

Chapter 5

Current International Law and Practice

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5.1 This chapter examines the current law and practice in child protection matters in a number of international jurisdictions which have similar legal systems to Australia.

NEW ZEALAND

GENERAL

5.2 The *Children, Young Persons and Their Families Act 1989* (NZ) (CYPF Act 1989) governs child protection in New Zealand and is administered by the Ministry of Social Welfare (the Ministry). The CYPF Act 1989 places great emphasis on family participation in decisions affecting children and young people.¹ The CYPF Act 1989 was strongly influenced by Maori culture, but applies to all children referred to Child, Youth and Family Services (CYF)² because of protection concerns.³

5.3 The core tenets of the CYPF Act 1989 are that the child's welfare and interests are paramount in all matters relating to the administration and application of the Act,⁴ and that the family is the carer for and protector of the child, supported by the state in its role.⁵

5.4 The CYPF Act 1989 provides the following principles relating specifically to the care and protection of children and young people: they must be protected from harm, have their rights upheld and have their welfare promoted.⁶ The principles also provide that it is desirable for a child or young person to live with his or her family and family group where possible.⁷

5.5 Two notable features of the New Zealand system are that:

- authorisation is required before a child can be involuntarily removed from his or her family by child protection workers, even in emergency circumstances⁸
- family group conferencing (FGC) is ordinarily mandatory before commencing court proceedings in relation to the care and protection of a child or young person.⁹

COMMENCEMENT OF A CARE AND PROTECTION MATTER

Notification and investigation

5.6 A care and protection matter commences when a report is made to a social worker or police officer that a child has been, or is likely to be, harmed physically, emotionally or sexually, ill-treated, neglected or deprived.¹⁰ Although New Zealand does not have mandatory reporting,¹¹ reports may be made by individuals, bodies or organisations concerned with the welfare of children and young people, or by a court following any proceedings where it is believed that a child is in need of care and protection.¹² The matter will be investigated by the social worker or police officer to whom the report was made,¹³ then referred to a care and protection coordinator (coordinator) if it is believed that the child is in need of care and protection.¹⁴ The coordinator is responsible for convening an FGC.¹⁵

5.7 It is at the coordinator's discretion whether it is necessary to convene an FGC.¹⁶ An FGC will only be convened where it is reasonably believed that a child is in need of care and protection.¹⁷ This will be determined by reference to the grounds set out in the CYPF Act 1989.

Grounds for determining that a child is in need of care and protection

- 5.8 Many of the grounds for determining that a child is in need of care and protection under the CYPF Act 1989 are similar to those set out in the *Children, Youth and Families Act 2005* (Vic). The CYPF Act 1989 provides that a child or young person is in need of care and protection if he or she is being, or is likely to be, harmed, ill-treated, abused or seriously deprived.¹⁸ Harm can be physical, emotional or sexual.¹⁹ The New Zealand grounds relating to 'harm' are similar to Victorian grounds. Both Acts also provide for circumstances in which the child or young person has been abandoned or the child or young person's parents are deceased or incapacitated.²⁰
- 5.9 The New Zealand grounds diverge from the Victorian grounds where 'no fault' characteristics have been included. While the Victorian grounds focus on parents not protecting or being unlikely to protect the child from harm, the New Zealand grounds include reference to parents being 'unable' to care for the child or young person.²¹ This inability is not limited, as it is in the CYF Act 2005, to parents who are incapacitated.²² There is also a ground in the CYPF Act 1989 which deals with situations in which behaviour of a child or young person is likely to be harmful to the wellbeing of that child or young person or others, and the young person's parents or guardians are unable or unwilling to control that behaviour.²³

FAMILY GROUP CONFERENCING

- 5.10 FGC plays a central role in New Zealand's child protection system, as it is ordinarily the mandatory first step before court proceedings can commence. It is 'a core part of the machinery of government, the engine-room of decision-making for child welfare and youth justice'.²⁴ In this report, the Commission considers the child welfare role of the FGC.
- 5.11 Decisions will be made at the FGC regarding whether the child is in need of care and protection and what steps are to be taken. It is a process that brings the family and professionals together in a 'family-led decision-making forum'.²⁵ The model used in New Zealand has been described as being at the 'cutting edge of family-centred practice'.²⁶

- 1 Marie Connolly, 'An Act of Empowerment: The Children, Young Persons and their Families Act (1989)' (1994) 24 *British Journal of Social Work* 87, 89.
- 2 Child, Youth and Family Services is a government agency within the Ministry of Social Development and has legal powers to intervene and help children who are being abused or neglected or are exhibiting problem behaviour: Ministry of Social Development (NZ), *Service Delivery Cluster* <www.msd.govt.nz/about-msd-and-our-work/about-msd/our-structure/service-delivery-cluster.html> at 19 May 2010.
- 3 Connolly, 'An Act of Empowerment', above n 1. The *Children, Young Persons and Their Families Act 1989* (NZ) has jurisdiction over persons who are under 17 years of age, with the exclusion of those who have been married or in a civil union: s 2.
- 4 *Children, Young Persons and their Families Act 1989* (NZ) s 6.
- 5 *Children, Young Persons and their Families Act 1989* (NZ) ss 5, 13; Connolly, 'An Act of Empowerment', above n 1, 90.
- 6 *Children, Young Persons and their Families Act 1989* (NZ) s 13(a).
- 7 *Children, Young Persons and their Families Act 1989* (NZ) s 13(b)-(c).
- 8 That is, in New Zealand there is no equivalent of the Victorian power for a 'protective intervener' to take a child into safe custody without a warrant.
- 9 *Children, Young Persons and their Families Act 1989* (NZ) s 70.
- 10 *Children, Young Persons and their Families Act 1989* (NZ) s 15.
- 11 *Children, Young Persons and their Families Act 1989* (NZ) s 15. The Act provides that any person 'may' report, rather than listing persons who 'must' report.
- 12 *Children, Young Persons and their Families Act 1989* (NZ) s 19.
- 13 *Children, Young Persons and their Families Act 1989* (NZ) s 17(1).
- 14 *Children, Young Persons and their Families Act 1989* (NZ) s 17(1). At this investigation stage, the social worker or police officer will consult with a care and protection resource panel—an advisory panel appointed by the Chief Executive from occupations and organisations concerned with the care and protection of young persons: s 428. If the report is made by a body, organisation or court then the matter can be referred to a coordinator directly and the investigation stage may not be necessary: s 19.
- 15 *Children, Young Persons and their Families Act 1989* (NZ) ss 18(1), 20 if referred by a social worker or police officer, or s 19(2)-(3) if referred by a body, organisation or court.
- 16 *Children, Young Persons and their Families Act 1989* (NZ) s 19(3).
- 17 *Children, Young Persons and their Families Act 1989* (NZ) ss 18(1), 19(1).
- 18 *Children, Young Persons and their Families Act 1989* (NZ) s 14(1)(a).
- 19 *Children, Young Persons and their Families Act 1989* (NZ) s 14(1)(a).
- 20 *Children, Young Persons and their Families Act 1989* (NZ) s 14(f)-(g); *Children, Youth and Families Act 2005* (Vic) s 162(1)(a)-(b).
- 21 *Children, Young Persons and their Families Act 1989* (NZ) s 14(f).
- 22 *Children, Youth and Families Act 2005* (Vic) s 162(1)(b).
- 23 *Children, Young Persons and their Families Act 1989* (NZ) s 14(d).
- 24 Stewart Bartlett, 'Family Decision Making Now and in the Future' (2007) 36 *Social Work Now* 15, 16.
- 25 Marie Connolly, 'Fifteen Years of Family Group Conferencing: Co-ordinators Talk About their Experiences in Aotearoa New Zealand' (2006) 36 *British Journal of Social Work* 523, 524.
- 26 Marie Connolly, 'Learning from the Past and Repositioning the Future' (2007) 36 *Social Work Now: The Practice Journal of Child, Youth and Family* 8, 14.

Convenors

5.12 Coordinators responsible for convening FGCs are appointed by the Chief Executive of the Ministry (Chief Executive) and are employed by CYF.²⁷ A coordinator must be suitably qualified by reason of his or her personality, training and experience.²⁸ However, no specific training requirements are set out in the CYPF Act 1989. It is the responsibility of the Chief Executive to ensure that those performing functions under the CYPF Act 1989 receive adequate training and comply with appropriate standards.²⁹ The coordinator has the power to delegate any function under the CYPF Act 1989 to a social worker.³⁰ There are no exemptions to this power of delegation, so it is possible that one social worker could be involved in the FGC and another social worker could be convening the FGC. This could have implications for the perceived independence of the FGC convenor.

Procedure and functions of the FGC

5.13 It is the coordinator's responsibility to convene the FGC.³¹ Before convening an FGC, the coordinator must consult with a care and protection resource panel.³²

5.14 The overall functions of the FGC are to:

- consider matters relating to the care and protection of the child in relation to whom the FGC was convened
- make decisions and recommendations and formulate plans when the FGC determines that the child or young person is in need of care and protection, in accordance with the overarching principles of the CYPF Act 1989
- review from time to time the decisions, recommendations and plans of the FGC and then implement any such decisions, recommendations and plans.³³

CYF must provide the FGC with administrative services to enable it to discharge these functions.³⁴

5.15 There are ordinarily three phases to the FGC:

- information sharing
- private family deliberation
- the coordinator seeking agreement to the conference's decisions.³⁵

At the first stage, the coordinator is responsible for making all relevant information available to the family group.³⁶ This information is often provided by the referring social worker and other professionals.³⁷ During the second stage, non-family members withdraw from the process, leaving the family alone to begin decision making.³⁸ Even the representative for the child must withdraw from deliberations at this stage, unless members of the family request that the representative is present.³⁹ At the third stage, the coordinator seeks agreement from the family group and then from the referral source.⁴⁰ The conference decides together whether the child is in need of care and protection and, if so, decides on an appropriate course of action.⁴¹ The FGC's process is self-regulated and does not operate under strict procedural requirements.⁴²

5.16 FGC proceedings are privileged and are not to be published.⁴³ Information, statements or admissions made or disclosed in the course of the FGC are inadmissible before any court or any person acting judicially.⁴⁴ The only information admissible before a court is the record of decisions and recommendations made and plans formulated by the FGC.⁴⁵ The privilege that operates in relation to FGC admissions or disclosures is absolute and cannot be waived, but this does not preclude concerns being raised with police.⁴⁶

Attendees and legal representation

5.17 Those entitled to attend the FGC are listed in the CYPF Act 1989 and include:

- the child or young person, unless it would not be in his or her best interests or he or she would be unable to understand proceedings
- every parent, guardian, person having care of the child or young person and member of the family or family group of the young person, unless a person's attendance would not be in the best interests of the child or young person or would be otherwise undesirable⁴⁷
- the care and protection coordinator
- the social worker or police officer who referred the matter to the coordinator
- a representative of the body or organisation which referred the matter to the coordinator
- any barrister, solicitor or lay advocate representing the child or young person.⁴⁸

5.18 Several other interested parties are also listed and, in addition to this list, any person may attend in accordance with the wishes of the family or family group of the child or young person.⁴⁹ Those wishes will have been made known during consultation with the coordinator prior to the FGC.⁵⁰ When discussion between family members or the wider family group is taking place, any members outside of the family group must not be present unless family members request otherwise.⁵¹

27 *Children, Young Persons and their Families Act 1989* (NZ) ss 18–25, 423(1); Nathan Harris, National Child Protection Clearinghouse, Australian Institute of Family Studies, 'Family Group Conferencing in Australia 15 Years On', *Child Abuse Prevention Issues* (2008) No 27, 3.

28 *Children, Young Persons and their Families Act 1989* (NZ) ss 18–25, 423(2).

29 *Children, Young Persons and Their Families Act 1989* (NZ) s 7(2)(f).

30 *Children, Young Persons and their Families Act 1989* (NZ) s 427(1).

31 *Children, Young Persons and their Families Act 1989* (NZ) ss 18(1), 19(1).

32 *Children, Young Persons and their Families Act 1989* (NZ) s 21(a). Care and protection resource panels are advisory committees established by the Chief Executive, and they also advise social workers and constables in relation to investigations: ss 17(1), 428. The coordinator of an FGC is also to consult a care and protection resource panel if no agreement is reached at the FGC, see below.

33 *Children, Young Persons and their Families Act 1989* (NZ) s 28.

34 *Children, Young Persons and their Families Act 1989* (NZ) s 27.

35 Connolly, 'An Act of Empowerment', above n 1, 92–3.

36 *Ibid* 92.

37 *Ibid*.

38 *Ibid* 92–3.

39 *Children, Young Persons and their Families Act 1989* (NZ) s 22(2).

40 Connolly, 'An Act of Empowerment', above n 1, 93.

41 *Ibid*.

42 *Children, Young Persons and their Families Act 1989* (NZ) s 26.

43 *Children, Young Persons and Their Families Act 1989* (NZ) ss 37–8.

44 *Children, Young Persons and Their Families Act 1989* (NZ) s 37(1).

45 *Children, Young Persons and Their Families Act 1989* (NZ) ss 37(2), 29(3).

46 Email from Stewart Bartlett, New Zealand Ministry of Social Development, 12 April 2010. Stewart Bartlett is Principal Analyst for Child, Family and Community Services in the New Zealand Ministry of Social Development. He was previously Manager of FGC Service Development within Child, Youth and Family in the Ministry of Social Development: Bartlett, 'Family Decision Making Now and in the Future', above n 24, 16.

47 This also includes the attendance of foster carers: *SH v KM WM RT TM CYFS FC CYFS FAM 2006-009-002310* 11 August 2006. In that case, a child of nine months had been placed outside of the family and the FGC was to determine the child's long-term care arrangements. It was held that the foster parents should have been invited, as they were clearly people having care of the child under s 22(1)(b)(i), as well as being part of the 'family group' as defined in s 2 as 'a person with whom the child has a significant psychological attachment': Judge Peter Boshier, Principal Family Court Judge, 'Safeguarding Children's Rights in Child Protection: The Use of Family Group Conferencing in the Family Court' (Paper presented to 5th World Congress on Family Law and Children's Rights, Nova Scotia, 24 August 2009) 6.

48 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1).

49 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1)(i).

50 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1)(i).

51 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(2).

5.19 The parents and family members, the coordinator and a referring social worker from CYF will be entitled members of the FGC,⁵² which means that they have ‘voting rights’ in FGC decisions.⁵³ Counsel for the child will be an entitled member if care and protection proceedings have already commenced in the Family Court.⁵⁴ Alternatively, as provided for in the CYPF Act 1989, the child or young person may be represented by a lay advocate.⁵⁵ The parties’ lawyers are not usually present and will not be entitled members, unless all members of the conference agree.⁵⁶

Agreements and enforceability

5.20 If the FGC reaches agreement, it may formulate a plan for the care and protection of the child or young person.⁵⁷ The decision, recommendation or plan of the FGC must be communicated to the referring social worker, police officer, court or organisation⁵⁸ and—with exception of referring courts—their agreement must be sought.⁵⁹ The Chief Executive must give effect to the FGC’s decisions, recommendations and plans, unless the referring social worker does not agree or the decision, recommendation or plan is clearly impracticable or inconsistent with the principles of the CYPF Act 1989.⁶⁰ It is the coordinator’s duty to ensure that any decision, recommendation or plan of an FGC is reviewed regularly.⁶¹

5.21 It is possible for a plan to be implemented solely by way of FGC agreement, and all parties are required to adhere to that agreement. However, if obligations under the plan are not carried out, the Court may be required to implement the plan through orders.⁶² Judges will place reliance on FGC outcomes in all but rare cases.⁶³ The decisions of an FGC are not registrable in court and the Court, unlike the Chief Executive, is under no obligation to give effect to the decisions of an FGC.⁶⁴ However, care and protection proceedings—that is, proceedings for a declaration that a child is in need of care and protection⁶⁵—cannot generally be commenced in the Family Court unless an FGC has taken place.⁶⁶

5.22 Even in circumstances where an exception applies and an FGC has not taken place before the application for a declaration,⁶⁷ an FGC must still take place before the Family Court will make a declaration.⁶⁸ It is this mandatory nature of FGC that strengthens agreements made at the conferencing stage. This has been referred to as the ‘jurisdictional quality’ of FGCs,⁶⁹ where the FGC is the necessary first step that precedes court involvement.

5.23 If the members of the FGC or the referring person or body cannot agree on an outcome, the coordinator is to consult a care and protection resource panel and report the failure to reach agreement to the referring social worker or police officer.⁷⁰ The police officer or social worker may then take action under the CYPF Act 1989 as he or she considers appropriate.⁷¹ In these instances, if the concerns were serious enough, it is likely that court proceedings would be initiated.⁷²

EMERGENCY REMOVAL POWERS

Comparison of New Zealand and Victoria

5.24 In all but rare cases, care and protection matters will be dealt with in the first instance by an FGC. However, there are circumstances in which it will not be possible or practicable to convene an FGC to resolve urgent care and protection issues. The power to remove a child in emergency circumstances is one way in which New Zealand differs greatly from Victoria. In New Zealand, authorisation is required before a child can be removed and, in the absence of judicial authorisation, only police have removal power. In Victoria, child protection workers may take a child into safe custody without authorisation.⁷³

5.25 The New Zealand warrant system requires a social worker or police officer to apply in writing and on oath for a ‘place of safety warrant’ if removal of the child is believed to be necessary.⁷⁴ Applications are made to a District Court judge, or, if no District Court judge is available, any justice or community magistrate, or any registrar other than a police officer.⁷⁵ For such a warrant to be granted, the judge or other officer of the court must be satisfied that there are reasonable grounds to believe that a child or young person is suffering, or is likely to suffer, ill-treatment, neglect, deprivation, abuse, or harm.⁷⁶ This warrant authorises any police officer or social worker to enter and search premises and remove or detain the child or young person, by force if necessary.⁷⁷

5.26 In New Zealand only police, and not child protection workers, have the power to remove a child without a warrant.⁷⁸ Any officer who believes on reasonable grounds that it is necessary to protect a child or young person from injury or death is able to enter and search premises and remove a child or young person without a warrant.⁷⁹ The New Zealand threshold for exercising this police power is also substantially higher than that in Victoria, requiring that removal is ‘critically necessary to protect a child or young person from injury or death’.⁸⁰ In Victoria, all that is required to remove a child without judicial authorisation is that the child is believed to be in need of protection, as determined by reference to the grounds.⁸¹

5.27 If a child or young person is found unaccompanied in circumstances which are likely to impair the child or young person’s mental or physical health, the New Zealand legislation also allows a police officer to deliver the child or young person to a parent or guardian, or a social worker if that is not possible.⁸² This measure will only be temporary if it does not appear that the child is in need of care and protection; it is not the same as an emergency removal power.

52 Email from Stewart Bartlett, New Zealand Ministry of Social Development, 18 March 2010.

53 Ibid.

54 Ibid.

55 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1)(h).

56 Bartlett, Email 18 March 2010, above n 52.

57 *Children, Young Persons and Their Families Act 1989* (NZ) s 29(1).

58 *Children, Young Persons and Their Families Act 1989* (NZ) s 30(1).

59 *Children, Young Persons and Their Families Act 1989* (NZ) s 30(1).

60 *Children, Young Persons and Their Families Act 1989* (NZ) s 34(1).

61 *Children, Young Persons and Their Families Act 1989* (NZ) s 424(f).

62 Judge Boshier, above n 47, 10.

63 Ibid 12.

64 Bartlett, Email 18 March 2010, above n 52.

65 *Children, Young Persons and Their Families Act 1989* (NZ) s 67.

66 *Children, Young Persons and Their Families Act 1989* (NZ) s 70.

67 *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2). Exceptions include circumstances in which a custody order or restraining order are required as a matter of urgency, and in these exceptional circumstances the Court is obliged to adjourn proceedings in order for an FGC to take place: ss 70(2), 72(3).

68 *Children, Young Persons and Their Families Act 1989* (NZ) s 72.

69 Bartlett, Email 18 March 2010, above n 52.

70 *Children, Young Persons and Their Families Act 1989* (NZ) s 31(1)(c), (e). Note that where a referring person, body or organisation will not agree to a plan or decision made by an FGC, the FGC can reconvene to reconsider its plan or decision: s 30(3).

71 *Children, Young Persons and Their Families Act 1989* (NZ) s 31(2).

72 Email from Allan Cooke, Barrister, New Zealand, 13 April 2010.

73 A ‘protective intervener’ may take a child into safe custody without a warrant: *Children, Youth and Families Act 2005* (Vic) ss 240–1. A ‘protective intervener’ in Victoria includes all members of the police force and the Secretary of the Department of Human Services, and the Secretary has delegated this power to various departmental employees: ss 17(1), 181.

74 *Children, Young Persons and Their Families Act 1989* (NZ) s 39(1). A similar warrant is available after court proceedings have commenced, but it is not called a ‘place of safety warrant’: s 40.

75 *Children, Young Persons and Their Families Act 1989* (NZ) s 39(1).

76 *Children, Young Persons and Their Families Act 1989* (NZ) s 39(1).

77 *Children, Young Persons and Their Families Act 1989* (NZ) s 39(3).

78 *Children, Young Persons and Their Families Act 1989* (NZ) s 42.

79 *Children, Young Persons and Their Families Act 1989* (NZ) s 42(1).

80 *Children, Young Persons and Their Families Act 1989* (NZ) s 42(1).

81 *Children, Youth and Families Act 2005* (Vic) ss 240–1.

82 *Children, Young Persons and Their Families Act 1989* (NZ) s 48(1).

New Zealand process following removal

5.28 Once a child or young person has been removed, either with or without a warrant, he or she is placed in the custody of the Chief Executive.⁸³ The matter may come before the Court when a parent or guardian applies for the release of or access to the child or young person while he or she is in the Chief Executive's custody.⁸⁴ The child or young person will otherwise be brought before the Court within five days, if not sooner released.⁸⁵ In these cases, the Court has power to make one of several orders:

- directing that the child be released from custody⁸⁶
- directing any person the Court sees fit to provide for the day-to-day care of the child⁸⁷
- granting the parent or guardian of the child or young person access to that child or young person.⁸⁸

5.29 This first court appearance does not necessitate the commencement of proceedings for a declaration that a child is in need of care and protection. Investigation will have taken place during the five-day period before the child or young person is brought before the Court, and it is possible that a referral to an FGC will satisfy concerns held about the child or young person.⁸⁹

5.30 Alternatively, the parents or guardians of the child or young person and the Chief Executive may have reached a temporary care agreement, whereby the child or young person remains in the custody of the Chief Executive while the parents or guardians access support services, for example.⁹⁰ Removal of the child is used in emergency situations only, and not as an alternative to FGC as the first stage.

COURT PROCEDURE AND PROCESSES**Commencement**

5.31 The Family Court of New Zealand hears care and protection proceedings for children and young people. In New Zealand, proceedings are commenced by bringing an application for a declaration that a child or young person is in need of care and protection.⁹¹ Ordinarily proceedings cannot commence until the matter has been to an FGC, but there are some exceptions.⁹² An application for a declaration can be made prior to an FGC taking place when:

- the child or young person has been removed on a place of safety warrant or removed by police without a warrant⁹³
- an interim restraining order needs to be granted as a matter of urgency⁹⁴
- an application for a custody order pending final determination, made at the same time as the application, needs to be granted as a matter of urgency⁹⁵
- the application is made on the ground that the child has been abandoned and no family group members are able to be found.⁹⁶

5.32 The Court may make a declaration if it is satisfied that a child is in need of care and protection based on any of the specified grounds.⁹⁷ However, in most circumstances, the Court must refer the matter to an FGC before it can make a declaration.⁹⁸

Court-annexed mediation

5.33 Where an application has been made to the Court for a declaration that a child or young person is in need of care and protection, the Court, the child or young person, parties to the application or legal representatives of those persons may request that a mediation conference be convened.⁹⁹ The purpose of the mediation conference is to identify the problem and attempt to reach agreement.¹⁰⁰ Every mediation conference is presided over by a Family Court judge,¹⁰¹ and, if appropriate, that same judge may hear any Family Court proceedings that eventuate.¹⁰² The child or young person, parties and legal representatives may attend.¹⁰³ The presiding judge has the power to make consent orders at the mediation conference.¹⁰⁴

Representation and participation of the child or young person in proceedings

- 5.34 Where the child is not already represented, the Court or court registrar must appoint a barrister or solicitor to act for the child in the proceedings and for any other purpose considered desirable.¹⁰⁵
- 5.35 The lawyer is to provide independent representation and advice to the child and has a duty to put the child's views before the Court.¹⁰⁶ The lawyer should not, however, require the child to express a view if the child does not want to, and the lawyer will not be required to put before the Court any views expressed in confidence to him or her by the child.¹⁰⁷ In cases where a conflict arises between a child's views and information relevant to the welfare and best interests of the child, the lawyer will:
- discuss the issues and the lawyer's obligations with the child
 - attempt to resolve the conflict with the child
 - advise the Court of the lawyer's position and, if the conflict cannot be resolved and as a matter of professional judgment the lawyer can only advocate the child's views, invite the Court to appoint a separate lawyer in respect of welfare and best interests.¹⁰⁸

83 *Children, Young Persons and Their Families Act 1989* (NZ) ss 39(3)(b)(i), 40(4)(b)(i), 42(1)(b).

84 *Children, Young Persons and Their Families Act 1989* (NZ) s 44(1).

85 *Children, Young Persons and Their Families Act 1989* (NZ) s 45.

86 *Children, Young Persons and Their Families Act 1989* (NZ) s 46(a)(i).

87 *Children, Young Persons and Their Families Act 1989* (NZ) s 46(a)(ii).

88 *Children, Young Persons and Their Families Act 1989* (NZ) ss 46(c), 121.

89 However, it should be noted that an application can be made without first attending an FGC where the child or young person has been removed: *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2)(a).

90 *Children, Young Persons and Their Families Act 1989* (NZ) s 139. This agreement can be made for up to 28 days and extended for another 28 days if the parents are not able to resume care of the child or young person at the end of the initial period: ss 139(1)(b), (2).

91 *Children, Young Persons and Their Families Act 1989* (NZ) s 67.

92 As noted above, it is likely that proceedings will be commenced where the FGC has been unable to reach an agreement.

93 *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2)(a).

94 *Children, Young Persons and Their Families Act 1989* (NZ) s 70(2)(b).

95 *Children, Young Persons and Their Families Act 1989* (NZ) ss 70(2)(c), 78. An FGC must be convened within 28 days of a custody order pending final determination being granted: *Draft Interim Custody Minute*, proposed final as at 30 November 2009, received via email from Judge Peter Boshier, Principal Family Court Judge, New Zealand, 5 March 2010.

96 *Children, Young Persons and Their Families Act 1989* (NZ) ss 14(1)(g), 70(2)(c).

97 *Children, Young Persons and Their Families Act 1989* (NZ) ss 14(1), 67.

Grounds are discussed above. Note that the Court may make a declaration in the absence of proof of responsibility for neglect or ill-treatment of a child or young person: s 71.

98 *Children, Young Persons and Their Families Act 1989* (NZ) s 72. The exception to this is where the child or young person has been abandoned: ss 14(1)(g), 70(2)(c), 72(2).

99 *Children, Young Persons and Their Families Act 1989* (NZ) s 170(1).

100 *Children, Young Persons and Their Families Act 1989* (NZ) s 171.

101 *Children, Young Persons and Their Families Act 1989* (NZ) s 172(1).

102 *Children, Young Persons and Their Families Act 1989* (NZ) s 177.

103 *Children, Young Persons and Their Families Act 1989* (NZ) s 172(2). Note, however, that attendance of legal representatives for participants other than the child or young person is at the discretion of the presiding Family Court judge: s 172(2)(d)(i).

104 *Children, Young Persons and Their Families Act 1989* (NZ) s 174.

105 *Children, Young Persons and Their Families Act 1989* (NZ) s 159(1). So far as possible, this barrister or solicitor should be suitably qualified by reason of his or her personality, training, cultural background and experience to represent the child or young person: s 159(3).

106 Judge Peter Boshier, Principal Family Court Judge, *Family Court Professional Services Practice Note: Lawyer for the Child Code of Conduct* (2007) 2. This practice note is guided by the *United Nations Convention on the Rights of the Child*.

107 *Ibid.*

108 *Ibid.*

- 5.36 If, because of age, maturity or a disability, a child is unable to express a view or guide representation in any way, the lawyer is to represent the child in accordance with the child's welfare and best interests and put all factors that impact on the child's welfare and best interests before the Court.¹⁰⁹
- 5.37 At any stage in proceedings, the Court may also appoint a lay advocate for the child, even if the child already has a legal representative.¹¹⁰ Representations may be made to the Court on behalf of the child or young person by the child or young person, a barrister or solicitor, a lay advocate or, with the leave of the Court, any other person.¹¹¹ Representations may also be made to the Court by or on behalf of a parent, guardian or other person having care of the child.¹¹²
- 5.38 It appears that the child is not formally a party to proceedings, as persons with the right to appeal a Family Court decision are listed as: any party to the proceedings, the child or young person to whom the proceedings relate, and any other person prejudicially affected by the decision.¹¹³ Listing the child separately from 'party to the proceedings' in this manner suggests that the child is not a party. With regard to participation in proceedings, children over the age of 12 are to be given notice that there has been an application for a declaration that they are in need of care and protection.¹¹⁴ As noted, the child may make representations to the Court him- or herself.¹¹⁵

Court procedure

- 5.39 The CYPF Act 1989 provides for certain specialised court procedures in care and protection proceedings. These include the following:
- Some matters of urgency do not have to be heard by the Family Court but can be heard by a District Court.¹¹⁶
 - Certain applications may be heard together where they relate to the same child or young person. For example, an application for a declaration that a child is in need of care and protection may be heard at the same time as domestic violence proceedings.¹¹⁷
 - Care and protection proceedings are not open to the public and the CYPF Act 1989 provides an exhaustive list of persons who may attend (although this includes accredited news media reporters).¹¹⁸
 - The judge may require any person to leave while the child or young person gives evidence, or may confer with the child or young person in private.¹¹⁹

FINAL ORDERS

Types of orders

- 5.40 The Court has the power to make various orders if it declares that the child or young person is in need of care and protection.¹²⁰ It may:
- discharge the child or young person, or any parent, guardian or person having the care of the child or young person, from proceedings without further order¹²¹
 - order that the child or young person, or any parent, guardian or person having the care of the child or young person, come before the Court at any time within two years, if called¹²²
 - order that certain persons receive counselling¹²³

- make a services order, directing the Chief Executive or any other named person or organisation to provide specified services and assistance to the child or young person, parent, guardian or other person having care of the child or young person¹²⁴
- make a support order, directing the Chief Executive or any other named person or organisation to provide support to the child or young person for up to 12 months.¹²⁵ Unlike a services order, a support order creates a duty for the Chief Executive or other person or organisation to monitor the standard of care provided and to provide or coordinate the provision of services and resources that will ensure appropriate care¹²⁶
- make a restraining order, restraining any named person from doing certain things, including residing with the child or young person and using or threatening violence¹²⁷
- make a custody order, placing the child or young person in the custody of the Chief Executive, a social service, the director of a child and family support service, or any other person for a specified period¹²⁸
- make a guardianship order, appointing the Chief Executive, a social service, the director of a family support service, or any other person to be the child's guardian.¹²⁹

5.41 Services orders, restraining orders, support orders and custody orders may also be made on an interim basis pending the determination of an application for a declaration that a child is in need of care and protection.¹³⁰ Where the Court proposes to make a services, support, custody or guardianship order, it must first obtain and consider a plan for the child or young person.¹³¹

109 Ibid 3.

110 *Children, Young Persons and Their Families Act 1989* (NZ) s 163. The role of the lay advocate is to ensure that the Court is made aware of relevant cultural matters and to represent the interests of the child or young person's *whānau* (extended family) *hapu* (a *hapu* is made of extended family groups) and *iwi* (tribe) to the extent that those interests are not otherwise represented in the proceedings: s 164.

111 *Children, Young Persons and Their Families Act 1989* (NZ) s 169(1).

112 *Children, Young Persons and Their Families Act 1989* (NZ) s 169(2).

113 *Children, Young Persons and Their Families Act 1989* (NZ) s 341(2).

114 *Children, Young Persons and Their Families Act 1989* (NZ) s 153.

115 *Children, Young Persons and Their Families Act 1989* (NZ) s 169(1).

116 *Children, Young Persons and Their Families Act 1989* (NZ) s 151. Urgent matters that can be heard in a District Court rather than the Family Court are: applications by parents or guardians for release of or access to the child or young person; proceedings following the removal of the child or young person; applications for custody pending final determination; and applications for interim restraining orders: s 152.

117 *Children, Young Persons and Their Families Act 1989* (NZ) s 158.

118 *Children, Young Persons and Their Families Act 1989* (NZ) s 166.

119 *Children, Young Persons and Their Families Act 1989* (NZ) s 167.

120 *Children, Young Persons and Their Families Act 1989* (NZ) s 83.

121 *Children, Young Persons and Their Families Act 1989* (NZ) s 83(1)(a).

122 *Children, Young Persons and Their Families Act 1989* (NZ) s 83(1)(b).

123 *Children, Young Persons and Their Families Act 1989* (NZ) s 83(1)(c).

124 *Children, Young Persons and Their Families Act 1989* (NZ) ss 83(1)(d), 86. The Chief Executive or the person or organisation that is to provide the services must be given notice of the Court's intention to make such an order and must be given an opportunity to be heard. An order directing the Chief Executive to provide services can be made without the consent of the Chief Executive: s 86(2)–(3).

125 *Children, Young Persons and Their Families Act 1989* (NZ) ss 83(1)(f), 91. As with a services order, the Chief Executive or the person or organisation that is to provide the services must be given notice of the Court's intention to make such an order and must be given an opportunity to be heard. An order directing the Chief Executive to provide services can be made without the consent of the Chief Executive: ss 91(2)–(3).

126 *Children, Young Persons and Their Families Act 1989* (NZ) s 93.

127 *Children, Young Persons and Their Families Act 1989* (NZ) ss 83(1)(e), 87.

128 *Children, Young Persons and Their Families Act 1989* (NZ) ss 83(1)(g), 101. Other than the Chief Executive, the person in whose custody the child or young person is placed must consent to such placement: s 101(3). A custody order expires when the child or young person turns 17, the young person marries or enters a civil union, or the child or young person is adopted by someone other than their parent: s 108.

129 *Children, Young Persons and Their Families Act 1989* (NZ) s 110. Other than the Chief Executive, the person appointed to be a guardian of the child or young person must consent to it: s 111. A guardianship order ceases to have effect when the young person reaches the age of 20 or marries or enters a civil union: s 117(1).

130 *Children, Young Persons and Their Families Act 1989* (NZ) ss 86A, 88, 92, 102.

131 *Children, Young Persons and Their Families Act 1989* (NZ) s 128. The Court directs who is to provide this plan and it is possible for the plan of an FGC, if one has been formulated, to be used for this purpose: ss 128(4), 129.

Review of orders

- 5.42 Various people listed in the CYPF Act 1989 may apply for an order to be varied or discharged.¹³² Applications may also be made to have support orders suspended.¹³³ The child or young person, a parent or guardian of the child or young person, a barrister or solicitor of the child or young person, and various other parties can make such an application.¹³⁴ The Court can vary or discharge the order, discharge a condition of the order or impose further conditions on the order.¹³⁵ Alternatively, the Court may refer an application for variation, discharge or suspension of an order to an FGC.¹³⁶

APPEALS FROM DECISIONS OF THE FAMILY COURT

- 5.43 If the Family Court decides to make or refuses to make an order to dismiss or otherwise finally determine the proceedings, a party to the proceedings, the child or young person to whom the proceedings relate or any other person prejudicially affected by the decision may appeal to the High Court against the decision.¹³⁷ For interlocutory or interim orders, a party to the proceedings, a child or young person to whom the proceedings relate, or any other person prejudicially affected by the order may appeal to the High Court with the leave of the Family Court.¹³⁸
- 5.44 Further appeals from decisions of the High Court are to the Court of Appeal, with leave of the Court of Appeal.¹³⁹

SCOTLAND**GENERAL**

- 5.45 Child protection in Scotland is governed by the *Children (Scotland) Act 1995*¹⁴⁰ (CS Act 1995) and its related rules.¹⁴¹ The CS Act 1995 provides the legislative basis for the children's hearings system,¹⁴² including the processes relating to referral and investigation of matters, and the Sheriff's Court. Of the principles that underpin the CS Act 1995 and guide the actions of the children's hearings, panels and courts, the welfare of the child is the paramount consideration.¹⁴³
- 5.46 Some distinguishing features of the Scottish child protection system are:
- Most matters are dealt with by children's hearings, which are conducted by tribunals of lay volunteers from the community.
 - The children's hearing system deals with juvenile justice matters and child protection matters together.
 - There is a principle that no order or supervision requirement can be made by a court or a children's hearing, unless it is determined that it would be better for the child than none being made at all.¹⁴⁴

Terminology within the Act

- 5.47 'Child' is defined in different ways throughout the CS Act 1995. For provisions relating to the children's hearing system, a child is generally defined as someone under the age of 16 years.¹⁴⁵ The term 'relevant person' is used repeatedly throughout the CS Act 1995 in relation to both children's hearings and Sheriff's Court proceedings; it means a person who enjoys or is vested with parental responsibilities and rights.¹⁴⁶

NOTIFICATION AND INVESTIGATION OF PROTECTION CONCERNS

The role of the local authority

- 5.48 Local authorities¹⁴⁷ (LAs), which are central to the provision of children's services in Scotland, play a significant role in child protection and the children's hearing system. They have a general responsibility to provide services to promote and safeguard the welfare of 'children in need',¹⁴⁸ and they have specific responsibilities to children 'looked after by them', including children under supervision requirements.¹⁴⁹
- 5.49 Following notification, LAs must undertake inquiries when a child might require compulsory supervision¹⁵⁰ Social workers play a key role in the initial inquiries and investigation of matters referred to the LA.¹⁵¹ Appropriate matters are referred to the Children's Reporter.¹⁵²

The role of the children's reporter

- 5.50 In addition to LAs, anybody, including the child, may refer a matter to a reporter where they believe a child may require compulsory measures of supervision.¹⁵³ Only LAs and the police are obliged to refer such matters.¹⁵⁴ Most referrals are from police, but referrals are also made by social workers and health and education agencies.¹⁵⁵ Courts can also refer matters to a reporter.¹⁵⁶
- 5.51 Reporters are the gatekeepers to the children's hearings system, receiving and investigating referrals and ultimately deciding whether there are grounds for particular matters to go to a hearing. They are trained officers of an independent statutory agency—the Scottish Children's Reporter Administration¹⁵⁷—and usually have legal training or social work backgrounds.¹⁵⁸
- 5.52 Once a referral is received, the reporter undertakes an initial investigation, usually obtaining the LA's report about the child and information from other relevant persons.¹⁵⁹ The reporter may then decide to:
- take no further action
 - refer the child to an appropriate LA
 - decide a children's hearing is required and arrange one.¹⁶⁰

The reporter can only refer the matter to a hearing if satisfied that compulsory measures of supervision are necessary and that at least one of the grounds listed in the CS Act 1995 is established.¹⁶¹ The majority of referrals to the reporter do not proceed to a hearing.¹⁶²

- 132 *Children, Young Persons and Their Families Act 1989* (NZ) ss 125–6.
- 133 *Children, Young Persons and Their Families Act 1989* (NZ) s 125(2).
- 134 *Children, Young Persons and Their Families Act 1989* (NZ) ss 125–6. Any person may make such an application with the leave of the Court: s 126(o).
- 135 *Children, Young Persons and Their Families Act 1989* (NZ) s 127.
- 136 *Children, Young Persons and Their Families Act 1989* (NZ) s 126A.
- 137 *Children, Young Persons and Their Families Act 1989* (NZ) s 341(1)–(2).
- 138 *Children, Young Persons and Their Families Act 1989* (NZ) s 341(3).
- 139 *Children, Young Persons and Their Families Act 1989* (NZ) s 347.
- 140 *Children (Scotland) Act 1995* (Scot).
- 141 *Children's Hearings (Scotland) Rules 1996* (Scot); *Children's Hearings (Legal Representation)(Scotland) Rules 2002* (Scot); *Children's Hearings (Legal Representation)(Scotland) Amendment Rules 2009* (Scot); *The Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001* (Scot).
- 142 Established in *Social Work (Scotland) Act 1968* (Scot), then incorporated into the current Act.
- 143 *Children (Scotland) Act 1995* (Scot) s 16(1). The s 16(5) paramouncy principle can be rebutted as a matter of public safety.
- 144 *Children (Scotland) Act 1995* (Scot) s 16(3).
- 145 *Children (Scotland) Act 1995* (Scot) s 93(2).
- 146 *Children (Scotland) Act 1995* (Scot) s 93.
- 147 Local authorities are councils established under the *Local Government etc. (Scotland) Act 1994* (Scot). Scotland has 32 local authority areas.
- 148 *Children (Scotland) Act 1995* (Scot) s 22. This includes, as far as is consistent with this duty, promoting the upbringing of such children by their families.
- 149 *Children (Scotland) Act 1995* (Scot) s 17. Supervision requirements are measures imposed by children's hearings and are discussed below.
- 150 *Children (Scotland) Act 1995* (Scot) s 53.
- 151 Edinburgh, Lothian and Borders Executive Group, *Edinburgh and Lothians Inter-Agency Child Protection Procedures* (2007) [4.1].
- 152 *Children (Scotland) Act 1995* (Scot) s 53. The Children's Reporter is referred to under the *Children (Scotland) Act 1995* (Scot) as the 'Principal Reporter' and delegates functions to reporters in the Scottish Children's Reporter Administration. These delegates of the Principal Reporter are referred to here as 'reporters'.
- 153 *Children (Scotland) Act 1995* (Scot) s 53(2). In 2008–09, 47 178 children were referred to the reporter: Scottish Children's Reporter Administration, *Online Statistics 2008/2009* (2009). As some children are referred multiple times, the overall number of referrals was 83 742.
- 154 *Children (Scotland) Act 1995* (Scot) s 53. LAs must report where they receive information which 'suggests' compulsory measures are required: s 53(1). Police officers must report where they have 'reasonable cause' to believe compulsory measures are required: s 53(2).
- 155 Scottish Children's Reporter Administration, *Online Statistical Dashboard* <www.scra.gov.uk/cms_resources/SCRA%20online%20statistical%20dashboard.swf> at 27 April 2010.
- 156 *Children (Scotland) Act 1995* (Scot) s 54. This can occur when a matter relating to a child which satisfies one of the grounds listed in s 52 of the Act arises during particular proceedings, including proceedings relating to parental responsibilities. Under this provision, acceptance of a ground by the child or relevant person is not required.
- 157 Formed under the *Local Government etc. (Scotland) Act 1994* (Scot).
- 158 Scottish Children's Reporter Administration, *A Day in the Life of a Children's Reporter* <www.scra.gov.uk/recruitment/a_day_in_the_life.cfm> at 27 April 2010. There are approximately 220 reporters in Scotland.
- 159 Note that the LA is under an obligation to provide information and reports on the child as required: *Children (Scotland) Act 1995* (Scot) s 56(2), (7).
- 160 *Children (Scotland) Act 1995* (Scot) s 56 (4)–(6).
- 161 *Children (Scotland) Act 1995* (Scot) ss 65, 52.
- 162 Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (2001) 210.

Grounds for determining that measures of supervision are necessary

- 5.53 In order for compulsory measures of supervision to be considered necessary, and for referral of the matter for a children's hearing, one of the grounds listed in the CS Act 1995 must be satisfied. These grounds include that the child:
- is beyond the control of any relevant person
 - is falling into bad associations or is exposed to moral danger
 - is likely to suffer unnecessarily or be impaired seriously in his or her health or development due to a lack of parental care
 - has failed to attend school regularly without reasonable excuse
 - has committed an offence
 - has misused alcohol, drugs or volatile substances
 - is the victim of particular offences, including physical injury or sexual abuse
 - in certain circumstances, behaves in such a way that special measures are necessary in the interest of the child or others.¹⁶³

PRE-HEARING PROCESSES

- 5.54 The CS Act 1995 does not mandate any specific pre-hearing ADR processes. However, a policy and practice emphasis on child protection and service delivery has responded to concerns about the hearing system, including the 'ever increasing' number of referrals.¹⁶⁴ There is now a focus is on improving and encouraging all children's access to the services they need, ensuring that only appropriate cases are referred into the hearing system and promoting multi-agency coordination and cooperation.¹⁶⁵ Child protection case conferences (CPCCs) seek to fulfil these aims.
- 5.55 CPCCs are a feature of LA pre-hearing processes where initial investigation has raised concerns.¹⁶⁶ A CPCC is 'a formal multi agency meeting that shares agencies' assessments ... and identifies necessary actions to protect a child', and will usually involve the child and family.¹⁶⁷ A CPCC can decide to refer the matter to the reporter, apply for exclusion or child protection orders, and place the child on the Child Protection Register.¹⁶⁸ If a CPCC results in a matter being referred to the reporter, it may subsequently be referred for a children's hearing.
- 5.56 Before a children's hearing occurs, the reporter may meet members of the children's panel who will hear the matter.¹⁶⁹ This is referred to as a 'business meeting' and will determine procedural and other matters, as well as defining the reporter's role in the hearing.¹⁷⁰ The child and any relevant person will have the opportunity to have their views presented through the reporter.¹⁷¹

HEARING OF PROTECTION MATTERS: THE CHILDREN'S HEARING**General**

- 5.57 The children's hearing system is a central component of the Scottish child protection jurisdiction. Tribunals comprised of unpaid laypeople from within the community run children's hearings.¹⁷² These tribunals are responsible for decision making in most matters relating to the welfare of children, whether they are referred because of 'child maltreatment or of offending behaviour'.¹⁷³ A protection matter can be determined in two primary ways: the general children's hearing procedure or, in certain circumstances, referral to the Sheriff's Court.¹⁷⁴

- 5.58 The 1964 Kilbrandon Report¹⁷⁵ led to the development of the hearing system. The report was triggered by concerns about how children ‘at risk’ or ‘in trouble’ were being dealt with.¹⁷⁶ In part, the report found that child offenders and children in need of care and protection faced common issues, namely ‘a failure in the normal experiences of upbringing’.¹⁷⁷ The report also recommended that another system would be preferable to court as a forum for making decisions about child welfare.¹⁷⁸
- 5.59 The children’s hearing system is seen as welfare and child focused.¹⁷⁹ It is a decision-making system that ‘puts the child at the centre and involves local people in deciding what is the right thing to do in the best interests of children’.¹⁸⁰ The emphasis of the children’s hearing is ‘on the social and environmental aspects of children’s problems rather than on legal problems’.¹⁸¹ Two significant features, essentially developed from the Kilbrandon Report findings and principles, underpin the children’s hearing system:
- It a single system for dealing with all children in trouble and at risk. Consequently, grounds for referral of a matter to a children’s hearing include that a child is ‘uncontrollable’, has offended, or is at risk of harm.¹⁸²
 - There is a ‘separation between the establishment of issues of disputed fact and decisions on the treatment of the child’.¹⁸³ A children’s hearing undertakes the second function but can only make final decisions on grounds accepted by the child and relevant person.¹⁸⁴ Where grounds are disputed, the Sheriff’s Court must find them established on the facts before the matter can be remitted to a children’s hearing.¹⁸⁵

- 163 *Children (Scotland) Act 1995* (Scot) s 52(2).
- 164 Scottish Children’s Reporter Administration, *Interim Report on the Monitoring of Non-Offence Pre-Referral Activity to the Reporter* (2008) 1.
- 165 For further information see Scottish Government, *Getting it Right for Every Child: Overview* <www.scotland.gov.uk/Topics/People/Young-People/childrenservices/girfec/programme-overview> at 22 June 2010.
- 166 Edinburgh, Lothian and Borders Executive Group, above n 151. CPCCs are convened on behalf of child protection committees—bodies consisting of representatives from agencies such as the local authority, police, health and children’s services, which oversee child protection processes and services in their area and are a point of inter-agency communication and liaison. Note, however, that CPCCs are not legislatively mandated.
- 167 *Ibid* [11.1].
- 168 *Ibid* [11.11]. The CPCC may also decide that no further action is required, or the child or family are referred voluntarily to support agencies or services.
- 169 *Children (Scotland) Act 1995* (Scot) s 64(1).
- 170 *Children (Scotland) Act 1995* (Scot) s 64(3).
- 171 *Children (Scotland) Act 1995* (Scot) s 64(2), (4).
- 172 Sheehan, above n 162, 207.
- 173 *Ibid*. Note that the focus of the Commission’s discussion is on applications made on care and protection grounds, pursuant to our terms of reference. Provisions relating to child offenders may be somewhat different from or additional to those covered here.
- 174 One such circumstance involves making an emergency application to the Court where there is fear of significant harm to the child. The general children’s hearing procedure is discussed immediately below, while the emergency route is detailed under ‘Court and associated processes’, as it is generally initiated by application to the Court for an order.
- 175 Scottish Home and Health Department, *Children and Young Persons Scotland* (1964). The Kilbrandon Report was largely focused on child offenders. There has been a significant shift, with welfare grounds the dominant grounds for referral today.
- 176 Scottish Government, *Children’s Hearings: The Foundation of the Children’s Hearings System* <www.chscotland.gov.uk/background.asp> at 27 April 2010.
- 177 Scottish Home and Health Department, *Children and Young Persons Scotland* (1964), reprinted as *Kilbrandon Report* (1995) 9.
- 178 *Ibid* 26–7. Court was, however, considered to be an ideal forum for determining questions of fact.
- 179 Scottish Government, *Children’s Hearings* <www.chscotland.gov.uk/> at 27 April 2010.
- 180 Scottish Executive, *United Nations Convention on the Rights of the Child: A Report on Implementation of the UN Convention on the Rights of the Child in Scotland 1999-2007* (2007) 41.
- 181 Sheehan, above n 162, 211–12.
- 182 *Children (Scotland) Act 1995* (Scot) s 52.
- 183 Scottish Home and Health Department, above n 175, vii.
- 184 *Children (Scotland) Act 1995* (Scot) s 65.
- 185 *Children (Scotland) Act 1995* (Scot) s 65.

Children's hearings panels

- 5.60 Each LA area is required to have a panel of members available to sit at children's hearings.¹⁸⁶ The members are trained lay volunteers from the local community, sitting on a rota basis.¹⁸⁷ Initially, members are appointed for three years, and appointments may be extended.¹⁸⁸ Each local area has a Children's Panel Advisory Committee that nominates members for the panel, who are then appointed by the State Secretary.¹⁸⁹
- 5.61 Each children's hearing is conducted before a tribunal of three members.¹⁹⁰ The tribunal must not be solely comprised of men or women¹⁹¹ and the aim is to have a mix of backgrounds and ages represented by the sitting members.¹⁹²
- 5.62 A children's hearing will ultimately decide whether a child requires compulsory measures of supervision (also referred to as supervision requirements), and, if so, which measures.¹⁹³ Compulsory measures can be for the protection, guidance, treatment or control of the child, and will include where the child is to reside, including secure accommodation.¹⁹⁴ There may be conditions on the compulsory measures regulating contact with the child.¹⁹⁵

Procedure and processes of children's hearings

- 5.63 The first sitting of a children's hearing establishes whether the child and the relevant person¹⁹⁶ accept or dispute the grounds of referral to the hearing.¹⁹⁷ As noted previously, if the grounds are disputed the matter will be referred to the Sheriff's Court to determine whether the grounds are established on the facts.¹⁹⁸ If the grounds are made out on the facts, the matter will be remitted to the children's hearing.¹⁹⁹ In circumstances where the grounds are accepted by both the child and the relevant person, there is no need for referral to the Sheriff's Court.
- 5.64 A children's hearing is 'informal, non-adversarial, direct and participatory'.²⁰⁰ In order to make a determination, a children's hearing will consider the LA's report, any other relevant information, and the views of the child, the relevant person and, if present, the safeguarder²⁰¹ and any representatives.²⁰²
- 5.65 Although present at hearings, the reporter has no part in decision making; their role during a hearing is to ensure fair processes are followed.²⁰³ There is no legislative requirement for continuity of either the reporter or the children's hearing members.
- 5.66 The children's hearing discusses the circumstances of the child fully with the parents, the child or young person and any representatives, the social worker and the teacher, if present. As the hearing is concerned with the wider picture and the long-term wellbeing of the child, the measures implemented will be based on the welfare of the child. They may not appear to relate directly to the reasons that were the immediate cause of the child's appearance at the hearing.²⁰⁴

Representation and participation in children's hearings

- 5.67 Children have a right to attend the hearing and in general must attend. The relevant person is legally required to attend.²⁰⁵ Both are considered central participants.²⁰⁶ As far as is practicable, a child should have the right to express his or her views and have these views considered.²⁰⁷ The child's views cannot be given to the hearing confidentially, although the members have the power to exclude the relevant person for a period and later explain the substance of what happened in the person's absence.²⁰⁸

- 5.68 One of the determinations that a children's hearing makes is whether to appoint either or both a legal representative or a safeguarder. A safeguarder is appointed if the members determine that this is necessary to safeguard the interests of the child in the proceedings.²⁰⁹ Safeguarders are often appointed when there are conflicting views, either between the child and relevant person, or between either of these parties and the social worker.²¹⁰ There is some evidence that safeguarders are appointed in approximately 10 per cent of cases.²¹¹
- 5.69 The role of the safeguarder is to make recommendations on the child's best interests, producing a report for the children's hearing.²¹² The safeguarder is appointed from a panel maintained by the LA, which can include legally-qualified safeguarders.²¹³
- 5.70 Since 2002, free legal representation at hearings has been available for children, either when it is required to ensure effective participation, or when the hearing is considering or reviewing placement of a child in secure accommodation.²¹⁴ Since 2009, state-funded legal representation has also been available for relevant persons in children's hearings where it is necessary to ensure effective participation.²¹⁵
- 5.71 Members decide whether to appoint a legal representative at a hearing or during a pre-hearing business meeting.²¹⁶ Children's legal representatives are qualified legal practitioners appointed from specialist panels maintained by LAs, and 'are expected to be sensitive to the atmosphere and ethos of the children's hearing'.²¹⁷ These legal representatives must be members of either the panel of safeguarders or *curator ad litem*,²¹⁸ which the LA maintains.²¹⁹
- 5.72 The 'regulations do not specify the role that the legal representative is to play',²²⁰ although there is a clear distinction between the role of legal representatives and safeguarders:

*A safeguarder safeguards the interests of the child, takes account of his/her views and interests and makes a recommendation on what is in the child's best interest. A legal representative will protect the child's rights, and if the child is able to instruct the solicitor, will act on the child's wishes. The legal representative need not consider the child's interests.*²²¹

- 186 *Children (Scotland) Act 1995* (Scot) s 39. There are approximately 2500 children's panel members working in Scotland: Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.
- 187 Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.
- 188 *Ibid.*
- 189 *Children (Scotland) Act 1995* (Scot) sch 1.
- 190 *Children (Scotland) Act 1995* (Scot) s 39(5).
- 191 *Children (Scotland) Act 1995* (Scot) s 39(5).
- 192 Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.
- 193 *Children (Scotland) Act 1995* (Scot) s 70.
- 194 *Children (Scotland) Act 1995* (Scot) s 70.
- 195 *Children (Scotland) Act 1995* (Scot) s 70(5)(b).
- 196 As noted previously, a 'relevant person' is someone vested with parental rights and responsibilities: *Children (Scotland) Act 1995* (Scot) s 93.
- 197 *Children (Scotland) Act 1995* (Scot) s 65. Matters will also be referred to the sheriff for a finding if the hearing is satisfied that the child will be incapable of understanding the grounds or the hearing if, for example, the child is too young.
- 198 *Children (Scotland) Act 1995* (Scot) s 65. The grounds are set out above.
- 199 This is discussed further under 'Court and associated processes' below. The hearing can also discharge the grounds if this is considered more appropriate.
- 200 Sheehan, above n 162, 211.
- 201 The safeguarder makes recommendations on the child's best interests and produces a report for the hearing. This is discussed below in this chapter.
- 202 *Children's Hearings (Scotland) Rules 1996* (Scot) r 20.
- 203 Scottish Children's Reporter Administration, *The Children's Hearings System: How it Works* <www.scra.gov.uk/children_s_hearings_system/index.cfm> at 27 April 2010.
- 204 *Ibid.*
- 205 *Children (Scotland) Act 1995* (Scot) s 45.
- 206 Scottish Children's Reporter Administration, *The Children's Hearings System: How it Works*, above n 203.
- 207 *Children (Scotland) Act 1995* (Scot) s 16(2).
- 208 *Children (Scotland) Act 1995* (Scot) s 46.
- 209 *Children (Scotland) Act 1995* (Scot) s 41.
- 210 Scottish Executive, *Scotland's Children Research Findings No1: The Role of Safeguarders in Scotland* (2002) 3. A safeguarder may also be appointed when the views of the child are difficult to obtain, or when there are gaps in the information put before the hearing. The appointment of a specific safeguarder is usually left to the reporter.
- 211 *Ibid.* The report suggests that there are discrepancies between different data sources.
- 212 *Children's Hearings (Scotland) Rules 1996* (Scot) r 14.
- 213 *The Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001* (Scot).
- 214 *Children's Hearings (Legal Representation) (Scotland) Rules 2002* (Scot) r 3. See also, Rachel Ormston and Louise Marryat, *Review of the Children's Legal Representation Grant Scheme: Research Report* (2009) 4.
- 215 *Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009* (Scot). This amends *Children's Hearings (Legal Representation) (Scotland) Rules 2002* (Scot), inserting r 3A.
- 216 The business meeting is discussed above under 'Pre-hearing processes'.
- 217 Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.
- 218 A *curator ad litem* is a 'legal representative' appointed where 'the court believes that the person lacks the mental capacity to make decisions for themselves': Ormston and Marryat, above n 214, 4.
- 219 *Children's Hearings (Scotland) Rules 1996* (Scot) r 5.
- 220 Kenneth Norrie, *Hearing and Speaking* (2010) The Journal Online <www.journalonline.co.uk/Magazine/55-1/1007435.aspx> at 18 January 2010.
- 221 Scottish Executive, *Advice to Panel Members: The Children's Hearings (Legal Representation) (Scotland) Rules 2001* (2002) as cited in Ormston and Marryat, above n 214, 33. It has been suggested that the distinction between safeguarder and legal representative can be confusing: Ormston and Marryat, above n 214, 33.

Outcomes of children's hearings

5.73 As noted above, the primary function of children's hearings is to determine whether a child requires compulsory measures of supervision. A children's hearing has significant powers and can decide to:

- make a supervision requirement
- continue to a subsequent hearing because the tribunal determines further investigation is needed to make a determination
- discharge the referral
- grant a warrant to find or remove the child, or move the child to a place of safety, and require the child to submit to medical or other treatment.²²²

5.74 The CS Act 1995 provides that the children's hearing should not put a supervision requirement in place unless it would be better for the child than no supervision requirement at all.²²³ Most children subject to supervision requirements will remain at home with supervision by a social worker.²²⁴ Less commonly, a hearing will decide that a child should reside with kinship or foster carers or in a residence managed by the LA or other organisation, which includes secure accommodation facilities.²²⁵ The duration of a supervision requirement is guided by the underlying principle that any such order should be in place only as long as it is 'necessary in the interest of promoting or safeguarding' the child's welfare.²²⁶ Without continuation or variation, a supervision order does not continue for longer than one year.²²⁷

5.75 Where a supervision requirement is ordered by a children's hearing, the relevant LA is required to give effect to that supervision requirement.²²⁸ Where an LA breaches this obligation, the reporter may enforce it. Where the child's place of residence is part of the supervision requirement, the LA is obliged to investigate whether the conditions of the supervision requirement are being fulfilled.²²⁹

5.76 The LA can refer a breach of a supervision requirement or its attached conditions to the reporter,²³⁰ and can take other measures, of which the LA must inform the reporter, including applying to a court for a parental responsibility order.²³¹

5.77 A review hearing is required to determine whether a supervision requirement should continue or be varied.²³² Prior to expiry or when, for example, the LA refers a case for consideration of variation, breach or termination, the reporter arranges a review of the supervision requirement by a children's hearing.²³³ At this point, the supervision requirement can be further investigated, continued, varied or terminated.²³⁴ Three months after an initial supervision requirement or a review decision as above has been made, a child or relevant person may require a review by a children's hearing panel.²³⁵

Appeals against children's hearings findings

5.78 The child or relevant person can appeal a decision of a children's hearing. The appeal must be made to the Sheriff's Court within three weeks of the hearing's decision²³⁶ and the sheriff is able to confirm or substitute a decision by a children's hearing.²³⁷

COURT AND ASSOCIATED PROCESSES

5.79 Although children's hearings are the main decision-making forum for children who are 'in trouble' or 'at risk', there are a number of reasons why matters involving such children may come before the Sheriff's Court.

5.80 The Sheriff's Court is the mechanism by which emergency child protection orders may be sought,²³⁸ the forum in which disputes over grounds of referral to a hearing are resolved,²³⁹ and the appeal body for children's hearing decisions.²⁴⁰ Additionally, there are a number of orders relating to children and their families which can only be made by the Court.²⁴¹

5.81 Legal aid is available in particular circumstances²⁴² for proceedings relating to child protection orders, child assessment orders and appeals from a children's hearing decision, including the decision to grant a warrant.²⁴³ If necessary, the sheriff may appoint a safeguarder to safeguard the child's interests in a proceeding before the Court.²⁴⁴

Emergency protection: child protection orders

5.82 Where the emergency protection of a child is sought, an application is made to the Sheriff's Court for a child protection order (CPO).²⁴⁵ Anybody, including an LA, can apply for a CPO.²⁴⁶ In order to grant a CPO, the sheriff must be satisfied:

- that there are reasonable grounds to believe that the child is being treated or neglected in such a way as to be suffering significant harm, or will suffer significant harm if not removed or retained at a place of safety, and
- that the order is necessary to protect the child.²⁴⁷

5.83 In certain circumstances, the LA may also apply for a CPO where it has reasonable grounds to believe that a child is suffering, or will suffer, significant harm due to the manner in which he or she is being treated or neglected, and is seeking to make inquiries to determine whether action needs to be taken.²⁴⁸ If access to the child is being unreasonably denied, the inquiries of the LA are being frustrated, and access to the child is required as a matter of urgency, the LA may apply for a CPO.²⁴⁹ In an emergency where a sheriff is unavailable, applications are made to a justice of the peace.²⁵⁰

222 *Children (Scotland) Act 1995* (Scot) s 69. Warrants are for up to 22 days and in the case of safe or secure accommodation placement a hearing may extend a warrant twice to a maximum of 66 days. For any further extension the reporter must apply to the sheriff under s 67.

223 *Children (Scotland) Act 1995* (Scot) s 16(3). In 2008–09, 4463 supervision requirements were made by children's hearings, with 13 523 in place overall: Scottish Children's Reporter Administration, *Online Statistics 2008/2009*, above n 153.

224 Scottish Government, *The Foundation of the Children's Hearings System*, above n 176.

225 *Ibid.*

226 *Children (Scotland) Act 1995* (Scot) s 73(1).

227 *Children (Scotland) Act 1995* (Scot) s 73. Note that a supervision requirement ceases once the child attains 18.

228 *Children (Scotland) Act 1995* (Scot) s 71(1).

229 *Children (Scotland) Act 1995* (Scot) s 71(2).

230 *Children (Scotland) Act 1995* (Scot) s 73(4).

231 *Children (Scotland) Act 1995* (Scot) s 71(2).

232 *Children (Scotland) Act 1995* (Scot) s 73(9). All provisions relating to review hearings are in s 73.

233 *Children (Scotland) Act 1995* (Scot) s 73(8).

234 *Children (Scotland) Act 1995* (Scot) s 73(9).

235 *Children (Scotland) Act 1995* (Scot) s 73(6).

236 *Children (Scotland) Act 1995* (Scot) s 51.

237 *Children (Scotland) Act 1995* (Scot) s 51.

238 *Children (Scotland) Act 1995* (Scot) s 57, see below for further detail.

239 *Children (Scotland) Act 1995* (Scot) s 68, see below for further detail.

240 *Children (Scotland) Act 1995* (Scot) s 51. The appeal must be made within three weeks of the hearing's decision. Appeals are discussed above.

241 Child assessment orders, exclusion orders and parental responsibility orders are all discussed below. The Court also has the power to issue various warrants.

242 For appeals against warrants issued by a hearing, legal aid is granted on application without inquiry into the resources of the applicant: *Children (Scotland) Act 1995* (Scot) s 92. For other appeals, grants of legal aid are dependent on consideration by the sheriff of the interests of the child and financial circumstances.

243 *Children (Scotland) Act 1995* (Scot) s 92 (substituted for s 29 of the *Legal Aid (Scotland) Act 1986* (Scot)).

244 *Children (Scotland) Act 1995* (Scot) s 41. The Court may also appoint a *curator ad litem*.

245 *Children (Scotland) Act 1995* (Scot) s 57.

246 *Children (Scotland) Act 1995* (Scot) s 57.

247 *Children (Scotland) Act 1995* (Scot) s 57(1).

248 *Children (Scotland) Act 1995* (Scot) s 57(2).

249 *Children (Scotland) Act 1995* (Scot) s 57(2).

250 The justice of the peace must be satisfied that the conditions required for a CPO exist and that it is not practicable for such an order to be made by a sheriff: *Children (Scotland) Act 1995* (Scot) s 61.

5.84 When a CPO is made, the LA and the reporter must be informed,²⁵¹ and the reporter must arrange an initial children's hearing on the second working day after the order was implemented.²⁵² A CPO will cease to have effect if it is not acted upon within 24 hours.²⁵³ If the hearing determines that the CPO should be continued, the reporter must arrange a children's hearing on the eighth working day after the order was implemented.²⁵⁴ This hearing will take place in the manner described above.

5.85 The only power under the CS Act 1995 for the removal of a child without a CPO or approval of a justice of the peace lies with the police.²⁵⁵ A police officer can remove a child to a place of safety²⁵⁶ when the police officer has reasonable cause to believe the conditions for making a CPO are satisfied but it is not practicable in the circumstances to make that application.²⁵⁷ This power only allows for the child to be removed for 24 hours, and ceases if a CPO is applied for.²⁵⁸

Referral from a children's hearing on the basis of disputed grounds

5.86 Where a child and relevant person dispute a ground of referral to a hearing, or where, for example, the child is too young to be able to accept the grounds of referral, the children's hearing may direct the reporter to apply to the Sheriff's Court for a finding.²⁵⁹ A sheriff hears the application within 28 days of it being lodged.²⁶⁰ The child has a right to attend, and generally must attend.²⁶¹ The sheriff makes a determination based on the evidence provided to the Court by the reporter.

5.87 If the sheriff determines that the grounds are not established, the application is dismissed and the referral to the hearing is discharged.²⁶² Where the sheriff determines that a ground is established, it is remitted back to a hearing.²⁶³

Sheriff's court orders

5.88 In addition to CPOs, the Sheriff's Court can make other orders related to children and their families. These include child assessment orders, exclusion orders and parental responsibility orders. The Sheriff's Court must be satisfied when making an order that doing so would be better for the child than making no order at all.²⁶⁴

5.89 The Sheriff's Court has discretion to grant child assessment orders sought by an LA. The Court may grant a child assessment order if satisfied that:

- the authority has reasonable cause to believe a child is being treated so that she or he is or is likely to suffer significant harm
- the assessment is needed to establish this, and
- such assessment is unlikely to be carried out satisfactorily if such an order is not made.²⁶⁵

5.90 An LA can apply for an exclusion order, which, if granted, excludes any person named in the order from the child's home. The Court can grant the exclusion order if satisfied that:

- the child is suffering from significant harm as a result of any conduct by a named person
- such an order is necessary for the child's protection, and
- an exclusion order would better safeguard the child's welfare than removal of the child from the family home.²⁶⁶

The person the sheriff is considering excluding must have an opportunity to be heard before a final determination can be made, but an interim order can be granted.²⁶⁷

- 5.91 Parental responsibility orders may be sought by LAs to transfer appropriate parental rights and responsibilities of a child to them.²⁶⁸ These orders can be made where each relevant person either consents, or is in some way incapacitated or failing in their parental responsibilities.²⁶⁹

REFORM PROGRAM

- 5.92 The Scottish system has undergone significant review and reform. As noted previously, much of this reform has led to initiatives directed to improving all children's access to services as and when they need them, ensuring that only appropriate cases are referred into the hearing system, and promoting multi-agency coordination and cooperation.
- 5.93 The Children's Hearings (Scotland) Bill (Scot), introduced in 2010, contains additional proposed reforms.²⁷⁰ Overall, the reforms uphold the Kilbrandon philosophy and the children's hearing system.²⁷¹ The Scottish Government has described the reforms as necessary to modernise the system and provide appropriate support to practitioners and volunteers.²⁷²
- 5.94 Some notable recommendations include a move towards better national uniformity in the children's hearing system, including children's hearing panel recruitment and training.²⁷³ Recruitment and training of panel members would be managed by a newly established 'National Convenor', to be supported by the new body 'Children's Hearing Scotland', and localised support teams.²⁷⁴
- 5.95 Further, state-funded legal representation would be provided through the general civil route as administered by the Scottish Legal Aid Board (SLAB).²⁷⁵ Legal representation would be automatically available in some circumstances, including where the children's hearing considers it might be necessary to make a 'compulsory supervision order'.²⁷⁶ Where the SLAB is satisfied particular conditions are met, including that it is in the child's best interests, representation would also be available for proceedings before the Sheriff's Court, including appeals.²⁷⁷
- 5.96 The reforms would also require the SLAB to maintain a register of solicitors and firms eligible to provide children's legal assistance,²⁷⁸ and to draft a code of practice in relation to registered solicitors carrying out their provision of such assistance.²⁷⁹ Under the Bill, the Minister would be empowered to make regulations about qualifications required by registered solicitors.²⁸⁰
- 5.97 Under the Children's Hearings (Scotland) Bill (Scot), the role of the reporter would largely remain the same, but with the Ministers having power to make regulations changing the functions of the reporter.²⁸¹ LA accountability would be strengthened by empowering a hearing to be able to direct the National Convenor to take an LA to court when there are concerns about the LA implementing a hearing's decisions.²⁸²
- 5.98 The Bill was at the initial 'Inquiry and Report' stage at the time of writing, and has been referred to a committee of the Scottish Parliament for consideration. The committee is due to report by July 2010.²⁸³

- 251 *Children (Scotland) Act 1995* (Scot) s 57(5).
- 252 *Children (Scotland) Act 1995* (Scot) s 59(3).
- 253 *Children (Scotland) Act 1995* (Scot) s 60.
- 254 *Children (Scotland) Act 1995* (Scot) s 65(2).
- 255 *Children (Scotland) Act 1995* (Scot) s 61(5).
- 256 *Children (Scotland) Act 1995* (Scot) s 93(1) defines place of safety to include an LA-run residence, a community home, a police station, a hospital or other suitable place.
- 257 *Children (Scotland) Act 1995* (Scot) s 61(5).
- 258 *Children (Scotland) Act 1995* (Scot) s 61(5)-(7).
- 259 *Children (Scotland) Act 1995* (Scot) s 65(7)-(9). In the alternative, the hearing is able to discharge grounds.
- 260 *Children (Scotland) Act 1995* (Scot) s 68(2).
- 261 *Children (Scotland) Act 1995* (Scot) s 68(4).
- 262 *Children (Scotland) Act 1995* (Scot) s 68(8).
- 263 *Children (Scotland) Act 1995* (Scot) s 68(10).
- 264 *Children (Scotland) Act 1995* (Scot) s 16(3).
- 265 *Children (Scotland) Act 1995* (Scot) s 55.
- 266 *Children (Scotland) Act 1995* (Scot) s 76(1)-(2).
- 267 *Children (Scotland) Act 1995* (Scot) s 76.
- 268 *Children (Scotland) Act 1995* (Scot) s 86-8.
- 269 *Children (Scotland) Act 1995* (Scot) s 86.
- 270 Scottish Government, *Children's Hearings System Reform* <www.scotland.gov.uk/Topics/People/Young-People/c-h-bill> at 27 April 2010.
- 271 Ibid.
- 272 Scottish Government, *News Release: Children's Hearings Bill* (24 February 2010) <www.scotland.gov.uk/News/Releases/2010/02/24093143> at 21 June 2010.
- 273 Explanatory Notes, *Children's Hearings (Scotland) Bill* (Scot) 2.
- 274 Ibid.
- 275 Ibid 53.
- 276 Ibid 52. 'Compulsory supervision orders' would be equivalent to the current 'supervision requirements'.
- 277 Ibid 53.
- 278 Ibid 55-56.
- 279 Ibid 57.
- 280 Ibid 56.
- 281 Ibid 3-5. It should be noted that any advice to a hearing, including on fair hearing processes, becomes the responsibility of the National Convenor.
- 282 Ibid 39.
- 283 The Scottish Parliament, *Children's Hearings (Scotland) Bill* (SP Bill 41) <www.scottish.parliament.uk/s3/bills/41-ChildrensHearing/index.htm> at 27 April 2010.

ENGLAND AND WALES

GENERAL

5.99 *The Children Act 1989* (UK) (CA 1989) governs child protection in England and Wales. It came into force on 14 October 1991 and was considered to be ‘the most comprehensive and far-reaching reform of child law which [had] come before parliament in living memory’.²⁸⁴ Some distinguishing features of the child protection system in England and Wales are:

- Only police have the power to remove a child from his or her accommodation without judicial authorisation.²⁸⁵
- Lay magistrates sit in the Family Proceedings Court²⁸⁶—one of the courts with jurisdiction to deal with child protection proceedings.
- There is a statutory requirement for the Court to appoint a guardian *ad litem* for specified proceedings,²⁸⁷ who then appoints a solicitor for the child.²⁸⁸ This results in a tandem representation model.
- A child is automatically a party to proceedings.²⁸⁹
- There is a ‘no order’ principle, meaning that before making an order, the Court must be satisfied that making the order would be better for the child than making no order at all.²⁹⁰

5.100 The CA 1989 consolidated earlier legislation, which was considered complex and fragmented, and responded to criticism of existing child protection practice.²⁹¹ The legislative framework is based on a best interests model, emphasising the preference for keeping the family unit together and the child at home.²⁹²

5.101 The CA 1989 was supplemented by the *Children Act 2004* (UK) (CA 2004).²⁹³ The CA 2004 enhances the child protection system in England and Wales by establishing a Children’s Commissioner and bodies responsible for inter-agency collaboration and provision of services,²⁹⁴ as well as setting up databases to hold information on all children.²⁹⁵ The rationale for enacting the CA 2004 was to

*encourage integrated planning, commissioning and delivery of services as well as improve multi-disciplinary working, remove duplication, increase accountability and improve the coordination of individual and joint inspections in local authorities.*²⁹⁶

5.102 The family justice system in England and Wales, including child welfare,²⁹⁷ is currently under review by the Ministry of Justice.²⁹⁸ The terms of reference direct an expert panel to consider the use of mediation as a way to avoid undue adversarialism in proceedings.²⁹⁹ Preserving the best interests of the child is the focus of the reference.³⁰⁰

KEY BODIES RESPONSIBLE FOR CHILD PROTECTION

5.103 **Local authorities (LAs):** are responsible for child protection matters under the CA 1989. They are the government structures responsible for social services, including children’s services, education and other services in each region. They are required to provide services to safeguard and promote the welfare of children within their area³⁰¹ and, by extension, promote the upbringing of such children.

5.104 **Department of Education (DE):** formerly the Department for Children, Schools and Families,³⁰² is responsible for the CA 1989 and for producing statutory and non-statutory guidelines for LAs.³⁰³

5.105 **Local Safeguarding Children Boards (LSCBs):** are statutory mechanisms ‘for agreeing how the relevant organisations in each local area will cooperate to safeguard and promote the welfare of children’.³⁰⁴ Their role is to foster inter-agency collaboration in the provision of services. LAs are responsible for establishing an LSCB in their area.³⁰⁵

5.106 **The Children and Family Court Advisory and Support Service (CAFCASS):** is a non-departmental public body that reports to the Secretary of State for Education, in what is now called the Department of Education.³⁰⁶ It brought together functions previously provided by three agencies, namely: the Family Court Welfare Service, the *Guardian Ad Litem* and Reporting Service, and the Children’s Division of the Official Solicitor’s Office.³⁰⁷

COMMENCEMENT OF A CHILD PROTECTION MATTER

Notification and investigation

5.107 Although there are no mandatory reporting laws in England or Wales, guidelines issued by professional bodies and LSCBs emphasise the need to make a referral where there is a ‘reasonable belief that a child is at risk of significant harm’.³⁰⁸

5.108 Where an LA is informed or has reasonable cause to believe that a child is suffering or likely to suffer significant harm, the LA shall make such inquiries as it considers necessary to decide whether to take any action to safeguard the child’s welfare.³⁰⁹ If, in the course of inquiries, access to the child is being refused or the child’s whereabouts is being concealed, the LA is to apply for an order in respect of the child unless it is satisfied that the child’s welfare can be safeguarded without an order.³¹⁰

5.109 The LA child protection team must decide what action to take within one working day of receiving a referral.³¹¹ The LA must investigate concerns about any child who is physically present in its area.³¹² This includes a child who is the subject of an emergency protection order, is in police protection, or who is likely to suffer significant harm.³¹³

284 United Kingdom, *Parliamentary Debates*, House of Lords, vol 502, col 488 (Lord Chancellor Mackay).

285 *Children Act 1989* (UK) s 46.

286 Judiciary of England and Wales, *About the Judiciary: Family Justice* <www.judiciary.gov.uk/about_judiciary/roles_types_jurisdiction/family_justice/index.htm#5> at 29 April 2010.

287 *Children Act 1989* (UK) s 41.

288 *Children Act 1989* (UK) s 41(3). The roles of the guardian *ad litem* and child solicitor are discussed below.

289 *Children Act 1989* (UK) s 41. The party status of the child in ‘specified proceedings’ is implied from the appointment of a guardian *ad litem*: Jane Fortin, *Children’s Rights and the Developing Law* (3rd ed, 2009) 211.

290 *Children Act 1989* (UK) s 1(5). The no order principle means that when the Court is making a decision about the child’s welfare, it must first consider whether making the order is better for the child’s welfare than making no order at all.

291 See, for example, Elizabeth Butler-Sloss, *Report of the Inquiry into Child Abuse in Cleveland 1987* (1988) Cm 412, 244–54; Louis Blom-Cooper et al, *A Child in Trust: The Report of the Panel of Enquiry into the Circumstances Surrounding the Death of Jasmine Beckford* (1985); London Borough of Greenwich, *A Child in Mind: Report of the Commission of Inquiry into the Circumstances Surrounding the Death of Kimberley Carlile* (1987); Department of Health and Social Security (UK), *Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party* (1985).

292 Stephen Brown, ‘The Implementation of the Children Act 1989’ (1994) 16(1) *Liverpool Law Review* 3, 4.

293 Both the *Children Act 1989* (UK) and the *Children Act 2004* (UK) are currently in operation. The *Children Act 2004* (UK) did not repeal provisions of the *Children Act 1989* (UK) but contains additional provisions in relation to child protection in England and Wales.

294 *Children Act 2004* (UK) ss 1(1), 13. The UK Children’s Commissioner is discussed further in Option 5.

295 *Children Act 2004* (UK) s 12.

296 Department for Children, Schools and Families (UK), *The Children Act and Reports: The Children Act 2004* <www.dcsf.gov.uk/childrenactreport/> at 19 May 2010.

297 Family Justice Council, *The Aims of the Family Justice System* <www.family-justice-council.org.uk/system_aims.htm> at 19 May 2010.

298 Ministry of Justice (UK), *Family Justice System Review: Terms of Reference* (2010) <www.justice.gov.uk/news/docs/family-justice-review-terms-reference.pdf> at April 29 2010.

299 *Ibid.* There is a perception that court hearings are adversarial in nature due to the requirement for evidence to be thoroughly tested in order to satisfy the threshold criteria: Law Society, *Good Practice in Child Care Cases: A Guide for Solicitors Acting in Public Law Children Act Proceedings Including Involving Adoption* (2004) 9.

300 Ministry of Justice (UK), *Family Justice System Review*, above n 298.

301 A child is deemed to be ‘in need’ if she or he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for her or him of services by an LA; her or his health or development is likely to be significantly impaired, or further impaired, without the provision for her or him of such services; or she or he is disabled: *Children Act 1989* (UK) s 17.

302 The Department of Education was the Department of Children, Schools and Families until 12 May 2010.

303 Department for Education and Skills (UK), *Every Child Matters: Change for Children* (2006); Department for Children Schools and Families (UK), *Working Together to Safeguard Children: A Guide to Inter-Agency Working to Safeguard and Promote the Welfare of Children* (2010).

304 Department for Children, Schools and Families (UK), *Local Safeguarding Children Boards (LSCBs)* <www.dcsf.gov.uk/everychildmatters/safeguardingandsocialcare/safeguardingchildren/localsafeguardingchildrenboards/lscb/> at 24 May 2010.

305 *Ibid.*

306 Children and Family Court Advisory and Support Service (CAFCASS), *About CAFCASS* <www.cafcass.gov.uk/about_cafcass.aspx> at 24 May 2010.

307 The Official Solicitor’s Office formerly acted for children requiring separate representation, the guardian *ad litem* and Reporting Service represented children in public law proceedings, and the Court Welfare Service prepared ‘welfare reports’ for the courts if requested to do so: Fortin, above n 289, 247.

308 National Society for the Prevention of Cruelty to Children (NSPCC), *Child Protection Fact Sheet: The Child Protection System in the UK* (2010) 12. ‘Harm’ is defined as ‘ill treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another’: *Children Act 1989* (UK) s 31(9); definition added to by *Adoption and Children Act 2002* (UK) s 121.

309 *Children Act 1989* (UK) s 47(1). Investigation may also be the result of the LA learning that a child is the subject of an emergency protection order or in police custody.

310 *Children Act 1989* (UK) s 47(6).

311 Department for Children Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 144.

312 *Children Act 1989* (UK) s 47.

313 *Children Act 1989* (UK) s 47.

5.110 The LA may decide that no further action is necessary if the child is deemed to be at no risk of harm.³¹⁴ In all other circumstances, the child protection team operating within the LA will proceed with an initial assessment within ten working days of receiving the referral.³¹⁵ If it becomes evident that a child is at risk of significant harm, the LA can apply for an emergency protection order (EPO).³¹⁶

Child assessment orders

5.111 To enable an investigation to take place, an LA or authorised person³¹⁷ may apply to the Court for a child assessment order.³¹⁸ The Court may only grant such an order if:

- there is reasonable cause to believe that the child is suffering, or is likely to suffer, significant harm
- an assessment of the child's health, development, or the way in which he or she has been treated is necessary to determine whether the child is suffering harm, and
- it is unlikely that such an assessment could be satisfactorily made in the absence of a child assessment order.³¹⁹

5.112 A child assessment order lasts up to seven days³²⁰ and there is provision for the child to be kept away from home if it is necessary to conduct the assessment.³²¹ Child assessment orders are used very rarely.³²²

PRE-COURT PROCESSES

5.113 The CA 1989 and accompanying guidance encourages greater cooperation between those responsible for children and statutory or voluntary agencies.³²³ The purpose of this is to divert child protection matters away from court and legal processes and instead use the child welfare guidance of the Court to settle matters.³²⁴ Even after proceedings have been commenced, the Court can encourage and facilitate alternative dispute resolution at any stage, if it is safe and in the best interests of the child.³²⁵

5.114 Child protection procedures, including the conduct of the child protection conferences (CPCs), are the responsibility of LAs, acting in accordance with guidance from the relevant governmental department.³²⁶

Child protection conferences

5.115 A CPC is a multi-disciplinary meeting to discuss the case of a particular child.³²⁷ It is the responsibility of the LA to convene a child protection conference.³²⁸ This conference is chaired by an LA officer who is not responsible for managing the child's case.³²⁹ The purpose of a CPC is to assess all relevant information and agree on a child protection plan in order to best safeguard and promote the welfare of that child.³³⁰

5.116 The LA solicitor may attend a CPC to advise the chair on issues relating to the management of the meeting, but may not give advice on the child protection plan or the case.³³¹ Other parties who may attend the CPC are family members and any professional that is involved with the child and his or her family.³³² A child may attend in circumstances where it is deemed appropriate.³³³ Although family members may attend, the professionals are responsible for drawing up the plan.³³⁴

Family group conference

5.117 An FGC is a decision-making forum, increasingly used to establish communication between the relevant parties. Although FGCs are not currently mandated by legislation, they are becoming more widely used as a method to integrate support from the wider family group with professional support services.³³⁵ The Court may direct parties to an FGC at any stage of proceedings, where appropriate.³³⁶ An FGC is convened by an independent coordinator, whose appointment is regulated by the LA.³³⁷ The independent coordinator will ordinarily be a professional recruited from local statutory and voluntary service communities.³³⁸ Like New Zealand, families in an FGC have an opportunity for private family time.³³⁹

Differences between CPCs and FGCs

5.118 The key difference between a CPC and an FGC is that the latter provides a chance for the *wider family* to meet and discuss the welfare of the child based on the information provided by the relevant professionals.³⁴⁰ The aim of this is to encourage the wider family to make a decision about how best to safeguard and promote the child's welfare based on the needs of the child.³⁴¹ FGCs do not replace CPCs, but may be run alongside them to give the wider family group greater input into the child protection plan than they would have at a CPC.³⁴²

EMERGENCY REMOVAL POWERS

5.119 In England and Wales, only the police have the power to remove a child from his or her family without judicial authorisation.³⁴³ Emergency removal is treated quite separately from care and supervision proceedings. Although emergency removal will often lead to care and supervision proceedings,³⁴⁴ it is not part of, or a prelude to, these proceedings.

Emergency removal of a child without judicial authorisation

5.120 Only police have the power to remove a child from his or her accommodation in emergency circumstances.³⁴⁵ A child may be taken into police protection for 72 hours without the Court first making an order.³⁴⁶ To exercise this power, the police officer must be satisfied that there is reasonable cause to believe the child would be likely to suffer significant harm if not removed.³⁴⁷ This police power may be exercised either at the request of the LA or at a police officer's own discretion.³⁴⁸

314 NSPCC, *Child Protection Fact Sheet*, above n 308, 14.

315 Ibid 13.

316 *Children Act 1989* (UK) s 44. See below for detailed discussion of EPOs.

317 An 'authorised person' for these purposes includes the NSPCC and its officers, and any person authorised by order of the Secretary of State to bring proceedings, as well as any officer of a body so authorised: *Children Act 1989* (UK) s 43(13).

318 *Children Act 1989* (UK) s 43(1).

319 *Children Act 1989* (UK) s 43(1).

320 *Children Act 1989* (UK) s 43(5).

321 *Children Act 1989* (UK) s 43(9).

322 Judith Masson et al, *Protecting Powers: Emergency Intervention for Children's Protection* (2007) 42.

323 *Children Act 1989* (UK) s 27; Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303.

324 The welfare guidance of the Court is set out in the *Children Act 1989* (UK) s 1(3). The 'welfare checklist' requires the Court to have regard to: the wishes of the child; the physical, emotional and educational needs of the child; the likely effect on the child of any change in circumstances; the child's age, sex, background and characteristics the Court considers relevant; any harm which he or she has suffered or is likely to suffer; how capable each of the child's parents is of meeting the child's needs; the range of powers available to the Court.

325 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline Practice Direction: Public Law Proceedings Guide to Case Management* (2010) 22.

326 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 132–185. The relevant department was previously the Department for Children, Schools and Families, now the Department of Education.

327 Family Justice Council, *Glossary of Common Terms in Family Proceedings* (2010) 3.

328 This is required by Department of Health (UK), *Framework for the Assessment of Children in Need and Their Families* (2000).

329 Family Justice Council, *Glossary of Common Terms*, above n 327, 3.

330 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 161.

331 Law Society, *Good Practice in Child Care Cases*, above n 299, 19.

332 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 162.

333 Ibid 161.

334 NSPCC Safeguarding Information Service, *Family Group Conferences in the Child Protection Process* (2009) <www.nspcc.org.uk/Inform/research/questions/family_group_conferences_in_the_child_protection_process_wda68725.html#The_difference_between_a_child_protection_case_conference_and_a_family_group_conference> at 19 May 2010.

335 Family Justice Council, *Using Family Group Conferences for Children Who Are, or May Become, Subject to Public Law Proceedings* (2008).

336 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 38.

337 Family Rights Group, *What Is a Family Group Conference?* <www.frg.org.uk/> at 19 May 2010.

338 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 164.

339 Family Justice Council, *Using Family Group Conferences*, above n 335, 7.

340 Law Society, *Good Practice in Child Care Cases*, above n 299, 20.

341 Department for Children, Schools and Families (UK), *Working Together to Safeguard Children*, above n 303, 167–9.

342 NSPCC, *Family Group Conferences*, above n 334.

343 *Children Act 1989* (UK) s 46(1).

344 Masson et al, *Protecting Powers*, above n 322, 188.

345 *Children Act 1989* (UK) s 46(1).

346 *Children Act 1989* (UK) s 46(1).

347 *Children Act 1989* (UK) s 46(1)(a)(b).

348 Masson et al, *Protecting Powers*, above n 322, 89.

5.121 As soon as reasonably practicable after removing a child from his or her accommodation, the police must inform all relevant parties of steps that have been taken and the reasons for removal.³⁴⁹ Relevant parties to be informed include:

- the child, if he or she appears capable of understanding
- the child's parents or carers
- the LA.³⁵⁰

On removal, the police are to ensure that the child is placed in accommodation provided by or on behalf of the LA, or in a refuge.³⁵¹ Despite the preference for making placement arrangements for the child prior to removal, it seems that many children are taken to police stations.³⁵²

5.122 Following removal, the police officer responsible for removing the child must take reasonable steps to ascertain the wishes and feelings of the child and ensure that a designated officer enquires into the case.³⁵³ When that inquiry is complete, the designated officer must release the child from police protection unless he or she considers that there is still reasonable cause to believe the child would suffer significant harm if released.³⁵⁴ If it is determined that it is not appropriate to release the child, the designated officer may apply for an EPO.³⁵⁵

5.123 When a child is in police protection, neither the officer who removed the child nor the designated officer has parental responsibility for the child.³⁵⁶ While a child is in police protection, the designated officer must allow certain persons, including the child's parents, to have contact with the child if the officer considers it to be both reasonable and in the child's best interests.³⁵⁷

5.124 Research has shown that the extent to which police exercise their powers in these matters varies greatly between forces.³⁵⁸ There are Child Abuse Investigation Units within the police force that are responsible for these types of cases,³⁵⁹ although these units are not always able to respond to all cases where police protection is required.³⁶⁰ Social workers from an LA sought police assistance

*where the risk of violence or refusal of entry necessitated the use of police presence and powers, or where action was needed in an emergency and it was not possible to obtain a court order for a child's removal immediately.*³⁶¹

Emergency removal of the child with judicial authorisation

5.125 Under the CA 1989, if the LA³⁶² has reason to believe that the child is likely to suffer, or is suffering, significant harm it may apply to the Court for an EPO.³⁶³ Similarly, if the LA³⁶⁴ is unreasonably denied access while trying to undertake an investigation in relation to a child, it may apply for an EPO.³⁶⁵ In cases of the LA applying for an EPO, the child is most likely known to the LA and on the child protection register.³⁶⁶ An EPO authorises the removal of the child to accommodation provided by or on behalf of the applicant, or prevents the child's removal from a hospital or other place.³⁶⁷ The EPO gives the applicant parental responsibility for the child.³⁶⁸

5.126 While in force, the EPO requires any person in a position to do so to comply with a request to produce the child to the applicant.³⁶⁹ It is an offence to obstruct or prevent the removal of a child under an EPO.³⁷⁰ A recommendation by the Law Commission resulted in the addition of an exclusion requirement in the *Family Law Act 1996* (UK) to operate alongside an EPO, so that it is possible for the child to remain at home while the perpetrator of abuse is excluded.³⁷¹

- 5.127 EPO applications are heard in the Family Proceedings Court (FP Court) unless the child is involved in separate proceedings in the County Court or High Court.³⁷² The usual period of notice for an EPO application is one day, but the application can be heard *ex parte*.³⁷³ Where the Court refuses to hear the application *ex parte*, it is usually prepared to allow it to be heard on short notice.³⁷⁴ Short notice typically means that the application is approved at the beginning of a working day, served on the parents during the morning and heard at 2pm.³⁷⁵
- 5.128 For the Court to grant an EPO, it must be satisfied that the child is suffering or likely to suffer significant harm if not removed from their accommodation.³⁷⁶ The 'no order' principle also applies to EPOs, meaning that the Court must be satisfied that making the order would be better for the child than making no order at all.³⁷⁷
- 5.129 An EPO can last for up to eight days and may be extended once for a period of no longer than seven days.³⁷⁸ The CA 1989 specifies that no application for the discharge of an EPO should be made until 72 hours after the EPO is made.³⁷⁹ Even then, persons cannot apply for the discharge of the EPO if they were given notice and were present at the hearing of the application.³⁸⁰ There can be no appeal made against the making of or refusal to make an EPO by the Court.³⁸¹
- 5.130 The LA or other applicant must return the child once it appears that it is safe to do so.³⁸² The child is to be returned to the person from whose care he or she was removed, or to another appropriate person if this is not reasonably practicable.³⁸³ While many EPO applications will ultimately lead to care and supervision proceedings, this will not necessarily be the case.

CARE AND SUPERVISION PROCEEDINGS

- 5.131 Care and supervision proceedings are dealt with separately from EPOs under the CA 1989.³⁸⁴ They are treated as a separate type of proceeding, giving rise to different procedural considerations and different orders. Care and supervision proceedings are commenced when an LA or authorised person³⁸⁵ applies for an order placing the child in the care or under the supervision of a designated LA.³⁸⁶

- 349 *Children Act 1989* (UK) s 46(3)(a), (c), (4).
- 350 *Children Act 1989* (UK) s 46(3), (4).
- 351 *Children Act 1989* (UK) s 46(3)(f). Refuges are voluntary homes or registered children's homes that have been issued a certificate by the Secretary of State. Foster homes may also be issued with such certificates: s 51.
- 352 Masson et al, *Protecting Powers*, above n 322, 75.
- 353 *Children Act 1989* (UK) s 46(3)(d)–(e). 'Designated officer' means an officer designated by the chief officer of the relevant police area: s 46(3)(e). This officer is responsible for investigating the case, allowing certain persons to have contact with the child and potentially applying for an emergency protection order.
- 354 *Children Act 1989* (UK) s 46(5).
- 355 *Children Act 1989* (UK) s 46(7).
- 356 *Children Act 1989* (UK) s 46(9).
- 357 *Children Act 1989* (UK) s 46(10). This will be the responsibility of the 'appropriate authority' and not the police if the child is being accommodated by or on behalf of that 'appropriate authority': s 46(11).
- 358 Masson et al, *Protecting Powers*, above n 322, 63.
- 359 *Ibid* 64.
- 360 *Ibid* 81.
- 361 *Ibid* 89.
- 362 Note that the NSPCC or any person authorised by order of the Secretary of State to bring proceedings may also apply for an EPO: *Children Act 1989* (UK) ss 44(1)(c), 44(2), 31(9). A police officer may also apply for an EPO as discussed above, and in that instance the maximum length of eight days for an EPO is counted from the time the child is taken into police protection: ss 46(7), 45(3).
- 363 *Children Act 1989* (UK) s 44(1).
- 364 Or other applicant as provided for under *Children Act 1989* (UK) s 44(1)(c).
- 365 *Children Act 1989* (UK) ss 44(1)(b), 47(6). Alternatively, the LA may apply for a child assessment order, discussed above, or a care or supervision order, discussed below. The LA's duty to investigate is discussed above in relation to child assessment orders.
- 366 Fortin, above n 289, 572. The child protection register is a central record maintained by an LA of all children in their area for whom support is being provided via inter-agency planning: Judicial Studies Board, *Family Proceedings Court Bench Book* (2009) 213.
- 367 *Children Act 1989* (UK) s 44(4)(b).
- 368 *Children Act 1989* (UK) s 44(4)(c).
- 369 *Children Act 1989* (UK) s 44(4)(a).
- 370 *Children Act 1989* (UK) s 44(15).
- 371 Judith Masson et al, *Emergency Protection Orders: Court Orders for Child Protection Crises* (2004) 5; United Kingdom Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home*, Law Com Report No 207 (1992) [6.19]. An exclusion order may also be attached to an interim care order made under the *Children Act 1989* (UK) s 38(1)(a). Note that this is similar to the safety notice system for family violence in Victoria.
- 372 *Children Act (Allocation of Proceedings) Order 1991* reg 3(1)–(3).
- 373 *Family Proceedings Courts (Children Act 1989) Rules 1991* rr 2(5)(a), 4(4); *Children Act 1989* (UK) s 44(1). Without notice applications to a single magistrate have been described as like applications for a warrant or 'place of safety warrant' which the EPO replaced: Masson et al, *Emergency Protection Orders*, above n 371, 9.
- 374 Masson et al, *Emergency Protection Orders*, above n 371, 162.
- 375 *Ibid*.
- 376 *Children Act 1989* (UK) s 44(1).
- 377 *Children Act 1989* (UK) s 1(5).
- 378 *Children Act 1989* (UK) s 45(1), (5)–(6).
- 379 *Children Act 1989* (UK) s 45(9).
- 380 *Children Act 1989* (UK) s 45(11).
- 381 *Children Act 1989* (UK) s 45(10).
- 382 *Children Act 1989* (UK) s 44(10). Or allow the child to be removed from the hospital or other place, as the case may be.
- 383 *Children Act 1989* (UK) s 44(10).
- 384 Part IV of the *Children Act 1989* (UK) deals with 'care and supervision' and pt V deals with 'protection of children'. Emergency protective provisions, such as EPOs and police emergency powers, are contained within pt V. While some matters, such as courts' jurisdiction, will be applicable to both kinds of proceedings, they are largely separate and an application for an EPO will not necessarily lead to care and supervision proceedings.
- 385 An 'authorised person' for these purposes includes the NSPCC and its officers, and any person authorised by order of the Secretary of State to bring proceedings and any officer of a body so authorised: *Children Act 1989* (UK) s 31(9).
- 386 *Children Act 1989* (UK) s 31(1).

Courts with jurisdiction to hear care and supervision proceedings

5.132 Proceedings in relation to the care and supervision of children and young people are dealt with by various courts in England and Wales. The CA 1989 created a combined jurisdiction for all courts dealing with family proceedings, encompassing both public law and private law matters.³⁸⁷ This means that in private law matters, such as divorce proceedings, a court may direct an investigation into a child's circumstances if it appears that a care or supervision order may be appropriate.³⁸⁸ This combined jurisdiction is established by giving certain courts powers to make 'orders with respect to children in family proceedings'.³⁸⁹ 'Family proceedings' include proceedings under:

- parts of the CA 1989
- the *Matrimonial Causes Act 1973* (UK)
- the *Domestic Violence and Matrimonial Proceedings Act 1976* (UK)
- the *Adoption Act 1976* (UK).

5.133 The CA 1989 gives this combined jurisdiction to the three levels of courts that hear all matters relating to the care, supervision and protection of children: the FP Courts, the County Courts, and the High Court. These courts have equivalent powers under the CA 1989.³⁹⁰ The Act includes the provision for the commencement of proceedings in and the transfer of proceedings to:

- a specified level of court
- a court which falls within a specified class of court
- a particular court determined in accordance with, or specified in, the order.³⁹¹

This provision allows for the transfer of complex cases to the relevant level of court.³⁹²

Family Proceedings Court

5.134 The FP Court, which usually hears care and protection proceedings, is a court of first instance in England and Wales.³⁹³ Its jurisdiction is derived from the Magistrates' Court.³⁹⁴ A bench of three lay magistrates, chosen from the family panel, constitute the FP Court.³⁹⁵ These lay magistrates are also referred to as justices of the peace.³⁹⁶ A legally-qualified clerk supports the bench and advises the magistrates on the law.³⁹⁷

5.135 Magistrates come from a range of backgrounds, are not usually legally qualified, and do not receive payment for their services. They can claim for expenses and loss of income.³⁹⁸ Magistrates receive supervised training by the Judicial Studies Board and must be appointed by the Lord Chancellor as a member of a FP Court.³⁹⁹ A legally qualified District Court judge may also hear matters in the FP Court.⁴⁰⁰

Case management in care and supervision proceedings

5.136 The Judiciary for England and Wales and the Ministry of Justice provide a practice direction relating to case management that applies to all care and supervision proceedings.⁴⁰¹ This practice direction is published jointly by the President of the Family Division and the Ministry of Justice and is referred to as the Public Law Outline (PLO).⁴⁰² The PLO provides that its overriding objective is to enable the Court to 'deal with matters justly, having regard to the welfare issues involved'.⁴⁰³

5.137 Both the PLO and the *Family Proceedings Court Bench Book* provide case management measures in support of this overarching objective.⁴⁰⁴ These measures include:

- identifying the appropriate court to hear the matter and referring it there as soon as possible⁴⁰⁵
- identifying at an early stage who should be a party to proceedings⁴⁰⁶
- drawing up a timetable to avoid delay likely to be prejudicial to the child⁴⁰⁷
- dealing with as many aspects of the case as possible on one occasion⁴⁰⁸
- fixing dates for all appointments and hearings⁴⁰⁹
- having no more than two magistrates or judges responsible for hearing proceedings in each case⁴¹⁰
- encouraging parties to cooperate with each other during the conduct of the proceedings.⁴¹¹

Representation and participation of the child

The guardian *ad litem*

5.138 The CA 1989 introduced the statutory appointment of a guardian *ad litem* for a child in specified proceedings, including care and supervision proceedings.⁴¹² Although children have had the right to full party status in all public law proceedings since 1975,⁴¹³ Her Majesty's Inspectorate found in 2005 that 'court staff, the judiciary and CAFCASS, both explicitly and formally' do not encourage children to attend court.⁴¹⁴

5.139 The guardian is an independent professional appointed in accordance with the rules of court to safeguard the interests of a child.⁴¹⁵ The Court is to appoint a guardian for the child concerned unless satisfied that it is not necessary to do so to protect the child's best interests.⁴¹⁶ In the event that a guardian is deemed necessary, the Children and Family Court Advisory and Support Service (CAFCASS) assists the Court in appointing a guardian.⁴¹⁷ CAFCASS provides the name of an available guardian to the Court, usually a CAFCASS officer,⁴¹⁸ and the Court then makes an order appointing that guardian, by name, for the individual child.

387 *Children Act 1989* (UK) s 37; Brown, above n 292, 6–7. Public law proceedings include care and supervision proceedings in which the State is a party, and private law proceedings include divorce and custody proceedings, for example, in which the parties are private individuals.

388 *Children Act 1989* (UK) s 37; Brown, above n 292, 6–7.

389 *Children Act 1989* (UK) pt II.

390 *Children Act 1989* (UK) s 92(7)

391 *Children Act 1989* (UK) sch 11(1)–(2).

392 Judiciary of England and Wales, above n 286. In 1991, the *Family Proceedings Rules 1991* (UK) established procedures which to be adopted in all levels of courts dealing with family matters.

393 *Children (Allocation of Proceedings) Order 1991* (UK) O 3.

394 *Children Act 1989* (UK) s 92(2).

395 The family panel is made up of magistrates authorised by the Training and Development Committee on the basis of aptitude and personal suitability: Judicial Studies Board, above n 366, 12.

396 Her Majesty's Courts Service (UK), *Magistrates and Magistrates' Courts* <www.hmcourts-service.gov.uk/infoabout/magistrates/index.htm> at 25 April. There are approximately 30 000 lay magistrates in England and Wales.

397 *Ibid.*

398 Judiciary of England and Wales, above n 286.

399 *Courts Act 2003* (UK) s 49(1)(3)(b).

400 Judiciary of England and Wales, above n 286.

401 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325.

402 *Ibid.*

403 *Ibid* 1.

404 *Ibid* 2; Judicial Studies Board, above n 366, 39.

405 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 5.

406 Judicial Studies Board, above n 366, 39.

407 *Ibid* 41; President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 2.

408 Judicial Studies Board, above n 366, 39.

409 *Ibid*; President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 2.

410 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 2.

411 Judicial Studies Board, above n 366, 39.

412 *Children Act 1989* (UK) s 41(1), (6). Note that the guardian *ad litem* is also referred to as the 'children's guardian' and 'Family Court advisor': Committee on the Lord Chancellor's Department, House of Commons, *Children and Family Court Advisory and Support Service: Third Report of Session 2002–03*, vol 1 (23 July 2003) 9; Fortin, above n 289, 247.

413 Fortin, above n 289, 274.

414 *Ibid* 276.

415 *Children Act 1989* (UK) ss 5, 41(2).

416 *Children Act 1989* (UK) s 41(1).

417 Fortin, above n 289, 247.

418 *Ibid.*

5.140 The primary functions of the guardian are:

- to appoint a solicitor for the child, unless this has already been done by the Court
- to give advice to the child as is appropriate to his or her understanding
- to instruct the solicitor on matters relevant to the child's interests, unless the child is judged to be of sufficient age and maturity to directly instruct his or her solicitor⁴¹⁹
- to advise the Court about the management of proceedings and prepare a report advising the Court on the child's interests.⁴²⁰

5.141 In order to perform his or her functions, the guardian has direct contact with the child, interviews members of the child's family and makes a professional assessment of the child's welfare, sometimes with expert assistance.⁴²¹

The child solicitor

5.142 Child solicitors are selected from the family practice register—the Children Panel Accreditation Scheme—set up by the Law Society Child Care Panel.⁴²² The register includes lawyers who have experience and an interest in family proceedings matters.⁴²³ Having both a guardian and a solicitor—the 'tandem' model of representation⁴²⁴—combines the qualifications of a lawyer and a social worker, providing synthesis to court proceedings. If a guardian is not available to represent the child, the Court will appoint a solicitor for the child and the solicitor will represent the best interests of the child until a guardian is appointed.⁴²⁵ Thereafter, the solicitor will be instructed by the guardian.⁴²⁶ It is desirable that the guardian and solicitor remain with the child throughout proceedings.

5.143 In cases where the child or young person expresses a wish to instruct the solicitor him- or herself, is deemed competent to do so and wishes to give instructions that conflict with those of the guardian, the solicitor will act on the child's instructions.⁴²⁷ The *Practice Guidance for Guardians* provides that 'if the child is competent and wishes to instruct the solicitor directly it is likely that the guardian will separate from the child's solicitor'.⁴²⁸ In this instance, the solicitor will no longer be acting on the guardian's instructions and there is provision for the guardian to obtain separate legal representation.⁴²⁹

Stages of care and supervision proceedings

5.144 The PLO sets out five stages for care and supervision proceedings.⁴³⁰

1. Issue of proceedings

5.145 At this initial stage, the Court ensures that pre-proceedings requirements have been complied with, allocates or transfers proceedings to a particular court and obtains the information that will be necessary at the first appointment.⁴³¹ Within three days of the issue of proceedings, CAFCASS allocates the case to a guardian *ad litem*.⁴³² A solicitor for the child is also appointed.⁴³³ Upon issue of proceedings, the Court lists a date for the first appointment for within six days.⁴³⁴

2. First appointment

5.146 During this stage, the Court confirms the allocation of proceedings and gives initial case management directions.⁴³⁵ This may involve identifying additional parties and determining whether the case is appropriate for an early final hearing.⁴³⁶ The Court scrutinises a care plan provided by the LA regarding future care of the child⁴³⁷ and lists the case management conference (CMC) for within 45 days of the issue of proceedings.⁴³⁸

3. Case management conference

- 5.147 Two days before the CMC, an advocates' meeting is held with the main purpose of drafting a case management order for the Court's approval.⁴³⁹ The aim of this meeting is to avoid 'discussions at the courtroom door'.⁴⁴⁰ Where the advocates are unable to agree on the terms of the draft order, they specify where they agree and where they disagree.⁴⁴¹ The advocates also try to agree on any questions to be put to experts.⁴⁴²
- 5.148 The CMC is the main hearing at which the Court manages the case.⁴⁴³ At the CMC, the primary objectives are to identify key issues and give full case management directions.⁴⁴⁴ The Court issues the approved case management order and sets a date for the issues resolution hearing (IRH).⁴⁴⁵

4. Issues resolution hearing

- 5.149 There may also be an advocates' meeting between two and seven days before the IRH to draft or update the case management order. The IRH takes place between 16 and 25 weeks after the issue of proceedings.⁴⁴⁶ At this stage, the Court identifies any key issues that are yet to be resolved and narrows the issues, if possible.⁴⁴⁷ The Court also issues the approved case management order if this was not done at the CMC stage, or if it has been updated since then.⁴⁴⁸ The Court undertakes any final case management and sets a date for the final hearing.⁴⁴⁹

5. Final hearing

- 5.150 The purpose of the final hearing is to determine any issues that could not be agreed upon at the IRH.⁴⁵⁰ There is opportunity for oral evidence to be heard and challenged.⁴⁵¹
- 5.151 It is important to note that interim steps can be bypassed if the issues are clear and the case proceeds to an early final hearing.⁴⁵² An early final hearing is appropriate where all the necessary information to determine issues of fact or welfare is immediately or shortly available to be filed.⁴⁵³ The PLO is flexible and provides that the Court can cancel or repeat a particular hearing, or give certain directions without a hearing.⁴⁵⁴

Grounds and orders in care and protection proceedings

- 5.152 Under the CA 1989, the grounds to be proved are closely linked to the order sought. Proceedings are not brought to determine whether the child is in need of protection, but rather to determine whether the grounds for making an order are made out.
- 5.153 The CA 1989 gives the Court power to make care and supervision orders.⁴⁵⁵ It establishes that a care or supervision order will only be granted if:
- the child is currently suffering or likely to suffer significant harm, and
 - the harm is attributable to the care given to the child, or likely to be given to the child, or attributable to the fact that the child is beyond parental control.⁴⁵⁶

'Harm' means ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing the ill-treatment of another person.⁴⁵⁷

419 CAFCASS, *Practice Guidance for Guardians Appointing a Solicitor for the Child* (2006) 3. It should be noted that the child solicitor is a separate representative from the guardian *ad litem*.

420 House of Commons, above n 412, 9–10.

421 *Ibid* 10.

422 CAFCASS, *Practice Guidance*, above n 419, 2–3.

423 Law Society, *Children Law* <www.lawsociety.org.uk/areasoflaw/view=areasoflawdetails.law?AREAOFLAW=Children%20law&AREAOFLAWID=9> at 25 May 2010.

424 CAFCASS, *Practice Guidance*, above n 419, 1.

425 *Children Act 1989* (UK) s 41(3).

426 *Children Act 1989* (UK) s 41(3).

427 *Family Proceedings Rules 1991* (UK) r 4.12(1)(a).

428 CAFCASS, *Practice Guidance*, above n 419, 5.

429 *Ibid*; *Family Proceedings Rules 1991* (UK) r 4.11(3)(iii).

430 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 11.

431 *Ibid*.

432 *Ibid*.

433 *Ibid*.

434 *Ibid*.

435 *Ibid*.

436 *Ibid*. An early final hearing would involve bypassing some of the interim stages.

437 *Ibid*. A care plan is to be produced in accordance with *Children Act 1989* (UK) s 31A. This section was inserted into the *Children Act 1989* (UK) by the *Adoption and Children Act 2002* (UK) s 121.

438 President of the Family Division and Her Majesty's Courts Service (UK), *Public Law Outline*, above n 325, 11. Note that this is not to be confused with the pre-court child protection conference (CPC), discussed above.

439 *Ibid* 18.

440 *Ibid*.

441 *Ibid* 19.

442 *Ibid*.

443 *Ibid*.

444 *Ibid*.

445 *Ibid* 20.

446 *Ibid* 13.

447 *Ibid*.

448 *Ibid*.

449 *Ibid*.

450 *Ibid* 21.

451 *Ibid*.

452 *Ibid* 11.

453 *Ibid* 18.

454 *Ibid* 22. For example, the Court may set a date for final hearing without conducting a hearing or order an early final hearing where appropriate.

455 *Children Act 1989* (UK) s 31(1).

456 *Children Act 1989* (UK) s 31(2).

457 *Children Act 1989* (UK) s 31(9); *Adoption and Children Act 2002* (UK) s 121.

5.154 Before making a care or supervision order, the Court must consider the 'no order' principle in the CA 1989⁴⁵⁸ and certain aspects of the child's welfare.⁴⁵⁹ A child must be under 17 years old, or 16 years old if married, at the time an order is made.⁴⁶⁰

5.155 The concept of parental responsibility is central to understanding the orders that can be made as a result of care and supervision proceedings. The CA 1989 defines parental responsibility as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.⁴⁶¹

Care orders

5.156 A care order places the child in the care of a designated LA.⁴⁶² It remains in force until the child is 18 and effectively gives the LA parental responsibility for the child and the right to decide the extent to which parents can meet their own responsibilities to the child.⁴⁶³ While the care order is in force, the LA will allow the child to have reasonable contact with persons including his or her parents.⁴⁶⁴

5.157 The Court may make an order relating to contact with particular persons, whether or not such an order has been applied for.⁴⁶⁵ Before making a care order, the Court is to consider the arrangements that the LA has made or proposed to make regarding contact of certain persons with the child.⁴⁶⁶ The Court may grant an order to authorise the LA to refuse contact with certain persons, including the child's parents.⁴⁶⁷ The Court may vary or discharge an order in relation to parental contact on the application of the LA, the child or the person named in the order.⁴⁶⁸

5.158 The Court may order that a child under the care of an LA be placed in secure accommodation if he or she is likely to abscond and would suffer significant harm in doing so.⁴⁶⁹

Supervision orders

5.159 If a supervision order is granted, parental responsibility remains with the child's parents.⁴⁷⁰ The LA will assign the child a supervisor from its social services department,⁴⁷¹ and it will be the role of the supervisor to advise, assist and befriend the supervised child.⁴⁷² Under the CA 1989, a child and those persons with parental responsibility for him or her may be subject to a supervision order for 12 months,⁴⁷³ but this can be extended by the Court for up to three years.⁴⁷⁴

5.160 A supervision order may require that persons having parental responsibility for the child keep the supervisor informed of their address,⁴⁷⁵ or ensure that the child is made available for medical or psychiatric assessments or treatment.⁴⁷⁶

5.161 If a supervision order is not complied with or the supervisor considers that the order may no longer be necessary, the supervisor is to consider whether to apply to the Court for variation or discharge of the order.⁴⁷⁷

Interim care and supervision orders

5.162 Where proceedings for a care order or supervision order have been adjourned, or the Court has directed an appropriate authority to undertake investigation into whether a care or supervision order is needed,⁴⁷⁸ the Court may make an interim care or supervision order.⁴⁷⁹ The first interim order may last up to eight weeks, and any subsequent orders can only last for periods of up to four weeks at a time.⁴⁸⁰

5.163 To grant an interim care or supervision order, the Court must still be satisfied that the criteria for an ordinary care or supervision order are made out.⁴⁸¹

Residence, contact and other orders in care and supervision proceedings

5.164 The CA 1989 also provides that in care and supervision proceedings,⁴⁸² the Court may make:

- **a contact order:** which requires the person with whom the child lives, or is to live, to allow the child to visit or stay with a named person, or for that person and the child to otherwise have contact
- **a prohibited steps order:** which provides that no step that could be taken by a parent exercising parental responsibility for a child shall be taken by a person without the consent of the Court
- **a residence order:** which settles the arrangements to be made as to the person with whom a child is to live
- **a specific issue order:** which gives directions for the purpose of determining a specific question in relation to the parental responsibility for a child.⁴⁸³

APPEALS

5.165 No appeal can be made against the making of or refusal to make an EPO, or against any direction given by the Court in connection with such an order.⁴⁸⁴

5.166 There is a general right of appeal from the FP Court to the High Court.⁴⁸⁵

458 Meaning that before making an order, the Court must be satisfied that making the order would be better for the child than making no order at all: *Children Act 1989* (UK) s 1(5).

459 *Children Act 1989* (UK) s 1(3). The welfare checklist is referred to above.

460 *Children Act 1989* (UK) s 31(3).

461 *Children Act 1989* (UK) s 3(1).

462 *Children Act 1989* (UK) s 33(1).

463 *Children Act 1989* (UK) s 33(3).

464 *Children Act 1989* (UK) s 34(1).

465 *Children Act 1989* (UK) ss 34(2), (5).

466 *Children Act 1989* (UK) s 34(11).

467 *Children Act 1989* (UK) s 34(4).

468 *Children Act 1989* (UK) s 34(9).

469 *Children Act 1989* (UK) s 25(1).

470 *Children Act 1989* (UK) s 35(1), sch 3 pt I.

471 *Children Act 1989* (UK) sch 3 pt II.

472 *Children Act 1989* (UK) s 35(1).

473 *Children Act 1989* (UK) sch 3 pt II [6].

474 *Children Act 1989* (UK) sch 3 pt II [6].

475 *Children Act 1989* (UK) sch 3 pt I [3].

476 *Children Act 1989* (UK) sch 3 pt I [4]–[5].

477 *Children Act 1989* (UK) s 35(1).

478 *Children Act 1989* (UK) s 37(1).

479 *Children Act 1989* (UK) s 38(1).

480 *Children Act 1989* (UK) s 38(4)–(5).

481 *Children Act 1989* (UK) ss 31(2), 38(2).

482 *Children Act 1989* (UK) s 8(1), (4), pt IV.

483 *Children Act 1989* (UK) s 8(1).

484 *Children Act 1989* (UK) s 45(10).

485 *Children Act 1989* (UK) s 94(1).

