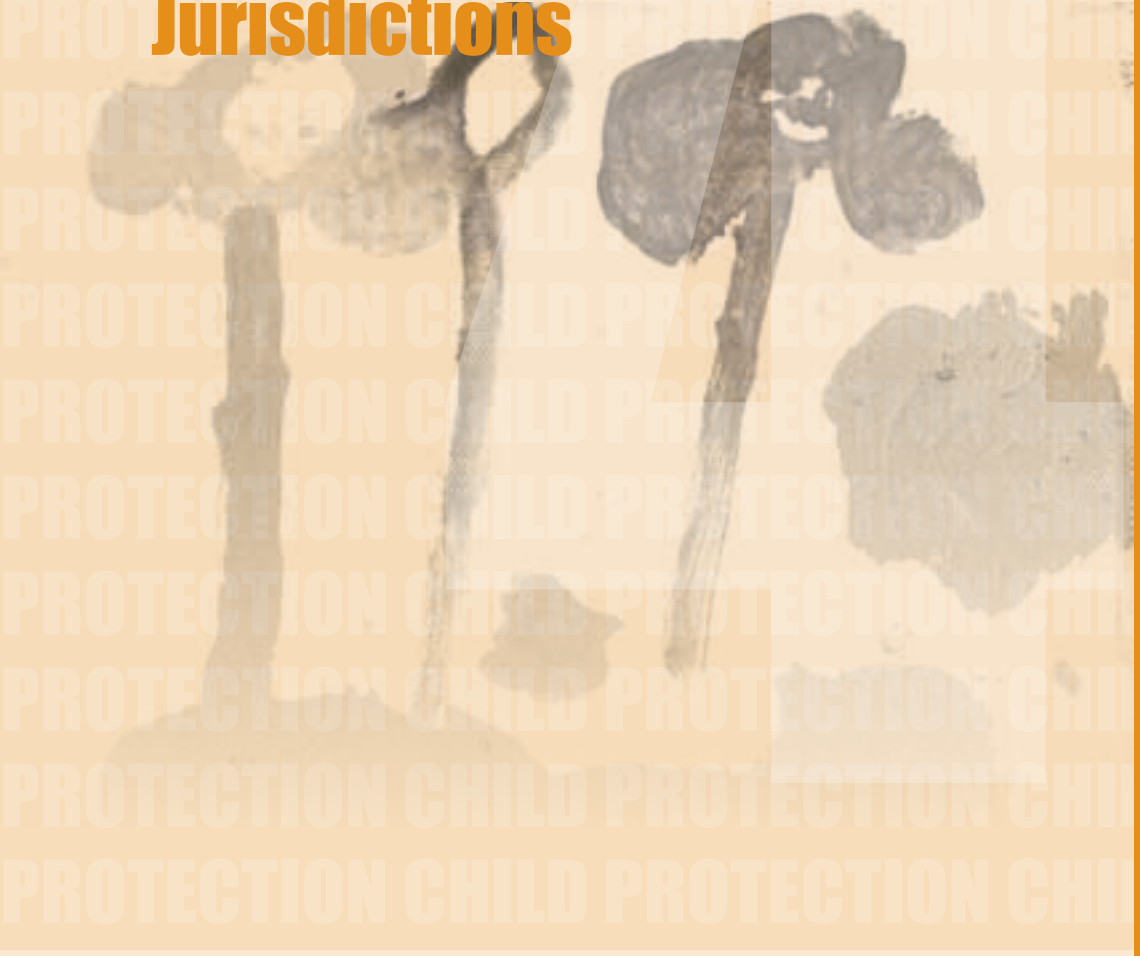
Chapter 4

Current Law and Practice in Other Australian Jurisdictions



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INTRODUCTION

4.1 This chapter examines the current law and practice in child protection matters in other Australia jurisdictions. It also considers some aspects of Commonwealth family laws. See Appendix N for a table showing the major differences between the Australian jurisdictions.

AUSTRALIAN CAPITAL TERRITORY

GENERAL OVERVIEW

4.2 The ACT statutory child protection system is governed by the *Children and Young People Act 2008* (ACT) (the ACT Act 2008). If the Office for Children, Youth and Family Support—a unit of the Department of Disability, Housing and Community Services (the Department)—believes on reasonable grounds that a child is in need of care and protection, it can file a care and protection application. The application is determined by the ACT Children's Court, which is presided over by a single children's magistrate.

4.3 Key distinguishing features of the ACT child protection system include:

- The ACT Public Advocate has a role in reviewing emergency removals of children, and power to attend court and case management conferences involving young children and represent certain children on the best interests model if required.
- The Department can apply to the Children's Court to register an agreement reached at a family group conference (FGC), which acts like a court order, although such an agreement cannot transfer parental responsibility for the child or young person to the Department.
- Lawyers representing children in the Children's Court have discretion about what model of representation—best interests or direct representation—they consider appropriate to use, based on their assessment of the child's maturity.

THE ROLE OF THE PUBLIC ADVOCATE

4.4 A unique feature of the ACT child protection system is the role of the ACT Public Advocate. The Public Advocate reviews all emergency removals of children and young people under the ACT Act 2008, and attends court and case management conferences—particularly in circumstances involving children under two years old—and undertakes best interests advocacy where required.[1]

4.5 In 2008–09, the Public Advocate provided best interests advocacy for 408 children and young people, which included attending court on 78 occasions, taking part in 105 care matters and 20 case conferences, undertaking 10 home visits and conducting audits of 15 Department files.[2]

4.6 The Public Advocate must also be notified whenever an application is made for any of the orders, or an extension of those orders, available under the care and protection chapters of the ACT Act 2008,[3] and is entitled to appear and be heard and call witnesses in any application, proceeding or matter under the ACT Act 2008.[4]

FAMILY GROUP CONFERENCING

4.7 Under the ACT Act 2008, the Department's Chief Executive may arrange for an FGC if he or she believes on reasonable grounds that a child or young person is in need of care and protection, and that arrangements should be made to secure that child or young person's care and protection.[5] The Department will then appoint and assign an independent facilitator who is responsible for deciding who to invite to the FGC, and for organising and conducting it.[6] The facilitator must invite:

- a representative of the Department
- anyone who has parental responsibility for the child or young person, unless the facilitator considers that it would not be in the child's best interests for that person to attend
- the child or young person, if the facilitator is satisfied they can understand and take part in the FGC.[7]

4.8 A lawyer may not represent participants in FGCs, but a support person may assist any participants other than the Department's representative in the FGC.[8]

4.9 If an FGC facilitator is satisfied that the participants who have parental responsibility for the child or young person and the Department's representative have reached an agreement about arrangements for the child, the facilitator may propose that the parties enter into an FGC agreement.[9] Before the parties enter into any agreement, the facilitator must give those with parental responsibility for the child or young person, and the young person if he or she is 15 years or older, an opportunity to obtain legal advice.[10] If the facilitator is satisfied that the child or young person can understand the proposed agreement, the child or young person's views and wishes must be considered and, if over 15, he or she must also consent to the agreement.[11]

4.10 Importantly, an FGC agreement cannot transfer parental responsibility for the child or young person to the Department.[12] If an FGC agreement is finalised, the Department may apply to the Children's Court to have it registered, and if registered it will have effect as if it were a care and protection order made by the Court.[13]

EMERGENCY REMOVAL POWERS AND ORDERS

4.11 If a Department employee or a police officer believes on reasonable grounds that a child or young person is in immediate need of care and protection, or is likely to be in immediate need of care and protection if emergency action is not taken, the employee or police officer may remove the child or young person.[14]

4.12 Once removed, the Department's Chief Executive has daily care responsibility for the child or young person for no longer than two court working days. After this time, the Department must return the child or young person to someone who has parental responsibility for the child unless the Department is granted an order by the Children's Court.[15] During the time that the Chief Executive has responsibility for a child or young person following an emergency action, a parent, former caregiver, the Public Advocate or the child or young person may apply to the Children's Court for the release of the child or young person to a nominated person.[16]

1 Public Advocate of the ACT, *Annual Report 2008-2009* (2009) 19. The current role of the ACT Public Advocate in child protection proceedings is not to be confused with the role that the Youth Advocate played between 1986 and 1994, referred to in Chapter 2. The Youth Advocate had responsibility for initiating protection applications in the ACT Children's Court, and presented the case for the applicant at court. The Youth Advocate was renamed the Community Advocate in 1991, and in 1994 the Community Advocate was relieved of the responsibility for initiating and having carriage of protection proceedings in the Children's Court. The Public Advocate, the successor to the Community Advocate, also does not have the functions that the Youth Advocate once exercised.

2 Ibid 20–1.

3 *Children and Young People Act 2008* (ACT) ss 377, 379, 386, 419, 427, 445, 452, 469, 541, 560.

4 *Court Procedures Act 2004* (ACT) s 74C.

5 *Children and Young People Act 2008* (ACT) s 80(2).

6 *Children and Young People Act 2008* (ACT) ss 78–9, 82.

7 *Children and Young People Act 2008* (ACT) s 83(1).

8 *Children and Young People Act 2008* (ACT) s 83(4)–(5).

9 *Children and Young People Act 2008* (ACT) s 85(1)–(2).

10 *Children and Young People Act 2008* (ACT) s 85(3).

11 *Children and Young People Act 2008* (ACT) ss 85(3)(a)(ii), 86.

12 *Children and Young People Act 2008* (ACT) s 76(2).

13 *Children and Young People Act 2008* (ACT) ss 390(2), 393. The Department must give notice to the Public Advocate if it makes an application to register an FGC agreement, and the Court will only register the agreement if satisfied that it could make a care and protection order to the same effect as the agreement: *Children and Young People Act 2008* (ACT) ss 390(4), 391.

14 *Children and Young People Act 2008* (ACT) ss 403, 405–6. If a police officer takes emergency action, he or she must immediately notify the Chief Executive: s 408(1). If an employee of the Department takes emergency action or is notified that emergency action has been taken, he or she must notify the Public Advocate and the Children's Court as soon as practicable: s 408(3).

15 *Children and Young People Act 2008* (ACT) ss 410, 415.

16 *Children and Young People Act 2008* (ACT) ss 416–17.

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APPRAISAL AND ASSESSMENT ORDERS

4.13 In order to assess whether an application for a care and protection order should be made in relation to a child, the Department can apply for either an appraisal order or an assessment order. An appraisal order enables the Department to assess whether a child is in need of care and protection by gathering information and making inquiries about either the child or young person or someone else,[17] and may include temporary transfer of parental responsibility to the Department's Chief Executive.[18] These orders last for four weeks, with the potential for one extension of a further four weeks.[19]

4.14 Assessment orders enable the Department to arrange for a care and protection assessment of a child or young person, which can include a medical, dental, social, developmental, psychological and/or psychiatric assessment.[20] Assessment orders last 10 weeks, with one potential extension for no longer than a further eight weeks.[21]

COURT PROCESSES AND PROCEDURE

4.15 The Department's Chief Executive may apply to the Children's Court for a care and protection order if he or she believes on reasonable grounds that a child or young person is in need of care and protection.[22]

4.16 The ACT Act 2008 defines a child or young person as 'in need of care and protection' if:

> *(1) the child or young person*
>
> *(a) has been abused or neglected, or*
>
> *(b) is being abused or neglected, or*
>
> *(c) is at risk of abuse or neglect; and*
>
> *(2) no-one with parental responsibility for the child or young person is willing and able to protect the child or young person from suffering the abuse or neglect.*[23]

4.17 The parties to an application include the child or young person, as well as the Public Advocate, if he or she applies to be joined.[24] Any party to a proceeding may be legally represented.[25] The child or young person may be represented by a lawyer, or a litigation guardian if the Court grants leave for one to be appointed,[26] or both.[27] If a child is not legally represented, the Court may only proceed to hear the application if it is satisfied that the child or young person has had a reasonable opportunity to obtain legal representation, and the child's best interests will be adequately represented in the proceeding.[28]

4.18 The ACT Act 2008 does not direct the legal representative of the child about the model of representation he or she should adopt. It merely requires the lawyer to inform the Court whether he or she is acting on the child or young person's instructions, or acting in their best interests, or both.[29] In practice, the legal representative will act on the instructions of an older child if the lawyer considers that the child's views are consistent with their best interests. For a younger child, the lawyer will present the child's wishes to the Court and, in addition, make submissions about the outcome the lawyer considers would be in the child's best interests.[30] Regardless of the model of representation, the representative of the child or young person must ensure that the views and wishes stated by the child or young person are put to the Court.[31]

4.19 The Children's Court must give initial consideration to a care and protection application within five working days of it being filed.[32] The Court must proceed informally,[33] is not bound by the rules of evidence, and can inform itself as it sees fit.[34]

4.20 The Children's Court may adjourn the hearing of a care and protection application and order that the parties attend a 'court-ordered meeting' to 'identify or resolve matters in dispute'.[35] The court-ordered meeting may be attended by anyone who was notified of the care and protection application, including the Public Advocate,[36] as well as legal representatives for the parties.[37] The Court appoints a person to convene the meeting, usually a registrar,[38] and that person must report the outcome of the meeting to the Children's Court.[39]

FINAL ORDERS

4.21 After a hearing, the Children's Court may make the following orders:

- Care and protection orders,[40] which may contain provisions relating to:
  - contact[41]
  - drug use[42]
  - enduring parental responsibility—parental responsibility to someone other than the Chief Executive until the child or young person turns 18[43]
  - residence[44]
  - short-term parental responsibility (for two years)[45]
  - long-term parental responsibility—parental responsibility to the Chief Executive until the child or young person turns 18[46]
  - supervision.[47]
- Domestic violence and protection orders act orders—these orders are available under the *Domestic Violence and Protection Orders Act 2008* (ACT). The Children's Court can make an order if it is satisfied that a person has engaged in domestic violence[48] towards the child or young person subject to the care and protection application.[49]

17 *Children and Young People Act 2008* (ACT) s 366.

18 *Children and Young People Act 2008* (ACT) ss 372–6. Applications for appraisal orders can be heard urgently, and if practicable should be heard by the Court on the day of filing, and the Court must hear them within five working days of filing: ss 377, 380.

19 *Children and Young People Act 2008* (ACT) s 384.

20 *Children and Young People Act 2008* (ACT) ss 367, 436.

21 *Children and Young People Act 2008* (ACT) ss 449, 454.

22 *Children and Young People Act 2008* (ACT) ss 424–5. A person other than the Chief Executive of the Department can only make an application for a care and protection order with leave of the Court: s 425(c). The Public Advocate must be notified whenever a care and protection application is made: s 427.

23 *Children and Young People Act 2008* (ACT) s 345.

24 *Children and Young People Act 2008* (ACT) s 700. Also, s 74A of the *Court Procedures Act 2004* (ACT) provides that 'a child or young person has a right to take part in a proceeding in a court in relation to the child or young person'.

25 *Children and Young People Act 2008* (ACT) s 709.

26 *Court Procedures Act 2004* (ACT) s 74F.

27 *Court Procedures Act 2004* (ACT) s 74E(1).

28 *Court Procedures Act 2004* (ACT) s 74G.

29 *Court Procedures Act 2004* (ACT) s 74E.

30 Telephone conversation with Matt Kamarul, lawyer from Legal Aid ACT, 19 May 2010.

31 *Court Procedures Act 2004* (ACT) s 74E(2). Also, the ACT Act imposes an obligation on all decision makers under care and protection chapters of the Act to give a child or young person a reasonable opportunity to express his or her wishes directly to the decision maker, if capable of such expression: *Children and Young People Act 2008* (ACT) s 352.

32 *Children and Young People Act 2008* (ACT) s 430(1).

33 *Children and Young People Act 2008* (ACT) s 712.

34 *Children and Young People Act 2008* (ACT) s 716.

35 *Children and Young People Act 2008* (ACT) s 431(2)(a).

36 See *Children and Young People Act 2008* (ACT) s 427.

37 *Children and Young People Act 2008* (ACT) s 432(1)(b)(ii).

38 *Children and Young People Act 2008* (ACT) s 432(2).

39 *Children and Young People Act 2008* (ACT) s 432(4).

40 *Children and Young People Act 2008* (ACT) ss 422, 464.

41 *Children and Young People Act 2008* (ACT) s 485.

42 *Children and Young People Act 2008* (ACT) s 488.

43 *Children and Young People Act 2008* (ACT) s 481.

44 *Children and Young People Act 2008* (ACT) s 484.

45 *Children and Young People Act 2008* (ACT) s 476.

46 *Children and Young People Act 2008* (ACT) s 479.

47 *Children and Young People Act 2008* (ACT) s 489.

48 This includes psychological abuse, which is defined to include exposing a child or young person to violence towards someone the child or young person lives with: *Children and Young People Act 2008* (ACT) ss 458, 461.

49 *Children and Young People Act 2008* (ACT) ss 458–60.

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- Therapeutic treatment orders—under these orders, the child or young person is directed to be confined at a therapeutic treatment place, for the implementation of a therapeutic treatment plan, and daily care responsibility is transferred to the Chief Executive for the period of confinement.[50]

NEW SOUTH WALES

GENERAL OVERVIEW

4.22 Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the NSW Act 1998), the Community Services Department (the Department) is responsible for making applications to the NSW Children's Court for a care order in relation to a child. The NSW Children's Court comprises a children's registrar (who conducts callovers and preliminary conferences, hears applications for adjournments and makes procedural directions), 13 specialist children's magistrates, and the Court President, who is a District Court judge.[51]

4.23 Key distinguishing features of the NSW child protection system include:

- Care plans developed through alternative dispute resolution (ADR)[52] can be registered with the Court, and form the basis of consent orders.
- The grounds upon which the Court may make a care order include a ground that 'the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection'.
- The Court has the power to appoint a guardian *ad litem* in addition to a legal representative for a child in care proceedings.
- The Court can make an order allocating parental responsibility to one parent to the exclusion of the other parent.

4.24 Following a recent review of the child protection system by former Supreme Court justice James Wood,[53] substantial amendments were made to the NSW Act 1998. This review is discussed in Chapter 2 and Appendix E.

PRE-COURT ADR, CARE PLANS AND PARENT RESPONSIBILITY CONTRACTS

4.25 The NSW Act 1998 provides that the Department is to 'consider the appropriateness' of using ADR to reduce the likelihood of needing to make an application for a care order.[54] The NSW Act 1998 also provides for care plans to be 'developed by agreement in the course of alternative dispute resolution', after which they can be registered in the Children's Court.[55] The care plans can also form the basis of orders by consent in the Children's Court, without the need for a care application.[56]

4.26 The NSW Act 1998 also provides for parent responsibility contracts, which are agreements made by the Department and the primary caregivers of a child and registered with the Court.[57] The contracts may impose conditions on the primary caregiver,[58] breach of which may lead to a presumption in subsequent care proceedings that a child is in need of care and protection.[59] Importantly, a parent responsibility contract cannot provide for the transfer of parental responsibility for the child or for the placement of the child or young person in out-of-home care.[60]

4.27 The Wood Report noted that the ADR mechanisms that existed in the NSW Act 1998 were 'not used to any significant extent', and questioned 'whether some of the decisions in relation to all or some children and young persons could be made in a forum other than the Children's Court'.[61]

EMERGENCY REMOVAL POWERS AND ORDERS

4.28 If a Department employee or a police officer is satisfied on reasonable grounds that a child or young person is at immediate risk of serious harm, and that the making of an apprehended violence order would not be sufficient to protect the child or young person from that risk, the employee or police officer can remove the child or young person from the place of risk without a warrant.[62] If a child or young person is removed under the emergency protection power, the Department must apply to the Children's Court for a care order[63] no later than 72 hours after the removal.[64] At the hearing of the application the Department must explain to the Court why removing the child without a warrant was necessary.[65]

4.29 Alternatively, the employee or a police officer can apply to an authorised officer[66] for a warrant to search premises for and to remove a child,[67] or the Children's Court can make an order for a child's removal when a care application in relation to that child or young person is made.[68]

ASSESSMENT ORDERS

4.30 The Court may order that the child or young person receive a psychological, psychiatric or other medical examination, or another type of assessment, or both.[69] If the Court makes an assessment order, it must appoint the Children's Court Clinic to prepare and submit the assessment report to the Court, unless the Clinic informs the Court that it is unable to do so, or that there is someone more appropriate to conduct the assessment.[70]

50 *Children and Young People Act 2008* (ACT) s 532. See generally pt 16.2 of the Act for details about these orders.

51 Department of Justice and Attorney General (NSW), *Children's Court* <www.lawlink.nsw.gov.au/lawlink/childrens_court/ll_cc.nsf/pages/CC_about_us> at 21 May 2010.

52 Please note that 'alternative dispute resolution' is the language used in the NSW Act 1998: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37. ADR is used throughout this report to refer to both 'alternative dispute resolution' and 'appropriate dispute resolution'—the language used by Attorney-General Rob Hulls in both the Commission's terms of reference and Department of Justice (Victoria), *Attorney-General's Justice Statement 2: The Next Chapter* (2008) 5.

53 See James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) ('the Wood Report'). See Chapter 2 for a discussion of the Wood Report.

54 The Director-General is also to consider using ADR if an application for a care order has already been filed, in order to 'work towards the making of consent orders that are in the best interests of the child or young person concerned': *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37(1).

55 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 38(1), 38F.

56 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38(2)–(3).

57 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38A(1)–(2).

58 Before the parties enter into a parental responsibility contract, the Department must give the other parties a reasonable opportunity to obtain independent advice about the provisions of the contract: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38A(4).

59 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38E(4).

60 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38A(6).

61 Wood, above n 53, vol 2, 466.

62 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 43(1). The employee of the Department or a police officer can also remove a child from a public place without a warrant if they suspect on reasonable grounds that the child is in need of care and protection, is not subject to the supervision or control of a responsible adult and is living in or habitually frequenting a public place: s 43(2).

63 This can include an emergency care and protection order, pursuant to which the Court will place the child or young person in the care responsibility of the Director-General of the Department for 14 days if satisfied the child or young person is at risk of serious harm: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 46. 'Care responsibility' means fulfilling various functions listed in the Act: ss 3, 157.

64 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45(1).

65 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45(2).

66 This can be a magistrate (including a children's magistrate), a registrar of a Local Court or an employee of the Attorney-General's Department authorised by the Attorney-General as an authorised officer: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3.

67 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 223.

68 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 48.

69 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 53.

70 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 58.

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COURT PROCESSES AND PROCEDURE

4.31 Under the NSW Act 1998, the Children's Court can make a care order if it is satisfied that a child or young person is in need of care and protection for any reason, including:

> *(a) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,*
>
> *(b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,*
>
> *(c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated,*
>
> *(d) subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers,*
>
> *(e) the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,*
>
> *(f) in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service.*[71]

4.32 After a care application is filed and served, a children's registrar will arrange and conduct a preliminary conference between the parties, unless the children's registrar believes that the conference should be deferred until a later time.[72] All parties are entitled to be legally represented at the preliminary conference.[73] One of the preliminary conference's purposes is to determine whether the best way to resolve the issues in dispute is to refer the application to independent ADR and, if so, the Court can order that independent ADR take place.[74]

4.33 Proceedings before the Children's Court are 'not to be conducted in an adversarial manner', should have as 'little formality and legal technicality and form' as possible, and the Court is not bound by the rules of evidence.[75] The Children's Court must ensure that the child or young person has the fullest opportunity practicable to be heard and to participate in the proceedings.[76]

4.34 In all proceedings, the child or young person, his or her parents, the Department's Director-General and the Minister may appear in person or by legal representative.[77] The Court can appoint a legal representative for the child, or grant leave for one to appear, if it appears to the Court that the child or young person needs to be represented.[78] The Court also has the power to appoint a guardian *ad litem* for the child.[79] There are two models of representation for the child under the NSW Act 1998. The model of legal representation depends on whether the child is capable of giving proper instructions. The NSW Act 1998 contains a rebuttable presumption that a child under 12 is incapable, and a child 12 or older is capable, of giving such instructions.[80]

4.35 A legal representative for a child or young person must act as a 'direct legal representative' if the child or young person is capable of giving proper instructions, and a guardian *ad litem* has not been appointed for the child or young person.[81] The NSW Act 1998 provides that a direct legal representative's role includes ensuring that the child's views are placed before the Children's Court, ensuring that all relevant evidence is adduced and, where necessary, tested, and acting on the child's instructions.[82]

4.36 A legal representative for a child or young person must act as an 'independent legal representative' if the child or young person is not capable of giving proper instructions, or if a guardian *ad litem* has been appointed for the child or young person.[83] The role of an independent legal representative under the NSW Act 1998 includes:

- acting on the guardian *ad litem's* instructions if a guardian has been appointed for the child or young person
- explaining to the child or young person the independent legal representative's role
- presenting direct evidence to the Children's Court about the child or young person and matters relevant to his or her safety, welfare and wellbeing
- presenting evidence of the child's or young person's wishes
- ensuring that all relevant evidence is adduced and, where necessary, tested
- cross-examining the parties and their witnesses
- making applications and submissions to the Children's Court for orders, whether final or interim, considered appropriate in the child's or young person's interests
- lodging an appeal against an order of the Children's Court if considered appropriate.[84]

4.37 The Court may appoint a guardian *ad litem* for the child, instead of or in addition to a legal representative, if there are 'special circumstances that warrant the appointment of a guardian *ad litem*', which may include that the child or young person has special needs because of age, disability or illness, or that the child or young person is, for any reason, incapable of giving proper instructions to a legal representative.[85] The NSW Act 1998 provides that the guardian *ad litem's* functions are to safeguard and represent the child's interests, and to instruct the legal representative of the child or young person.[86] In certain circumstances, the Court may also appoint a guardian *ad litem* for a parent of the child.[87]

4.38 One NSW lawyer has noted that '[n]either the Act, Regulations or any Rule of Court prescribe the class or group of people that may be appointed as a guardian *ad litem*'.[88] The NSW Attorney-General has set up a panel of persons who can be appointed as a guardian *ad litem*.[89]

4.39 In *Re Oscar*,[90] a case in which the Children's Court had made an order that the Attorney-General's Department appoint a guardian *ad litem* for a child who was almost 12 years old, the NSW Supreme Court stated that:

> *This order for a Guardian ad Litem is rarely made, it usually being deemed sufficient for the interests of the child to be protected by an order under Section 99 of the Act for legal representation of a child. The appointment of a Guardian ad Litem was, in my view, particularly indicated in this case because this is a situation where the child is of an age sufficient for the child's wishes to be a very relevant consideration but not yet of an age where they should be the governing consideration. In addition the history of the matter is particularly bitter and complicated. The Guardian ad Litem selected by the Attorney General's Department under the provisions of Section 100 of the Act appears to me to be eminently suitable, being a person with a long and quite distinguished career in Public Education in New South Wales with great experience of, and contact with, children and young people of various ages, and awareness of their problems.*[91]

71 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71.

72 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65(1). The children's registrar may dispense with the requirement for a preliminary conference if there has already been a defended hearing in relation to an application for an assessment order, interim care order or final care order, and the children's registrar 'considers that no useful purpose will be served by a preliminary conference', or if the parties consent to dispense with the conference: s 65(1A).

73 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65(3).

74 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 65(2)(c), 65A.

75 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93.

76 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 95(3).

77 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 98.

78 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99.

79 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 100.

80 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 99B–99C. In the context of this detailed prescription of the role of children's representatives in NSW it is important to note that the Law Society of New South Wales offers specialist accreditation in 'Children's Law' for legal practitioners.

81 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99A(1).

82 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99D(a).

83 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99A(2).

84 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99D(b).

85 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 100(1)–(2).

86 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 100(3).

87 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 101.

88 Robert McLachlan, 'Guardian ad Litem' (2002) 2(3) *Children's Court of New South Wales: Case Law News* 13, 15. Italics added.

89 Children's Court of New South Wales, 'The Guardian ad Litem Panel' (2002) 2(1) *Children's Court of New South Wales: Case Law News* 1.

90 (2002) NSWSC 453 (Unreported, Supreme Court of New South Wales Equity Division, Hamilton J, 21 May 2002).

91 *Re Oscar* (2002) NSWSC 453 (Unreported, Supreme Court of New South Wales Equity Division, Hamilton J, 21 May 2002) [7].

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CARE ORDERS

4.40 A care order can be either a final or interim order.[92] The Court can make an interim order after a care application is made and before the application is finally determined, if it is satisfied that it is appropriate to do so.[93] The Department must satisfy the Court that it is not in the best interests of the safety, welfare and wellbeing of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility pending finalisation of the case.[94] The Court should not make an interim care order unless it is satisfied that the order is necessary, in the child's interests, and is preferable to making a final order or an order dismissing the proceedings.[95]

4.41 If the Court is satisfied that a child or young person is in need of care and protection, the Court can make a care order including:

- an order accepting an undertaking made by a person with parental responsibility for the child or young person, a birth parent or a person who is the primary caregiver of the child of young person[96]
- an order directing a person or organisation named in the order to provide support services for the child or young person for a fixed period not exceeding 12 months[97]
- an order requiring a child under 14 years of age who has exhibited sexually abusive behaviour to attend a therapeutic or treatment program[98]
- an order placing the child or young person in relation to whom a care application has been made under the supervision of the Department's Director-General for no longer than 12 months[99]
- an order allocating parental responsibility to one parent to the exclusion of the other parent, to one or both parents and the Minister jointly, to another suitable person or persons, or to the Minister[100]—the Court cannot make this type of order unless the Department has presented a care plan to it[101]
- an order stipulating the minimum contact requirements between the child or young person and his or her parents, relatives or other persons of significance, that contact with a person be supervised, and/or that contact with a person be denied.[102]

NORTHERN TERRITORY

GENERAL OVERVIEW

4.42 The Northern Territory has recently overhauled its child protection legislation with the passage of the *Care and Protection of Children Act 2007* (NT) (NT Act 2007), which had a staged implementation throughout 2008. The introduction of the new Act was part of the Northern Territory 'Caring for our Children' child protection reform agenda, which began in 2004.[103]

4.43 Under the NT Act 2007, the Families and Children branch of the Department of Health and Families (the Department) can apply for a care and protection order if it believes that a child is in need of care and protection. The Family Matters Court decides applications for care and protection orders. It is a division of the Northern Territory Local Court constituted by a single magistrate.[104]

4.44 Some important features of the new Northern Territory child protection system are:

- Under regulations which have not yet come into operation,[105] the convenor appointed to convene a mediation conference will have the power to decide not to hold a mediation conference if he or she considers it inappropriate or not possible within a reasonable time.
- One of the grounds for making a care and protection application is that a child 'is not under the control of any person and is engaged in conduct that causes or is likely to cause harm to the child or other persons'.
- If a separate legal representative is appointed by the Court for the child, he or she must act in the child's best interests 'regardless of any instructions from the child'.

PRE-COURT ADR

4.45 The NT Act 2007 provides that the Department can arrange for a mediation conference if concerns about the child's wellbeing have been raised, the Department 'reasonably believes' the conference may address those concerns, and the parents are willing to participate in the conference.[106] The Department must appoint a convenor who is approved by the parents,[107] and the convenor may invite parents and other persons that the convenor considers appropriate to attend the conference.[108]

4.46 The *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) (NT Regulations 2010) require that before a convenor convenes a mediation conference, he or she must, if the convenor considers it appropriate to do so, having regard to the child's maturity and understanding:

- explain the purpose of the conference to the child
- discuss with the child whether the child wants a person to be appointed to present, or assist the child to present, the wishes and views of the child at the conference
- discuss with the child whether the child wants a particular person to attend the conference to support the child.[109]

92 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 62.

93 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 69(1)–(1A).

94 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 69(2).

95 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 70A.

96 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 73.

97 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 74.

98 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 75.

99 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 76–7.

100 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79.

101 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 80.

102 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 86.

103 Also, in August 2006 the Northern Territory established the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse. The Inquiry found that 'sexual abuse of Aboriginal children is common, widespread, and grossly under reported'. The Inquiry 'supported the review of child protection legislation and system reforms governing the function and administration of child protection systems in the NT as critical child protection measures': Department of Health and Families (NT), *Child Protection System Reform* <www.health.nt.gov.au/Children_Youth_and_Families/Child_Protection/Child_Protection_System_Reform/index.aspx> at 23 May 2010.

104 *Care and Protection of Children Act 2007* (NT) s 89.

105 The provisions of the NT Act that relate to mediation conferences, and the regulations made pursuant to those provisions (discussion below) have not, at the date of writing (23 May 2010), come into operation. They are expected to commence operation shortly.

106 *Care and Protection of Children Act 2007* (NT) s 49.

107 A person may be appointed as a convenor if the person is an accredited mediator under the Australian National Mediator Accreditation System, or 'has experience relevant to convening a mediation conference': *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 11.

108 *Care and Protection of Children Act 2007* (NT) s 49(5)–(6).

109 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 5(1)(a).

Current Law and Practice in Other Australian Jurisdictions

4.47 The convenor may also arrange for a person who has a similar cultural, ethnic or religious background to the child to assist the convenor to prepare for or conduct the mediation conference.[110]

4.48 Under the NT Regulations 2010, the convenor will have the power to decide not to convene a mediation conference if, following discussions with the child or a member of the child's family, he or she believes that a conference should not be convened, or if there has been an unsuccessful attempt to convene a conference and it does not appear a conference could be convened within a reasonable time.[111]

4.49 If the convenor decides to convene a mediation conference, he or she is required, at the child's request, to appoint a suitable person[112] to present, or assist the child to present, the child's wishes and views at the conference, but only if the convenor considers it to be in the child's best interests.[113] The NT Act 2007 and the NT Regulations 2010 are silent as to whether legal representatives for either the child or family members may attend a mediation conference, but it appears this could be possible.[114]

4.50 If an agreement is reached during the mediation conference about the best means of safeguarding the child's wellbeing, the convenor will be required to arrange that a written agreement is signed.[115] After a mediation conference, the convenor will be required to provide a written report within 28 days to the participants and the Department's Chief Executive Officer. The report includes:

- a summary of the concerns raised at the conference
- a summary of the child's views and wishes, but only if the child agrees for the summary to be included and the convenor considers it to be in the child's best interests
- if an agreement was reached, a copy of that agreement, accompanied by a statement from the convenor as to whether or not he or she considers that the child's wellbeing will be safeguarded through the agreement.[116]

EMERGENCY REMOVAL POWERS AND ORDERS

4.51 If a Department employee reasonably believes a child is in need of protection and that provisional protection is 'urgently needed to safeguard the wellbeing of the child', the employee may take a child into provisional protection.[117] The child may only be in the Department's provisional protection for 72 hours, after which the child must be returned to the family if no order has been made in relation to the child.[118] Authorised officers have the power to move a child found outside of home to a safe place on a temporary basis if the authorised officer reasonably believes that there is a risk to the child's wellbeing if he or she is not removed.[119]

4.52 After a child has been taken into provisional protection, or instead of taking a child into provisional protection, the Department can apply for a temporary protection order, if the 'proposed order is urgently needed to safeguard the wellbeing of the child'.[120] The application can be made by phone, fax, or other electronic means, and can be decided in the absence of the parents.[121] If the child has not already been taken into provisional protection, an authorised officer may remove the child pursuant to the temporary protection order.[122] A temporary protection order lasts for 14 days, but consecutive temporary protection orders can be granted.[123]

ASSESSMENT ORDERS

4.53 Assessment orders authorise the Department to carry out an assessment of a child which cannot be carried out without an order and can involve a medical or psychological examination of the child or the child's parent.[124] The Court will not make such an order unless satisfied that the Department took reasonable steps to obtain the parents' consent to the assessment.[125] Assessment orders have effect for 28 days.[126]

COURT PROCESSES AND PROCEDURE

4.54 The NT Act 2007 provides that a child is in need of care and protection if:

> *(a) the child has suffered or is likely to suffer harm or exploitation because of an act or omission of a parent of the child; or*
>
> *(b) the child is abandoned and no family member of the child is willing and able to care for the child; or*
>
> *(c) the parents of the child are dead or unable or unwilling to care for the child and no other family member of the child is able and willing to do so; or*
>
> *(d) the child is not under the control of any person and is engaged in conduct that causes or is likely to cause harm to the child or other persons.*[127]

4.55 Under the NT Act 2007, the child, the parents and the Department are parties to any application.[128] All parties to proceedings under the Act may be legally represented.[129] The Court may order that a child be separately legally represented if it considers that it would be in the child's best interests to do so.[130] The NT Act 2007 directs that the child's legal representative must act in the child's best interests 'regardless of any instructions from the child', and must present the child's views and wishes to the Court.[131] In the best interests role, the child's legal representative may:

> *(a) interview the child; and*
>
> *(b) explain the role of the legal representative to the child; and*
>
> *(c) present evidence to the Court about the best interests, and the views and wishes, of the child; and*
>
> *(d) cross-examine other parties to the proceedings and their witnesses; and*
>
> *(e) make applications and submissions to the Court for the child; and*
>
> *(f) lodge an appeal against a decision of the Court for the child.*[132]

4.56 Proceedings in the Family Matters Court 'must be conducted with as little formality and legal technicality as the circumstances permit', and the Court is not bound by the rules of evidence.[133]

110 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 5(4).

111 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 7(1). If the convenor decides not to hold a mediation conference, he or she must, as soon as practicable, give the Department written notice of this decision, along with the grounds on which it is based: reg 7(2).

112 'Suitable person' is defined as 'any person the convenor considers will accurately and effectively present, or assist the child to present, the wishes and views of the child at the mediation conference, taking into account the cultural, ethnic and religious background of the child': *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 6(2).

113 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 6(1).

114 The NT Regulations 2010 make reference to a participant attending the conference 'in person or by other means': *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 8(3)(a)(iii).

115 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 8(3).

116 *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 9.

117 *Care and Protection of Children Act 2007* (NT) s 51.

118 *Care and Protection of Children Act 2007* (NT) s 53.

119 *Care and Protection of Children Act 2007* (NT) s 56.

120 *Care and Protection of Children Act 2007* (NT) s 103.

121 *Care and Protection of Children Act 2007* (NT) s 105(5). The Act provides that as soon as practicable after the order is made, the Department must give a copy of the order to each parent of the child, inform the child about the order, and explain the effect of the order to the child: s 106.

122 *Care and Protection of Children Act 2007* (NT) s 108.

123 *Care and Protection of Children Act 2007* (NT) ss 107, 110.

124 *Care and Protection of Children Act 2007* (NT) s 111.

125 *Care and Protection of Children Act 2007* (NT) s 113.

126 *Care and Protection of Children Act 2007* (NT) s 117.

127 *Care and Protection of Children Act 2007* (NT) s 20.

128 *Care and Protection of Children Act 2007* (NT) s 94.

129 *Care and Protection of Children Act 2007* (NT) s 101.

130 *Care and Protection of Children Act 2007* (NT) s 146.

131 *Care and Protection of Children Act 2007* (NT) s 146(6).

132 *Care and Protection of Children Act 2007* (NT) s 146(7).

133 *Care and Protection of Children Act 2007* (NT) s 93.

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4.57 Under the NT Act 2007, the Court and any other decision maker under the Act are bound by several principles, including treating the child with respect[134] and child participation.[135] Decisions involving a child should be made 'with the informed participation of the child, the child's family and other people who are significant in the child's life'.[136]

4.58 Under the NT Act 2007, the Family Matters Court has the power to order the parties to attend a mediation conference prior to an application being determined.[137] The parties required to attend court-ordered mediation may be represented.[138]

PROTECTION ORDERS

4.59 The Department can apply for a protection order if it reasonably believes that the child is in need of care and protection.[139] The application must contain a proposed protection order that must include one or more of the following directions:

- a supervision direction requiring that a person must do, or refrain from doing, a specified thing directly related to the child's protection, including refraining from having contact with the child; and/or that the Department's Chief Executive Officer must supervise the child's protection in relation to specified matters
- a daily care and control direction giving daily care and control of the child to a specified person
- a short-term parental responsibility direction giving parental responsibility for the child to a specified person for a specified period not exceeding two years
- a long-term parental responsibility direction giving parental responsibility for the child to a specified person for a specified period that exceeds two years and ends before the child is 18 years of age.[140]

QUEENSLAND

GENERAL OVERVIEW

4.60 The *Child Protection Act 1999* (Qld) (Qld Act 1999) governs the statutory child protection system in Queensland. The Qld Act 1999 is implemented by the Department of Child Safety, a division of the Department of Communities (the Department). The Department can make a child protection order if it believes that a child has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm, and does not have a parent able and willing to protect the child from the harm.

4.61 The Queensland child protection system has a 'two-tiered' Children's Court system, which includes an original and an appellate jurisdiction. Original jurisdiction in child protection matters is exercised by a children's magistrate, who is referred to as the 'Children's Court' when exercising this jurisdiction. The Children's Court has jurisdiction in relation to child protection applications.

4.62 Appellate jurisdiction in child protection matters is exercised by a District Court judge, who is referred to as the 'Children's Court of Queensland' (CCQ) when exercising this jurisdiction. The CCQ hears appeals from the Children's Court.[141]

4.63 Other key distinguishing features of the Queensland child protection system include:

- Following emergency removal of a child, the Department must be granted a court order within eight hours.
- The court order that the Department may be granted after emergency removal lasts for only three days and is called a temporary assessment order.
- The Children's Court has the power to order the appointment of a separate representative for the child who must 'act in the child's best interests regardless of any instructions from the child'.
- The Children's Court cannot make an order specifying the level of contact the Department's Chief Executive must facilitate between the child and his or her parents, other than to exclude such contact entirely.

PRE-COURT ADR

4.64 Under the Qld Act 1999, the Department must convene a family group meeting (FGM) to develop or review a case plan for a child.[142] As the Act prohibits the Court from making a child protection order unless an acceptable case plan for the child has been filed,[143] the Qld Act 1999 effectively requires the Department to convene an FGM in every case before a child protection order can be made.

4.65 The convenor of an FGM must give the child,[144] the child's parents, a support person for the parents (who can be a legal representative), other members of the family group and any legal representative for the child, a reasonable opportunity to attend and participate in the FGM.[145] The Lawyers Practice Manual Queensland notes that it is common practice for solicitors to attend FGMs with their clients.[146] If a case plan is developed at an FGM, the Department must endorse the case plan, unless the plan is 'clearly impracticable or not in the child's best interests'.[147]

EMERGENCY REMOVAL POWERS

4.66 If an authorised officer or police officer reasonably believes that a child is at risk of harm and the child is likely to suffer harm if the officer does not immediately remove the child, the officer may take the child into custody.[148] Within eight hours after the child is taken into custody, the Department must be granted a temporary assessment order (TAO) or must release the child.[149]

4.67 An application for a TAO can be made directly to a Children's Court magistrate—usually in chambers—by either an authorised officer or police officer,[150] and can be heard and determined on an *ex parte* basis if the magistrate decides this is appropriate.[151] In urgent circumstances, an application for a TAO can be made after hours by phone or fax to magistrates who are on-call.[152] These after-hours applications are made through the Child Safety After Hours Service Centre in Brisbane.

ASSESSMENT ORDERS

4.68 In order to grant a TAO, the Children's Court magistrate must be satisfied that 'an investigation is necessary to assess whether the child is in need of protection', and that the investigation cannot be properly carried out unless the order is made.[153] In relation to the latter requirement for a TAO, the magistrate must be satisfied that reasonable steps have been taken to obtain consent to the Department's desired assessment procedures from a least one of the child's parents, or that it is 'not practicable' to take such steps.[154]

134 *Care and Protection of Children Act 2007* (NT) s 9.

135 *Care and Protection of Children Act 2007* (NT) s 10.

136 *Care and Protection of Children Act 2007* (NT) s 9(2)(c).

137 *Care and Protection of Children Act 2007* (NT) s 127.

138 *Care and Protection of Children Act 2007* (NT) s 127(4).

139 *Care and Protection of Children Act 2007* (NT) s 121.

140 *Care and Protection of Children Act 2007* (NT) s 123.

141 See the definition of 'appellate court' in sch 3 of the *Child Protection Act 1999* (Qld).

142 *Child Protection Act 1999* (Qld) s 51H.

143 *Child Protection Act 1999* (Qld) s 59.

144 Unless it would be inappropriate because of the child's age or ability to understand the meeting to invite the child: *Child Protection Act 1999* (Qld) s 51L(1)(e).

145 *Child Protection Act 1999* (Qld) s 51L(1)–(2).

146 Caxton Legal Centre, *Lawyers Practice Manual Queensland (2009)* [31.265].

147 *Child Protection Act 1999* (Qld) ss 51Q–51R. If the Chief Executive is of the view that the case plan is not appropriate for those reasons, he or she can either reconvene the FGM, convene a new FGM, or amend the case plan and endorse it: s 51R(2).

148 *Child Protection Act 1999* (Qld) s 18(1)–(2). As in the Northern Territory, an authorised officer or police officer has the option of simply moving the child (if under 12) to a safe place on a temporary basis, if he or she reasonably believes that the child is at risk of harm, but does not consider it necessary to take the child into the Chief Executive's care: s 21.

149 *Child Protection Act 1999* (Qld) s 18(7).

150 *Child Protection Act 1999* (Qld) s 25.

151 *Child Protection Act 1999* (Qld) s 26.

152 *Child Protection Act 1999* (Qld) s 30. TAOs applied for in this way are referred to as 'special orders'.

153 *Child Protection Act 1999* (Qld) s 27.

154 *Child Protection Act 1999* (Qld) s 27(2).

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4.69 The Children's Court magistrate can allow the authorised officer or police officer to take the child into—or keep the child in—custody for the duration of the order if the magistrate considers it 'is necessary to provide interim protection for the child while the investigation is carried out'.[155] A TAO can only last for a maximum of three days,[156] with the possibility of an extension of one further business day if the magistrate is satisfied that the Department intends to apply for a court assessment order or a child protection order.[157]

4.70 Following a TAO, or as an initial action if emergency removal was not necessary, the Department will usually apply for a court assessment order (CAO). The test for a CAO is the same as for a TAO,[158] with the additional requirement that more than three days is necessary to complete the investigation and assessment. The Children's Court may hear and decide the application in the absence of the child's parents if they were given notice and failed to attend, or if it is satisfied it was not practicable for the parents to be given notice of the hearing.[159]

4.71 A CAO can also provide the authority to take a child into care.[160] A CAO can be made for a maximum of four weeks,[161] but it can be extended once for a further four weeks if the Court is satisfied that an extension would be in the child's best interests.[162]

COURT PROCESSES AND PROCEDURE

4.72 Under the Qld Act 1999, a child is defined as 'in need of protection' for the purposes of a child protection application when he or she has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm, and does not have a parent able and willing to protect the child from the harm.[163] The Qld Act 1999 defines 'harm' as 'any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing'.[164] The Act further clarifies that, for the purposes of finding the child to be in need of protection, it is 'immaterial how the harm is caused', and that harm can be caused 'by physical, psychological or emotional abuse or neglect, or sexual abuse or exploitation'.[165]

4.73 The Children's Court has the power to adjourn proceedings and order that the Department convene an FGM to develop or revise, and subsequently file in court, a case plan or to address 'another matter relating to the child's wellbeing and protection and care needs'.[166] The Court can also order that a conference be held between the parties before the proceeding continues 'to decide the matters in dispute or to try to resolve the matters'.[167]

4.74 If the Court orders that a conference be convened, the Court registrar must appoint an independent chairperson and convene a conference as soon as practicable.[168] In practice, the chairperson of a court-ordered conference is an employee of the Department of Justice who has no other dealings with the proceedings.[169]

4.75 All parties except the child are required to attend, and may be represented by legal representatives.[170] Although the child is not required to attend, arrangements can be made for the child to attend the conference if it is considered appropriate. If a separate representative has been appointed, he or she will also attend.[171]

4.76 The Lawyers Practice Manual Queensland advises that these court-ordered conferences

> *are often a very useful opportunity for parties to discuss the type of order that should be made for the child, the time period of the order and most importantly what is to happen during the period of the order. This is especially the case prior to the finalisation of proceedings and with an independent chairperson present.*[172]

4.77 Anything said at the conference is inadmissible in the proceedings, but the chairperson must report to the Court about the outcome of the conference.[173]

4.78 The Children's Court is not bound by the rules of evidence,[174] it can appoint an expert to assist the Court,[175] and it can receive submissions from non-parties.[176] The child is a party to the proceedings,[177] and the child, the child's parents and the other parties have a right to appear in person or be represented by a lawyer.[178]

4.79 The Lawyers Practice Manual Queensland advises that the lawyer representing a child pursuant to section 108

> *would be a lawyer engaged by the child to act directly on the child's instructions in the proceedings. The usual solicitor/client relationship would exist between the child and the lawyer, and the lawyer would advocate in the proceedings on behalf of the child's instructions. There is no age limit requirement on this right in the legislation, however, it may be that any submissions made by this lawyer are considered by the court in the context of the child's age and ability to understand.* [179]

4.80 However, if the Children's Court considers that it is necessary in the child's best interests for the child to have separate legal representation, the Court may order that a separate representative be appointed for the child.[180] Factors that the Court may take into account when deciding whether to order that a separate representative be appointed for the child include whether the application for the order is contested by the parents, and if the child opposes the orders.[181] A separate representative for the child must 'act in the child's best interests regardless of any instructions from the child' and 'as far as possible, present the child's views and wishes to the court'.[182]

4.81 The Lawyers Practice Manual Queensland explains that

> *Separate representatives commonly are family lawyers also on the independent children's lawyers panel maintained by Legal Aid Queensland ...*
>
> *In practice the separate representative will take part in all of the proceedings including mentions, conferences, family meetings and hearings. They may call and cross-examine witnesses and make final submissions.*
>
> *To assist them to carry out their role the separate representative may engage an independent social worker, psychologist or psychiatrist to prepare a social assessment report. However, taking into consideration the often numerous assessments children involved in the child protection system have been subjected to, this may not be as a matter of course ... Information provided to the report writer may form part of their report and the separate representative has a duty to provide information relevant to the best interests of the child before the court.*[183]

CHILD PROTECTION ORDERS

4.82 The Children's Court can only make a child protection order if satisfied that:

- the child is in need of protection and the order is 'appropriate and desirable for the child's protection'
- a case plan has been developed that 'is appropriate and desirable for the child's assessed protection and care needs' and has been filed with the Court

155 *Child Protection Act 1999* (Qld) s 28.
156 *Child Protection Act 1999* (Qld) s 29.
157 *Child Protection Act 1999* (Qld) s 34.
158 *Child Protection Act 1999* (Qld) s 44.
159 *Child Protection Act 1999* (Qld) ss 41, 43.
160 *Child Protection Act 1999* (Qld) s 45.
161 *Child Protection Act 1999* (Qld) s 47.
162 *Child Protection Act 1999* (Qld) s 49.
163 *Child Protection Act 1999* (Qld) s 10.
164 *Child Protection Act 1999* (Qld) s 9(1).
165 *Child Protection Act 1999* (Qld) s 9(2)–(3).
166 *Child Protection Act 1999* (Qld) s 68(1)(d).
167 *Child Protection Act 1999* (Qld) s 68(1)(e).
168 *Child Protection Act 1999* (Qld) s 69(1).
169 Caxton Legal Centre, above n 146, [31.270].
170 *Child Protection Act 1999* (Qld) s 70. If the child is Aboriginal or a Torres Strait Islander, a cultural representative may attend the conference: s 70(4).
171 Caxton Legal Centre, above n 146, [31.270].
172 Ibid.
173 *Child Protection Act 1999* (Qld) ss 71, 72(1).
174 *Child Protection Act 1999* (Qld) s 105.
175 *Child Protection Act 1999* (Qld) s 107.
176 *Child Protection Act 1999* (Qld) s 113.
177 See the definition of 'party' in *Child Protection Act 1999* (Qld) sch 3.
178 *Child Protection Act 1999* (Qld) s 108.
179 Caxton Legal Centre, above n 146, [31.230].
180 *Child Protection Act 1999* (Qld) s 110.
181 *Child Protection Act 1999* (Qld) s 110(2).
182 *Child Protection Act 1999* (Qld) s 110(3).
183 Caxton Legal Centre, above n 146, [31.230].

- if the making of the application was contested, that reasonable attempts to hold a conference have been made
- the child's wishes have been made known to the Court, and
- the protection sought to be achieved by the order is unlikely to be achieved by an order on less intrusive terms.[184]

4.83 The Qld Act 1999 also requires that before making a child protection order granting long-term guardianship of a child, the Court must be satisfied that there is no parent able and willing to protect the child within the foreseeable future, or that the child's need for emotional security will be best met in the long term by making the order.[185] The Court must not grant long-term guardianship to the Department's Chief Executive if the Court 'can properly grant guardianship to another suitable person'.[186]

4.84 The Children's Court may make any of the following child protection orders it considers appropriate in the circumstances:

- an order directing a child's parent to do or refrain from doing something directly related to the child's protection
- an order directing a parent not to have direct or indirect contact with the child, or to have only supervised contact with the child
- an order requiring the Chief Executive to supervise the child's protection in relation to the matters stated in the order
- an order granting custody of the child to a suitable person, other than a parent of the child, who is a member of the child's family, or the Chief Executive
- an order granting short-term guardianship of the child to the Chief Executive
- an order granting long-term guardianship of the child to a suitable person, other than a parent of the child, or to the Chief Executive.[187]

4.85 In relation to the duration of these child protection orders, the Qld Act 1999 states that:

- if a order does not grant custody or guardianship of the child, the order ends after one year
- if an order grants custody or short-term guardianship of the child, the order ends after two years
- if an order grants long-term guardianship of the child, the order ends the day before the child turns 18.[188]

4.86 The Children's Court cannot make an order requiring the Department's Chief Executive to facilitate a certain level of contact between the child and his or her parents or other family members. The Department makes these decisions administratively.[189] However, the Qld Act 1999 imposes an obligation on the Chief Executive to 'provide opportunity for contact between the child and the child's parents and appropriate members of the child's family as often as is appropriate in the circumstances'.[190] If the Chief Executive makes a decision to refuse, restrict or impose conditions on such contact, the person affected can apply to the Queensland Civil and Administrative Tribunal for review of that decision.[191]

SOUTH AUSTRALIA

GENERAL OVERVIEW

4.87 The *Children's Protection Act 1993* (SA) (SA Act 1993) governs the statutory child protection system in South Australia. Families SA, a division of the Department for Families and Communities (the Department), will file an application in the Youth Court of South Australia if an employee is of the opinion that a child is at risk and that an order should be made to secure the child's care and protection. The Youth Court is a specialist court constituted by two District Court judges, one of whom heads the Court as the Senior Judge, and two specialist magistrates. The Youth Court, located in Adelaide, hears and determines all child protection matters for the whole of the state.

4.88 Unique features of the South Australian child protection system include:

- The Care and Protection Unit, a body which is independent of the Department and attached to the Youth Court, is responsible for running family care meetings.
- In child protection proceedings in the Youth Court, the Department is represented by lawyers from the Crown Solicitor's Office.
- The child, who is always a party to child protection proceedings in the Youth Court, must be represented unless he or she has made an informed and independent decision not to be represented.

EMERGENCY REMOVAL POWERS

4.89 If a police officer, or an authorised Departmental officer, believes on reasonable grounds that a child is in serious danger and that it is necessary to remove the child from that situation in order to protect the child from harm or further harm, the officer may remove the child from any premises or place.[192] However, a Department employee may only remove a child from the custody of a guardian with the Chief Executive's prior approval.[193]

4.90 The officer who removes a child must, if possible, return the child to his or her home unless the officer is of the opinion that it would not be in the child's best interests to do so.[194] The interim custody of a child removed from a situation of danger will terminate at the end of the next working day following the day of removal, unless a Youth Court order—usually an investigation and assessment order—is obtained.[195]

INVESTIGATION AND ASSESSMENT ORDERS

4.91 The Department's Chief Executive may apply to the Youth Court for an investigation and assessment order (I&AO) if he or she is of the opinion that:

- there is some information or evidence leading to a reasonable suspicion that a child is at risk
- further investigation of the matter is warranted or a family care meeting (FCM) should be held, and
- the investigation cannot properly proceed unless an order under this Division is made, or it is desirable that the child be protected while the matter is being investigated or a family care meeting is being held.[196]

184 *Child Protection Act 1999* (Qld) s 59.
185 *Child Protection Act 1999* (Qld) s 59(4).
186 *Child Protection Act 1999* (Qld) s 59(5).
187 *Child Protection Act 1999* (Qld) s 61.
188 *Child Protection Act 1999* (Qld) s 62.
189 Caxton Legal Centre, above n 146, [31.295].
190 *Child Protection Act 1999* (Qld) s 87(1).
191 See ch 2A and s 247 of the *Child Protection Act 1999* (Qld), and the list of 'reviewable decisions' in sch 2 of the Act.
192 *Children's Protection Act 1993* (SA) s 16(1).
193 *Children's Protection Act 1993* (SA) s 16(2)(b).
194 *Children's Protection Act 1993* (SA) s 16(3)(b).
195 *Children's Protection Act 1993* (SA) s 16(5). As the period of emergency custody is limited to one *working* day, children removed on a Friday will therefore be kept in the Department's care until the Youth Court opens on Monday.
196 *Children's Protection Act 1993* (SA) s 20(1).

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4.92 The Court can adjourn the hearing of an I&AO application once, for no more than seven days.[197] If the Court is satisfied that there are 'sufficient grounds' for making an I&AO, and that it would be in the child's best interests that such an order be made, the Court may order an examination and assessment of the child.[198] The Court can grant custody of the child to the Minister for the duration of the I&AO, which is limited to six weeks, with one possible extension—which can only be granted by the Senior Judge—of no more than four weeks.[199] An FCM is usually convened during the lifetime of an I&AO, before a care and protection application has been filed.

FAMILY CARE MEETINGS RUN BY THE CARE AND PROTECTION UNIT[200]

4.93 The SA Act 1993 directs the Minister to convene an FCM if the Minister believes that a child is at risk and that arrangements should be made to secure the child's care and protection.[201] The Minister cannot make an application for a care and protection order before an FCM has been held in respect of the child unless:

- it has not been possible to hold a meeting despite reasonable endeavours to do so
- an order should be made without delay
- the guardians of the child consent to the application
- there is other good reason to do so.[202]

4.94 FCMs are convened and conducted by coordinators in the Care and Protection Unit. The coordinators are appointed by the Senior Judge of the Youth Court, and have social science or psychology qualifications and previous experience working with children. There are currently five full-time coordinators in the Unit.

4.95 The SA Act 1993 gives the coordinator the power to determine who attends the FCM,[203] and the coordinator consults with the child and his or her guardians as to who should be invited to attend, and when and where the meeting should be held.[204] The coordinator must always appoint an advocate for the child who will attend the FCM, unless he or she is satisfied that the child has made an independent decision to waive his or her right to have a lay advocate.[205] The coordinator will decide whether it would be in the child's best interests for the child to attend the FCM,[206] but he or she is guided by the advocate's views. If the child does not attend, the coordinator must ascertain the child's views and relay those views to the FCM.[207]

4.96 No lawyers attend the FCM,[208] but the child's parent may have a support person present.[209] If the child is Aboriginal, a cultural representative must attend the FCM.[210]

4.97 At an FCM, the Department presents its concerns about the child, and the parents or other guardians or relatives of the child are given the opportunity to develop a plan to meet those concerns, guided by the coordinator.[211] If an agreement is reached at an FCM, the coordinator will not validate it unless he or she considers that it properly secures the child's care and protection.[212] Once validated, the coordinator will draft the agreement, and the child, if appropriate, and his or her parents will sign it.[213]

4.98 Although an FCM agreement cannot be registered with the Court and therefore cannot be legally enforced, it can be used in any subsequent Youth Court proceedings and considered by the Court when deciding what orders are appropriate.[214] An FCM arrangement can be reviewed at another FCM.[215] If no agreement is reached at the FCM, or if an agreement is not complied with, the Minister may apply for a care and protection order.[216]

COURT PROCESSES AND PROCEDURE

4.99 The Minister may apply for an order if he or she believes that a child is at risk and that an order should be made for the child's care and protection.[217] A child is defined to be 'at risk' in a number of circumstances, including if:

- there is a significant risk that the child will suffer serious harm to his or her physical, psychological or emotional wellbeing, against which he or she should have, but does not have, proper protection
- the child has been, or is being, abused or neglected[218]
- a person with whom the child resides, whether a guardian of the child or not, has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out; or has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person
- the guardians of the child are deceased, or unable or unwilling to care for and protect the child or exercise adequate supervision and control over the child, or have abandoned the child, or cannot be found.[219]

4.100 Once a care and protection application has been filed, the Youth Court may order that a conference be convened to determine what matters are in dispute, or to resolve any matters in dispute.[220] The conference is presided over by a judicial officer, other than the one who is hearing or will hear the proceedings, and legal representatives for the parties can attend.[221] The Court also has the power to adjourn the hearing of an application and refer the parties to the Care and Protection Unit for an FCM to resolve specific issues and report to the Court.[222]

197 *Children's Protection Act 1993* (SA) s 23(1)–(2). This adjournment might, for instance, be necessary to enable parents to obtain legal advice and/or representation. The Court can make orders concerning the custody of the child over this adjournment period: s 23(3)(a).

198 For the meaning of 'examination and assessment' see *Children's Protection Act 1993* (SA) s 26.

199 *Children's Protection Act 1993* (SA) s 21.

200 The Commission is grateful for the information provided by the coordinators of the Care and Protection Unit on its visit to the Adelaide Youth Court on 24 March 2010.

201 *Children's Protection Act 1993* (SA) s 27(1).

202 *Children's Protection Act 1993* (SA) s 27(2).

203 *Children's Protection Act 1993* (SA) s 30.

204 *Children's Protection Act 1993* (SA) s 29(3).

205 *Children's Protection Act 1993* (SA) s 29(2).

206 *Children's Protection Act 1993* (SA) s 30(2)(a).

207 *Children's Protection Act 1993* (SA) s 32(1).

208 There is a limited exception in cases where a lawyer has already been appointed for the child by the Youth Court in concurrent court proceedings, in which case that lawyer will attend the FCM, but as a lay advocate for the child, not as a legal representative.

209 *Children's Protection Act 1993* (SA) s 31(h).

210 *Children's Protection Act 1993* (SA) s 30(1)(e).

211 *Children's Protection Act 1993* (SA) s 32(2)–(3).

212 *Children's Protection Act 1993* (SA) s 32(6).

213 *Children's Protection Act 1993* (SA) s 32(7). Note that the agreement of the Department representative is not required.

214 The Youth Court can annex an FCM agreement to an order.

215 *Children's Protection Act 1993* (SA) s 33.

216 *Children's Protection Act 1993* (SA) s 35.

217 *Children's Protection Act 1993* (SA) s 37(1). There are also two other grounds for a care and protection application. One relates to drug abuse on the part of the child's guardians and the need for treatment of this. The other is if arrangements for the child already exist and the child would be likely to suffer significant psychological injury if those arrangements were disturbed, and it would be in the child's best interests for the arrangements to be made the subject of an order: s 37(1a), (2).

218 See *Children's Protection Act 1993* (SA) s 6(1) for the definition of 'abuse or neglect'.

219 *Children's Protection Act 1993* (SA) s 6(2).

220 *Children's Protection Act 1993* (SA) s 42(1).

221 *Children's Protection Act 1993* (SA) s 42(2)–(3).

222 *Children's Protection Act 1993* (SA) s 49.

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4.101 The Youth Court is 'not bound by the rules of evidence but may inform itself as it thinks fit', and 'must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms'.[223] The child is a party to proceedings under the SA Act 1993,[224] and must be represented unless he or she has made an informed and independent decision not to be represented.[225] If the child is to be represented but is not capable of properly instructing the legal practitioner, the legal practitioner 'must act, and make representations to the Court, according to his or her own view of the best interests of the child'.[226]

4.102 The child must always be given a reasonable opportunity to give the Court his or her own views unless the Court is satisfied that the child is not capable of doing so, or that it would 'give rise to an unacceptable risk to the child's wellbeing' to let him or her do so.[227]

CARE AND PROTECTION ORDERS

4.103 If the Youth Court is satisfied that a care and protection order should be made, the Court may make an order:

- requiring that a guardian of the child or the child enter into a written undertaking, for a specified period not exceeding 12 months, to do any specified thing, or to refrain from doing any specified thing and, if the Court thinks fit, requiring the child to be under the supervision of the Chief Executive or some other specified person or authority for the duration of the undertaking
- granting custody of the child for a specified period not exceeding 12 months to a guardian of the child, a member of the child's family, the Minister, the Chief Executive of a licensed children's residential facility, or any other person that the Court thinks appropriate in the circumstances of the case
- placing the child under the guardianship of the Minister, or such other person or two persons as the Court thinks appropriate in the circumstances of the case, for a specified period not exceeding 12 months, or until the child turns 18
- directing a party to the application to cease or refrain from residing in the same premises as the child, or from coming within a specified distance of the child's residence, or from having any contact alone, or at all, with the child
- making consequential or ancillary orders providing for access to the child; or dealing with matters relating to the care, protection, health, welfare or education of the child; or requiring a parent, or other guardian to undertake specified courses of instruction, or programmed activities, in order to increase his or her capacity to care for and protect the child; or dealing with any other matter.[228]

4.104 Before the Court can make an order giving custody or guardianship of a child to a person who is not the child's parent, it must be satisfied that there is no parent able, willing and available to provide adequate care and protection for the child and that the order is the best available solution to the child's need for care and protection, including consideration of the child's emotional security, and the child's age, developmental needs and emotional attachments.[229]

TASMANIA

GENERAL OVERVIEW

4.105 In Tasmania, statutory child protection is governed by the *Children, Young Persons and Their Families Act 1997* (Tas) (the Tas Act 1997). Under the Tas Act 1997, the Department of Health and Human Services (the Department) may apply for a care and protection order if it considers that a child is at risk, and that a care and protection order should be made to secure the care and protection of the child.

4.106 Tasmania no longer has a separate Children's Court.[230] The Children's Division of the Tasmanian Magistrates' Court decides all child protection matters under the Tas Act 1997. A unique feature of the Tasmanian child protection system is that the Tas Act 1997 does not confer a power on either Department employees or police officers to remove a child without a warrant in emergencies. The Act does permit a magistrate, who is on-call after hours, to issue a warrant on an *ex parte* basis to remove a child for assessment. The application can be made over the phone in urgent cases.

FAMILY GROUP CONFERENCES

4.107 The Tas Act 1997 provides that the Secretary of the Department can convene an FGC in respect of a child if the Secretary believes that the child is at risk, and that arrangements should be made to secure the child's care and protection.[231]

4.108 If the Secretary decides to convene an FGC, he or she must consult the child and the child's immediate family about the appointment of a facilitator, who is independent of the Department.[232] The facilitator must appoint an advocate for the child to attend the FGC, unless the facilitator is satisfied that the child has made an independent decision to waive his or her right to have an advocate.[233] The facilitator must consult the child, the child's guardians and, in the case of an Aboriginal child, an appropriate recognised Aboriginal organisation, before deciding who should be invited to attend the FGC and the time and place of the meeting.[234] The FGC must be held within three weeks of the Secretary's decision to convene the conference, if reasonably practicable.[235]

4.109 The facilitator must invite the child, the guardians of the child, the child's advocate and a Department employee to attend the FGC unless, in the case of guardians, this would contravene a restraint order or would not be in the child's best interests.[236] The facilitator need not invite the child to attend if it would not be in the child's best interests, or the child is unable to understand or participate in the conference because of his or her age or for any other reason.[237]

4.110 The Tas Act 1997 neither expressly allows nor prohibits lawyers from attending FGCs, but it appears that a specific lawyer could be invited if the facilitator thought it would be appropriate.[238] However, if a separate legal representative for the child has been appointed in court proceedings prior to or concurrent with the FGC, it appears that that representative does attend.[239] The child and each guardian of the child is entitled to have a support person, approved by the facilitator, attend the FGC.[240]

4.111 An agreement reached at an FGC is reduced to writing by the facilitator and signed by the parties.[241] Once the Secretary receives notification of a decision about arrangements for the child reached at an FGC, he or she may approve those arrangements,[242] and the Tas Act 1997 imposes an obligation on the Secretary to 'take such action as is necessary to implement and maintain those arrangements'.[243] Alternatively, if the Secretary does not consider the arrangements decided upon at an FGC suitable, he or she can reconvene the FGC to make other arrangements, or apply for a care and protection order in relation to the child.[244]

223 See *Children's Protection Act 1993* (SA) s 45(1).

224 See *Children's Protection Act 1993* (SA) s 46(1).

225 See *Children's Protection Act 1993* (SA) s 48(1).

226 See *Children's Protection Act 1993* (SA) s 48(2).

227 See *Children's Protection Act 1993* (SA) s 48(3).

228 *Children's Protection Act 1993* (SA) s 38(1).

229 *Children's Protection Act 1993* (SA) s 38(2).

230 The Children's Court, including all specialist children's magistrates, was abolished by s 7 of the *Children, Youth and Their Families (Transitional and Savings Provisions) Act 1998* (Tas).

231 *Children, Young Persons and Their Families Act 1997* (Tas) s 30(1). Also, the Secretary must cause an FGC to be convened if he or she has approved arrangements for the care of a child under s 37, or if arrangements have been implemented pursuant to a care and protection order, and the child, or two or more family members of the child, request an FGC to review those arrangements: *Children, Young Persons and Their Families Act 1997* (Tas) ss 39, 53.

232 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(1).

233 *Children, Young Persons and Their Families Act 1997* (Tas) ss 32(3), 35.

234 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(4).

235 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(5).

236 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(6)–(8).

237 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(8)–(9).

238 See *Children, Young Persons and Their Families Act 1997* (Tas) s 32(10)(e).

239 See *Children, Young Persons and Their Families Act 1997* (Tas) ss 34(5)(c), 35(1), 36(3)(b)(iii).

240 *Children, Young Persons and Their Families Act 1997* (Tas) s 33(2).

241 *Children, Young Persons and Their Families Act 1997* (Tas) s 36(1).

242 *Children, Young Persons and Their Families Act 1997* (Tas) s 37(1)(a).

243 *Children, Young Persons and Their Families Act 1997* (Tas) s 38.

244 *Children, Young Persons and Their Families Act 1997* (Tas) s 37(1)(b).

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WARRANTS TO REMOVE CHILDREN FOR ASSESSMENT

4.112 Under the Tas Act 1997, there is no power to remove a child without judicial authorisation. The Act provides that an authorised officer can remove a child for the purposes of an assessment, either with the consent of the child's guardian or a person with whom the child is residing, or pursuant to a warrant issued by a magistrate.[245] The authorised officer can apply for a warrant if a person fails or refuses to comply with a requirement to cause the child to attend a place specified by the authorised officer, or if the officer has reasonable grounds for believing that the person would fail or refuse to comply with such a requirement if one were made.[246]

4.113 In urgent circumstances, an application for a warrant to remove the child for assessment can be made on an *ex parte* basis by telephone to a magistrate.[247] Magistrates are available on-call after hours to decide urgent applications.

4.114 Following the removal of a child by this procedure, the Secretary may retain custody of the child if he or she considers that:

- there is a reasonable likelihood that the child is at risk
- further assessment of the matter is warranted
- the assessment cannot properly proceed unless the child remains in the Secretary's custody, or it is desirable that the child be protected while the matter is being assessed.[248]

4.115 The Secretary's custody of the child ends 120 hours after the child came into the Secretary's care, unless the Secretary is granted custody of the child pursuant to an assessment order within that time.[249]

ASSESSMENT ORDERS AND RESTRAINT ORDERS

4.116 The Secretary may apply to the Children's Division of the Magistrates' Court for an assessment order, and the Court may grant such an order if it is satisfied that:

- there is a reasonable likelihood that a child is at risk
- further assessment of the matter is warranted or an FGC should be held
- the assessment cannot properly proceed unless an assessment order is made, or it is desirable that the child be protected while the matter is being assessed or an FGC is being convened and held, and
- it would be in the child's best interests to make the order.[250]

4.117 An assessment order may authorise examination and assessment of the child, and may grant custody of the child to the Secretary for the duration of the order, which cannot exceed four weeks.[251] The Secretary can apply for one extension of an assessment order, for a period of eight weeks if the Secretary advises the Court that he or she intends to hold an FGC in respect of the child, or for a period of four weeks in any other case.[252]

4.118 On the filing of an application for an assessment order by the Secretary, in addition to or instead of making an assessment order, the Court may make a restraint order against a person under the *Justices Act 1959* (Tas).[253]

COURT PROCESSES AND PROCEDURE

4.119 The Secretary may apply to the Children's Division of the Magistrates' Court for a care and protection order, and the Court may grant this application if is satisfied that:

- a child is at risk, and that a care and protection order should be made to secure the child's care and protection, or
- proper arrangements exist for the child's care and protection, and the child would be likely to suffer significant psychological harm if the arrangements were to be disturbed; and it would be in the child's best interests for the arrangements to be incorporated in a care and protection order.[254]

4.120 For the purposes of the Tas Act 1997, a child is defined as being 'at risk' if:

- the child has been, is being, or is likely to be, abused or neglected
- any person with whom the child resides or who has frequent contact with the child has threatened to kill, abuse or neglect the child and there is a reasonable likelihood of the threat being carried out, or has killed or abused or neglected some other child or an adult and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person
- the child is an affected child within the meaning of the *Family Violence Act 2004* (Tas)
- the child's guardians are unable or unwilling to maintain the child, or exercise adequate supervision and control over the child, or to prevent the child from suffering abuse or neglect, or are deceased, have abandoned the child, or cannot be found after reasonable inquiry.[255]

4.121 The Tas Act 1997 defines 'abuse or neglect' as

> *sexual abuse or physical or emotional injury or other abuse, or neglect, to the extent that the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's wellbeing, or the injured, abused or neglected person's physical or psychological development is in jeopardy.*[256]

4.122 The Court may convene a conference between parties for the purpose of determining and/or resolving the matters in dispute.[257] The conference is presided over by a magistrate or an officer of the Court nominated by the magistrate, and legal representatives for all parties to the proceedings are to be admitted.[258] Evidence of anything said or done at the conference is inadmissible in the proceedings, unless all parties to the proceedings agree.[259]

4.123 In Tasmania, a practice has developed, in addition to or as an alternative to a court-ordered conference, for the child's legal representative to ask for an adjournment in proceedings, and to initiate his or her own conference with the lawyer for the Department, the child's parents and their legal representatives to clarify the issues in dispute.[260] These conferences are productive and preferred by lawyers, especially in complex cases, as the child's representative can and does act as an 'honest broker' between the Department and the parents, and their representatives.[261]

245 *Children, Young Persons and Their Families Act 1997* (Tas) s 20.
246 *Children, Young Persons and Their Families Act 1997* (Tas) s 20(3).
247 *Children, Young Persons and Their Families Act 1997* (Tas) sch 4.
248 *Children, Young Persons and Their Families Act 1997* (Tas) s 21(1).
249 *Children, Young Persons and Their Families Act 1997* (Tas) s 21(2).
250 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(1)–(2).
251 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(3)–(4).
252 *Children, Young Persons and Their Families Act 1997* (Tas) s 22(5).
253 *Children, Young Persons and Their Families Act 1997* (Tas) s 23.
254 *Children, Young Persons and Their Families Act 1997* (Tas) s 42(3)(a)–(b).
255 *Children, Young Persons and Their Families Act 1997* (Tas) s 4(1).
256 *Children, Young Persons and Their Families Act 1997* (Tas) s 3.
257 *Children, Young Persons and Their Families Act 1997* (Tas) s 52(1).
258 *Children, Young Persons and Their Families Act 1997* (Tas) s 52(2)–(3).
259 *Children, Young Persons and Their Families Act 1997* (Tas) s 52(4).
260 Telephone conversation with Andrew Mead, private legal practitioner in Tasmania, 21 April 2010.
261 Ibid.

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4.124 The Court also has the power to order that a matter be referred to an FGC, in order for the parties to consider and report to the Court with recommendations on any matter relevant to the proceedings.[262]

4.125 The Tas Act 1997 provides that the Children's Division of the Magistrates' Court may

> *determine that it is not bound by the rules of evidence in any proceedings if it is satisfied that it would not be in the best interests of the child to be bound by those rules.*[263]

Where the Court does so, it 'may inform itself in any way it considers appropriate'.[264]

4.126 The child is a party to proceedings in the Children's Division[265] and the Court must give a child an opportunity to express his or her wishes.[266] The Court may inform itself of the wishes expressed by a child by having regard to: anything said by the child personally to the Court, anything contained in a report given to the Court, or by any other means the Court considers appropriate.[267]

4.127 All parties to proceedings in the Children's Division are entitled to legal representation.[268] The Court must not hear an application unless:

- the child is represented in the proceedings by an Australian legal practitioner
- the Court is satisfied that the child has made an informed and independent decision not to be so represented
- the Court believes that it is in the child's best interests to proceed with the hearing in the absence of the child's representative.[269]

4.128 The Court has the power to order that a child be separately represented, whether or not a legal practitioner represents the child.[270] While the Tas Act 1997 does not stipulate which model of representation the separate representative should adopt, the practice in Tasmania is for the separate representative to act on the best interests model of representation, including expressing the child's views and wishes to the Court.[271]

CARE AND PROTECTION ORDERS

4.129 The Children's Division of the Magistrates' Court may make a care and protection order, including:

- an order requiring the child or a guardian of the child, for a specified period not exceeding 12 months, to do any specified thing or to refrain from doing any specified thing
- an order granting custody of the child, for a specified period not exceeding 12 months, to a guardian of the child, a member of the child's family, the chief executive officer of a non-government organisation, the Secretary, or any other person that the Court considers appropriate in the circumstances
- an order placing the child, for a specified period not exceeding 12 months, under the guardianship of the Secretary, or one or two other persons
- an order placing the child, until the child attains 18 years of age, under the guardianship of the Secretary, or one or two other persons
- an order providing for access to the child

- an order providing for the way in which a person who has custody or guardianship of the child under the Court's order is to deal with matters relating to the care, protection, health, welfare or education of the child
- any other order the Court considers appropriate.[272]

4.130 A care and protection order can also include conditions to be observed by the child, the child's guardian, a person with whom the child is living, the Secretary, a person who is to supervise or is granted custody of the child, or any other person who is involved with the child's care and protection.[273]

4.131 On an application for a care and protection order, the Court can, in addition to or instead of making a care and protection order, make a restraint order under the *Justices Act 1959* (Tas).[274]

4.132 In relation to the review of arrangements for the care and protection of a child implemented under a care and protection order, the Tas Act 1997 provides that an FGC must be convened to review such arrangements if:

- the order requires the Secretary to convene such a conference
- the Secretary has been requested by the child or any two or more members of the child's family to convene such a conference
- the Secretary considers it necessary or desirable to convene such a conference.[275]

WESTERN AUSTRALIA

GENERAL OVERVIEW

4.133 In Western Australia the *Children and Community Services Act 2004* (WA) (WA Act 2004) governs the statutory child protection system. The Department for Child Protection (the Department) is responsible for bringing an application for a protection order in respect of a child if it believes that a child is in need of protection. Generally, child protection proceedings are commenced in the Children's Court of Western Australia. The Children's Court comprises a President of the Court, who is a District Court judge, four full-time magistrates and one other magistrate.

4.134 In limited circumstances, the court that exercises family law jurisdiction in Western Australia can also hear and determine related child protection matters. Western Australia is the only state with a state family court—the Family Court of Western Australia—that is vested with federal family law jurisdiction. However, the Family Court of Western Australia can only exercise the powers of the Children's Court if a child who is the subject of family law proceedings appears to be in need of protection.[276]

4.135 Other unique features of the Western Australian child protection system include:

- The 'Signs of Safety' pilot is the trial of a mediation-based approach to resolving issues between the Department and families.
- The WA Act 2004 does not provide for the making of assessment orders.
- The Children's Court is required to conduct protection proceedings 'in a way that is sensitive to the child's level of understanding'.
- The WA Act 2004 prohibits the Court from making a protection order unless it is satisfied that making the order would be better for the child than making no order at all—the 'no-order' principle.

262 *Children, Young Persons and Their Families Act 1997* (Tas) s 62(1); see also s 30(2)–(3).

263 *Children, Young Persons and Their Families Act 1997* (Tas) s 63(2).

264 *Children, Young Persons and Their Families Act 1997* (Tas) s 63(3).

265 *Children, Young Persons and Their Families Act 1997* (Tas) s 64.

266 *Children, Young Persons and Their Families Act 1997* (Tas) s 56. The Act clarifies that this requirement does not permit the Court or any person to *require* the child to express his or her wishes in relation to any matter: s 58. However, the *Magistrates' Court (Children's Division) Act 1998* (Tas) s 7 also imposes a duty on the Court to 'consider the opinion of the child to whom proceedings before the Court relate.'

267 *Children, Young Persons and Their Families Act 1997* (Tas) s 57.

268 *Magistrates' Court (Children's Division) Act 1998* (Tas) s 14.

269 *Children, Young Persons and Their Families Act 1997* (Tas) s 59(1)–(2).

270 *Children, Young Persons and Their Families Act 1997* (Tas) s 59(4).

271 Legal Aid Commission of Tasmania, *Proposed Guidelines for Separate Representation of Children in Welfare (Care and Protection) Proceedings*, provided in an email from Patrick Fitzgerald, Legal Aid Tasmania, 20 April 2010.

272 *Children, Young Persons and Their Families Act 1997* (Tas) s 42(4).

273 *Children, Young Persons and Their Families Act 1997* (Tas) s 42(5).

274 *Children, Young Persons and Their Families Act 1997* (Tas) s 43.

275 *Children, Young Persons and Their Families Act 1997* (Tas) s 53.

276 *Family Court Act 1997* (WA) s 36(6). The Commission understands that the Attorney General of Western Australia has recently requested that a Reference Committee be set up by 1 July 2010 to examine the advantages and disadvantages of child protection matters being heard exclusively in the Family Court of Western Australia.

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PRE-COURT ADR: THE SIGNS OF SAFETY PILOT

4.136 The WA Act 2004 does not require the Department to attend ADR with the parents of a child prior to filing protection proceedings in the Children's Court. Instead, a 'Signs of Safety' pilot program was commenced on 9 November 2009. The pilot was jointly developed and implemented by Legal Aid WA, the Department, the King Edward Memorial Hospital (KEMH) and the Perth Children's Court.[277]

4.137 The Signs of Safety pilot adopts a mediation-based approach to resolving issues between families and the Department by combining aspects of Legal Aid WA dispute resolution processes used in family law matters with the Signs of Safety child protection assessment framework.[278] The pilot consists of both pre-court processes, in the form of Signs of Safety meetings involving pregnant mothers, their families and lawyers at KEHM, and Signs of Safety pre-hearing conferences for proceedings in the Perth Children's Court.[279] For discussion of pre-hearing conferences generally, see below.

4.138 As part of the pilot, training was given to all facilitators and convenors of pre-court and court meetings and conferences, the lawyers representing the Department, parents, children, the judge and magistrates of the Perth Children's Court and social workers at KEMH.[280] The focus of the pilot is on using a collaborative approach between the Department, health professionals, lawyers and families to address concerns or situations of child abuse.

EMERGENCY REMOVAL POWERS AND ORDERS

4.139 The WA Act 2004 provides that if an authorised officer 'determines that action should be taken to safeguard or promote a child's wellbeing' he or she has a number of options, including taking 'intervention action', which includes:

- making an application for a provisional protection and care warrant under section 35
- taking the child into provisional protection and care under section 37
- making a protection application.[281]

4.140 An authorised officer may apply for a warrant to take a child into provisional protection and care if he or she believes that a child is in need of protection and:

- is unable to find the child
- believes that leaving the child at the place where the child is living poses an unacceptable risk to the child's wellbeing, or
- believes that if a parent of the child or other person becomes aware of a proposed protection application in respect of the child, the child will be moved from the place where the child is living and the officer will be unable to find the child.[282]

4.141 The judge or magistrate may issue a warrant for provisional protection and care if satisfied that there are reasonable grounds for the authorised officer to believe that the child is in need of protection, and that one of the above three grounds applies.[283] If a child is taken into provisional protection and care pursuant to a warrant, the Department must file a protection application in relation to the child not more than two working days after removing the child, and the Children's Court must attempt to list the protection application not more than three working days after the application is made.[284]

4.142 However, if an authorised officer or police officer suspects on reasonable grounds that there is an immediate and substantial risk to the child's wellbeing, the officer can take the child into provisional protection and care without a warrant.[285] After removal, the Department must make a protection application within two working days or release the child, and the Court must attempt to list the application not more than three working days after the application is filed.[286]

4.143 Authorised officers and police officers also have the power to move a child to a safe place without a warrant if a child is found away from home and the officer believes on reasonable grounds that the child is not under the immediate supervision of a parent or an adult capable of adequately supervising the child, and there is a risk to the child's wellbeing.[287]

COURT PROCESSES AND PROCEDURE

4.144 The WA Act 2004 provides that a child will be found to be 'in need of protection' if:

- the child has been abandoned by his or her parents and, after reasonable inquiries the parents, or any suitable adult relative or other suitable adult who is willing and able to care for the child, cannot be found
- the child's parents are deceased or incapacitated and, after reasonable inquiries, no suitable adult relative or other suitable adult can be found who is willing and able to care for the child
- the child has suffered, or is likely to suffer, harm[288] as a result of physical abuse, sexual abuse, emotional abuse, psychological abuse or neglect,[289] and the child's parents have not protected, or are unlikely or unable to protect, the child from harm or further harm of that kind
- the child has suffered, or is likely to suffer, harm as a result of the child's parents being unable to provide, or arrange the provision of, adequate care for the child, or the child's parents being unable to provide, or arrange the provision of, effective medical, therapeutic or other remedial treatment for the child.[290]

4.145 Under the WA Act 2004, the Children's Court has the power to order parties to protection proceedings to attend a conference to discuss, and reach agreement on, any matter relevant to the protection application.[291] The pre-hearing conference must be presided over by a judge or magistrate,[292] or a convenor appointed by the Court in accordance with the *Children and Community Services Regulations 2007* (WA).[293] Any party to protection proceedings, including the child, unless the convenor otherwise directs, legal representatives for the parties, and any person that the convenor considers is significant in the child's life may attend the pre-hearing conference.[294] At the conclusion of the conference, the person who presided over the conference must report to the Court on its outcome.[295]

4.146 The WA Act 2004 requires that the Children's Court conduct protection proceedings 'with as little formality and legal technicality as the circumstances of the case permit', and 'as expeditiously as possible in order to minimise the effect of the proceedings on the child and the child's family'.[296] If the child is present in court, the Act also further directs the Court to conduct protection proceedings 'in a way that is sensitive to the child's level of understanding'.[297]

277 Material provided to the Victorian Law Reform Commission by WA Legal Aid, 4 February 2010.

278 Ibid.

279 Ibid.

280 Ibid.

281 *Children and Community Services Act 2004* (WA) s 32.

282 *Children and Community Services Act 2004* (WA) s 35. In urgent circumstances, an application for a warrant can be made to a judge or magistrate by telephone, fax or email: *Children and Community Services Act 2004* (WA) s 120.

283 *Children and Community Services Act 2004* (WA) s 35(3).

284 *Children and Community Services Act 2004* (WA) s 36(2)–(3).

285 *Children and Community Services Act 2004* (WA) s 37(2).

286 *Children and Community Services Act 2004* (WA) s 38(4)–(5).

287 *Children and Community Services Act 2004* (WA) s 41.

288 'Harm' is defined as 'any detrimental effect of a significant nature on the child's wellbeing': *Children and Community Services Act 2004* (WA) s 28(1).

289 'Neglect' is defined to include 'failure by a child's parents to provide, arrange, or allow the provision of adequate care for the child, or effective medical, therapeutic or remedial treatment for the child': *Children and Community Services Act 2004* (WA) s 28(1).

290 *Children and Community Services Act 2004* (WA) s 28(2).

291 *Children and Community Services Act 2004* (WA) s 136(1)–(2).

292 *Children and Community Services Act 2004* (WA) s 136(5).

293 *Children and Community Services Act 2004* (WA) s 136(3). Under the *Children and Community Services Regulations 2007* (WA) reg 10, the President of the Children's Court may appoint as a convenor 'a person by virtue of the office or position held by the person in the Court' or 'a person who, in the opinion of the President, has appropriate qualifications and experience'.

294 *Children and Community Services Act 2004* (WA) s 136(6)(c); *Children and Community Services Regulations 2006* (WA) reg 14.

295 *Children and Community Services Act 2004* (WA) s 136(5).

296 *Children and Community Services Act 2004* (WA) s 145(1), (3).

297 *Children and Community Services Act 2004* (WA) s 145(2).

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4.147 When hearing a protection application, the Court is not bound by the rules of evidence, but 'may inform itself on any matter in any manner it considers appropriate'.[298] Specifically, the WA Act 2004 allows the Court to 'admit evidence of a representation about a matter that is relevant to the protection proceedings … despite the rule against hearsay'.[299]

4.148 In Western Australia, the child is considered to be a party to proceedings in the Children's Court,[300] and if it appears to the Court that the child 'ought to have separate legal representation', the Court may order that the child be separately represented by a legal practitioner.[301] The legal representative for the child must act on the child's instructions if the child has sufficient maturity and understanding to give instructions,[302] and wishes to give instructions.[303] In any other case, the child's representative must act in the child's best interests.[304]

4.149 The WA Act 2004 provides that the child may be present in court in protection proceedings if the child so wishes, subject to certain exceptions.[305] The Act imposes an obligation on the Department to ensure that the child is made aware of the child's right to be present in court, and is provided with any support services that the Department considers appropriate to enable the child to participate in the proceedings.[306]

PROTECTION ORDERS

4.150 If, after a protection application hearing, the Children's Court finds that the child is in need of protection, the Court may either make the protection order sought in respect of the child, or make another protection order in respect of the child.[307] The Court must not make a protection order unless it is satisfied that making the order would be better for the child than making no order at all—the 'no-order' principle.[308]

4.151 Under the WA Act 2004 there are four types of protection orders available:

- a protection order (supervision)
- a protection order (time-limited)
- a protection order (until 18)
- a protection order (enduring parental responsibility).[309]

4.152 A protection order (supervision) provides for the supervision of the child's wellbeing by the Department for a specified period which cannot exceed two years, and 'does not affect the parental responsibility of any person for the child except to the extent (if any) necessary to give effect to the order'.[310] A protection order (supervision) always includes a condition that a child's parent must keep the Department informed as to where the child is living, and can include conditions to be complied with by the child, a parent of the child, and/or an adult with whom the child is living.[311] The WA Act 2004 also provides that while a protection order (supervision) is in force, the Department 'must ensure that the child and the child's parents are provided with any social services that the Chief Executive Officer considers appropriate'.[312]

4.153 A protection order (time-limited) gives the Chief Executive Officer parental responsibility to the exclusion of any other person for a fixed period of time which is not longer than two years.[313]

4.154 A protection order (until 18) gives the Chief Executive Officer parental responsibility to the exclusion of any other person until the child reaches 18 years of age.[314] The WA Act 2004 prohibits the Court from making this type of order unless it is satisfied that long-term arrangements should be made for the child's wellbeing.[315]

4.155 Finally, a protection order (enduring parental responsibility) gives a natural person, or two persons jointly, parental responsibility for a child, to the exclusion of any other person, until the child reaches 18 years of age.[316] However, a protection order (enduring parental responsibility) cannot give parental responsibility to the child's parent or to the Chief Executive Officer.[317] Under the WA Act 2004, the Court must not make a protection order (enduring parental responsibility) in respect of a child unless the Court is satisfied that:

- long-term arrangements should be made for the child's wellbeing, and
- having regard to a written report that the Department must provide to the Court, the proposed carer or each proposed carer is a suitable person to provide long-term care for the child,[318] and is willing and able to provide such care.[319]

4.156 A protection order (enduring parental responsibility) can include conditions about contact between the child and another person, but must not include any other conditions.[320]

AUSTRALIAN FAMILY LAW CHILDREN'S DISPUTES

FAMILY LAW IN THE AUSTRALIAN FEDERATION

4.157 Family law in Australia is primarily a federal matter, although neither Commonwealth nor state and territory governments have complete jurisdiction over the subject. This fragmentation has been described as 'fundamental',[321] providing scope for duplication of proceedings, forum shopping and systems abuse for children and their families.[322]

298 *Children and Community Services Act 2004* (WA) s 146(2).

299 *Children and Community Services Act 2004* (WA) s 146(3).

300 *Children and Community Services Act 2004* (WA) s 147(a).

301 *Children and Community Services Act 2004* (WA) s 148(2).

302 The Court determines any question of whether a child has sufficient maturity and understanding to give instructions: *Children and Community Services Act 2004* (WA) s 148(5).

303 *Children and Community Services Act 2004* (WA) s 148(4).

304 *Children and Community Services Act 2004* (WA) s 148(4).

305 *Children and Community Services Act 2004* (WA) s 149(1)–(2).

306 *Children and Community Services Act 2004* (WA) s 149(3). This is consistent with the 'principle of participation' set out in s 10 of the Act.

307 *Children and Community Services Act 2004* (WA) s 45.

308 *Children and Community Services Act 2004* (WA) s 46.

309 *Children and Community Services Act 2004* (WA) s 43.

310 *Children and Community Services Act 2004* (WA) ss 47–8.

311 *Children and Community Services Act 2004* (WA) s 51.

312 *Children and Community Services Act 2004* (WA) s 53.

313 *Children and Community Services Act 2004* (WA) ss 54–5.

314 *Children and Community Services Act 2004* (WA) s 57.

315 *Children and Community Services Act 2004* (WA) s 58.

316 *Children and Community Services Act 2004* (WA) s 60(1), (3).

317 *Children and Community Services Act 2004* (WA) s 60(2).

318 If the child is an Aboriginal or Torres Strait Islander child, the Court must, in assessing the suitability of the proposed carer, have regard to the Aboriginal and Torres Strait Islander child placement principle set out in s 12: *Children and Community Services Act 2004* (WA) s 60(4).

319 *Children and Community Services Act 2004* (WA) s 61(2)–(3).

320 *Children and Community Services Act 2004* (WA) s 63.

321 Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (2008) 18.

322 Fiona Kelly and Belinda Fehlberg, 'Australia's Fragmented Family law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law Policy and the Family* 38, 43.

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4.158 The division of family law powers between the Commonwealth and state and territory governments is governed by complex arrangements under the Australian Constitution. Under sections 51(xxi) and 51(xxii) of the Constitution, the Commonwealth has the power to make laws for 'marriage' and 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and Guardianship of infants'.

4.159 Judicial interpretation, combined with multiple referrals of state powers, has expanded Commonwealth jurisdiction to cover the following family law matters:

- marriage and divorce
- disputes over care of children following separation or divorce, regardless of the marital status of the parents
- property and financial proceedings following separation of both married and unmarried couples, including unmarried same-sex couples
- child support and child maintenance, regardless of the marital status of the parents
- determinations of rights, duties, privileges or liabilities regarding children's welfare.[323]

4.160 Family law matters that remain with the state and territories include child protection and adoption, except for step-parent adoption. In addition, state and territory Supreme Courts have been given jurisdiction to hear and determine matrimonial causes under the *Family Law Act 1975* (Cth) (FLA 1975).[324]

DECISION-MAKING PRINCIPLES FOR CHILDREN

4.161 Under Part VII of the FLA 1975, decisions may be made about children whose parents have separated. These decisions may relate to allocation of parental responsibility, which involves longer-term decision making for children, or about who a child lives with, spends time with or communicates with following separation. Decisions about children can be made either through family courts in the form of parenting orders,[325] by consent or following contested proceedings, or through parental agreement expressed in the form of a parenting plan—a non-binding written record, signed by the parties that outlines the matters settled on by the parents.[326] An application for a parenting order may be brought by a child's parent(s), grandparent(s) or the child him- or herself, or by any other person concerned with the child's care, welfare or development.[327]

4.162 The paramount consideration which a court must consider when making a parenting order is the best interests of the child.[328]

4.163 The FLA 1975 provides a list of factors that a court must take into account when determining what is in the child's best interests.[329] Since 2006, that Act has divided the best interests factors into a list of primary and additional considerations. The intention behind this split was 'to elevate the importance of the primary factors'.[330] The primary considerations are:

(a) *the benefit to the child of having a meaningful relationship with both of the child's parents; and*

(b) *the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*[331]

4.164 There are 13 additional considerations that the court must also take into account when determining the child's interests.[332] There is some uncertainty about how the two tiers of best interests factors should interact, including whether the additional considerations amplify the primary ones and whether there is actually a conflict between the primary and additional considerations.[333] These questions have not been authoritatively determined by the High Court or the Family Court of Australia (FCA).

4.165 Under the FLA 1975, judges who approve consent orders are not required to consider the primary and additional factors relevant to determining the child's best interests. When judges make parenting orders with the consent of the parties, consideration of the best interest factors is optional, but not mandatory.[334]

4.166 There is no legislative requirement to consider the child's interests as paramount when parents are negotiating a parenting plan. When making a parenting plan, parents are 'encouraged' to consider the child's best interests as the paramount consideration.[335] The best interests principle is reinforced through the advisers who help parents develop their parenting plan.[336] Advisers are obliged to inform parents that the agreement they make in their parenting plan 'should be made in the best interests of the child'.[337] Unlike judges in court, however, there is no requirement in the FLA 1975 for parents negotiating parenting plans to make agreements that are in the child's best interests.

Decision-making principles For Aboriginal children

4.167 Since 2006, the FLA 1975 has explicitly recognised the importance of cultural heritage for Aboriginal children who are the subject of family proceedings. The objects of the Act identify the importance of a child's right to enjoy his or her Aboriginal culture, which includes the right:

> *(a) to maintain a connection with that culture; and*
>
> *(b) to have the support, opportunity and encouragement necessary:*
>
> *(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and*
>
> *(ii) to develop a positive appreciation of that culture.*[338]

4.168 In addition, when determining a child's best interests, a court must take into account an Aboriginal child's right to enjoy his or her culture, including the likely impact a proposed parenting order will have upon that child's cultural rights.[339]

ADR IN FAMILY LAW

General

4.169 At least 94 per cent of family law matters resolve through settlement.[340] It is therefore important to consider the processes by which these settlements are reached. One such process is family dispute resolution (FDR). 'Family dispute resolution' is a term that was introduced in 2006, replacing the terms 'family and child mediation' and 'primary dispute resolution'.[341] The FLA 1975 defines FDR in broad, inclusive terms as

> *a process (other than a judicial process)*
>
> *(a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and*
>
> *(b) in which the practitioner is independent of all the parties involved in the process.*[342]

323 See further, Anthony Dickey, *Family Law* (5th ed, 2007) 13–40; Lisa Young and Geoff Monahan, *Family Law in Australia* (7th ed, 2009) 62–113; Fehlberg and Behrens, above n 321, 17–54.

324 *Family Law Act 1975* (Cth) s 39.

325 *Family Law Act 1975* (Cth) ss 64C, 64B.

326 *Family Law Act 1975* (Cth) s 63C.

327 *Family Law Act 1975* (Cth) s 65C.

328 *Family Law Act 1975* (Cth) s 60CA.

329 *Family Law Act 1975* (Cth) s 60CC.

330 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 14.

331 *Family Law Act 1975* (Cth) s 60CC(2).

332 *Family Law Act 1975* (Cth) s 60CC(3). These additional considerations include: the views expressed by the child and factors that the court should take into account in determining the weight of those views; the nature of the child's relationship with her or his parents and carers; the effect of any changes in a child's circumstances; the practical difficulty and expense of a child spending time, and communicating, with his or her parents; family violence affecting the child or their family; and whether the order would be least likely to lead to further proceedings.

333 Patrick Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers' (2006) 20 *Australian Journal of Family Law* 179, 183; Richard Chisholm, 'Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *Australian Journal of Family Law* 143; Fehlberg and Behrens, above n 321, 275–6.

334 *Family Law Act 1975* (Cth) s 60CC(5). The Explanatory Memorandum for the Bill, which introduced the section, states that this provision 'allows the court to take these considerations into account and is consistent with the Government's policy of encouraging people to take responsibility for resolving disputes themselves, in a non-adversarial manner': Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 19.

335 *Family Law Act 1975* (Cth) s 63B(e).

336 Advisers include family dispute resolution practitioners, lawyers and counsellors.

337 *Family Law Act 1975* (Cth) s 63DA(2)(c).

338 *Family Law Act 1975* (Cth) s 60B(3).

339 *Family Law Act 1975* (Cth) s 60CC(3)(h).

340 House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) [1.23]. This was the figure for matters filed within the FCA in 2000–01.

341 Fehlberg and Behrens, above n 321, 333.

342 *Family Law Act 1975* (Cth) s 10F.

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4.170 The definition includes various processes along the mediation–conciliation continuum.[343] Mediation and conciliation both satisfy the definition of FDR under the FLA 1975.[344] FDR may be closer to conciliation when the FDR practitioner encourages parties to reach child-centric agreements.

4.171 'Divorce mediation' was historically a process facilitated by a mediator who 'implicitly or explicitly assumed from the outset that parents were capable of representing their children and representing themselves'.[345] Earlier models of mediation would not have been appropriate for many parents currently participating in FDR to resolve disputes over children.[346] More sophisticated intake procedures that assess the readiness and capacity of parties to negotiate, as well as measures to formally address power imbalances, have enabled a larger proportion of separating families to access dispute resolution processes.[347]

The compulsory nature of family dispute resolution and exceptions

4.172 Unless an exception applies, parties to a dispute about children must attend FDR before applying for a parenting order in the family courts.[348] At FDR, the parties must make a 'genuine effort' to resolve the dispute.[349] Some exceptions to attending FDR before applying to the court include where:

- the parties agree and apply to the court for a consent order[350]
- there has been family violence or child abuse[351]
- the application is made in circumstances of urgency.[352]

4.173 The FDR practitioner may give various certificates in relation to the FDR,[353] which may state that:

- the parties attended FDR and made a genuine effort to resolve the issues
- a party did not attend
- a party did not make a genuine effort
- the FDR practitioner considers that it would not be appropriate to undertake or continue with the FDR.[354]

The certificate will be filed with the application for a parenting order, and only then may the court hear the application.[355]

4.174 The appropriateness or otherwise of FDR will be determined by the FDR practitioner, having regard to the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) (the FDR Regulations). The practitioner must consider:

- the history of family violence, if any
- the likely safety of the parties
- the equality of bargaining power
- the risk that a child may suffer abuse
- the emotional, psychological and physical health of the parties
- any other matter he or she considers relevant.[356]

If the FDR practitioner determines that FDR would be appropriate, he or she may provide it.[357] The FDR practitioner must ensure that, as far as possible, the FDR process is suited to the parties' needs.[358] The practitioner must terminate the FDR if requested to do so by a party or if satisfied that it is no longer appropriate.[359]

Family dispute resolution providers

4.175 As noted previously, FDR practitioners are responsible for coordinating the FDR process under the FLA 1975. The FLA 1975 defines who is to be considered a FDR practitioner[360] and the FDR Regulations specifically govern the accreditation and functions of these persons.[361] The accreditation criteria are any one of the following:

- completion of the full Vocational Graduate Diploma of Family Dispute Resolution or the higher education provider equivalent
- an appropriate qualification or accreditation under the National Mediation Accreditation Scheme and competency in the six compulsory units from the Vocational Graduate Diploma of Family Dispute Resolution or the higher education provider equivalent
- listing in the Family Dispute Resolution Register before 1 July 2009 and competency in the three specified units or higher education provider equivalent.[362]

4.176 Beyond formal qualifications, it is also required that the person:

- is not prohibited under state or territory law from working with children
- has complied with the laws for employment of persons working with children in the particular state or territory
- has access to a suitable complaints mechanism to which persons who use their services as a dispute resolution practitioner might have recourse
- is suitable to perform the functions and duties of an FDR practitioner
- is not disqualified from accreditation.[363]

343 'Mediation' is used here in its facilitative, problem-solving sense, where a mediator is 'expected to provide a process but not to intervene in the outcome or content of the dispute': Michael King et al, *Non-Adversarial Justice* (2009) 104. 'Conciliation' is used here to mean a more advisory process where the conciliator has a more active role in suggesting possible terms of settlement to the parties: at 106–7. See also National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) 1–7.

344 Mieke Brandon and Tom Stodulka, 'A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution in Australia: How Practitioners Practise across Both Processes' (2008) 8(1) *QUT Law and Justice Journal* 194, 196.

345 Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (2009) 94.

346 Ibid.

347 Ibid.

348 *Family Law Act 1975* (Cth) s 60I(1), (7).

349 *Family Law Act 1975* (Cth) s 60I(1).

350 *Family Law Act 1975* (Cth) s 60I(9)(a).

351 *Family Law Act 1975* (Cth) s 60I(9)(b).

352 *Family Law Act 1975* (Cth) s 60I(9)(d).

353 *Family Law Act 1975* (Cth) s 60I(8).

354 *Family Law Act 1975* (Cth) s 60I(8).

355 Unless an exception applies: *Family Law Act 1975* (Cth) s 60I(7).

356 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(2).

357 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(3).

358 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 29(a).

359 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 29(c).

360 *Family Law Act 1975* (Cth) s 10G(1).

361 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).

362 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 5, regs 9–10; Australian Government Attorney-General's Department, *Family Dispute Resolution Practitioner Accreditation* (2008) <www.ema.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ResearchandEvaluation_ForPotentialFamilyDisputeResolutionPractitioners> at 10 May 2010.

363 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 6(1). Persons are disqualified from accreditation if they have been convicted of an offence involving violence to a person or a sex-related offence: reg 6(2).

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4.177 A person who wishes to become an accredited FDR practitioner must apply in writing to the Australian Attorney-General's Department.[364] If accreditation is successful, the person will be subject to the legislative obligations placed upon FDR practitioners,[365] including undertaking at least 24 hours of education, training or professional development in FDR every two years.[366] While the Family Court Chief Executive can authorise an officer of the court or staff member to act as an FDR practitioner,[367] the FLA 1975 says nothing about the qualifications required of these persons. The relevant Minister may also designate organisations to undertake FDR, and persons acting for these organisations will be considered FDR practitioners.[368]

Family Relationship Centres

4.178 The 2006 reforms to the FLA 1975 were accompanied by changes to the family relationship services delivery system, including the establishment of 65 Family Relationship Centres (FRCs) throughout Australia.[369] They are federally-funded specialist services intended to reduce family court case lists and provide choices for separating families.[370] A range of community organisations, such as Relationships Australia, Unifam, Interelate, Lifeline and Centacare, had previously provided family mediation services in parenting and property matters[371] and have continued to provide these services since the introduction of FRCs. Many of these organisations successfully tendered to become FRCs.[372] The *Operational Framework* for FRCs emphasises the need to keep separating parents out of court and focused on their child's needs.[373]

4.179 Some FDR practitioners practise within FRCs, while others work within private and community organisations.[374] The establishment of FRCs was the alternative to establishing a 'Families Tribunal'—a single entry point to the family law system recommended by the *Every Picture* report.[375] FRCs most commonly assist families who are separating and want to commence family law proceedings, but also have a broader role in providing information, assistance and referral.[376]

VICTORIA LEGAL AID: ROUNDTABLE DISPUTE MANAGEMENT

4.180 Victoria Legal Aid (VLA) also offers family dispute resolution through its Roundtable Dispute Management program (RDM). In order to access RDM, a person may have applied to VLA for a grant of assistance and either requested or been directed to RDM, or a person may be contacted by RDM and invited to use the service.[377] RDM case managers and chairpersons work together with clients and their lawyers, if they have lawyers, and other professionals such as independent children's lawyers (ICLs) and child consultants.[378] Chairpersons who run the sessions have significant experience in dispute resolution and will be registered as an FDR practitioner and qualified as a social worker, psychologist, barrister or solicitor.[379]

4.181 The program has a comprehensive screening and assessment process, which addresses issues of risk, urgency, safety and the capacity of parties to participate.[380] The case manager is responsible for conducting an assessment, which involves speaking directly with the clients, lawyers, ICL, and DHS, if it is involved.[381] If a client does not have a lawyer, the case manager may refer them to one.[382] The safety of each person at RDM is the first priority, and some cases involving threats or family violence may be screened out.[383]

LEGAL REPRESENTATION IN FAMILY DISPUTE RESOLUTION

4.182 Until the 2004 amendments to the *Family Law Rules* (the Rules), family mediators—now called FDR practitioners—were required to direct parties to seek legal advice before and during mediation, and before any agreement became legally binding.[384] The Rules are now silent on this issue,[385] although the FDR Regulations require FDR practitioners to inform parties at the outset that it is not the practitioner's role to provide legal advice, unless the FDR practitioner is also a legal practitioner.[386] Even when the FDR practitioner is also a legal practitioner, he or she is not permitted to give legal advice except in relation to procedural matters.[387]

4.183 Family lawyers do not usually attend FDR sessions with their clients, although they may advise their clients before and after the process.[388] Until July 2009, lawyers were prohibited from attending FRCs,[389] although that exclusion has since been repealed in an attempt to move away from an adversarial approach to negotiating outcomes.[390] A number of pilot programs that fund legal advice in conjunction with FDR are currently underway for cases involving allegations of family violence. Announcing the pilots in 2009, the federal Attorney-General said, 'My view is that, in the right circumstances, lawyers can assist parties to resolve their disputes out of court, including in family matters'.[391]

4.184 Legal advice around the dispute resolution process can be very important to assist vulnerable parties who are required to participate.[392] Lawyers may play a central role before, during and after dispute resolution, to help mitigate power imbalances between the parties and ensure that outcomes are not exploitative.[393] A 2008 study of inter-professional collaboration in this field found that while some family lawyers and FDR practitioners enjoy positive collaborative relationships, many practitioners have little contact with members of the other profession and there are significant misunderstandings and tensions between the two groups.[394] The study found that successful inter-professional collaborative relationships around family law ADR are characterised by what the authors called a

> *complementary services approach to their relationship, in which each group saw themselves and the other profession as contributing different but equally valuable and complementary skills and expertise to the dispute resolution process.*[395]

4.185 The RDM process at VLA 'supports the active involvement of lawyers at every stage of the family dispute resolution process'[396] and emphasises the lawyer's diverse and non-adversarial role as legal advisor, coach, problem solver, negotiator, professional support person and drafter of agreements.[397] Prior to RDM, the lawyer has a role in helping the client understand that it is a non-adversarial process.[398] Concerns relating to the perceived adversarial nature of lawyers' conduct may be resolved by collaborative law.[399] The RDM model has been presented as a successful example of collaborative inter-professional practice,

> *involving a high degree of mutual understanding and respect for each profession's roles and responsibilities ... where family dispute resolution practitioners and clients' legal advisers worked together as a team in roundtable conferences.*[400]

364 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) regs 9–10; Australian Government Attorney-General's Department, *Family Dispute Resolution Practitioner Accreditation*, above n 362.

365 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) pt 3.

366 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 14.

367 *Family Law Act 1975* (Cth) ss 10G(1)(c), 38BD.

368 *Family Law Act 1975* (Cth) s 10G(1)(b).

369 Kaspiew et al, above n 345, 35.

370 Brandon and Stodulka, above n 344, 196.

371 Ibid.

372 Ibid.

373 Australian Government Attorney-General's Department, *Operational Framework for Family Relationship Centres* (2007) 1.

374 Fehlberg and Behrens, above n 321, 330.

375 House of Representatives Standing Committee on Family and Community Affairs, above n 340, [4.88].

376 Fehlberg and Behrens, above n 321, 331.

377 Victoria Legal Aid Roundtable Dispute Management, *Roundtable Dispute Management Practice Manual: A Resource Guide for Lawyers* (2009) 3.

378 Ibid 3, 7. The ICL must attend if there is a conference.

379 Ibid 7.

380 Ibid 4.

381 Ibid.

382 Ibid.

383 Ibid 13–14.

384 *Family Law Rules 1984* (Cth) O 25A, r 12 (now repealed); Becky Batagol, 'Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution' (2008) 8(1) *QUT Law and Justice Journal* 24, 26.

385 Batagol, above n 384, 26.

386 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth)* reg 28(1)(a).

387 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth)* reg 29(d).

388 Batagol, above n 384, 28.

389 Australian Government Attorney-General's Department, *Operational Framework*, above n 373, 47.

390 Ibid.

391 Attorney-General Robert McClelland (Australian Government), 'Speech' (Speech delivered to the Albury-Wodonga Family Pathways Event, Albury-Wodonga, 24 July 2009).

392 King et al, above n 343, 134–5.

393 Batagol, above n 384, 43–4.

394 Helen Rhoades et al, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008) 49.

395 Ibid.

396 Victoria Legal Aid Roundtable Dispute Management, above n 377, 17.

397 Ibid 7.

398 Ibid 6.

399 This is discussed below under the heading 'ADR practices other than family dispute resolution'. 'Collaborative law' means that parties to dispute resolution sign a contract to the effect that if the dispute proceeds to litigation, the existing lawyers must be replaced. This is intended to allow for negotiation without the threat of litigation.

400 Rhoades et al, above n 394, vi–vii.

Chapter 4 Current Law and Practice in Other Australian Jurisdictions

Representation and involvement of children in family dispute resolution

4.186 Contemporary FDR practitioners attempt to maximise the autonomy of parents as well as actively representing children.[401] This can be done directly, by working with child consultants and engaging in child-inclusive practice, or indirectly, through child-focused practice.[402] Child-focused practice in facilitated dispute resolution involves 'finding the child's voice in the absence of the child',[403] creating an environment in which parents are able to consider the needs of their children, and facilitating a parenting agreement that protects children from further conflict.[404] Actively creating a child-focused environment in FDR is identified as the minimum standard for good practice.[405] Child-inclusive practice involves a child consultant interviewing a child and reporting back on that interview to parents at FDR.[406] As well as incorporating the objectives of child-focused practice, child-inclusive practice validates children's experiences by consulting them directly.[407]

4.187 RDM at VLA promotes a child focus by asking clients 'to commit to understanding what might be happening for their children and listening to what they have to say'.[408] Information gathered by these child-focused practices is used to help make decisions.[409] In order to facilitate a child focus, RDM offers Kid's Talk—a service that 'gives children a safe place where they have an opportunity to say what they think and feel'.[410] A client can request Kid's Talk, or RDM can recommend it.[411] The child will be interviewed by a specially trained child-consultant who will provide feedback to the parents, who, in turn, can use the information to help them make decisions.[412] Kid's Talk will be especially appropriate where the clients are open to hearing more from their children and willing to take their children's views into account when making decisions.[413]

Status of agreements

4.188 Agreements reached through FDR may be implemented in two ways under the FLA 1975. The first is to make a parenting plan and the second is to seek a consent order.

Parenting plans

4.189 Parenting plans were first introduced in 1996, but were not widely used at that time.[414] As noted above, parenting plans are parental agreements outlining the settled matters in the form of a non-binding written record, and signed by the parties.[415] As is also noted above, parents are 'encouraged', but not legally required, to regard the child's interests as paramount when negotiating a parenting plan.[416]

4.190 The parenting plan may deal with matters such as with whom the child is to live, the time the child is to spend with certain persons, and matters relating to the child's care, welfare or development.[417] The plan may be varied or revoked by further written agreement.[418] Parents are encouraged to reach an informal agreement about their children in the form of a parenting plan, but if they seek enforceable arrangements, they must obtain a court order by consent.[419] Since 2004, it has not been possible to register parenting plans with the family courts. Although the parenting plan is not strictly binding or enforceable, parenting orders may be subject to any terms of parenting plans and, when making an order, a court must consider the terms of the most recent parenting plan.[420] Concern has been raised that parenting plans' lack of enforceability may confuse parties as to their possible legal effect if a parenting order is later made by the court.[421]

Consent orders

4.191 To ensure the enforceability of agreements, consent orders need to be sought.[422] Consent orders can be sought even where there is no current case before the court. The family courts have devised specific forms for lodging an application for consent orders, in which the parties must set out the orders they wish the court to make.[423] When the court is considering making a consent order, it may, but is not required to, consider the child's best interests factors set out in the FLA 1975.[424]

ADR practices other than family dispute resolution

4.192 The 2006 reforms have been described as 'rebadging' mediation as FDR.[425] As noted above, the definition given for FDR in the FLA 1975 can be interpreted as encompassing various non-judicial processes on the mediation–conciliation continuum.[426] The model to be adopted by FDR practitioners is not strictly regulated by the FLA 1975 or the accompanying FDR Regulations,[427] but will certainly impact on the outcomes achieved for children and parents.[428] Regardless of whether the particular FDR service is closer to mediation or conciliation, in neither instance should the FDR practitioner determine the outcome for the parties.[429]

4.193 As well as mediation and conciliation, the FLA 1975 also provides for arbitration, which is defined by the National Australian Dispute Resolution Advisory Council (NADRAC) as 'a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination'.[430] Although arbitration could potentially fall within the definition of FDR as a non-judicial process by which an independent practitioner helps people to resolve some or all of their disputes,[431] it is limited by the FLA 1975 to property and financial disputes.[432] It has been contended by some, however, that the part of the FDR process that requires an FDR practitioner to make an assessment as to whether parties have made a 'genuine effort' could be considered an arbitrative function.[433]

4.194 In addition to traditional conceptions of mediation and conciliation, collaborative practice has been gaining currency in the family law field over the past decade.[434] It is usually a lawyer-led dispute resolution process that can involve a range of professionals, including lawyers, psychologists, child specialists and financial counsellors.[435] The aim of this process is to negotiate without the threat of litigation by having parties sign a 'disqualification agreement'—an agreement that if the dispute proceeds to litigation, the existing lawyers will cease to act for the parties and new lawyers will have to be engaged.[436] For collaborative law to operate successfully, trust and respect between family lawyers and other professionals is necessary.[437]

NATURE OF FAMILY COURT PROCEEDINGS

Courts exercising family law jurisdiction

4.195 A number of courts currently exercise jurisdiction under the FLA 1975. Those courts are the Family Court of Australia (FCA), the Family Court of Western Australia, the Federal Magistrates Court (FMC) and, with limited jurisdiction, state and territory magistrates' or local courts.[438]

401 Kaspiew et al, above n 345, 95.
402 Ibid; Lawrie Moloney and Jennifer McIntosh, 'Child-Responsive Practices in Australian Family Law' (2004) 10(1) *Journal of Family Studies* 71.
403 Moloney and McIntosh, above n 402, 72.
404 Ibid.
405 Ibid.
406 Ibid.
407 Ibid.
408 Victoria Legal Aid Roundtable Dispute Management, above n 377, 15.
409 Ibid.
410 Ibid 20.
411 Ibid.
412 Ibid.
413 Ibid.
414 Fehlberg and Behrens, above n 321, 342.
415 *Family Law Act 1975* (Cth) s 63C.
416 *Family Law Act 1975* (Cth) s 63B(e).
417 *Family Law Act 1975* (Cth) s 63C(2).
418 *Family Law Act 1975* (Cth) s 63D.
419 *Family Law Act 1975* (Cth) note to s 63B.
420 *Family Law Act 1975* (Cth) ss 64D(2), 64DAB. Note that the court will only have regard to a parenting plan when making a parenting order if to do so would be in the best interests of the child: *Family Law Act 1975* (Cth) s 64DAB.
421 Fehlberg and Behrens, above n 321, 343.
422 Ibid.
423 For the Family Court of Australia, see *Family Law Rules 2004* (Cth) r 10.15.
424 *Family Law Act 1975* (Cth) s 60CC(5).
425 Young and Monahan, above n 323, 54.
426 *Family Law Act 1975* (Cth) s 10F.
427 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).
428 Young and Monahan, above n 323, 55.
429 Brandon and Stodulka, above n 344, 195, 199.
430 National Alternative Dispute Resolution Advisory Council, above n 343, 4.
431 *Family Law Act 1975* (Cth) ss 10F, 10L(1).
432 *Family Law Act 1975* (Cth) s 10L(2).
433 *Family Law Act 1975* (Cth) s 60I(1); Donna Cooper and Rachael Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an "Independent Practitioner"' (2008) 8(1) *QUT Law and Justice Journal* 158, 172.
434 King et al, above n 343, 135.
435 Ibid.
436 Ibid.
437 Ibid. This will not be possible if stereotypes around lawyers and adversarialism persist. This is discussed above under the heading 'Legal representation in family dispute resolution'.
438 The Supreme Court of the Northern Territory retains some residual jurisdiction: *Family Law Act 1975* (Cth) s 39(5).

Chapter 4

Current Law and Practice in Other Australian Jurisdictions

4.196 The first national specialist court to exercise family law jurisdiction in Australia was the FCA, which opened in 1976. The Family Court of Western Australia was also established in 1976, determining matters under the FLA 1975 for that state only. Both the federal and Western Australian courts are specialist family courts with a focus on both the legal and emotional consequences of relationship breakdown for families and their children. This approach was neatly encapsulated by the phrase 'helping courts', the term used by Prime Minister Whitlam to describe the new family courts in 1974.[439] As a specialist family court, the FCA has been described as a

> *court with an integrated court-attached counselling service, an emphasis on litigation as a step of last resort and a direction that its judges be appointed on the basis of their suitability (by reason of training, experience and personality) to deal with family law matters.*[440]

4.197 In 2000, the FMC was established to handle less complex matters in the areas of family law and general federal law.[441] Although not a specialist family court by design, the concentration of the Court's work in the area of family law[442] means that it is a de-facto specialist family court. The FMC now handles 81 per cent of national filings in the family law field.[443] This leaves the FCA hearing fewer cases than it did before the establishment of the FMC. The cases the FCA does hear, however, are considered to be 'the more complex and intractable family law matters requiring substantial court time'.[444]

4.198 In May 2010, the federal Attorney-General announced the incorporation of the family law work of the FMC into the FCA so that the FCA will become the single federal court dealing with family law.[445] Federal magistrates undertaking family law work will be offered judicial appointments to preside in a lower tier of the FCA, known as the 'General Division' of the Court. The administration of the two Courts was combined in 2009 and it is anticipated that the new Court structure will operate from late 2011.

4.199 Although they all operate under the common principles in the FLA 1975, the FCA, the Family Court of Western Australia and the FMC presently retain distinctive court processes.

Judge-managed proceedings in family courts

4.200 Family courts in Australia have been early and enthusiastic to adopt procedures that have moved away from traditional adversarial litigation processes. Many of these reforms have emphasised the role of the judge in controlling proceedings before the court. These reforms are part of an observable trend across many common law jurisdictions, away from traditional adversarial trials in disputes over care of children following separation.[446]

4.201 Arguably, there are two imperatives that have driven the trend towards non-adversarial processes in family law:[447] the perceived inappropriateness of the adversarial system for determining family disputes, where there is often the need for an ongoing relationship, and the harm caused by adversarial processes to children. '[T]he unmodified adversarial system caters poorly for children, who are not parties to their parents' dispute and cannot present their own case.'[448]

4.202 The question of the degree to which FCA proceedings should be adversarial and inquisitorial has been important since the Court opened in 1976. One of the questions facing the early administrators and judges of the FCA was whether

> *proceedings under the new Act should be conducted according to the traditional, adversary procedure of the common law, or whether proceedings under the Act should, or could, be conducted by way of an inquiry by the judge.*[449]

4.203 Since then, Australian family courts have tended to experiment with modifying various aspects of traditional adversary procedures to the extent allowed within anticipated constitutional bounds. Discussing a range of procedural reforms to family law, including, most radically, the introduction of the Division 12A trial process (see below), Margaret Harrison argues these reforms should be viewed as part of an inevitable convergence between adversarial and inquisitorial approaches:

> *In one sense the new changes can be seen as a further movement along a previously identified spectrum of less adversarial procedures, although it far exceeds those in its scope and impacts to the point where it should be regarded as a new system.*[450]

4.204 There are many provisions in the FLA 1975 and its subordinate legislation that seek to modify 'full-blooded' adversarial processes. In particular, many of these provisions encourage active management of court processes by the judicial officer. An original provision of the 1975 Act is section 97(3), which states that 'In proceedings under this Act, the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted'. Anthony Dickey describes the impact of this provision as less radical than it might have been, and as 'little more than an exhortation to the courts to minimise formality where they can, and to ensure that proceedings are conducted as speedily as possible in the circumstances'.[451]

4.205 Rule 1.04 of the *Family Law Rules 2004* (Cth) states that the main purpose of the Rules is 'to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case'. Rule 1.06 then requires the court to be more active in pursuing that purpose than traditional adversarial processes would permit, including:

- helping and encouraging parties to consider non-trial based dispute resolution methods[452]
- identifying the issues in dispute early in the case and disposing of any issues that do not require trial at the early stage[453]
- matching types of cases to the most appropriate case management procedure at an early stage[454]
- setting case timetables and monitoring and actively controlling the progress of each case[455]
- dealing with as many aspects of the case as possible on the same occasion[456]
- minimising the need for parties and their lawyers to attend court, including by relying on documents if appropriate.[457]

4.206 Judicial officers in family courts are permitted to appoint ICLs to represent a child's interests in proceedings.[458] Family law judges are empowered on their own initiative to seek reports from court-based family consultants on whichever aspects of the care, welfare, development and views of children the judicial officer thinks is desirable.[459] The judicially initiated report becomes part of court evidence.[460] Judges in family courts can also call any witness in proceedings under the FLA 1975, as well as making any orders thought fit for examination and cross-examination of that witness.[461]

439 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4322.

440 Margaret Harrison, 'Australia's Family Law Act: The First Twenty-Five Years' (2002) 16 *International Journal of Law, Policy and the Family* 1, 1.

441 Federal Magistrates Court of Australia, *Annual Report 2008–09* (2009) 1.

442 In 2008–09, over 90 per cent of filings in the Federal Magistrates Court were in the family law area: ibid 9.

443 Ibid 10.

444 Diana Bryant, 'Chief Justice's Column' (2007) 1 *Family Court Bulletin* 1, 1.

445 Attorney-General Robert McClelland and Minister for Defence Senator John Faulkner (Australian Government), 'Military Court of Australia' (Joint Press Conference, Parliament House, Canberra, 24 May 2010) 2–3.

446 Bryant, above n 444, 1.

447 King et al, above n 343, 124–5.

448 Ibid 125.

449 Dickey, above n 323, 83.

450 Margaret Harrison, *Finding a Better Way: A Bold Departure Away From the Traditional Common Law Approach to the Conduct of Legal Proceedings* (2007) 9.

451 Dickey, above n 323, 84.

452 *Family Law Rules 2004* (Cth) r 1.06(a).

453 *Family Law Rules 2004* (Cth) r 1.06(c).

454 *Family Law Rules 2004* (Cth) r 1.06(d).

455 *Family Law Rules 2004* (Cth) r 1.06(e).

456 *Family Law Rules 2004* (Cth) r 1.06(h).

457 *Family Law Rules 2004* (Cth) r 1.06(i).

458 *Family Law Act 1975* (Cth) s 68L. See 'Representation of children in family court processes' below.

459 *Family Law Act 1975* (Cth) s 62G(2).

460 *Family Law Act 1975* (Cth) s 62G(8).

461 *Family Law Rules 2004* (Cth) r 15.71.

Chapter 4

Current Law and Practice in Other Australian Jurisdictions

Case-management and individual docket systems

4.207 Both the FCA and the FMC employ individual docket systems for judicial officers to manage a list of their own cases through the trial process. In an individual docket system, each judicial officer is responsible for the smooth passage of their own cases from commencement until the matter's finalisation. Individual docket systems aim to 'promote more active and effective judicial case management in order to streamline processing, encourage early settlement and, overall, dispose of cases more efficiently'.[462]

4.208 The docket system in the FCA was fully implemented in all registries by 2009. Prior to this date, a docket system had been selectively used in the Court for Magellan cases, the Children's Cases Pilot (both discussed below), and in less adversarial trials (LATs) in children's cases and other specialist lists. Under the Court's docket system, registrars and case coordinators assist judges in their management of cases.[463]

4.209 In 2008–09, the FCA finalised 4883 applications for final orders using the docket system.[464] That number was greater than projected, which the Court attributed mainly to the success of its docket system.[465]

4.210 The FMC has employed a docket system since its establishment in 2000. The Court combines this case management system with a high volume of matters heard: in 2008–09, the Court heard a total of 85 984 applications across all registries.[466] At this time, 61 federal magistrates shared the load of managing these cases across the registries in the areas of family and general law.[467]

4.211 As of 2008, each federal magistrate had an average of 74 new family law matters added to her or his docket every month and managed approximately 400 matters at any given time.[468] The FMC also operates its docket system in conjunction with an extensive judicial circuit system to 38 regional areas. The Court has noted that this occasionally means another federal magistrate will be involved at the intermediate stage of a matter.[469] The docket system has resulted in fewer formal directions and a reduction in the number of court appearances.[470] Federal Magistrate Michael Baumann, the National Coordinator of Case Management in the Court, has described the benefits of this system as including that:

- parties, who are often first-time litigants, know who will hear their case and do not need to re-tell their story as many times
- parties are provided with multiple opportunities to resolve the issues without trial or at least narrow the compass of the dispute
- judicial management of individual cases means that process does not overwhelm common sense
- self-represented litigants are more comfortable when they can talk directly to the person who is making a decision for them.[471]

Magellan and Columbus case management programs

4.212 The Magellan and Columbus case management programs were designed to deal with the challenging issues involving sexual abuse and serious physical abuse in the FCA (Magellan)[472] and the Family Court of Western Australia (Columbus).[473]

4.213 Magellan is an interagency model of case management.[474] The focus in Magellan is on inter-agency cooperation, including from the courts, police, legal aid, private lawyers, the statutory child protection department, hospitals, private psychologists, community health centres or other counselling agencies, to ensure all the necessary information is gathered to process cases through the Court more quickly.[475] The Magellan 'model' has a number of key features, including a specialist team within the court registry that comprises one or two specialist judicial officers and dedicated staff.[476] Another feature of the model is a steering committee comprised of key interagency stakeholders,[477] chaired by the Magellan judge.

4.214 Reviews of Magellan have been positive compared to similar cases in non-Magellan jurisdictions.[478] The key benefits are the length of time to resolve matters, greater inter-agency involvement and a more streamlined approach. Use of Magellan has reduced disposition times, led to fewer court events, and used fewer judicial officers for each case in the FCA.[479] It may also have led to lower levels of distress amongst the children involved.[480] The Australian Institute of Family Studies (AIFS) submission argued that Magellan provides an especially good example of how various agencies can cooperate to provide timely information to judicial decision makers in cases where there is a question over the safety of children concerned.[481]

4.215 However, as noted by AIFS, Magellan is unable to overcome the gaps in federal and state jurisdiction in combined family and child protection matters. Moreover, Magellan does not incorporate other aspects of the LAT process, such as a relaxation on the rules of evidence, and other collaborative decision-making processes, such as FGCs. It is also limited to sexual and physical abuse cases.

4.216 The Columbus pilot was established in the Family Court of Western Australia. As noted by Higgins and Pike, Columbus was introduced

> *with the objectives of assisting, enabling, and encouraging separated parents to acknowledge the debilitating effects of continuing conflict, violence, or abusive behaviour on their children, and to encourage such parents to resolve their differences without resorting to prolonged litigation in the family court.*[482]

462 Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (2002) 1.

463 Family Court of Australia, 'Judicial Docket System' (2007) 1 *Family Court Bulletin* 3. Chief Justice Diana Bryant described some of the benefits of an individual docket system in her Court as assisting 'in reducing the widespread and entrenched culture of non-compliance' in the Court—'[i]ncreased confidence in the system, by both the legal profession and litigants, due to a Judge having familiarity with the litigation history and issues in a particular case'; and also a '[r]eduction in court time in the hearing of trials due to more active case management and pre-trial procedures': Diana Bryant, 'State of the Nation' (Paper presented at the 12th National Family Law Conference, Perth, 23 October 2006) 8–9.

464 Family Court of Australia, *Annual Report 2008-2009* (2009) 36.

465 Ibid.

466 Federal Magistrates Court of Australia, above n 441, 16.

467 Ibid 5.

468 Federal Magistrates Court of Australia, *Annual Report 2007–08* (2008) 24.

469 Federal Magistrates Service, *Annual Report 2000–01* (2001) 17.

470 Federal Magistrates Court of Australia, above n 441, 16.

471 Michael Baumann, 'Working Together' (Speech delivered to the National Access to Justice and Pro Bono Conference, Sydney, 14 November 2008).

472 Magellan was introduced to the FCA as a pilot in 1998. For further reading see Thea Brown 'Magellan's Discoveries: An Evaluation of a Program for Managing Family Court Parenting Disputes Involving Child Abuse Allegations' (2002) 40(3) *Family Court Review* 320.

473 Columbus was introduced into the Family Court of WA as a pilot in 2001 by the Chief Judge.

474 Submission 40 (AIFS).

475 Daryl Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (2007) 77.

476 This includes the manager of child dispute services, who arranges a family consultant, a registrar and a client services officer or case coordinator who is dedicated solely to Magellan matters.

477 This includes representatives from the Magellan team as described above, legal aid representatives, practitioners from the family law section of the law society and bar, the police and the Department.

478 See Higgins, above n 475.

479 Ibid; Submission 40 (AIFS).

480 Brown, above n 472, 325.

481 AIFS stated in its submission that, 'In the context of the Children's Court of Victoria, Magellan provides an example of how interagency coordination can be achieved in order to provide timely information for judicial decision-making. However, it does not incorporate other aspects of the mainstream less adversarial trial process (e.g., around rules of evidence), or other collaborative decision-making processes (such as family group conferencing)': Submission 40 (AIFS).

482 Lisbeth Pike and Paul Murphy, 'The Columbus Pilot in the Family Court of Western Australia' (2006) 44(2) *Family Law Review* 270.

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4.217 Columbus is very similar to the Magellan model, but there are some differences. Where Magellan focused exclusively on matters of child abuse and child sexual abuse, Columbus had a broader, multi-disciplinary approach to 'addressing allegations of child abuse and family violence with child protection implications'.[483]

The Division 12A reforms

4.218 Probably the most comprehensive shift towards active judicial control of family law proceedings has been the introduction of Division 12A of Part VII, FLA 1975. Since July 2006, the FCA and FMC have used the principles outlined in this division to conduct all child-related proceedings, as well as other FLA 1975 disputes with the parties' consent, such as disputes over property division.[484] Division 12A contains a legislative basis for processes developed by the FCA in a pilot project—the Children's Cases Project, which ran from 2004 at the Sydney and Parramatta registries. Division 12A is provided in Appendix O.

4.219 The five principles for conducting child-related proceedings in Division 12A are outlined in section 69ZN of the FLA 1975:

> *Principle 1*
> *(3) The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.*
>
> *Principle 2*
> *(4) The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.*
>
> *Principle 3*
> *(5) The third principle is that the proceedings are to be conducted in a way that will safeguard:*
>
> *(a) the child concerned against family violence, child abuse and child neglect; and*
>
> *(b) the parties to the proceedings against family violence.*
>
> *Principle 4*
> *(6) The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.*
>
> *Principle 5*
> *(7) The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.*

4.220 Under Division 12A, the provisions of the *Evidence Act 1995* (Cth) do not apply to child-related proceedings.[485] In pursuit of the five principles, the provisions in Division 12A permit the court to take the following actions on its own initiative:[486]

- give weight as it thinks fit to evidence admitted in the absence of the *Evidence Act 1995* (Cth)[487]
- designate a court-employed family consultant as the family consultant in relation to the proceedings and take into account the opinion of the consultant where the opinion is given as sworn evidence[488]

- give directions or make orders about who is to give evidence, the matters on which the parties should present evidence, how evidence is to be given and about the nature of expert evidence and the number of expert witnesses[489]
- ask questions of and seek evidence or the production of documents from witnesses and experts on matters relevant to proceedings[490]
- give directions about whether particular steps are to be taken in proceedings and the timing of particular steps[491]
- if the court considers it appropriate, encourage parties to use FDR and family counselling[492]
- deal with as many aspects of the matters as it can on a single occasion and, where appropriate, without requiring the parties, physical presence[493]
- interview a child directly and act on that information.[494]

4.221 The FCA has implemented the Division 12A provisions through the LAT process. The LAT process is a child-focused individual docket case-management system. The aim of the process is to

> *achieve better outcomes for children by promoting a less adversarial approach to disputes about children and by encouraging parents to focus on their children's needs both in the immediate and longer term.*[495]

A secondary aim is to reduce case finalisation time and expense to the parties.

4.222 A single judge hears the same case from commencement until resolution. There is some variation in practice between judicial officers in their conduct of LAT trials. Matters proceed to the first day of a trial only after all other attempts at resolution have been exhausted and the parties have completed a child-focused questionnaire that elicits similar information to a traditional affidavit. On the first day of the trial, the parties sit at the bar table with their lawyers and the ICL.

4.223 The role of the parties' lawyers is usually less prominent in a LAT trial than in traditional hearings, although the role of the ICL is enhanced. A court-employed family consultant is in attendance on the first day and she or he may sit at the bar table or in the witness box, depending upon the judge's preference. The consultant has usually spoken to the family before the first trial date. The judge then introduces her- or himself, explains the LAT process to the parties and gives a summary of their understanding of the case. The parties are sworn in at the bar table and told that everything they say will become evidence in the trial.

4.224 Each party then speaks directly to the judge and explains, briefly, what he or she is seeking before the Court. The parties' lawyers do not usually speak for their clients.[496] After the parties have spoken, the ICL will ordinarily present any of the child's views she or he has obtained from a prior interview with the child and outline any significant issues relating to the child. The family consultant will then usually offer comment on the case, including any principles of child development relevant to the case.

4.225 The information provided by the family consultant is central; it is designed to assist parents, lawyers, and judges to reach outcomes that are safe and developmentally appropriate for children.[497] The parties and the judge then discuss what issues are in dispute, settlement opportunities and how the case will be managed from that point onwards.

483 According to Pike and Murphy, other distinctive features of Columbus were: cases being individually managed (not just fast-tracked) through a series of family conferences; referrals to and integration of therapeutic services and education programs as part of the process; confidential proceedings; the presiding Columbus conference registrar being disqualified from involvement in a matter that was subsequently referred back to the family court process; and there being no limit to the number of conferences available to a couple: ibid 271.

484 *Family Law Act 1975* (Cth) s 69ZM.

485 *Family Law Act 1975* (Cth) s 69ZT(1).

486 *Family Law Act 1975* (Cth) s 69ZP.

487 *Family Law Act 1975* (Cth) s 69ZT(2).

488 *Family Law Act 1975* (Cth) ss 69ZS, 69ZU.

489 *Family Law Act 1975* (Cth) s 69ZX(1).

490 *Family Law Act 1975* (Cth) s 69ZX(1)(e).

491 *Family Law Act 1975* (Cth) s 69ZQ(1)(c)–(d).

492 *Family Law Act 1975* (Cth) s 69ZQ(1)(f).

493 *Family Law Act 1975* (Cth) s 69ZQ(1)(g)–(h).

494 *Family Law Rules 2004* (Cth) r 15.02. For more detail see Harrison, *Finding a Better Way*, above n 450, 50.

495 Deborah Fry, 'The Role of the Family Consultant in the Less Adversarial Trial' (2007) 21 *Australian Journal of Family Law* 113, 114. Much of the description of the LAT process in the following paragraphs is based upon this article. Deborah Fry is the manager of the child dispute section at the Sydney registry of the Family Court.

496 Fry describes the process of direct communication between judicial officer and parties on the first day of the trial as enhancing a child-focused approach: 'One might expect that parties would find it difficult to stay within the 10 minute limit or to maintain the focus on the children but this has proven to not be the case. On the contrary, many parties make the most of this opportunity to metaphorically bring their children into the court room. The atmosphere while this occurs seems to shift and become less formal and it is even more clear that everyone's focus is on these children rather than, as is often the case in traditional hearings, on grievances between the parties': ibid 116.

497 Ibid 117.

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4.226 The evaluation of the 2006 family law reforms conducted by AIFS suggests a division of views between participating professionals on the efficacy of the LAT process. Between 58 and 60 per cent of respondents—family consultants, family lawyers and judges—agreed that the implementation of the LAT process was a positive development.[498]

4.227 However, family judges were more likely than other professionals to be positive about the new procedures, arguing that the greater flexibility of process engendered a sharper focus on the child's interests.[499] In particular, judges singled out the first day procedure of LAT as enabling an early assessment of key issues. Family consultants were largely positive about the LAT process because it influenced the identification and framing of issues in a child-centred manner.[500]

4.228 Legal practitioners welcomed the active judicial case management, the child focus and the ability of clients to be heard in the process, but were more critical of the inconsistency in practices under the LAT system between judicial officers.[501] Lawyers argued that it was difficult to prepare cases and advise clients in the shadow of this inconsistency. Some lawyers thought that their clients appreciated the chance to speak directly to the judge while other lawyers felt that inarticulate, nervous or uneducated clients were not able to use effectively the opportunity to speak to the judge and would have been better off with a court advocate.[502]

4.229 The FMC also operates under Division 12A, although it does not employ the same LAT process as the FCA. The FMC did not change its docket case-management model after Division 12A was introduced into legislation in 2006.[503] The AIFS evaluation of the 2006 reforms showed that family lawyers who worked in the FMC predominantly believed that little had changed in practice within the Court since the introduction of Division 12A, and that, in essence, it remained a traditional, adversarial legal forum.[504]

Other evaluations of Division 12A

4.230 In addition to the AIFS review of Division 12A, two additional evaluations were conducted of the LAT precursor—the Children's Cases Pilot Program (CCPP).[505]

4.231 The CCPP, run in the Sydney and Parramatta Registries of the FCA in 2004–06 was the template for the LATs under Division 12A and was the first of the FCA's major initiatives.[506] The reviews of the CCPP commented positively on better outcomes for children and the new roles played by judges and practitioners within the new model.[507] Further, the pilot was identified as assisting the early identification of issues and reducing adversarialism.[508]

4.232 The second of the major initiatives, the Child Responsive Program (CRP), ran in Melbourne and Dandenong Registries in 2006 and 2007. This program was designed as a stand-alone or integrated intervention, to assist pre-court settlement and to complement the in-court work of LAT.[509] The evaluation's findings again demonstrated more positive outcomes for parents and children, reduced acrimony, reduced conflict and greater cooperation.[510]

THE INVOLVEMENT OF CHILDREN IN FAMILY LAW PROCESSES

General

4.233 The involvement of children and weight given to their views are important considerations both at FDR[511] and in family court proceedings. The child is not a party to family law proceedings,[512] but the child's views must be put before the court.[513] This is consistent with article 12 of the *United Nations Convention on the Rights of the Child*, which provides that the child has a right to express his or her views freely in all matters affecting him or her, and to have the opportunity to be heard, either directly or through a representative.[514]

4.234 Children's views are made known to the court through the evidence of parents, the reports and evidence of family consultants, and through evidence obtained from other sources such as school teachers, counsellors, other professionals and lay people. Much independent evidence regarding a child's views, level of maturity and understanding will be gathered by an ICL, if one is appointed. Children do not directly participate in proceedings. There is legislative prohibition against a child giving evidence by affidavit or being called as a witness in the absence of a court order.[515]

4.235 'Any views expressed by the child' and any factors that are relevant to the weight the court should give to the child's views, such as maturity or level of understanding, are to be considered in determining what is in the child's best interests.[516] It is possible that the child's best interests and his or her views may sometimes conflict, and it is the shared responsibility of the family, FDR practitioner, family consultant and ICL, where appointed, and the court to balance these potentially competing considerations.

'*Gillick* competence' and children's views

4.236 As noted previously, the child's best interests are to be the paramount consideration when making a parenting order.[517] Although this principle does not specify whether or how children are to participate in proceedings,[518] it is clear that the child's views are a factor in determining the child's best interests[519] and the ICL, where appointed, is required to put the child's views before the court.[520] Elsewhere in family law, most particularly with regard to the exercise of parental responsibility, it is recognised that parental rights of control are not absolute, but exist only insofar as they are necessary to protect the child.[521] That is, 'as children become more mature and develop the capacity to make their own decisions, the scope of parental authority and control diminishes accordingly'.[522]

4.237 This notion is termed '*Gillick* competence'[523] and means, in essence, that children acquire competence to make decisions for themselves as they attain maturity, and that the question of competence is to be determined on a case-by-case basis.[524] In this sense, *Gillick* competence is consistent with the evolving conception of autonomy that applies to children.[525]

498 Kaspiew et al, above n 345, 327.

499 Ibid 328.

500 Ibid 327–8.

501 Ibid 329.

502 Ibid 330.

503 Ibid 321.

504 Ibid 327.

505 For further information see Rosemary Hunter, 'Child Related Proceedings under Part VII, Division 12A of the *Family Law Act*: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227; Jennifer McIntosh, *The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-being* (2006).

506 Hunter, above n 505, 227.

507 McIntosh, above n 505.

508 Hunter, above n 505, 234.

509 Jennifer McIntosh and Caroline Young, *The Child Responsive Program Operating within the Less Adversarial Trial: A Follow-up Study of Parent and Child Outcome* (2007) 6–7.

510 Ibid 6.

511 See the discussion relating to child-focused and child-inclusive practices previously in this chapter under the heading 'Representation and involvement of children in family dispute resolution'.

512 *Family Law Rules 2004* (Cth) r 6.02.

513 *Family Law Act 1975* (Cth) s 60CC(3).

514 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12 (entered into force 2 September 1990). This is discussed in greater detail in Chapter 3.

515 *Family Law Act 1975* (Cth) s 100B.

516 *Family Law Act 1975* (Cth) s 60CC(3)(a).

517 This is discussed above in this chapter under the heading 'Decision-making principles for children'.

518 Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 1, 4.

519 *Family Law Act 1975* (Cth), s 60CC(3)(a).

520 *Family Law Act 1975* (Cth), s 68LA(5)(b). This is consistent with article 12 of CROC, which provides that the child has a right to express his or her views freely in all matters affecting him or her, and to have the opportunity to be heard, either directly or through a representative: *United Nations Convention on the Rights of the Child*, above n 514.

521 Young and Monahan, above n 323, 267.

522 Ibid.

523 This is because the principle comes from the English House of Lords case *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1986] AC 112. This judgment was referred to with approval by the High Court in *Secretary, Department of Health and Community Services v JWB and SMB ('Re Marion')* (1992) 175 CLR 218.

524 Fehlberg and Behrens, above n 321, 260.

525 The notion of evolving autonomy is raised, for example, by John Tobin, 'The Development of Children's Rights' in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 23, 29.

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4.238 Although most commonly considered in medical cases involving children,[526] the concept of *Gillick* competence is also relevant to making parenting orders under the FLA 1975, as the child's views are to be put before the court by the ICL and given such weight as is appropriate in light of the child's maturity and level of understanding.[527] It is important that any assessment of the child's maturity and level of understanding be made independently of an evaluation of the child's opinion, otherwise there is a danger that immaturity of the child will be inferred simply by reason of disagreement with the child's view.[528]

REPRESENTATION OF CHILDREN IN FAMILY COURT PROCESSES[529]

4.239 The role of the ICL is unique and involves representing and promoting the child's best interests in family law proceedings.[530] This appointment enables the child to be involved in the decision-making process.[531] However, the level of the child's involvement will depend on the extent to which the child wishes to be involved and the extent to which it is appropriate for the child to be involved, having regard to the child's age, developmental level, cognitive abilities, emotional state and views.[532]

Appointment of an independent children's lawyer

4.240 Where the child's best interests or welfare is the paramount or a relevant consideration in proceedings, the court may order that the child's interests in the proceedings are to be independently represented by an ICL.[533] It should be noted that as an ICL can only be appointed by the court, the ICL will not take part in FDR unless court proceedings have already commenced. The court may make an order for the appointment of an ICL on its own initiative or on the application of the child, an organisation concerned with the welfare of children or any other person.[534] In determining whether an ICL ought to be appointed in a particular case, the court has regard to a non-exhaustive list of factors set out in the case of *Re K*.[535]

4.241 An ICL will only be appointed if funding is granted from the relevant state legal aid body. Since February 2008, VLA has applied a quota-based limitation on the funding of ICLs. Generally, funding for ICLs is limited to 10 per week in the FMC and up to 33 per month in the FCA.

4.242 VLA has in-house ICL practitioners and an ICL panel, membership of which entitles a practitioner to act as an ICL in family law matters.[536] Appointment to this panel is for a term of three years and in order to be considered for appointment lawyers must:

- be admitted as practitioners of the Supreme Court of Victoria, have signed the High Court Roll and hold a current practising certificate under the *Legal Profession Act 2004* (Vic), and
- have previously acted as an ICL in cases arising under the FLA 1975, or
- have at least five years experience in cases arising under the FLA 1975 and involving ICLs, and
- have undertaken the National Independent Children's Lawyer Training Course or be enrolled to do so.[537]

The grounds and procedure for being removed from this VLA panel are clearly set out in the Independent Children's Lawyer Practitioner Manual.[538]

4.243 The ICL is not a party to proceedings, but parties must conduct the case as if the ICL was a party.[539] The court may also make such other orders as it considers necessary to ensure the independent representation of the child's interests.[540] This includes making an order for the purpose of allowing the ICL to find out the child's views on the matters to which the proceedings relate.[541]

Role and duties of the independent children's lawyer

4.244 If an ICL is appointed, he or she must:

- form an independent view of what is in the child's best interests based on the evidence available[542]
- act in relation to the proceedings in what he or she believes to be the child's best interests[543]
- make a submission to the court suggesting a particular course of action if satisfied that that particular course of action is in the child's best interests[544]
- act impartially in dealings with parties to the proceedings[545]
- ensure that any views expressed by the child in relation to the proceedings are put fully before the court[546]
- analyse any report or document relating to the child that is to be used in proceedings to identify matters significant to determining what is in the child's best interests and ensure that those matters are brought to the court's attention[547]
- endeavour to minimise the trauma to the child associated with the proceedings[548]
- facilitate an agreed resolution of matters at issue in the proceedings to the extent that doing so is in the child's best interests[549]
- collate expert evidence and ensure that all relevant is before the court[550]
- test, by cross-examination, the evidence of the parties and their witnesses.[551]

Best interests model of representation for children in family law

4.245 The model of representation of children in family law has been continually refined as a 'best interests' model through legislative change, jurisprudence and practice directions.[552] The best interests nature of the ICL's role is reflected in various provisions of the FLA 1975. The ICL is not the child's legal representative and is not obliged to act on the child's instructions in relation to the proceedings.[553]

4.246 Although the ICL is not under an obligation to disclose to the court any information that the child communicates, and nor can the ICL be required to disclose this information to the court,[554] the ICL may disclose any information communicated by the child if satisfied that it is in the child's best interests.[555] This is the case even if such disclosure is made against the child's wishes.[556] The ICL is also under an obligation to make a report to the appropriate state or territory department responsible for child welfare, if he or she has a suspicion on reasonable grounds that a child has been abused or is at risk of being abused, unless the ICL knows that the department has already been notified about that abuse or risk.[557]

526 Fehlberg and Behrens, above n 321, 281.

527 *Family Law Act 1975* (Cth), s 60CC(3)(a).

528 David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 *International Journal of Children's Rights* 1, 10.

529 Referred to as 'family court processes' as the ICL can only be appointed by the court. Note, however, that the ICL will play a role outside of the courtroom in informal negotiations and family dispute resolution.

530 Family Court of Australia, *Guidelines for Independent Children's Lawyers*, endorsed by the Chief Justice of the Family Court of Australia and by the Federal Magistrates Court of Australia (2007) 1.

531 Ibid 2.

532 Ibid.

533 *Family Law Act 1975* (Cth), s 68L(1)–(2).

534 *Family Law Act 1975* (Cth) s 68L(4).

535 *Re K* (1994) 17 Fam LR 537.

536 Victoria Legal Aid, *Independent Children's Lawyer* <www.legalaid.vic.gov.au/813.htm> at 11 May 2010.

537 Ibid.

538 Victoria Legal Aid, *Section 29A Panel: Independent Children's Lawyer Practitioner Manual* (2009) 9–14.

539 *Family Law Rules 2004* (Cth) rr 6.02, 8.02.

540 *Family Law Act 1975* (Cth) s 68L(2)(b).

541 *Family Law Act 1975* (Cth) s 68L(5). This does not apply if it would be inappropriate because of the child's age or maturity, or some other special circumstance: *Family Law Act 1975* (Cth) s 68L(6).

542 *Family Law Act 1975* (Cth) s 68LA(2)(a).

543 *Family Law Act 1975* (Cth) s 68LA(2)(b).

544 *Family Law Act 1975* (Cth) s 68LA(3).

545 *Family Law Act 1975* (Cth) s 68LA(5)(a).

546 *Family Law Act 1975* (Cth) s 68LA(5)(b).

547 *Family Law Act 1975* (Cth) s 68LA(5)(c).

548 *Family Law Act 1975* (Cth) s 68LA(5)(d).

549 *Family Law Act 1975* (Cth) s 68LA(5)(e).

550 *P and P* (1995) 19 Fam LR 1, 33. This role of the ICL was reinforced in *DS v DS* (2003) 32 Fam LR 352, where it was held that the ICL must gather evidence and confer with the child rather than just relying on expert reports: at 360.

551 *P and P* (1995) 19 Fam LR 1, 33; *B & R and the Separate Representative* (1995) FLC 92–636. Rules relating to cross-examination are set out in the *Family Law Rules 2004* (Cth).

552 Young and Monahan, above n 323, 552.

553 *Family Law Act 1975* (Cth) s 68LA(4).

554 *Family Law Act 1975* (Cth) s 68LA(6)–(7).

555 *Family Law Act 1975* (Cth) s 68LA(7).

556 *Family Law Act 1975* (Cth) s 68LA(8).

557 *Family Law Act 1975* (Cth), s 67ZA.

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LEGAL REPRESENTATION IN FAMILY LAW

4.247 Since the implementation of the FLA 1975, a transformation has taken place in the nature of family legal practice. While family law practice once had a predominantly adversarial nature, the majority of current family lawyers do not practise in this manner.

4.248 Studies have demonstrated that most family lawyers attempt to defuse conflict between parents and regularly encourage their clients to settle. One study of family law practice in the late 1990s showed that a key element of family legal practice was managing client expectations about attainable outcomes.[558]

4.249 Many family lawyers also demonstrate a sophisticated approach to balancing their parent-clients' interests against the child's interests. One recent study of 42 family lawyers practising in Queensland found that around 80 per cent of lawyers interviewed were child-focused in their approach to their practice.[559] Half of the lawyers interviewed believed that even when acting for parents, their ethical duties to the child were equal to their duty to the court and their client.[560] Many of these lawyers occasionally or often experienced a conflict between their perceived duty to the child and their other ethical duties and, in these circumstances, the lawyers demonstrated thoughtful responses to these situations.[561]

Accreditation for family lawyers

4.250 Law societies in the Australian states and territories provide for specialist accreditation of family lawyers. In Victoria, the Law Institute of Victoria's system of specialist accreditation of family lawyers requires that accredited specialists must have at least five years full-time practice experience or equivalent, including a substantial involvement in the family law field in the past three years and engagement in continuing professional development.[562] Accreditation schemes are designed to encourage high quality legal services in specific areas of practice.

4.251 In 2004, the Family Law Council, together with the Family Law Section of the Law Council of Australia, developed best-practice guidelines for family lawyers with the aim of setting out the principles that all family lawyers should follow in family law proceedings and improving the legal practice standards in Australian family law.[563] The guidelines promote a less adversarial approach to legal practice.[564]

558 John Dewar and Stephen Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 1, 16–17.

559 Cate Banks, 'Being a Family Lawyer and Being Child Focused—A Question of Priorities?' (2007) 21 *Australian Journal of Family Law* 37, 46–7.

560 Ibid 47.

561 These child-focused family lawyers were clearly not mere adversarial advocates for their parent-clients. Banks notes that, 'the child-focused lawyers in the study demonstrated a level of self reflection that, to a great extent, overrode convention of adversarial advocate and responsible lawyer in their pursuit of child-focused outcomes ... Child focused lawyers took a holistic approach to lawyering, built a relationship with the client and were committed to a caring approach to the matrix of relationships associated with the family dynamic, always mindful that the child must remain the central point of decision making': Banks, above n 559, 47.

562 Law Institute of Victoria, *Specialisation Scheme Rules* (2010).

563 Family Law Council, *Best Practice Guidelines for Lawyers Doing Family Law Work* (2004) v.

564 They state that best practice in family law is characterised by a number of aspects including: 'a constructive and conciliatory approach to the resolution of family disputes', 'having regard to the interests and protection of children and encouraging long term family relationships', 'the narrowing of the issues in dispute and the effective and timely resolution of disputes', and 'ensuring that costs are not unreasonably incurred': ibid 1.