 1975* (Cth), and it expires when any parenting orders are made.[327]

3.193 In determining any application for an extension of a custody to Secretary order or guardianship to Secretary order, the Court must consider the appropriateness of making a permanent care order for the child before considering the benefits of the child remaining in the custody or guardianship of the Secretary.[328] The Court must also take the following matters into account:

- the nature of the relationship of the child with his or her parents and the access between the child and the parents
- the capacity of the parents to fulfil the duties and responsibilities of parenthood
- any action taken by a parent to fulfil the goals of the case plan
- the effects on the child of continued separation from the parents
- any other relevant fact in considering what is in the child's best interests.[329]

The Court may extend the custody to Secretary order if it is in the child's best interests.[330]

Long-term guardianship to Secretary order

3.194 A long-term guardianship order grants custody and guardianship of a child aged 12 years or older to the Secretary.[331] The order may last until the child turns 18 or until the child marries, whichever is earlier.[332] To make a long-term guardianship order, the Court must be satisfied that there is a long-term carer or carers with whom the child can live, that the child and the Secretary consent to the order, and that the order is in the child's best interests.[333] The Secretary must apply to revoke the order if the child's placement with the carer has broken down.[334] In other circumstances, a child, a parent, with leave of the Court, or the Secretary may apply to revoke the order.[335]

3.195 There are no conditions attached to this order so there are no applications for breach or variation. To prevent the order from lapsing, the Secretary must review the operation of the order every 12 months and provide a notice to the Court, the child and parents that the order continues to be in the child's best interests.[336]

3.196 A long-term guardianship order is suspended when an application, with prior consent of the Secretary, is made for relevant parenting orders under the *Family Law Act 1975* (Cth), and expires when any parenting orders are made.[337] In 2008–09, the Court made 43 long-term guardianship orders.[338]

Interim protection order

3.197 Before making a protection order, the Court may make an interim protection order for a maximum period of three months when the Court considers it desirable 'to test the appropriateness of a particular course of action'.[339] The order may also be made upon revocation of a supervised custody order, custody to third party order or breach of a supervised custody order or supervision order.[340]

3.198 The interim protection order may include any conditions on parents, a child or a carer that are in the child's best interests, including conditions about where the child lives and access by a parent or other person.[341] The Secretary is responsible for implementing the order.[342] The Court may order that a further report—often a Clinic report—be prepared.[343] Before the end of the interim protection order, the Court must consider a further disposition report and then make or refuse to make a protection order.[344] The Court cannot extend or make a new interim protection order.[345]

3.199 The Secretary, parent or child may apply to vary or revoke an interim protection order.[346] The Secretary may bring an application for breach of conditions by a child, parent or carer.[347] On a breach application, the Court may:

- confirm the interim protection order
- end the interim protection order with the making of an interim accommodation order
- vary any conditions
- revoke the order, and may make a further protection order (but not a further interim protection order).[348]

3.200 In 2008–09, the Court made 893 interim protection orders.[349]

COSTS ORDERS

3.201 The parties to child protection proceedings in the Children's Court are usually responsible for their own legal costs. Most parents and represented children in child protection proceedings have legal representation provided by VLA.

3.202 The Children's Court has powers given to the Magistrates' Court under the *Magistrates' Court Act 1989* (Vic),[350] including the power to order costs against a person or legal practitioner.[351] It is very uncommon, however, for the Court to order costs against a party in child protection proceedings.[352] In *DHS v Hanrahan & Maher,*[353] Justice Hampel held that costs may be awarded when a protection application is withdrawn.

APPEALS

3.203 The parties have a right to appeal against a Children's Court order. Appeals are heard by either the County Court or Supreme Court, depending on the type of order appealed from, who the original decision maker was, and whether it is an appeal on a question of law. Parties must lodge an application for appeal under the Act within 28 days,[354] or 30 days for an appeal on a question of law.[355] As IAOs last for only 21 days, appeals against this type of order are often filed within 24 hours.

326 *Children, Youth and Families Act 2005* (Vic) s 297(1)(f).

327 *Children, Youth and Families Act 2005* (Vic) ss 288, 289(4).

328 *Children, Youth and Families Act 2005* (Vic) s 295(2).

329 *Children, Youth and Families Act 2005* (Vic) s 295(3).

330 *Children, Youth and Families Act 2005* (Vic) s 294.

331 *Children, Youth and Families Act 2005* (Vic) s 290(1)(a)–(b).

332 *Children, Youth and Families Act 2005* (Vic) s 290(1)(c).

333 *Children, Youth and Families Act 2005* (Vic) s 290(2).

334 *Children, Youth and Families Act 2005* (Vic) s 306(2).

335 *Children, Youth and Families Act 2005* (Vic) s 306(1).

336 *Children, Youth and Families Act 2005* (Vic) s 290(3)–(4).

337 *Children, Youth and Families Act 2005* (Vic) ss 290(5), 288.

338 Children's Court of Victoria, *Annual Report*, above n 3, 19.

339 *Children, Youth and Families Act 2005* (Vic) s 291(1)(b), (3)(e).

340 *Children, Youth and Families Act 2005* (Vic) s 291(2).

341 *Children, Youth and Families Act 2005* (Vic) s 291(3)(f).

342 *Children, Youth and Families Act 2005* (Vic) s 291(3)(a).

343 *Children, Youth and Families Act 2005* (Vic) s 291(3)(c).

344 *Children, Youth and Families Act 2005* (Vic) s 291(6).

345 *Children, Youth and Families Act 2005* (Vic) s 291(6).

346 *Children, Youth and Families Act 2005* (Vic) ss 299(e), 303(g).

347 *Children, Youth and Families Act 2005* (Vic) s 311(c).

348 *Children, Youth and Families Act 2005* (Vic) ss 311, 317–18.

349 Children's Court of Victoria, *Annual Report*, above n 3, 19.

350 *Children, Youth and Families Act 2005* (Vic) s 528.

351 *Magistrates' Court Act 1989* (Vic) ss 131–2.

352 Children's Court of Victoria, *Research Materials*, above n 136, [3.9.3].

353 *Secretary to the Department of Human Services v His Worship Mr Hanrahan & Maher & Ors* (Unreported, Supreme Court of Victoria, Hampel J, 10 December 1996).

354 *Children, Youth and Families Act 2005* (Vic) s 425(1).

355 *Children, Youth and Families Act 2005* (Vic) s 329(4)(a).

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FULL RE-HEARING (HEARING *DE NOVO*)

3.204 The parties, including specified persons, may appeal against certain orders of the Children's Court to the County Court, if the original decision was made by a Court magistrate, or to the Supreme Court, if the original decision was made by the President of the Court. The types of orders providing a right of appeal with a full re-hearing include:

- a protection order[356]
- the dismissal of a protection application or irreconcilable difference application[357]
- an undertaking under section 272 of the Act[358]
- orders relating to the variation, revocation, extension and breach of various orders[359]
- permanent care orders[360]
- orders dismissing various applications.[361]

Pending an appeal, the Court is to hear and determine an application for a stay of an order as expeditiously as possible.[362]

3.205 A parent, the child, the Secretary, the person granted custody and guardianship in a permanent care order, and the Attorney-General—if the Attorney-General appeared in the original proceeding—may lodge appeals.[363]

3.206 Appeals operate as re-hearings of the original proceedings. The appellate court is to consider the matter afresh, on the evidence presented.[364] The procedures for an appeal from a decision in the Family Division of the Court are cross-referenced to sections relating to appeals in the Criminal Division of the Court, with necessary modifications. Relevant sections set out matters regarding:

- how an appeal is commenced[365]
- the determination of appeal[366]
- the effect of failing to appear[367]
- the abandonment of appeal[368]
- legal representation[369]
- explanation of and reasons for orders[370]
- the circumstances in which an appeal case, or part of a case, is open to the public.[371]

APPEAL ON A QUESTION OF LAW

3.207 A party to proceedings before the Family Division of the Children's Court, or the Attorney-General—if represented in the original proceedings—may appeal to the Supreme Court on a question of law from a final order of the Court.[372] The appellant must demonstrate that the Children's Court made an error of law, such as the misapplication of a legal principle.[373]

3.208 A person who appeals on a question of law is deemed to have abandoned finally and conclusively any other right under the Act or any other Act to appeal to the County Court or the Trial Division of the Supreme Court.[374]

JUDICIAL REVIEW

3.209 There is also a right to challenge the decision-making process by means of judicial review in the Supreme Court.[375] This procedure enables a party to appeal a decision that is not a final order. Judicial review is limited; it focuses on the jurisdiction and legality of court actions, not on whether the decision was correct.[376]

APPEAL TO SUPREME COURT FOR INTERIM ACCOMMODATION ORDERS

3.210 A child, parent or protective intervener may appeal to the Supreme Court against an IAO or an order dismissing an IAO application.[377] The Supreme Court can make any other order it thinks ought to have been made in place of the Court's original order or dismissal, or it can dismiss the appeal.[378] The appeal operates as a re-hearing on the original material, but the Supreme Court may consider any other relevant material.[379]

APPEALS IN PRACTICE

3.211 It is rare for child protection decisions to be the subject of an appeal or review. The Children's Court reports that in the financial year 2007–08, 12 child protection cases were appealed or reviewed.[380] In three of these cases, the Court's original decision was either partly or wholly overturned.[381]

3.212 IAO appeals are also unusual. Over the past five years, there has been an average of two appeals per year,[382] only one of which was successful.[383]

3.213 The Children's Court regularly hears IAO contests by evidence in circumstances where a party has not been satisfied with the judicial officer's decision following an IAO contest by submission. In a sense, this is a form of internal review and is cheaper and more convenient than an appeal to the Supreme Court. The Court also hears many applications for breaches of IAO conditions.[384] If initiated by safe custody, these applications may be back before the Court or a bail justice within 24 hours.[385] Between September 2002 and June 2007, applications for breach of IAO conditions grew by 17 per cent per year.[386]

356 *Children, Youth and Families Act 2005* (Vic) s 328(1)(a).

357 *Children, Youth and Families Act 2005* (Vic) s 328(1)(b).

358 *Children, Youth and Families Act 2005* (Vic) s 328(1)(c).

359 *Children, Youth and Families Act 2005* (Vic) s 328(1)(i)–k).

360 *Children, Youth and Families Act 2005* (Vic) s 328(1)(n).

361 *Children, Youth and Families Act 2005* (Vic) s 328(1)(m), (o).

362 *Children, Youth and Families Act 2005* (Vic) s 328(9).

363 *Children, Youth and Families Act 2005* (Vic) s 328(2).

364 *Mr and Mrs X v Secretary to the Department of Human Services and Anor* (Unreported, Supreme Court of Victoria, Common Law Division, Gillard J, 12 May 2003) [58], [60].

365 *Children, Youth and Families Act 2005* (Vic) s 328(6)(a), refers to s 425 except sub-s 3(a).

366 *Children, Youth and Families Act 2005* (Vic) s 328(6)(b), refers to s 426(1)–(2), (4)–(5).

367 *Children, Youth and Families Act 2005* (Vic) s 328(6)(e), refers to s 430D, and s 328(6)(f) refers to s 430E.

368 *Children, Youth and Families Act 2005* (Vic) s 328(6)(d), refers to s 430C except sub-ss (3)–(4).

369 *Children, Youth and Families Act 2005* (Vic) s 328(6)(j), refers to s 430ZE.

370 *Children, Youth and Families Act 2005* (Vic) s 328(6)(l), refers to s 430ZG.

371 *Children, Youth and Families Act 2005* (Vic) s 328(6)(i), refers to s 430ZD.

372 *Children, Youth and Families Act 2005* (Vic) ss 329–30.

373 See, for example, *Director-General of Community Services Victoria v Buckley & Ors* (Unreported, Supreme Court of Victoria, O'Bryan J, 11 December 1992).

374 *Children, Youth and Families Act 2005* (Vic) s 328(5).

375 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 56.01.

376 *Mr and Mrs X v Secretary to the Department of Human Services and Anor* (Unreported, Supreme Court of Victoria, Common Law Division, Gillard J, 12 May 2003) [23]–[26]. See, for example, *Dr John Paterson v Keith Smith & Gregory Levine* (Magistrate, Children's Court) (Unreported, Supreme Court of Victoria, Harper J, 29 June 1993)—held the Court's decision was beyond jurisdiction; *PR v the Department of Human Services* [2007] VSC 338 (Unreported, Osborn J, 27 August 2007)—application for judicial review dismissed.

377 *Children, Youth and Families Act 2005* (Vic) s 271(1).

378 *Children, Youth and Families Act 2005* (Vic) s 271(2)–(3).

379 *Purcell v RM & Ors* [2004] VSC 14 (Unreported, Gillard J, 9 January 2004) [25].

380 Submission 46 (Children's Court of Victoria) 14.

381 Ibid.

382 Ibid 53.

383 Ibid.

384 Under s 269 of the *Children, Youth and Families Act 2005* (Vic), a protective intervener, satisfied on reasonable grounds that there has been a failure to comply, may initiate an application for breach of an interim accommodation order or any condition attached to it.

385 *Children, Youth and Families Act 2005* (Vic) s 269(5).

386 Boston Consulting Group, *Children's Court of Victoria Demand and Capacity Review: Findings and Recommendations* (2007), 16. The new data released by the Boston Consulting Group in February 2010 does not appear to include relevant data regarding breach of interim accommodation orders: *Boston Consulting Group, Child Protection Proceedings Taskforce*, above n 24.

3.214 Some appellate courts have suggested that because the Children's Court is a specialist court dedicated to matters relating to children, they should be reluctant to interfere with the exercise of discretionary powers. In the *Department of Human Services v Yalniz,*[387] Justice Nathan held that protection applications are *sui generis* and, in order for the Children's Court to ensure the protection of children, the rules of procedure can be tailored by the Court.[388] Similarly, Justice Beach emphasised the special role of the Children's Court by observing that the Supreme Court should be reluctant to interfere with Children's Court orders and 'should only do so where it is abundantly clear that some significant error has been made'.[389] Similar comments have been made in more recent decisions.[390]

TRANSFER OF CHILD PROTECTION ORDERS AND PROCEEDINGS

3.215 The CYF Act 2005 provides for the transfer of protection proceedings or protection orders between Victoria and another Australian state or territory, or between Victoria and New Zealand.[391] The Secretary can transfer protection orders administratively, if the persons affected by the order, such as the child's parents and any other person who is granted access to the child under the order, consent.[392] If consent cannot be obtained, the Secretary may apply to the Children's Court for an order to transfer the child protection order.[393]

3.216 The Children's Court can also transfer protection proceedings that have not been finalised to the Children's Court in any participating state or territory.[394]

CHILD PROTECTION RESPONSIBILITIES AFTER THE COURT MAKES A PROTECTION ORDER

PROTECTION ORDER PHASE—CASE PLANS, STABILITY PLANS, CULTURAL PLANS

3.217 Child Protection refers to the protection order phase as the fourth phase in the context of their casework practice. It commences when the Court has found the protection application proven and a protection order has been made in respect of a child. The child protection practitioner monitors, oversees and seeks to ensure that parents adhere to conditions of the protection order for the period of the order. The practitioner continues to assess the safety and wellbeing of the child. This may involve bringing a further application to court for breach, variation, revocation or extension of a protection order.

3.218 During this phase, the child protection practitioner formulates a case plan within six weeks of the making of an protection order,[395] establishes a stability plan where required,[396] and establishes a cultural support plan or cultural plan for an Aboriginal child.[397]

Case plan

3.219 If the Court makes a supervision order, supervised custody order, custody to the Secretary order, guardianship order, long-term guardianship order or therapeutic treatment (placement) order, then the Department must prepare a case plan for the child within six weeks of the order.[398]

3.220 The case plan is often referred to as the 'statutory case plan' or the 'statutory best interests case plan', to distinguish it from the original 'best interests plan' created during the protection intervention phase.

3.221 The case plan must contain all of the Secretary's significant decisions concerning the child that relate to the child's present and future wellbeing, including the placement of and access to the child.[399] The best interests principles in section 10 and the decision-making principles in section 11 of the CYF Act 2005 apply to Child Protection when making case plans. If a child is Aboriginal, the principles in section 12 and, where relevant, sections 13 and 14, apply.

3.222 Family members attend case plan meetings and may have support persons present, although it is very rare for parents or children to be legally represented at case plan meetings.

3.223 A grant of legal aid for a lawyer to attend a case plan meeting for a party is only available in special circumstances. This would occur, for instance, if a parent or older child lacked capacity to participate because of an intellectual disability. Children are generally not legally represented at case plan meetings. Copies of the plan must be provided to the child and parents within 14 days of preparation together with a notice advising of procedures for an internal review.[400]

3.224 In submissions and consultations, the Commission heard concerns about how case plans and, where a protection order had not yet been made, best interests plans, could be designed to achieve a particular goal or outcome, but that outcome was in dispute between family members and Child Protection. For example, following a 12-month custody to Secretary order, Child Protection may create a plan with a goal of permanent care for the child, when parents seek to be reunified with the child at the end of the 12-month period.

3.225 If the custody to Secretary order contained a broadly expressed access condition, then the case plan may only include the minimum access necessary under the order in support of a permanent care goal. Legal practitioners for parents and children argued that a low level of access would interfere with the parents and/or child's goal for reunification. Child protection practitioners also expressed concern about this issue, stating that they had statutory obligations to create a plan in the child's best interests and they could not know when court proceedings would be finalised.[401]

Review of case plans

3.226 The Secretary must review case plans from time to time 'as appears necessary'. Parents and children may seek an internal review of a case plan decision, and if unsatisfied with the result, they have a right of review through the Victorian Civil and Administrative Tribunal (VCAT).[402] Parties and/or children who are capable of providing instructions are not routinely legally represented at any VCAT review. Special circumstances must be shown.[403] In 2009, there were only 12 case plan reviews to VCAT.[404] The Children's Court does not have jurisdiction to review case plan decisions.

Stability plan

3.227 Following the making of an IAO or a protection order by the Court, unless it is contrary to the child's interests, the Secretary must prepare a stability plan if a child is in out-of-home care and has been so for a designated period since the order was made.[405] The designated periods vary according to the age of the child: for children under two years old at the date of the order, the period is 12 months in total; for children of two to under seven years old, the period is 18 months; and for children above seven years old, the period is two years out of three years since the order was made.[406]

387 *Secretary of the Department of Human Services v Yalniz* [2001] VSC 231 (Unreported, Nathan J, 13 July 2001) [21].

388 Ibid.

389 *Hien Tu v Secretary of Department of Human Services* [1999] VSC 42 (Unreported, Beach J, 23 February 1999) [21].

390 *Purcell v RM & Ors* [2004] VSC 14 (Unreported, Gillard J, 9 January 2004) [27]–[28]; *CJ v Department of Human Services* [2004] VSC 317 (Unreported, Habersberger J, 9 August 2004) [21]–[22]; *The Secretary, Department of Human Services v Merigan & Anor* [2006] VSC 129 (Unreported, Hansen J, 21 February 2009) [13]–[14]: Hansen J held that 'I would, with respect, take the position that the decision of an experienced Magistrate in a specialist court is to be afforded respect and weight in consequence that it is such a decision, but doing so, in the end the decision must nevertheless be regarded in the context of all the relevant facts and circumstances of the case.'

391 *Children, Youth and Families Act 2005* (Vic) ss 335, 228, sch 1.

392 *Children, Youth and Families Act 2005* (Vic) sch 1, cl 4.

393 *Children, Youth and Families Act 2005* (Vic) sch 1, pt 2, div 2.

394 *Children, Youth and Families Act 2005* (Vic) sch 1, pt 3.

395 *Children, Youth and Families Act 2005* (Vic) s 167.

396 *Children, Youth and Families Act 2005* (Vic) s 170.

397 *Children, Youth and Families Act 2005* (Vic) s 176.

398 *Children, Youth and Families Act 2005* (Vic) s 167.

399 *Children, Youth and Families Act 2005* (Vic) s 166.

400 *Children, Youth and Families Act 2005* (Vic) ss 167(2), 331.

401 Consultation 6 (Private Practitioners 1).

402 *Children, Youth and Families Act 2005* (Vic) ss 331, 333. Decisions relating to the recording of information in the central register may also be reviewed by VCAT: *Children, Youth and Families Act 2005* (Vic) s 333(1)(b).

403 Victoria Legal Aid, *Grants Handbook*, above n 256, 94. Refer to Appendix M for details of Victoria Legal Aid funding.

404 Email from Justice Ross, President of VCAT, to the Commission, 31 May 2010.

405 *Children, Youth and Families Act 2005* (Vic) ss 170–1.

406 *Children, Youth and Families Act 2005* (Vic) s 170(3).

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3.228 A stability plan sets goals for the child's long-term out-of-home care.[407] It may include details of the proposed carer, the type of court order that the Secretary considers would support the long-term placement of the child in out-of-home care, future access arrangements for parents and siblings, and other considerations for best meeting the child's needs.[408]

Cultural plan

3.229 If an Aboriginal child has been placed in out-of-home care under a guardianship to Secretary order or long-term guardianship to Secretary order, the Secretary must prepare a cultural plan for the child.[409] A cultural plan sets out how the child is to remain connected to his or her Aboriginal community and culture.[410] The Secretary must monitor the carer's compliance with the cultural plan.[411]

3.230 The Commission heard that cultural plans would also be desirable for Aboriginal children placed on custody to Secretary orders and other orders involving placement in out-of-home care.[412]

CASE CLOSURE BY CHILD PROTECTION

3.231 Case closure is the last of the five phases of child protection work. A case can close following the recording of a particular outcome at any of the four preceding phases. At the end of the protection order phase, recorded outcomes may indicate:

- that 'no further action is required'
- that advice, information, and referral were provided
- that harm was substantiated but sufficient safety was provided
- a 'move to closure'.[413]

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES AND INTERNATIONAL RIGHTS INSTRUMENTS

INTRODUCTION

3.232 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) contains a number of human rights relevant to this review of child protection processes. Some international human rights instruments are also important.

3.233 While children have not always been seen as people with rights, various assumptions concerning the status of children fell away during the 20th century.[414] In earlier times, it had been suggested that children should not be entitled to rights because the enjoyment of rights is contingent on capacity to exercise rights, which some children lacked.[415] It is now widely accepted that capacity is not a precondition to the enjoyment of human rights, and that all persons have rights by virtue of their humanity.[416]

3.234 Theorists have contended that the concept of rights should not be confined to those who can lay claim to or waive them,[417] and that children can therefore be considered to have rights. This is the 'interest' theory of rights, and enables children to benefit from rights even though they may lack capacity to make what adults consider 'reasoned decisions'.[418] An evolving conception of autonomy applies to children, reflecting their age and level of maturity and enabling them to become active agents in matters affecting them.[419] Widespread support for the *UN Convention on the Rights of the Child* (CROC)[420] demonstrates that children are now considered rights-bearing subjects.

3.235 Child protection matters and human rights interact in a number of ways, including:

- balancing the rights of families and children
- the separation of children from their families
- the representation and participation of children in child protection processes
- the right to a fair hearing
- cultural rights as they apply to children.

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (VIC)

3.236 Victoria is one of two Australian jurisdictions with a charter of rights.[421] The Charter came into full operation on 1 January 2008.[422] The Charter gives statutory recognition to 20 civil and political rights and freedoms primarily derived from the *International Covenant on Civil and Political Rights* (ICCPR).[423] The purpose of the Charter is to protect and promote the human rights of all persons who are present in Victoria.[424] The Charter establishes a 'dialogue model' of human rights protection, whereby the government, courts and parliament are assigned specific roles to ensure that human rights are protected and promoted in Victoria. Laws are to be developed and interpreted compatibly with human rights, and government and public authorities are required to act consistently with human rights.[425] Children benefit from almost all human rights set out in the Charter, as persons.[426] A number of human rights principles enshrined in the Charter are pertinent to the current law and practice of child protection in Victoria.[427]

3.237 Under the Charter, it is unlawful for a public authority to 'act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.[428] However, this provision does not apply 'if, as a result of a [Commonwealth or state statutory provision] or otherwise under law, the public authority could not reasonably have acted differently or made a different decision'.[429] The Department is a public authority and organisations undertaking functions of a public nature on behalf of the Department are also public authorities under the Charter when performing those functions.[430]

407 *Children, Youth and Families Act 2005* (Vic) s 169.

408 *Children, Youth and Families Act 2005* (Vic) s 169(3).

409 *Children, Youth and Families Act 2005* (Vic) s 176(1).

410 *Children, Youth and Families Act 2005* (Vic) s 176(2)–(3).

411 *Children, Youth and Families Act 2005* (Vic) s 176(4).

412 Consultation 27 (FVPLS Victoria).

413 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Definition and Purpose of Case Closure ', Advice No 1531 (23 April 2007), from CD-ROM provided at 23 March 2010.

414 John Tobin, 'The Development of Children's Rights' in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 23, 25–7.

415 Ibid 28.

416 Ibid 29.

417 Jane Fortin, *Children's Rights and the Developing Law* (3rd ed, 2009) 13.

418 Ibid.

419 Tobin, above n 414, 29; *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 5, 12 (entered into force 2 September 1990) (CROC).

420 At 17 May 2010, 193 countries were party to the *Convention on the Rights of the Child*. This excludes Somalia and the United States of America, which are only signatories to the Convention.

421 The other is the Australian Capital Territory. See the *Human Rights Act 2004* (ACT).

422 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2.

423 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1.

424 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(1). 'Person' is defined in s 3(1) to mean a human being, and 'child' means a person under 18 years of age.

425 *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 3.

426 A notable exception is the right to vote which is legitimately restricted on the basis of age: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 18(2)(a).

427 All submissions which considered the human rights implications of child protection identified the Charter as central to the current law and practice of child protection.

428 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1).

429 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(2).

430 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4. A number of submissions highlighted the Charter obligations on DHS, including: submissions 33 (Youthlaw), 24 (WHCLS), 45 (FCLC), 25 (LIV).

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3.238 An act of a public authority that is unlawful under the Charter[431] does not give rise to an independent right to relief or a remedy,[432] but may be used as an additional ground in a non-Charter cause of action relating to the unlawful conduct of a public authority.[433] That is, an act by a public authority that is incompatible with the Charter does not give rise to a freestanding cause of action against the public authority, but may be used as part of an existing cause of action. There is no entitlement to damages for a breach of the Charter.[434] The Charter expanded the functions of the Victorian Ombudsman to include 'the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter'.[435]

3.239 The Charter acknowledges that human rights, in general, are not absolute, but

> *may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.*[436]

3.240 When determining whether any limitations on rights are reasonable, the relevant facts to consider include:

- the nature of the right
- the importance of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- whether there is a less restrictive way to achieve the purpose of the limitation
- any other relevant factors.[437]

These factors are to be taken into account when human rights are engaged in most, if not all, child protection matters.

INTERNATIONAL CONVENTIONS

3.241 Australia is state party to a number of key international conventions that protect and promote the rights of families and children. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides that families should be afforded the widest possible protection and assistance.[438] Furthermore, states are to adopt special measures to protect and assist children and young people without discrimination on the basis of parentage or other conditions.[439] The ICCPR also provides specific rights protecting the rights of families and children.[440] As the natural and fundamental group unit in society, the family is entitled to protection by society and the state.[441] Every child, without discrimination, has 'the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State'.[442] CROC sets out internationally accepted principles for promoting and protecting the fundamental human rights of children, including principles for child protection.[443] It entitles each person under the age of 18 to the rights set out within it.[444] The relevant substantive rights will be discussed at length below.

3.242 Australia has ratified all of these international conventions.[445] At the time of ratification, Australia lodged only one reservation to CROC.[446] Ratification of CROC and other international instruments indicates that not only is Australia committed to the human rights principles protected and promoted in these conventions, but it also consents to the legal obligations which flow from them. As a state party, Australia must protect, respect and fulfil the human rights relevant to children and families enshrined in the ICCPR, ICESCR and CROC.

3.243 Under each of these international rights instruments, Australia accepts an obligation in good faith to enable enjoyment of the rights within domestic law.[447] International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right can also play an important role in interpreting rights under the Charter.[448] The Charter itself provides that it must be reviewed after four years of operation. One of the matters to be considered is whether the rights in CROC should be included in the Charter.[449]

PROTECTION OF FAMILIES AND CHILDREN—A BALANCING EXERCISE

Protection of families as the fundamental group unit of society

3.244 The Charter recognises that 'families are the fundamental group unit of society and are entitled to be protected by society and the State',[450] although 'family' is not defined. The Explanatory Memorandum to the Charter states that the section is to be interpreted broadly so that it may 'be given a meaning that recognises the diversity of families that live in Victoria, all of whom are worthy of protection'.[451] The United Nations Human Rights Committee (UNHRC) has held that under article 23(1) of the ICCPR, on which this Charter right is modelled,[452] states are required to adopt legislative, administrative or other measures to protect the family.[453]

3.245 CROC reinforces the importance of the family as the fundamental group of society and natural environment for the growth and wellbeing of all its members, particularly children.[454] A broad and non-discriminatory perception of families is supported in CROC, and article 5 requires states to respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community, in providing guidance and support to the child.[455]

3.246 In the CYF Act 2005, it is 'parent and child', not 'family', that is described as the fundamental group unit of society.[456] Although 'parent' is given a relatively broad definition under the CYF Act 2005,[457] the relevant rights instruments[458] are unanimous in identifying the 'family' as the fundamental group unit of society and the unit which is to be protected. It is surprising that legislation entitled the *Children, Youth and Families Act* does not give priority to the status of the family.

431 Pursuant to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 28.

432 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 28.

433 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(1).

434 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

435 *Ombudsman Act 1973* (Vic) s 13(1A); *Charter of Human Rights and Responsibilities Act 2006* (Vic) sch 2.

436 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

437 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

438 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 10(1) (entered into force 3 January 1976).

439 Ibid art 10(3). This was discussed in submissions 45 (FCLC), 26 (FVPLS Victoria).

440 The ICCPR was noted in submissions, including: submissions 45 (FCLC), 26 (FVPLS Victoria).

441 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 23(1) (entered into force 23 March 1976).

442 Ibid art 24(1).

443 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

444 Ibid art 1.

445 Australia became a signatory to the ICCPR on 18 December 1972 and ratified on 13 August 1980. Australia became a signatory to the ICESCR on 18 December 1972 and ratified on 10 December 1975. Australia became a signatory to CROC on 22 August 1990 and ratified on 17 December 1990.

446 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(c) (entered into force 2 September 1990). Note that this reservation relates to the separation of children from adults in prison.

447 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980): 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith; Tobin, above n 414, 29.

448 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2).

449 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44(2)(a)(ii).

450 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1).

451 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 14.

452 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 23(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 14. Note that article 23(1) of the ICCPR refers to the family as the 'natural and fundamental group unit of society', while the word 'natural' is omitted from s 17(1) of the Charter.

453 Human Rights Committee, *General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art 23)*, 39th sess, UN Doc/HRI/GEN/1/Rev 6 (27 July 1990) [3].

454 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, Preamble (entered into force 2 September 1990).

455 Ibid art 5.

456 *Children, Youth and Families Act 2005* (Vic) s 10(3)(a).

457 *Children, Youth and Families Act 2005* (Vic) s 3. 'Parent' is defined as the father and mother of the child, the spouse of the father or mother, the domestic partner of the father or mother, a person named as the father or mother in the Register of Births, Deaths and Marriages, a person who acknowledges he is the father by an instrument under the *Status of Children Act 1974* and a person in respect of whom the court has made a declaration finding that the person is the father of the child.

458 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 23(1) (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990).

3.247 While the CYF Act 2005 refers to the need to strengthen, preserve and promote positive relations between the child and other family members,[459] and encourages placement with family members when the child is removed from his or her parents,[460] it emphasises the parent–child relationship rather than that of the 'family'. The Committee on the Rights of the Child (CRC) has noted that CROC applies to various forms of families, including not only the extended family as provided for by local custom,[461] but also 'the nuclear family, re-constructed family, joint family, single parent family, common-law family and adoptive family'.[462]

3.248 The right to family protection is not only a parental right, but also a right of the child. In order to maintain personal relations and direct contact with both parents on a regular basis, CROC requires states parties to respect the right of the child who is separated from one or both parents, unless it is contrary to the child's best interests.[463] The protection of the family as the fundamental group unit of society is an important children's right, especially in light of research which depicts some '[out-of-home] care leavers as being particularly disadvantaged and as having significantly reduced life chances'.[464]

Protection of children

3.249 The Charter section which provides for the protection of families also provides for the protection of children.[465] The Charter recognises the special vulnerability of children and provides that 'every child has the right, without discrimination,[466] to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.[467] The CRC recognises that child protection is of the utmost importance and requires a multi-disciplinary approach to ensure children are protected and their families are supported.[468]

Responsibility for protecting children

3.250 According to the UNHRC,[469] responsibility for guaranteeing the necessary protection of children lies primarily with the family, particularly the parents, who are to be assisted by the state, society, and social institutions.[470] Furthermore, states are to adopt every social and economic measure to prevent children from being victims of violence and cruel and inhuman treatment, as well as other measures to protect children and promote their development and education.[471]

3.251 CROC provides the human rights basis for the protection of children, apportioning responsibility for this between parents and the state. Article 19 provides:

> *(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
>
> *(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*[472]

3.252 States are obliged to consult children and families, and enact legislation and adopt policies to protect children from harm.[473] The principle of social responsibility is to inform all legislation and policies, as the state and every adult are responsible for protecting children.[474] In undertaking such care and protection as is necessary for the child's wellbeing, states are to consider the rights and duties of the child's parents or guardians and take all appropriate legislative and administrative measures.[475]

3.253 CROC also provides that the primary responsibility for securing and providing conditions of living necessary for the child's development lies with parents or others responsible for the child.[476] Both parents share common responsibilities for the child's upbringing and development and their primary concern should be the child's best interests.[477] The CRC recommends that governments, in collaboration with civil society, take all necessary measures to support parents to fulfil their parental responsibilities.[478] Australia, as a state party, is to provide material assistance and support programs to those families in need, with particular regard to nutrition, clothing and housing.[479] Additionally, Australia is to render appropriate assistance to those with child-rearing responsibilities, which includes ensuring the development of institutions, services and facilities for the care of children.[480]

3.254 Throughout CROC[481] and the ICCPR,[482] parents, family and persons having care of the child are named as the parties responsible for providing care and protection for the child, supported in their role by the state. The Charter does not apportion responsibility for this task.[483]

The right to life and protection from torture and cruel, inhuman or degrading treatment

3.255 The Charter protects key physical integrity rights which are central to child protection. Section 9 provides that 'every person has the right to life and has the right not to be arbitrarily deprived of life'.[484] The right to life should not be narrowly interpreted.[485] The right to life not only imposes a negative duty on the state to refrain from arbitrary deprivation of life, but can also require the state to adopt positive measures.[486] In the context of child protection, this means that the state has a positive duty to protect the life of vulnerable children.[487] Accordingly, CROC provides that states parties shall ensure, to the maximum extent possible, the survival and development of the child.[488]

459 *Children, Youth and Families Act 2005* (Vic) s 10(3)(b).

460 *Children, Youth and Families Act 2005* (Vic) s 10(3)(h).

461 Committee on the Rights of the Child, *Day of General Discussion: Children Without Parental Care*, 40th sess, CRC/C/153 (17 March 2006) [644].

462 Ibid.

463 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 9(3) (entered into force 2 September 1990). This right is also discussed below.

464 Guy Johnson et al, *Australian Housing and Urban Research Institute Final Report: Pathways from Out-of-Home Care* (2010) 8. The study emphasises, however, that those leaving out-of-home care are a heterogeneous group with varied backgrounds and experiences.

465 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

466 Discrimination is on the basis of an attribute as set out in s 6 of the *Equal Opportunity Act 1995 (Vic)*. Listed bases for discrimination are: age; breastfeeding; gender identity; impairment; industrial activity; employment activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sexual orientation; and personal association (whether as relative or otherwise) with a person who is identified by reference to any of the above attributes.

467 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2). The Charter right to protection for children is derived from the ICCPR: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 24(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 14. Note that there is an equivalent to this right in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 3(1)–(2) (entered into force 2 September 1990).

468 Committee on the Rights of the Child, *Day of General Discussion*, above n 461, [649]–[650].

469 Commenting on the ICCPR article from which the Charter right to protection of children is derived.

470 Human Rights Committee, *General Comment 17: Rights of the Child (Art 24)*, 35th sess, UN Doc HRI/GEN/1/Rev 6 (7 April 1989) [6]. The importance of state and social support for families was emphasised in submissions, see for example, submission 24 (WHCLS).

471 Human Rights Committee, *General Comment 17*, above n 470, [3].

472 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 19 (entered into force 2 September 1990).

473 Committee on the Rights of the Child, *Day of General Discussion*, above n 461, [651].

474 Ibid [652].

475 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 3(2) (entered into force 2 September 1990).

476 Ibid art 27(2).

477 Ibid art 18(1).

478 Committee on the Rights of the Child, *Day of General Discussion*, above n 461, [647], [649], [689].

479 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 27(3) (entered into force 2 September 1990).

480 Ibid art 18(2).

481 Ibid arts 18(1)–(2), 19(2), 27(2)–(3).

482 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 24(1) (entered into force 23 March 1976).

483 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

484 *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 9. The formulation of this Charter right is based on: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 6(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 10. Note that there is an equivalent to this right in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 6(1) (entered into force 2 September 1990).

485 Human Rights Committee, *General Comment 06: The Right to Life (Art 6)*, 16th sess, UN Doc HRI/GEN/1/Rev 6 (30 April 1982) [1].

486 Ibid [5].

487 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Human Rights and Child Protection', Advice No 1568 (31 December 2007), from CD-ROM provided at 23 March 2010, 44.

488 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 6(2) (entered into force 2 September 1990).

3.256 Protection from torture and cruel, inhuman or degrading treatment is enshrined in section 10 of the Charter.[489] This right is concerned not only with the physical integrity of individuals, but also with their mental integrity and their inherent dignity as human beings.[490] Although section 10 is phrased in negative terms, it may give rise to positive state obligations, such as taking steps to prevent and minimise the risk and occurrence of acts of torture and cruel, inhuman and degrading treatment by persons acting in a private capacity, and to investigate allegations of such conduct.[491] When making decisions and taking action, the Department and other public authorities must consider the obligation to protect children from inhuman or degrading treatment by family members, legal guardians or out-of-home carers.[492]

Balancing the protection of the child in his or her best interests and protection of the family

3.257 Protection of the family and protection of children exist as separate rights under the ICCPR,[493] but in the Charter they are two subsections of section 17.[494] The reason for this drafting decision is not explained in the Explanatory Memorandum of the Charter, nor in the Parliamentary Debates.[495]

3.258 The structure of section 17 of the Charter suggests that its two parts are to be read together and that one qualifies the other. The Explanatory Memorandum to the *Children and Young People Bill 2008* (ACT) (CYP Bill 2008) discusses the relationship between these two rights under the *Human Rights Act 2004* (ACT) (HRA 2004).[496] The CYP Bill 2008, like the Victorian CYF Act 2005, emphasised the role of the family in providing care and protection for young people, but limited this by allowing for protective intervention in cases of abuse, neglect or risk thereof.[497] This was considered the appropriate way to balance the right to protection of the family and the right to protection of children when those two rights conflict under the HRA 2004.

3.259 The family's right to protection may sometimes need to be infringed in order to protect the child.[498] The Child Protection Practice Manual notes, however, that there are many principles in the CYF Act 2005 to ensure that when the rights of the family are limited by action taken to protect a child, 'there is a reasonable and proportionate connection between the limits and their purpose'.[499] The example provided is the best interests provisions of the CYF Act 2005,[500] which require that intervention into the parent–child relationship is limited to that necessary to secure the child's safety and wellbeing.[501]

3.260 The concept of 'best interests' is particularly important to the interpretation and application of section 17(2) of the Charter—the right of children to protection. The child's best interests are to be a primary consideration in all actions concerning children.[502] This includes decisions made by courts, administrative or legislative bodies, and actions undertaken by public or private social welfare institutions.[503] Consistent with this approach, the CYF Act 2005 declares that the best interests of the child are paramount and establishes best interests principles to be considered when making a decision or taking action in relation to a child.[504]

Right against unlawful and arbitrary interference with privacy, family and home

3.261 The Charter right of a person 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'[505] is closely related to the right to protection of families.[506] Justice Bell, sitting as the President of VCAT, recently said that

The rights to privacy, family, home and correspondence in section 13(a) are of fundamental importance to the scheme of the Charter. Their purpose is to protect and enhance the liberty of the person—the existence, autonomy, security and wellbeing of every individual in their own private sphere.[507]

3.262 The Charter right to privacy, family, home and correspondence[508] is engaged when public authorities enter a family's home without consent and remove a child believed to be in need of protection. This right, however, does not prohibit all interference—only that which is unlawful or arbitrary. This means that interference may only take place in a manner permitted by law that is reasonable in the particular circumstances.[509] 'Reasonableness' in this context requires that the interference is proportional to the end sought and necessary in the circumstances.[510] Interference with privacy, family or the home may be considered a reasonable limitation of the right in circumstances where it is necessary to protect the child and his or her best interests.[511] Any decision pertaining to interference will involve an exercise in balancing competing rights.

SEPARATION OF CHILDREN FROM THEIR FAMILIES

General

3.263 Some human rights are engaged when children are separated from their parents or families for their protection.[512] The family's right to protection must be considered in these circumstances.[513] This issue was addressed in an ACT Supreme Court decision relating to the rights engaged when making an interim care and protection order.[514] Justice Crispin held that it would be

an error of law for a court … to make orders authorising the removal of children from the parents or the substantial exclusion of a parent from the family without having due regard for the importance of the family unit and the entitlement to protection provided by [section 11(1)].[515]

489 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10. Article 7 of the ICCPR is the basis for this Charter right: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 10. Note that there is an equivalent to this right in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37 (entered into force 2 September 1990).

490 Human Rights Committee, *General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7),* 44th sess, UN Doc HRI/GEN/1/Rev 6 (10 March 1992) [2].

491 Ibid [2], [8], [10].

492 Department of Human Services (Victoria), 'Human Rights and Child Protection', above n 487, 45.

493 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 23(1), 24(1) (entered into force 23 March 1976).

494 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17.

495 Note however that in Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2644, Richard Della-Riva states 'It says in the bill that to define a right is to limit that right. We see some fundamental issues with what that statement means in relation to clause 17'. He did not get time to discuss this issue.

496 Explanatory Memorandum, Children and Young People Bill 2008 (ACT) 96. Note that s 11(1)–(2) of the *Human Rights Act 2004* (ACT) are largely analogous to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(1)–(2) regarding protection of families as the basic or fundamental group unit of society and protection of children.

497 Explanatory Memorandum, Children and Young People Bill 2008, above n 496, 96.

498 Department of Human Services (Victoria), 'Human Rights and Child Protection', above n 487, 40.

499 Ibid.

500 *Children, Youth and Families Act 2005* (Vic) s 10; Department of Human Services (Victoria), 'Human Rights and Child Protection', above n 487, 40.

501 *Children, Youth and Families Act 2005* (Vic) s 10(3)(a); Department of Human Services (Victoria), 'Human Rights and Child Protection', above n 487, 40. Submissions that recognised this link and the importance of best interests include: submissions 33 (Youthlaw), 24 (WHCLS), 43 (VCOSS & YACVic), 44 (CHP).

502 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 3(1) (entered into force 2 September 1990). Regarding 'best interests', see also, *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3, art 18(1) (entered into force 2 September 1990); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

503 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 3(1) (entered into force 2 September 1990).

504 *Children, Youth and Families Act 2005* (Vic) s 10.

505 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a). It should be noted that this right is a negative right against interference, rather than the 'right to respect' for private, family and home life as protected by article 8 of the *European Convention on Human Rights*: *Director of Housing v Sudi* [2010] VCAT 328 [28]. See also, *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3, art 16(1) (entered into force 2 September 1990): art 16(1) states 'no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation'.

506 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 17(1). This right is modelled on: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 13.

507 *Director of Housing v Sudi* [2010] VCAT 328 [29].

508 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

509 Human Rights Committee, *General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)*, 32nd sess, UN Doc HRI/GEN/1/Rev 6 (8 April 1988).

510 Human Rights Committee, *Toonen v Australia: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) [8.3].

511 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2). Interference in the form of entering a family's home and removing a child is lawful in the sense that it is envisaged under the *Child, Youth and Families Act 2005* (Vic) ss 240–1. The arbitrariness or otherwise of the action will depend on whether interference is reasonable in the particular circumstances.

512 This issue was raised in submissions, including submission 25 (LIV).

513 Human Rights Committee, *General Comment 17*, above n 470, [6]. The Human Rights Committee held that 'in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require'.

514 *A v Chief Executive, Department of Disability, Housing and Community Services* [2006] ACTSC 43.

515 *A v Chief Executive, Department of Disability, Housing and Community Services* [2006] ACTSC 48. The *Human Rights Act 2004* (ACT) s 11(1) provides that '[t]he family is the natural and basic group unit of society and is entitled to be protected by society'.

3.264 Article 9(1) of CROC relates directly to the separation of children from their parents, and states that a child is not to be

> *separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents.*[516]

3.265 If a child is removed from his or her family in these circumstances, all interested parties are to be given the opportunity to participate and voice their views in such proceedings.[517] States are obliged to respect the child's right to maintain regular contact and personal relations with his or her parents, unless it would be contrary to the child's best interests.[518]

The right to liberty and security of person and humane treatment when deprived of liberty

3.266 Rights to liberty and security of the person, and the right to humane treatment when deprived of liberty, are also closely related to the removal of children. Section 21 of the Charter provides for a person's right to liberty and security.[519] Under the Charter, a person is not to be subjected to arbitrary arrest or detention,[520] and a person must not be deprived of his or her liberty, except on grounds established by law, and in accordance with procedures established by law.[521] Any person deprived of their liberty by detention or arrest can apply to a court for a declaration or order regarding the lawfulness of the detention. The court is to make a decision without delay and order the release of the person if it finds the detention is unlawful.[522]

3.267 Persons deprived of liberty must be treated with humanity and respect for their dignity.[523] The right to humane treatment when deprived of liberty applies to anyone deprived of liberty under the laws and authority of the state, including protective detention in welfare facilities.[524] This section complements the prohibition on torture and cruel, inhuman and degrading treatment or punishment in the Charter by protecting against less severe forms of ill-treatment while deprived of liberty.[525] A positive obligation is imposed on the state to ensure that detained persons are treated with humanity and dignity.[526]

REPRESENTATION AND PARTICIPATION OF CHILDREN IN CHILD PROTECTION PROCESSES

3.268 Children's participation in proceedings affecting them and the representation of children are closely related children's rights issues. Some children may be able to express their own views, while others may want or need a representative to do this for them. The extent to which children will be able to participate and be heard in proceedings will depend on whether they are represented, and the mode of any representation.[527]

3.269 Article 12 of CROC relates directly to the participation and representation of children in matters affecting them. It provides that where a child is capable of forming his or her own views, states parties shall allow the child to express those views freely in all matters affecting him or her.[528] These views are to be given due weight in accordance with the age and maturity of the child.[529] The right requires that the child be provided with an opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative.[530]

3.270 In addition, CROC's reference to the 'evolving capacities of the child'[531] and the requirement for the child's best interests to be a primary consideration in all actions concerning children is central to participation and representation.[532] As noted previously, when a child is separated from his or her parents against their will, even if it is necessary in the child's best interests, all interested parties must be given the opportunity to participate and voice their views in proceedings.[533] The child is clearly an interested party.

3.271 These CROC rights require that children have a voice in proceedings affecting them, regardless of the model of representation adopted. The incorporation of participation rights in CROC was seen as a recognition of the child as a subject of civil and political rights accorded to adults, rather than just as objects of concern or subjects of welfare rights.[534] Article 12 of CROC has been termed the 'participation principle', requiring decision makers to listen to children, enable them to express their views and consider those views when making decisions.[535] An important aspect of the right to participate directly is that the child has the right to express his or her views 'freely'.[536] This has been interpreted by the CRC to mean that the child can express his or her views without pressure and can choose whether he or she wishes to express a view or not.[537]

3.272 Although it is possible to interpret article 12 of CROC as mandating only a consultative form of participation,[538] some commentators have addressed the importance of children having a direct participation role if they wish to.[539] It has been the 'conventional wisdom' that indirectly hearing children's views through a representative is preferable to judges speaking with children directly.[540] However, that notion is now being challenged and research has found that many children would like to be more involved with decisions that profoundly affect their lives.[541] One reason given by children for wanting to speak directly with the judge is that the judge then knows 'exactly how they felt without any mixed messages or misinterpretation'.[542]

516 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 9(1) (entered into force 2 September 1990).

517 Ibid art 9(2). The question of children's right to participate in proceedings is discussed in 'Representation and Participation of Children in Child Protection Processes', below.

518 Ibid art 9(3).

519 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(1).

520 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(2).

521 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(3). There are equivalent rights to s 21(1)–(3) of the Charter in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(c) (entered into force 2 September 1990).

522 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(7). Article 9 of the of the ICCPR is the basis for s 21(1)–(7) of the Charter, except that there is no right to compensation for breach of the right under the Charter: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423,16. The UN HRC considers that art 9 of the ICCPR protections extend to all deprivation of liberty and all persons deprived of their liberty by detention or arrest, except for specific provisions applicable to persons against whom criminal charges are brought: Human Rights Committee, *General Comment 08: Right to Liberty and Security of Persons (Art 9)*, 16th sess, UN Doc HRI/GEN/1/Rev 6 (30 June 1982) [1].

523 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22(1). Section 22(1) of the Charter is modelled on: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 10(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 17. Note that there is an equivalent to this right in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(c) (entered into force 2 September 1990). The additional requirement in art 37(c) of CROC is that the manner in which a child is to be treated takes into account the needs of persons his or her age.

524 Human Rights Committee, *General Comment 09: Humane Treatment of Persons Deprived of Liberty (Art 10)*, 16th sess, UN Doc HRI/GEN/1/Rev 6 (30 July 1982) [2].

525 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10.

526 Human Rights Committee, *General Comment 09*, above n 524, [3].

527 Nicola Ross, 'Legal Representation of Children' in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 544, 545.

528 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990).

529 Ibid.

530 Ibid art 12(2).

531 Ibid art 5.

532 Ibid art 3.

533 Ibid art 9(2).

534 Ross, above n 527, 549.

535 Ibid 550.

536 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990).

537 Committee on the Rights of the Child, *General Comment 12: The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [22].

538 Ross, above n 527, 550.

539 Judy Cashmore and Patrick Parkinson, 'What Responsibility do Courts have to Hear Children's Voices?' (2007) 15 *International Journal of Children's Rights* 43.

540 Ibid 49.

541 Ibid.

542 Ibid 51.

3.273 This perspective was reinforced in the report from the CREATE Foundation, which consulted children and young people for the purposes of this reference and compiled their views.[543] When asked how they would make a child feel comfortable in court if they were the judge, a participant responded that they would do this by 'letting the young person have a say about their situation'.[544] Another participant recalled an incident in which he or she spoke up to correct the lawyer, who had said something wrong, and 'would prefer that the children speak themself'.[545]

3.274 Participation of the child in proceedings before the Children's Court is provided for under the CYF Act 2005.[546] Various other Australian jurisdictions also provide that the child must be given the opportunity to express his or her views or wishes directly to the court in child protection proceedings if he or she wants to and is capable of doing so.[547] For reasons elucidated in Chapter 8, the Commission suggests that the relevant section of the CYF Act 2005 be amended to take into account some additional considerations.

Representation of children in child protection proceedings[548]

3.275 Although neither the Charter nor CROC is prescriptive about the model of representation for children, concerns have been raised regarding the fact that under the CYF Act 2005, children will usually only be represented on the basis that they are capable of giving instructions.[549]

3.276 The CRC has suggested that children's views should always be presented to the court, either directly or through some form of representative. This is certainly the case where the child is capable of forming his or her own views.[550] On the text of CROC alone, the situation is less clear regarding infants or children who are not capable of forming their own views. However, the CRC has clarified the approach to be taken for very young children, providing that

> *States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences.*[551]

3.277 The CRC has also emphasised that article 12 applies to both younger and older children.[552] As rights-bearers, even the youngest children should be allowed to express their views and have those views given due weight in accordance with the age and maturity of the child.[553] Regarding the age at which children should be considered able to express their views, researchers have contended that even very young children are capable of understanding their experiences and expressing their views, and are therefore capable of participating in decision making.[554] Freeman notes that 'even small children can show a preference, and most children can understand a situation'.[555]

3.278 Pursuant to both the text of CROC and explanatory comments from the CRC, children who are capable of forming views are to have those views put before the court, either by them directly or by a representative.[556] If a child is not deemed capable of forming views, even on a very broad and inclusive definition of 'capable of forming views',[557] then he or she must be represented by someone acting in his or her best interests.[558] This is consistent with article 3, which provides that best interests must be a primary consideration in all actions concerning children.[559]

3.279 Participation and representation of children are also closely related to whether children are parties to proceedings in matters that affect them.[560] Although the child is not automatically a party to proceedings under the CYF Act 2005, various other Australian jurisdictions provide for the child to be a party.[561] Giving the child status as a party would support the overarching concept of children's participation in decisions that affect them.[562]

THE RIGHT TO A FAIR HEARING

3.280 Where a person is charged with a criminal offence or is party to civil proceedings, the Charter protects the right to a fair and public hearing by a competent, independent and impartial court or tribunal.[563] The issue of fair hearing in child protection proceedings was raised in a number of submissions.[564]

3.281 The section of the Charter which sets out the right to a fair hearing has 'created its own universe populated by two species of proceedings'—criminal and civil.[565] While the Charter does not define civil proceedings, the term is to be defined by reference to the nature of the proceedings, the form and character of the action and the nature of the jurisdiction being exercised.[566] 'Civil proceeding' has often been defined as any proceeding that is not criminal in nature.[567] On this definition, child protection proceedings are civil in nature.

3.282 Incorporating child protection proceedings within the ambit of the Charter right to a fair hearing[568] is consistent with a recent decision of the United Kingdom High Court, which held that '[a]ll the parties in care proceedings are entitled to a fair hearing in the determination of their civil rights and obligations'.[569] It must be noted, however, that to classify child protection proceedings as civil for the purposes of the Charter is an artificial characterisation, for these proceedings are 'truly a creature of statute, neither civil nor criminal in nature. They are therefore *sui generis*'.[570]

543 The report can be accessed at Victorian Law Reform Commission, *Child Protection—Community Group Devolved Consultation Reports*, <www.lawreform.vic.gov.au/wps/wcm/connect/justlib/law+reform/home/current+projects/child+protection/lawreform+-+child+protection+-+community+group+devolved+consultation+reports>.

544 CREATE Foundation, *Children and Young People in Care Consultation for the Victorian Law Reform Commission* (2010) 23.

545 Ibid.

546 *Children, Youth and Families Act 2005* (Vic) s 522(1)(c).

547 See, eg, *Children's Protection Act 1993* (SA) s 48; *Children and Young People Act 2008* (ACT) s 352; *Children, Young Persons and Their Families Act 1997* (Tas) s 56. Western Australia's Act requires that the child is made aware of his or her right to be present in court, and is provided with any support services considered appropriate to enable the child to participate in the proceedings: *Children and Community Services Act 2004* (WA) s 149(3).

548 The human rights implications of adopting a particular model of representation for children are further discussed in Chapter 8.

549 The representation model currently employed under the CYF Act 2005 is discussed earlier in this chapter. This issue was raised in submissions, see for example: submissions 38 (VALS), 46 (Children's Court of Victoria) 57–67. Note that the Children's Court submission was not unanimous on this point, with only some members advocating for a change in the model of representation for children.

550 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990).

551 Committee on the Rights of the Child, *General Comment 07: Implementing Rights in Early Childhood*, 40th sess, CRC/C/GC/7/Rev 1 (20 September 2006) [13].

552 Ibid [14].

553 Ibid; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990).

554 Anna Smith 'Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory' (2002) 10 *International Journal of Children's Rights* 73, 82–5. This was discussed in submission 38 (VALS).

555 Michael Freeman, 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5, 12.

556 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990).

557 Committee on the Rights of the Child, *General Comment 12*, above n 537, [21].

558 Committee on the Rights of the Child, *General Comment 07*, above n 551, [13].

559 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 3(1) (entered into force 2 September 1990).

560 The child still has standing in appeal proceedings: *Children, Youth and Families Act 2005* (Vic) s 328(2).

561 See *Children and Young People Act 2008* (ACT) s 700; *Children's Protection Act 1999* (SA) s 46(1); *Children, Young Persons and Their Families Act 1997* (Tas) s 64; *Children and Community Services Act 2004* (WA) s 147.

562 The Commission makes a proposal in relation to this in Chapter 8.

563 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1). This right is modelled on: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14(1) (entered into force 23 March 1976); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, above n 423, 18.

564 See submissions 24 (WHCLS), 26 (FVPLS Victoria), 33 (Youthlaw), 45 (FCLC), 46 (Children's Court of Victoria) 99–100.

565 *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009) [411]. Note that *Kracke* was disapproved of in *R v Momcilovic* [2010] VSCA 50, but not regarding this particular point of law.

566 Ibid; see also, *Butterworth's Concise Australian Legal Dictionary* (2nd ed, 1998) and the *Oxford Australian Law Dictionary* (2010). Note also that the Children's Court submission proceeds on the basis that child protection proceedings are civil in nature: submission 46 (Children's Court of Victoria) 99–100.

567 *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009) [412]. Note also that submission 46 (Children's Court of Victoria) 99–100 proceeds on the basis that child protection proceedings are civil in nature.

568 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

569 *W (Children)* [2010] UKSC 12 [3] (Lady Hale).

570 *J v Lieschki* (1987) 162 CLR 447, 451 (Wilson J).

3.283 The right to a fair hearing comprises several express elements: the fairness of proceedings, the public nature of proceedings and the competence, independence and impartiality of the decision maker.[571] As well as these express elements, the right may also encompass several implied elements.[572] These include a right of access to the court, a right to advice and representation, a right to hearing without undue delay, and a right to disclosure of relevant evidence.[573]

3.284 The right to a fair hearing will not be limited if persons involved in dispute resolution processes retain the opportunity to access judicial adjudication if they are unable to resolve their dispute by agreement. In order to be compatible with the right to a fair hearing, it is necessary that any compulsory dispute resolution process does not cause undue delay or expense.[574] Effective dispute resolution processes would ideally enhance the right to a fair hearing by reducing the number of cases in the court and ensuring speedy access to justice for those whose cases progress to judicial adjudication.[575]

CULTURAL RIGHTS

3.285 The Charter protects the cultural rights of all persons with a particular cultural, religious, racial or linguistic background.[576] It also grants four additional rights to Aboriginal people, including the right to maintain their 'kinship ties' and 'distinctive spiritual, material and economic relationship with land and waters and other resources with which they have a connection under traditional laws and customs'.[577] The obligation is negatively phrased, so public authorities are obliged not to deny the right rather than positively obliged to assist groups with the development and maintenance of their culture and cultural rights. A number of submissions and consultations highlighted the importance of protecting and promoting cultural rights in the child protection system.[578] The over-representation of Aboriginal children in out-of-home care is of great concern, both locally and internationally.[579]

3.286 CROC also provides that in states where ethnic, religious or linguistic minorities exist, or where there are persons of indigenous origin, children belonging to those minorities or indigenous groups shall not be denied the right to enjoy their own culture, practise their own religion and use their own language in community with other members of their group.[580] Other international instruments identified by submissions[581] as relevant to the cultural rights of families and children include:

- *United Nations Declaration on the Rights of Indigenous Peoples*[582]
- *United Nations Declaration on the Elimination of Violence Against Women*.[583]

3.287 The CYF Act 2005 recognises cultural rights within the best interests principles,[584] and includes specific decision-making principles for Aboriginal children.[585] One such principle provides that in recognition of Aboriginal self-determination, a decision in relation to an Aboriginal child should involve a meeting convened by an Aboriginal convenor, approved by an Aboriginal agency.[586] This decision-making process (AFDM) may involve the child, their parents, members of the child's extended family, and other appropriate members of the Aboriginal community.[587] The Child Protection Practice Manual states that AFDM operates in every region.[588] However, submissions raised concerns about the AFDM program being under-utilised due to resource constraints.[589] The submission from Aboriginal Family Violence Prevention and Legal Service Victoria raised a concern that '[v]ery few AFDMs are occurring due to lack of available convenors and at times unwillingness of DHS to convene meetings … Regional variations are evident'.[590] That submission also expressed concern that VLA does not fund lawyers for children or families at AFDM or best interests planning meetings.[591]

3.288 Another important principle of the CYF Act 2005 is the Aboriginal Child Placement Principle, which provides that when an Aboriginal child is to be placed in out-of-home care, he or she must be placed with Aboriginal extended family or relatives wherever possible.[592] Although a cultural support plan is not mandatory in all cases, the Department recommends as good practice that a plan is developed for all Aboriginal children placed in out-of-home care, whether placed with Aboriginal carers or not.[593] Even if a cultural support plan is not required, the court must not make a permanent care order placing an Aboriginal child solely with a non-Aboriginal person unless the court has received a report from an Aboriginal agency recommending the order.[594]

3.289 The CYF Act 2005 provides for the enjoyment of cultural rights in numerous ways. However, cultural rights under the Charter and CROC will only be upheld if the relevant CYF Act 2005 provisions are utilised and complied with.

571 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

572 Kylie Evans and Alistair Pound, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 165.

573 Ibid. This issue was raised by submission 45 (FCLC), which noted that the right to a fair hearing includes elements of procedural fairness and access to justice.

574 The interaction between compulsory dispute resolution processes and the right to a fair hearing was also discussed in Victorian Law Reform Commission, *Civil Justice Review: Report*, Report No 14 (2008) 262–3.

575 Dispute resolution is discussed in greater depth in Chapter 7.

576 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1).

577 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(2).

578 Including submissions 45 (FCLC), 26 (FVPLS Victoria), 39 (VACCA), 38 (VALS).

579 Committee on the Rights of the Child, *Concluding Observations on Australia*, 40th sess, CRC/C/15/Add 268 (20 October 2005) [37], [75]–[77]. This issue was raised in submissions, see for example, submission 27 (FVPLS Victoria). This is also discussed at length in Chapter 1.

580 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 30 (entered into force 2 September 1990).

581 Submission 26 (FVPLS Victoria).

582 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (13 September 2007). Since its adoption, Australia has reversed its position and now endorses the Declaration as of 3 April 2009.

583 *United Nations Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 85th plen mtg, UN Doc A/RES/48/104 (20 December 1993).

584 *Children, Youth and Families Act 2005* (Vic) s 10(c), (l)–(m).

585 *Children, Youth and Families Act 2005* (Vic) ss 12–14.

586 *Children, Youth and Families Act 2005* (Vic) s 12. This practice is referred to as Aboriginal Family Decision Making (AFDM). The Department's Practice Manual states that AFDM processes are co-convened by a child protection convenor and a convenor from an Aboriginal agency: Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Family Decision Making', Advice No 1296 (17 July 2008), from CD-ROM provided at 23 March 2010, 127.

587 *Children, Youth and Families Act 2005* (Vic) s 12.

588 Department of Human Services (Victoria), 'Family Decision Making', above n 586, 127.

589 See, for example, submissions 26 (FVPLS Victoria), 38 (VALS).

590 Submission 26 (FVPLS Victoria).

591 Ibid.

592 *Children, Youth and Families Act 2005* (Vic) s 13.

593 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Cultural Support Plans', Advice No 1060 (23 April 2007), from CD-ROM provided at 23 March 2010, 248.

594 *Children, Youth and Families Act 2005* (Vic) s 323.